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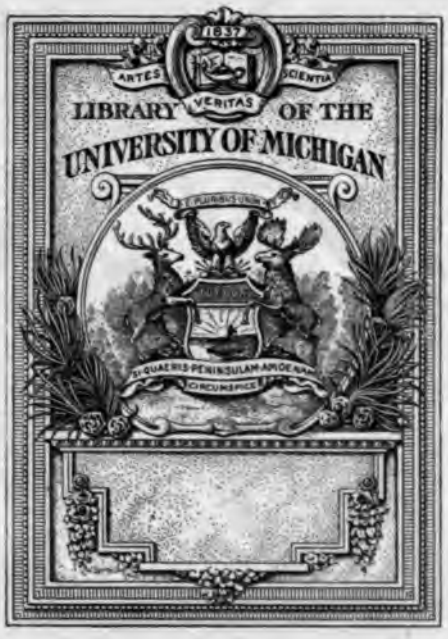
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U. S. Supreme court.

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1906, IN

203, 204, 205, 206 U. S.

BOOK 51,

LAWYERS' EDITION,

COMPLETE WITH HEADLINES, HEADNOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOTNOTES AND PARALLEL REFERENCES,

BY

THE PUBLISHERS' EDITORIAL STAFF.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY,
ROCHESTER, NEW YORK.
1907.

JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MELVILLE WESTON FULLER.

ASSOCIATE JUSTICES,

HON. JOHN MARSHALL HARLAN,

HON. DAVID JOSIAH BREWER,

HON. EDWARD DOUGLASS WHITE,

HON. RUFUS W. PECKHAM,

HON. JOSEPH MCKENNA,

HON. OLIVER WENDELL HOLMES

HON. WILLIAM R. DAY,

HON. WILLIAM HENRY MOODY.[1]

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HON. CHARLES J. BONAPARTE.[2]

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MARSHAL,

JOHN MONTGOMERYY WRIGHT, ESQ.

[1]Appointed to succeed Mr. Justice Brown, who retired May 28, 1906. Commission ordered recorded December 17, 1906.
[2]Commission ordered recorded December 17, 1906.

289866

U. S. Supreme court.

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ALLOTMENT, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

December 24, 1906.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see 51 L. ed., Appendix I. post, 1193.

Names of Justices, and Whence Appointed.	By Whom Appointed.	Circuits. 1902–1903.	Commissioned.	Sworn in.
Associate Justice OLIVER WENDELL HOLMES, Massachusetts.	President Roosevelt.	First. Me., N. H., Mass., R. I.	1902. (Dec. 4.)	1902. (Dec. 8.)
Associate Justice RUFUS W. PECKHAM, New York.	President Cleveland.	Second. Vermont, Conn., New York.	1895. (Dec. 9.)	1896. (Jan. 6.)
Associate Justice WILLIAM H. MOODY, Massachusetts.	President Roosevelt.	Third. New Jersey, Pa., Del.	1906. (Dec. 12.)	1906. (Dec. 17.)
Chief Justice MELVILLE W. FULLER, Illinois.	President Cleveland.	Fourth. Md., Va., N. C., W. Va., S. C.	1888. (July 20.)	1888. (Oct. 8.)
Associate Justice EDWARD D. WHITE, Louisiana.	President Cleveland.	Fifth. Ga., Ala., Fla., Miss., La., Tex.	1894. (Feb. 19.)	1894. (Mar. 12.)
Associate Justice JOHN M. HARLAN, Kentucky.	President Hayes.	Sixth. Ky., Tenn., Ohio, Mich.	1877. (Nov. 29.)	1877. (Dec. 10.)
Associate Justice WILLIAM R. DAY, Ohio.	President Roosevelt.	Seventh. Ind., Ill., Wis.	1903. (Feb. 23.)	1903. (Mar. 2.)
Associate Justice DAVID J. BREWER, Kansas.	President Harrison.	Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. D., S. D., Utah, Wyo., New Mex.,* Okla.*	1889. (Dec. 18.)	1890. (Jan. 6.)
Associate Justice JOSEPH McKENNA, California.	President McKinley.	Ninth. Cal., Or., Nev., Mont., Wash., Idaho, Alaska,* Arizona,* Hawaii.*	1898. (Jan. 21.)	1898. (Jan. 26.)

*Territories assigned to circuits by order of the Supreme Court.

GENERAL TABLE OF CASES REPORTED

IN THIS BOOK.

VOLUMES 203, 204, 205, 206.

A.

Abilene Cotton Oil Co., Texas & P. R. Co. v. 553
Acosta v. Porto Rico (Mem.) (206 U. S. 566) 1191
Adams, Wallace v. 547
Adams Exp. Co. v. Kentucky (206 U. S. 138) 992
v. Kentucky (206 U. S. 129) 987
Aetna L. Ins. Co., Whitfield v. 895
Alabama & V. R. Co. v. Railroad Commission (203 U. S. 496) .. 289
Alaska Treadwell Gold Min. Co. v. Cheney (Mem.) (206 U. S. 563) 1189
Allen v. Riley (203 U. S. 347)..... 216
v. United States (204 U. S. 581) 634
United States ex rel. Lowry v. 281
Alliance Gas & Electric Co. v. City Alliance (Mem.) (203 U. S. 598) 333
American Car & Foundry Co., Robinson v. (Mem.) 330
American Exp. Co. v. Kentucky (206 U. S. 139) 993
American News Co. v. United States (Mem.) (206 U. S. 565) .. 1190
American R. Co. v. Cardona de Castro 1187
v. Castro (204 U. S. 453) 564
v. Fernandez (Mem.) (203 U. S. 597) 333
American Smelting & Ref. Co. v. Colorado ex rel. Lindsley (204 U. S. 103) 393
Anderson, New Jersey v. 284
Standard Oil Co. v. (Mem.) .. 923
v. White Star Min. Co. (Mem.) (205 U. S. 540) 921
Andrews v. Eastern Oregon Land Co. (203 U. S. 127) 119
Andrus v. Berkshire Power Co. (Mem.) (203 U. S. 596) .. 333
Angle v. United States (Mem.) (205 U. S. 542) 922
Appleyard v. Massachusetts (203 U. S. 222) 161
Arizona, Copper Queen Consol. Min. Co. v. 1143
Armour & Co. v. Skene (Mem.) (206 U. S. 562) 1189
Armstrong v. Ashley (204 U. S. 272) 482
Arthur v. Texas & P. R. Co. (204 U. S. 505) 590
Ashley, Armstrong v. 482
Atchison, T. & S. F. R. Co., Empire State Cattle Co. v. (Mem.) 672
Minnesota & D. Cattle Co. v. (Mem.) 672
Atlanta, Chattanooga Foundry & Pipe Works v. 241
Atlantic Coast Line R. Co. v. Florida ex rel. Ellis (203 U. S. 256) 174
v. North Carolina Corp. Commission (206 U. S. 1.) 933
Atlantic Transport Co. v. Barnes (Mem.) (203 U. S. 589) .. 330
Atlantic Trust Co. v. Chapman (Mem.) (203 U. S. 587) 329
Atty. Gen., Colorado ex rel., Patterson v. 879
Automatic Scale Co., Computing Scale Co. v. 645
Axtell v. Webber (Mem.) (203 U. S. 578) 325

B.

Babcock, Chicago, B. & Q. R. Co. v. 636
Bachtel v. Wilson (204 U. S. 36) 357
v. Wilson (204 U. S. 42) 360
Bacon v. Walker (204 U. S. 311) 499
Badgley, Colorado ex rel., Elder v. .. 381
Bailey, Yates v. 1015
Baker, Fisher v. 142
Ballard v. Hunter (204 U. S. 241) .. 461
v. Hunter (Mem.) 1191
Ballentyne v. Smith (205 U. S. 285) .. 803
Bancroft, Wicomico County v. 112
Bank, Des Moines Sav., v. Des Moines (205 U. S. 503)..... 901
Eau Claire Nat. v. Jackman (204 U. S. 522) 596
Equitable Nat., James McCreery Realty Corp. v. (Mem.) .. 328

Bank, Euclid Park Nat., v. Union Trust & D. Co. (Mem.) (205 U. S. 547) 924
First Nat., Conboy v..... 128
First Nat., v. Flickinger (Mem.) (203 U. S. 595)..... 332
First Nat., National Live Stock Bank v. 192
Home Sav., v. Des Moines (205 (205 U. S. 503)..... 901
Jones Nat., Yates v..... 1002
National Exchange, v. Superior (Mem.) (206 U. S. 564).. 1190
National Live Stock, v. First Nat. Bank (203 U. S. 296) 192
Northwestern Sav., Centerville Station v. (Mem.)..... 1190
Ohio Valley Nat., v. Hulitt (204 U. S. 162) 423
People's Sav., v. Des Moines (205 U. S. 503) 901
Union, Oxford & C. L. R. Co. v. (Mem.) 1190
Union Nat., Neill v. (Mem.)... 924
Utica, Yates v. 1015
Varick, Hiscock v. 945
Barber Asphalt Paving Co., Field v. (Mem.) 328
Barnes, Atlantic Transport Co. v. (Mem.) 330
Barrington v. Missouri (205 U. S. 483) 890
Bay Prairie Irrig. Co. v. Wood (Mem.) (205 U. S. 545)..... 923
Bay State Dredging Co. v. United States (206 U. S. 246).... 1047
Beach, Buck v. 1106
Behn, M. & Co. v. Campbell & Go Tauco (205 U. S. 403)... 857
Benjamin H. Howell, Son & Co., United States v. (Mem.) 671
Berkshire Power Co., Andrus v. (Mem.) 333
Berkson v. Marcuse (Mem.) (205 U. S. 551) 925
Bernheimer v. Converse (206 U. S. 516) 1163
Bethlehem Steel Co., United States v. 731
Bidwell, Crossman v. (Mem)..... 674
Bierce v. Hutchins (205 U. S. 340)... 828
Bigelow, Chapman & D. Land Co. v.... 953
Billings, Zartarian v. 428
Birkett, Tindle v. 762
Blackford, Wilder v. (Mem.)..... 922
Blanton, Kentucky Distilleries & Warehouse Co. v. (Mem.)..... 922
Blumer, Iowa Railroad Land Co. v.... 1148
Board of Education v. Illinois (203 U. S. 553) 314
Bonsall v. Platt (Mem.) (206 U. S. 564) 1190
Borden v. Trespalacios Rice & Irrig. Co. (Mem.) (204 U. S. 667) 671
Boston & M. R. Co. v. Gorkey (Mem.) (204 U. S. 672)..... 673
Bown v. Walling (204 U. S. 320)..... 503
Boynton, Ex parte (Mem.) (204 U. S. 668) 671
Mason City & Ft. D. R. Co. v. 629
Braden v. Treat (205 U. S. 33)..... 695
Bradford, Expanded Metal Co. v. (Mem.) 1189
v. United States (Mem.) (206 U. S. 563) 1190
Brandenburg v. District of Columbia (205 U. S. 135)..... 743
Brast, Stephens v. (Mem.)..... 921
Bravo v. Gomez (Mem.) (205 U. S. 549) 925
Brewster, Cahen v. 310
Bright v. Fifth Congre. Church (Mem.) (205 U. S. 541).. 921
Brown, Kurtz v. (Mem.)..... 923
v. Lanyon (Mem.) (204 U. S. 672) 673
United States v..... 1046
v. United States (206 U. S. 240) 1046
Urquhart v. 760
Browne, Johnson v. 816
Buchanan, South Carolina ex rel., v. Jennings (Mem.) (204 U. S. 667) 671
Buck v. Beach (206 U. S. 392)..... 1106
Buckley, Crane v. 260
Buffalo Land & Exploration Co., Strong v. (Mem.)..... 327
Buffalo, R. & P. R. Co., Schlemmer v.. 681
Burdick v. Dillon (Mem.) (205 U. S. 550) 925
Burns, Taylor v..... 116
Burroughs v. Treat (205 U. S. 33)... 695
Burt v. Smith (203 U. S. 129)..... 121
Bush, Shropshire, W. & Co. v..... 436
Buster v. Wright (Mem.) (203 U. S. 599) 334
Butler, News & C. Co. v. (Mem.)..... 672

C.

Cahen v. Brewster (203 U. S. 543)... 310
California Consol. Min. Co. v. Manley (Mem.) (203 U. S. 579).. 326
Campbell & Go Tauco, Behn, M. & Co. v. 857
Cardona de Castro, American R. Co. v. 1187
Carl, John Woods & Sons v. 219
Carlson, Chicago, B. & Q. R. Co. v. (Mem.) 334
Carpenter v. Treat (205 U. S. 33)... 695
Cary, Ornstine v. (Mem.)..... 672
Cassatt, Pennsylvania Coal & Coke Co. v. (Mem.) 924
Webster Coal & Coke Co. v. (Mem.) 924
Castro, American R. Co. v..... 564
Centerville Station v. Northwestern Sav. Bank (Mem.) (206 U. S. 564) 1190

Central Eureka Min. Co., East Central Eureka Min. Co. v.... 476
Chaison v. Hyde (Mem.) (203 U. S. 596) 333
Chanler, Ex parte (Mem.) (205 U. S. 535) 919
v. Kelsey (205 U. S. 466) 882
Chapman, Atlantic Trust Co. v. (Mem.) 329
v. Chapman (Mem.) (203 U. S. 586) 329
School Dist. No. 11 v. (Mem.) 923
Chapman & D. Land Co. v. Bigelow (206 U. S. 41) 953
Charles, Dexter v. (Mem.) 925
Chattanooga Foundry & Pipe Works v. Atlanta (203 U. S. 390) .. 241
Cheney, Alaska Treadwell Gold Min. Co. v. (Mem.) 1189
Cherokee Nation v. United States (203 U. S. 76) 96
Cherry v. Fidelity & D. Co. (Mem.) (205 U. S. 537) 920
Chesapeake & O. S. S. Co. v. Morris (Mem.) (203 U. S. 592) ... 331
Chicago v. Chicago City R. Co. (Mem.) (205 U. S. 549) 925
v. Mills (204 U. S. 321) 504
Chicago, B. & Q. R. Co. v. Babcock (204 U. S. 585) 636
v. Carlson (Mem.) (203 U. S. 599) 334
Green v. 916
v. Williams (205 U. S. 444) ... 875
Chicago City R. Co., Chicago v. (Mem.) 925
Chicago Consol. Traction Co., North Chicago Street R. Co. v. (Mem.) 1190
West Chicago Street R. Co. v. (Mem.) 1190
Chicago, R. I. & P. R. Co. v. Mumford (Mem.) (203 U. S. 601) ... 335
Peterson v. 841
Chicago, St. P. M. & O. R. Co., Knudsen-Ferguson Fruit Co. v. (Mem.) 672
Chisholm, Eagle Ore Sampling Co. v. (Mem.) 329
C. H. Nichols Lumber Co. v. Franson (203 U. S. 278) 181
Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission (206 U. S. 142) 995
Cisco Oil Mill, Texas & P. R. Co. v... 562
Citizens' Sav. & T. Co. v. Illinois C. R. Co. (205 U. S. 46) 703
City Alliance, Alliance Gas & Electric Co. v. (Mem.) 333
Clark, Fidelity Mut. L. Ins. Co. v..... 91
v. Gerstley (204 U. S. 504) ... 589
Osborne v..... 619
v. Wells (203 U. S. 164) 138
Clement v. United States (Mem.) (206 U. S. 562) 1189
Cleveland v. Cleveland Electric R. Co. (204 U. S. 116) 399
Cleveland Electric R. Co. v..... 399
Cleveland Cliffs Iron Co. v. East Itasca Min. Co. (Mem.) (205 U. S. 545) 923
Cleveland Electric R. Co. v. Cleveland (204 U. S. 116) 399
Cleveland v. 399
Coffey v. Harlan County (204 U. S. 659) 666
Cogswell, Jerome v. 343
Cole v. Indianapolis (Mem.) (203 U. S. 592) 331
Coleman, Kansas ex rel., Rose v. (Mem.) 326
Collins v. O'Neil (Mem.) (203 U. S. 599) 334
Colorado, Kansas v..... 956
Colorado ex rel. Lindsley, American Smelting & Ref. Co. v..... 393
Badgley, Elder v. 381
Atty. Gen., Patterson v. 879
Columbus, Mercantile Trust & D. Co. v. 198
Computing Scale Co. v. Automatic Scale Co. (204 U. S. 609) .. 645
Conboy v. First Nat. Bank (203 U. S. 141) 128
Connecticut, Reynolds v. (Mem.) 328
Wightman v. (Mem.) 335
Continental Paper Bag Co. v. Eastern Paper Bag Co. (Mem.) (205 U. S. 542) 922
Continental Wall Paper Co. v. Lewis Voight & Sons Co. (Mem.) (204 U. S. 673) 673
Convent of St. Rose v. United States Sav. & L. Co. (Mem.) (205 U. S. 543) 922
Converse, Bernheimer v. 1163
Drey v. 1163
Copper Queen Consol. Min. Co. v. Arizona (206 U. S. 474) 1143
Coram, Ingersoll v. (Mem.) 333
Covington, Covington & C. Bridge Co. v. (Mem.) 334
Covington & C. Bridge Co. v. Covington (Mem.) (203 U. S. 598) ... 334
v. Hager (203 U. S. 109) 111
Craig Shipbuilding Co., Graham & M. Transp. Co. v. (Mem.) 325
Crane v. Buckley (203 U. S. 441) 260
Crawford, Ex parte (Mem.) (206 U. S. 561) 1189
Crichfield v. Julia (Mem.) (203 U. S. 593) 332
Crossman v. Bidwell (Mem.) (204 U. S. 675) 674
Crouch, Dakota, W. & M. River R. Co. v. (Mem.) 327
Crowe v. Harmon (204 U. S. 241) 461
v. Trickey (204 U. S. 228) 454
Cruit v. Owen (203 U. S. 368) 227

Cumberland Teleph. & Teleg. Co. v. Nashville (Mem.) (203 U. S. 589) 330
Cunningham v. Springer (203 U. S. 647) 662
Curtin v. Tucker (Mem.) 1191

D.

Dakota, W. & M. River R. Co. v. Crouch (Mem.) (203 U. S. 582) 327
Dalcour, United States v. 248
Dampskibsselskaber Kjoebenhabn, Ward v. (Mem.) 923
Dastas, Garrozi v. 369
Davidson S. S. Co., Ohio Transp. Co. v. (Mem.) 332
v. United States (205 U. S. 187) 764
Davis v. Wilson (204 U. S. 42) 360
Delamater v. South Dakota (205 U. S. 93) 724
De Laney Forge & Iron Co., Iroquois Transp. Co. v. 836
Delaware, New Jersey v. (Mem.) 925
Delaware, L. & W. R. Co. v. Rutter (Mem.) (203 U. S. 588) ... 330
Denver & R. G. R. Co., New Mexico ex rel. E. J. McLean & Co. v. 78
Des Moines, Des Moines Sav. Bank v.. 901
Home Sav. Bank v. 901
People's Sav. Bank v. 901
Des Moines Sav. Bank v. Des Moines (205 U. S. 503) 901
Deutsche Levante Linie v. Galanopulo (Mem.) (205 U. S. 546) .. 923
v. Harris (Mem.) (205 U. S. 546) 923
v. Hills Bros. Co. (Mem.) (205 U. S. 546) 923
v. National Bd. of Marine Underwriters (Mem.) (205 U. S. 546) 923
v. Stephenson (Mem.) (205 U. S. 546) 923
Dexter v. Charles (Mem.) (205 U. S. 549) 925
Diamond Match Co., Saginaw Match Co. v. (Mem.) 330
Dillon, Burdick v. (Mem.) 925
District of Columbia, Brandenburg v. 743
Martin v. 743
Donald, Guy v. 245
Donnell v. Herring-Hall-Marvin Safe Co. (Mem.) (203 U. S. 591) 331
Douville, Keel v. (Mem.) 327
Downes v. Teter-Heany Development Co. (Mem.) (205 U. S. 543) 922
Doyle v. London Guarantee & Acci. Co. (204 U. S. 599) 641
Drey v. Converse (206 U. S. 516) 1163
Duke v. Turner (204 U. S. 623) 652

E.

Eagle Ore Sampling Co. v. Chisholm (Mem.) (203 U. S. 587) 329
East Central Eureka Min. Co. v. Central Eureka Min. Co. (204 U. S. 266) 476
Eastern Dredging Co. v. United States (206 U. S. 246) 1047
Eastern Oregon Land Co., Andrews v. 119
Eastern Paper Bag Co., Continental Paper Bag Co. v. (Mem.) 922
East Itasca Min. Co., Cleveland Cliffs Iron Co. v. (Mem.) 923
Eau Claire Nat. Bank v. Jackman (204 U. S. 522) 596
Echman, Mexican C. R. Co. v. (Mem.) 920
Edelstein v. United States (Mem.) (205 U. S. 543) 922
Edwards, Illinois C. R. Co. v. 305
Iroquois Transp. Co. v. 836
Eidman v. Tilghman (Mem.) (203 U. S. 580) 326
Eisner v. Saxlehner (Mem.) (203 U. S. 591) 331
E. J. McLean & Co., New Mexico ex rel., v. Denver & R. G. R. Co. (203 U. S. 38) 78
Elder v. Colorado ex rel. Badgley (204 U. S. 85) 381
Eldred, Kessler v. 1065
Ellis, Lee v. (Mem.) 335
v. United States (206 U. S. 246) 1047
Ellis, Florida ex rel., Atlantic Coast Line R. Co. v. 174
Florida ex rel., Seaboard Air Line R. Co. v. 175
Emmons, Waters v. (Mem.) 325
Empire State Cattle Co. v. Atchison, T. & S. F. R. Co. (Mem.) (204 U. S. 670) 672
Empire State-Idaho Min. & Developing Co. v. Hanley (205 U. S. 225) 779
Ensley Land Co., Kessler v. (Mem.) .. 921
Equitable Nat. Bank, James McCreery Realty Corp. v. (Mem.) ... 328
Erie & W. Transp. Co., Erie R. Co. v. 450
Erie R. Co. v. Erie & W. Transp. Co. (204 U. S. 220) 450
Euclid Park Nat. Bank v. Union Trust & D. Co. (Mem.) (205 U. S. 547) 924
Expanded Metal Co. v. Bradford (Mem.) (206 U. S. 561) .. 1189
Ex parte Boynton (Mem.) (204 U. S. 668) 671
Chanler (Mem.) (205 U. S. 535) 919
Johnson (Mem.) (205 U. S. 551) 925
Montana Min. Co. (Mem.) (204 U. S. 667) 671
St. Louis Min. & Mill. Co. (Mem.) (206 U. S. 561) .. 1189

Ex parte Seneca Nation (Mem.) (203 U. S. 577) 325
Wisner (203 U. S. 449) 264
Zell (Mem.) (203 U. S. 586) .. 329

F.

Fair Haven & W. R. Co. v. New Haven (203 U. S. 379) 237
Farenholt, United States v. 1036
Fernandez, American R. Co. v. (Mem.) 333
Fidelity & D. Co., Cherry v. (Mem.) .. 920
Fidelity Mut. L. Ins. Co. v. Clark (203 U. S. 64) 91
Field v. Barber Asphalt Paving Co. (Mem.) (203 U. S. 585) .. 328
Fields v. United States (205 U. S. 292) 807
Fifth Congre. Church, Bright v. (Mem.) 921
Finch v. Maryland Casualty Co. (Mem.) (203 U. S. 592) .. 331
Fink, Union P. R. Co. v. (Mem.) 334
Union P. R. Co. v. 636
Weinreb v. (Mem.) 329
First Nat. Bank, Conboy v. 128
v. Flickinger (Mem.) (203 U. S. 595) 332
National Live Stock Bank v. 192
Fisher v. Baker (203 U. S. 174) 142
Fite v. United States (203 U. S. 76) .. 96
Fitts, Spaugh v. (Mem.) 921
Flahive, Love v. 768
Love v. 1092
Flickinger, First Nat. Bank v. (Mem.) 332
v. United States (Mem.) (204 U. S. 671) 673
Florida ex rel. Ellis, Atlantic Coast Line R. Co. v. 174
Ellis, Seaboard Air Line R. Co. v. 175
Fowler v. Osgood (Mem.) (205 U. S. 535) 919
Francis v. Francis (203 U. S. 233) 165
v. United States (Mem.) (206 U. S. 565) 1190
Frank v. Vollkommer (205 U. S. 521) 911
Franson, C. H. Nichols Lumber Co. v. 181
Frantz, Saylor v. (Mem.) 924
Frederick L. Grant Shoe Co. v. W. M. Laird Co. (203 U. S. 502) 292
Fulton, Wilmington Star Min. Co. v. 708

G.

Galanopulo, Deutsche Levante Linie v. (Mem.) 823
Gallagher v. Illinois (Mem.) (203 U. S. 600) 334
Gandolfi v. Siegert (Mem.) (205 U. S. 542) 922
Garrozi v. Dastas (204 U. S. 64) 369
Garza de Villereal v. Texas (Mem.) (205 U. S. 536) 920
Gates, Newman v. 385
Gatti, New York Foundling Hospital v. 254
George Riggs & Co., United States v. 127
Georgia v. Tennessee Copper Co. (206 U. S. 230) 1038
Gerstley, Clark v. 589
McGuire v. 581
G. Falk & Bro., United States v. 411
Gila Bend Reservoir & Irrig. Co. v. Gila Water Co. (205 U. S. 279) 801
Gila Valley, G. & N. R. Co. v. Lyon (203 U. S. 465) 276
Gila Water Co., Gila Bend Reservoir & Irrig. Co. v. 801
Gill, North American Transp. & Trading Co. v. (Mem.) 326
Gillelen v. Youngworth (Mem.) (205 U. S. 538) 920
Gillett, Roming v. (Mem.) 919
Gilmore, Old Dominion S. S. Co. v. (Mem.) 330
Ginzberg, Tracy v. 755
Goat & Sheepskin Import Co. v. United States (206 U. S. 194) 1022
Goldsborough, McCallum v. (Mem.) .. 673
Gomez, Bravo v. (Mem.) 925
Gonzales Resto v. Resto y Negron (Mem.) (203 U. S. 602) 335
Gorkey, Boston & M. R. Co. v. (Mem.) 673
Goudy v. Meath (203 U. S. 146) 130
Gould v. Youngworth (Mem.) (205 U. S. 538) 920
Grafton v. United States (206 U. S. 333) 1084
Graham & M. Transp. Co. v. Craig Shipbuilding Co. (Mem.) (203 U. S. 577) 325
Grand Central Min. Co., Mammoth Min. Co. v. (Mem.) 1191
Grand View Bldg. Asso., Northern Assur. Co. v. 109
Greco v. The Sarnia (Mem.) (203 U. S. 588) 330
Green v. Chicago, B. & Q. R. Co. (205 U. S. 530) 916
J. B. Orcutt Co. v. 390
Greenberg, Western Turf Asso. v. 520
Green County, Quinlan v. 860
Guice, Scott v. (Mem.) 331
Gulf, C. & S. F. R. Co. v. Texas (204 U. S. 403) 540
Guy v. Donald (203 U. S. 399) 245

H.

Hager, Covington & C. Bridge Co. v. .. 111
Haight & F. Co. v. Robinson (Mem.) (203 U. S. 581) 327
Haire, Montana ex rel., v. Rice (204 U. S. 291) 490
Hall's Safe Co., Herring-Hall-Marvin Safe Co. v. (Mem.) 331
Halter v. Nebraska (205 U. S. 34) 696

Hammond v. Whittredge (204 U. S. 538) 606
Hampton Roads R. & Electric Co., Newport News & O. P. R. & Electric Co. v. (Mem.) 334
Hancock, Troy Wagon Works Co. v. (Mem.) 1190
Hand, Security Warehousing Co. v.... 1117
Hanley, Empire State-Idaho Min. & Developing Co. v..... 779
Harlan County, Coffey v..... 666
Harmon, Crowe v. 461
Harris, Deutsche Levante Linie v. (Mem.) 923
Rosenberger v. (Mem.)..... 331
Harrison v. Magoon (205 U. S. 501).. 900
Hart, Ward v. (Mem.) 922
Hartman v. John D. Park & Sons Co. (Mem.) (206 U. S. 562).. 1189
Hatch, New York ex rel., v. Reardon (204 U. S. 152)..... 415
Hauser, Stuart v. (Mem.)..... 328
Hawaii, Lowrey v. 1026
Haynes v. Watkins (Mem.) (204 U. S. 673) 673
Hedderly v. Youngworth (Mem.) (203 U. S. 602)..... 335
Heinszen, United States v..... 1098
Henderson v. Henrie (Mem.) (206 U. S. 563) 1190
Hennessey, Van Buren v. (Mem.).... 334
Henrie, Henderson v. (Mem.)..... 1190
Henry E. Frankenberg Co. v. United States (206 U. S. 224).... 1034
Hensey, Mercantile Trust Co. v..... 811
Herring-Hall-Marvin Safe Co., Donnell v. (Mem.) 331
v. Hall's Safe Co. (Mem.) (203 U. S. 591) 331
Heymann v. Southern R. Co. (203 U. S. 270) 178
Hills Bros. Co., Deutsche Levante Linie v. (Mem.)..... 923
Hiscock v. Mertens (205 U. S. 202).. 771
v. Varick Bank (206 U. S. 28) 945
Hitchcock, United States ex rel. West v. 718
Hite, United States v. 514
Hodges v. United States (203 U. S. 1) 65
Holsclaw, Sobey v. (Mem.)..... 332
Holtzman v. Linton (Mem.) (203 U. S. 600) 335
Home Sav. Bank v. Des Moines (205 U. S. 503) 901
Honore v. Wilson (Mem.) (204 U. S. 675) 674
Hubbard Bros. & Co., Southern R. Co. v. (Mem.) 922
Hughes, Western U. Teleg. Co. v..... 294
Hulitt, Ohio Valley Nat. Bank v..... 423
Hultberg, White Star Min. Co. v. (Mem.) 921
Hunt v. New York Cotton Exchange (205 U. S. 322)..... 821
Hunter, Ballard v. 461
Hunter, Ballard v. (Mem.)..... 1191
v. Johnson (Mem.) (204 U. S. 673) 673
Hutchins, Bierce v. 828
Hyde, Chaison v. (Mem.)..... 333
Hynes v. Youngworth (Mem.) (203 U. S. 602) 335

I.

Iglehart v. Iglehart (204 U. S. 478).. 575
Illinois, Board of Education v..... 314
Gallagher v. (Mem.)..... 334
Illinois C. R. Co., Citizens' Sav. & T. Co. v. 703
v. Edwards (203 U. S. 531).... 305
v. Interstate Commerce Commission (206 U. S. 441)..... 1128
v. McKendree (203 U. S. 514).. 298
Mississippi Railroad Commission v. 209
Indianapolis, Cole v. (Mem.)..... 331
Ingersoll v. Coram (Mem.) (203 U. S. 596) 333
Insurance Co., Ætna L., Whitfield v... 895
Fidelity Mut. L., v. Clark (203 U. S. 64) 91
Metropolitan L., v. New Orleans (205 U. S. 395)..... 853
Northwestern Nat. L., v. Riggs (203 U. S. 243) 168
Philadelphia Trust, S. D. &, McCoach v. (Mem.) 921
Philadelphia Trust, S. D. &, McCoach v. (Mem.)..... 332
International Trust Co. v. Weeks (203 U. S. 364) 224
Interstate Commerce Commission, Cincinnati, H. & D. R. Co. v. 995
Illinois C. R. Co. v..... 1128
Iowa Railroad Land Co. v. Blumer (206 U. S. 482) 1148
Iroquois Transp. Co. v. De Laney Forge & Iron Co. (205 U. S. 354) 836
v. Edwards (205 U. S. 354).... 836
Irvine, Wyoming ex rel. Wyoming Agricultural College v..... 1063
Iverson, Smith v. (Mem.)..... 329

J.

Jackman, Eau Claire Nat. Bank v... 596
Jacks, Monterey v. 220
James B. Clow & Sons, Merchants Heat & Light Co. v..... 488
James McCreery Realty Corp. v. Equitable Nat. Bank (Mem.) (203 U. S. 584)..... 328
J. B. Orcutt Co. v. Green (204 U. S. 96) 390
Jennings, Smith v. 1061
South Carolina ex rel. Buchanan v. (Mem.) 671
Jerome v. Cogswell (204 U. S. 1).... 343

John D. Park & Sons Co., Hartman v. (Mem.) 1189
Johnson, Ex parte (Mem.) (205 U. S. 551) 925
v. Browne (205 U. S. 309) 816
Hunter v. (Mem.) 673
v. White Star Min. Co. (Mem.) (205 U. S. 540) 921
John Woods & Sons v. Carl (203 U. S. 358) 219
Jones Nat. Bank, Yates v. 1002
Jordan, Landram v. 88
Judges of Circuit Court, Zell v. (Mem.) 325
Julia, Crichfield v. (Mem.) 332

K.

Kaipu v. Pinkham (Mem.) (206 U. S. 566) 1191
Kalyton, McKay v. 566
Kann v. King (204 U. S. 43) 360
Kansas v. Colorado (206 U. S. 46) ... 956
Thomas v. (Mem.) 919
v. United States (204 U. S. 331) 510
Kansas ex rel. Coleman, Rose v. (Mem.) 326
Karrick, Wetmore v. 745
Kawananakoa v. Polyblank (205 U. S. 349) 834
Keatley, United States v. 618
Keel v. Douville (Mem.) (203 U. S. 583) 327
Kelsey, Chanler v. 882
Kentucky, Adams Exp. Co. v. 987
Adams Exp. Co. v. 992
American Exp. Co. v. 993
Kentucky Distilleries & Warehouse Co. v. Blanton (Mem.) (205 U. S. 543) 922
Kerner, Laffoon v. (Mem.) 326
Kessler v. Eldred (206 U. S. 285) 1065
v. Ensley Land Co. (Mem.) (205 U. S. 541) 921
v. Treat (205 U. S. 33) 695
Kewanee Mfg. Co., Leigh v. (Mem.) ... 332
Kibbe, Stevenson Iron Min. Co. v. (Mem.) 920
King, Kann v. 360
Webb v. 360
Kinney v. Mitchell (Mem.) (203 U. S. 586) 329
Kirk, United States v. (Mem.) 671
Klutt, Philadelphia & R. R. Co. v. (Mem.) 673
Knowles, Ramsden v. (Mem.) 1189
Knudsen-Ferguson Fruit Co. v. Chicago, St. P. M. & O. R. Co. (Mem.) (204 U. S. 670) .. 672
v. Michigan C. R. Co. (Mem.) (204 U. S. 671) 672
Kurtz v. Brown (Mem.) (204 U. S. 544) 923

L.

Laffoon v. Kerner (Mem.) (203 U. S. 579) 326
Lamar v. Spalding (Mem.) (203 U. S. 584) 328
Landram v. Jordan (203 U. S. 56) ... 88
Lanyon, Brown v. (Mem.) 673
Lawson v. Washington (Mem.) (205 U. S. 536) 919
Lee v. Ellis (Mem.) (203 U. S. 601) .. 335
Leeds & C. Co. v. Victor Talking Mach. Co. (Mem.) (206 U. S. 563) 1190
Leigh v. Kewanee Mfg. Co. (Mem.) (203 U. S. 595) 332
Zell v. (Mem.) 672
Levi, Vietor v. (Mem.) 333
Lewisohn, Old Dominion Copper Min. & Smelting Co. v. (Mem.) 673
Lewis Voight & Sons Co., Continental Wall Paper Co. v. (Mem.) 673
Lexington, Security Trust & S. V. Co. v. 204
Lindsley, Colorado ex rel., American Smelting & Ref. Co. v. 393
Linton, Holtzman v. (Mem.) 335
Loeb, Slaughter v. (Mem.) 334
London Guarantee & Acci. Co., Doyle v. 641
Look, Smith v. (Mem.) 332
Louisville & N. R. Co. v. Smith, H. & Co. (204 U. S. 551) 612
Love v. Flahive (205 U. S. 195) 768
v. Flahive (206 U. S. 356) 1092
Lowrey v. Hawaii (206 U. S. 206) 1026
Lowry, United States ex rel., v. Allen (203 U. S. 476) 281
Lukert, Oklahoma Gas & Electric Co. v. (Mem.) 334
Lyon, Gila Valley, G. & N. R. Co. v. ... 276

M.

McCallum v. Goldsborough (Mem.) (204 U. S. 672) 673
McCarty v. United States (Mem.) (205 U. S. 537) 920
McCoach v. Norris (Mem.) (203 U. S. 594) 332
v. Norris (Mem.) (205 U. S. 539) 921
v. Philadelphia Trust, S. D. & Ins. Co. (Mem.) (203 U. S. 594) 332
v. Philadelphia Trust, S. D. & Ins. Co. (Mem.) (205 U. S. 539) 921
McCormick, Miller v. (Mem.) 1191
McDonough, Old Wayne Mut. Life Asso. v. 345
McDowell v. Treat (205 U. S. 33) 696
McGill, Michigan S. S. Co. v. (Mem.) 332
McGrath, New York C. & H. R. R. Co. v. (Mem.) 924

McGuire v. Gerstley (204 U. S. 489) .. 581
Moore v. 773
McKay v. Kalyton (204 U. S. 458) .. 566
McKendree, Illinois C. R. Co. v. 298
MacKenzie v. Pease (Mem.) (203 U. S. 588) 330
McLoud, Walker v. 495
McSwean, St. Louis & S. F. R. Co. v. (Mem.) 921
Magoon, Harrison v. 900
Mammoth Min. Co. v. Grand Central Min. Co. (Mem.) 1191
Manford v. Minnesota (Mem.) (205 U. S. 548) 924
Manley, California Consol. Min. Co. v. (Mem.) 326
Marcuse, Berkson v. (Mem.) 925
Marion Trust Co., United States v. (Mem.) 332
United States v. (Mem.) 1191
Martin v. District of Columbia (205 U. S. 135) 743
v. Pittsburg & L. E. R. Co. (203 U. S. 284) 184
Maryland Casualty Co., Finch v. (Mem.) 331
Mason City & Ft. D. R. Co. v. Boynton (204 U. S. 570) 629
Massachusetts, Appleyard v. 161
Mathieson, Mathieson Alkali Works v. (Mem.) 674
Mathieson Alkali Works v. Mathieson (Mem.) (204 U. S. 674).. 674
Meath, Goudy v. 130
Mercantile Trust & D. Co. v. Columbus (203 U. S. 311) 198
Mercantile Trust Co. v. Hensey (205 U. S. 298) 811
v. Wheeler (Mem.) (203 U. S. 593) 332
Merchants Heat & Light Co. v. James B. Clow & Sons (204 U. S. 286) 488
Mertens, Hiscock v. 771
Metropolitan L. Ins. Co. v. New Orleans (205 U. S. 395) 853
Mexican C. R. Co. v. Eckman (Mem.) (205 U. S. 538) 920
Michigan, United States v. (Mem.) .. 335
Michigan C. R. Co., Knudsen-Ferguson Fruit Co. v. (Mem.) 672
Michigan S. S. Co. v. McGill (Mem.) (203 U. S. 593) 332
Miller v. McCormick (Mem.) 1191
v. Northern Assur. Co. (Mem.) (203 U. S. 597) 333
v. Wilson (204 U. S. 42) 360
Mills, Chicago v. 504
Minnesota, Manford v. (Mem.) 924
Minnesota & D. Cattle Co. v. Atchison, T. & S. F. R. Co. (Mem.) (204 U. S. 670) 672
Mississippi Railroad Commission v. Illinois C. R. Co. (203 U. S. 335) 209
New Orleans Great Northern R. Co. v. (Mem.) 925
Missouri, Barrington v. 890
Mitchell, Kinney v. (Mem.) 329
United States v. 752
Mobile, Shea v. (Mem.) 922
Moeschen v. Tenement House Department (Mem.) (203 U. S. 583) 328
Montana ex rel. Haire v. Rice (204 U. S. 291) 490
Montana Min. Co., Ex parte (Mem.) (204 U. S. 667) 671
v. St. Louis Min. & Mill. Co. (Mem.) 1191
v. St. Louis Min. & Mill. Co. (204 U. S. 204) 444
Monterey v. Jacks (203 U. S. 360) .. 220
Moore v. McGuire (205 U. S. 214) .. 776
Porterfield v. (Mem.) 1191
Morales, Ex parte (Mem.) (205 U. S. 539) 920
Moran, Re (203 U. S. 96) 105
Morgan v. Treat (205 U. S. 33) 695
United States v. (Mem.) 333
Morris, Chesapeake & O. S. S. Co. v. (Mem.) 331
Mortiga, Serra v. 571
Moyer v. Nichols (203 U. S. 221) 160
Mumford, Chicago, R. I. & P. R. Co. v. (Mem.) 335
Murphy, Wilson v. (Mem.) 326
Myers v. Osborne (Mem.) (205 U. S. 538) 920
v. Wymore (Mem.) (205 U. S. 551) 925

N.

Nashville, Cumberland Teleph. & Teleg. Co. v. (Mem.) 330
National Bd. of Marine Underwriters, Deutsche Levante Linie v. (Mem.) 923
National Council of the J. O. U. A. M. v. State Council of Va. J. O. U. A. M. (203 U. S. 151) 132
National Enameling & Stamping Co., Wecker v. 430
National Exchange Bank v. Superior (Mem.) (206 U. S. 564) .. 1190
National Live Stock Bank v. First Nat. Bank (203 U. S. 296) 192
Nebraska, Halter v. 696
Neill v. Union Nat. Bank (Mem.) (205 U. S. 546) 924
New Haven, Fair Haven & W. R. Co. v. 237
New Jersey v. Anderson (203 U. S. 483) 284
v. Delaware (Mem.) (205 U. S. 550) 925

Newman v. Gates (204 U. S. 89) 385
New Mexico ex rel. E. J. McLean & Co. v. Denver & R. G. R. Co. (203 U. S. 38) 78
New Orleans, Metropolitan L. Ins. Co. v. 853
New Orleans Great Northern R. Co. v. Mississippi Railroad Commission (Mem.) (205 U. S. 551) 925
Newport News & O. P. R. & Electric Co. v. Hampton Roads R. & Electric Co. (Mem.) (203 U. S. 598) 334
News & C. Co. v. Butler (Mem.) (204 U. S. 670) 672
New York, Patrick v. (Mem.) 335
Sauer v. 1176
New York ex rel. Hatch v. Reardon (204 U. S. 152) 415
New York C. & H. R. R. Co. v. McGrath (Mem.) (205 U. S. 547) .. 924
New York Cotton Exchange, Hunt v.
New York Evening Journal Pub. Co. v. Simon (Mem.) (203 U. S. 589) 330
New York Foundling Hospital v. Gatti (203 U. S. 429) 254
New York, N. H. & H. R. Co. Offield v. 231
Nichols, Moyer v. 160
Pettibone v. 148
Nicomen Boom Co., North Shore Boom & Driving Co. v. (Mem.) .. 924
Noel-Young Bond & Stock Co., Presidio County v. (Mem.) 923
Norris, McCoach v. (Mem.) 921
McCoach v. (Mem.) 332
North American Transp. & Trading Co. v. Gill (Mem.) (203 U. S. 579) 326
North Carolina Corp. Commission, Atlantic Coast Line R. Co. v. 933
North Carolina Land & Timber Co., Reeve v. (Mem.) 329
North Chicago Street R. Co. v. Chicago Consol. Traction Co. (Mem.) (206 U. S. 565) .. 1190
Northern Assur. Co. v. Grand View Bldg. Asso. (203 U. S. 106) 109
Miller v. (Mem.) 333
Northern Lumber Co. v. O'Brien (204 U. S. 190) 438
Northern P. R. Co. v. Slaght (205 U. S. 134) 742
v. Slaght (205 U. S. 122) 738
North German Lloyd, Palson v. (Mem.) 673
North Shore Boom & Driving Co. v. Nicomen Boom Co. (Mem.) (205 U. S. 548) 924
Northwestern Nat. L. Ins. Co. v. Riggs (203 U. S. 243) 168
Northwestern Sav. Bank, Centerville Station v. (Mem.) 1190

O.

O'Brien, Northern Lumber Co. v. .. 438
Offield v. New York, N. H. & H. R. Co. (203 U. S. 372) 231
Ohio Transp. Co. v. Davidson S. S. Co. (Mem.) (203 U. S. 593) 332
Ohio Valley Nat. Bank v. Hulitt (204 U. S. 162) 423
Oklahoma Gas & Electric Co. v. Lukert (Mem.) (203 U. S. 598) .. 334
Old Dominion Copper Min. & Smelting Co. v. Lewisohn (Mem.) (204 U. S. 673) 673
Old Dominion S. S. Co. v. Gilmore (Mem.) (203 U. S. 590) .. 330
Old Wayne Mut. Life Asso. v. McDonough (204 U. S. 8) 345
O'Neil, Collins v. (Mem.) 334
Ruef v. (Mem.) 924
Ornstine v. Cary (Mem.) (204 U. S. 669) 672
Osborne v. Clark (204 U. S. 565) 619
Myers v. (Mem.) 920
Osgood, Fowler v. (Mem.) 919
Owen, Cruit v. 227
Oxford & C. L. R. Co. v. Union Bank (Mem.) (206 U. S. 565) .. 1190

P.

Pabst Brewing Co., Thorley v. (Mem.) 333
Paine Lumber Co., United States v. 1139
Palson v. North German Lloyd (Mem.) (204 U. S. 671) .. 673
Passmore, Rawlins v. (Mem.) 327
Patrick v. New York (Mem.) (203 U. S. 602) 335
Patterson v. Colorado ex rel. Atty. Gen. (205 U. S. 454) 879
v. Taylor (Mem.) (205 U. S. 548) 924
Pearcy v. Stranahan (205 U. S. 257) 793
Pease, MacKenzie v. (Mem.) 330
Pennsylvania, Rearick v. 295
Pennsylvania Coal & Coke Co. v. Cassatt (Mem.) (205 U. S. 547) 924
Pennsylvania R. Co., White v. (Mem.) 923
People's Sav. Bank v. Des Moines (205 U. S. 503) 901
Perovich v. United States (205 U. S. 86) 722
Persons Claiming Rights v. United States (203 U. S. 76) 96
Peterson v. Chicago, R. I. & P. R. Co. (205 U. S. 364) 841
Pettibone v. Nichols (203 U. S. 192) 148
Philadelphia, The, White v. (Mem.) 923
Philadelphia & R. R. Co. v. Klutt (Mem.) (204 U. S. 672) .. 673

Philadelphia Trust, S. D. & Ins. Co., McCoach v. (Mem.) 332
McCoach v. (Mem.) 921
Phoenix, Phoenix Water Co. v. (Mem.) 674
Phoenix Water Co. v. Phoenix (Mem.) (204 U. S. 674) 674
Pinkham, Kaipu v. (Mem.) 1191
Pittsburg & L. E. R. Co., Martin v. 184
Platt, Bonsall v. (Mem.) 1190
Pollitz, Re (206 U. S. 323) 1081
Polyblank, Kawananakoa v. 834
Porterfield v. Moore (Mem.) (206 U. S. 566) 1191
Porto Rico, Acosta v. (Mem.) 1191
Presidio County v. Noel-Young Bond & Stock Co. (Mem.) (205 U. S. 545) 923

Q.

Quinlan v. Green County (205 U. S. 410) 860

R.

Railroad Commission, Alabama & V. R. Co. v. 289
Railroad Co., American, v. Cardona de Castro 1187
American, v. Castro (204 U. S. 453) 564
American, v. Fernandez (Mem.) (203 U. S. 597) 333
Atlantic Coast Line, v. Florida ex rel. Ellis (203 U. S. 256) 174
Atlantic Coast Line, v. North Carolina Corp. Commission (206 U. S. 1) 933
Boston & M., v. Gorkey (Mem.) (204 U. S. 672) 673
Chicago, R. I. & P., Peterson v. 841
Dakota, W. & M. River, v. Crouch (Mem.) (203 U. S. 582) 327
Delaware, L. & W., v. Rutter (Mem.) (203 U. S. 588) .. 330
Denver & R. G., New Mexico ex rel. E. J. McLean & Co. v. 78
Erie, v. Erie & W. Transp. Co. (204 U. S. 220) 450
Fair Haven & W., v. New Haven (203 U. S. 379) 237
Illinois C., Citizens' Sav. & T. Co. v. 703
Illinois C., v. Edwards (203 U. S. 531) 305
Illinois C., v. Interstate Commerce Commission (206 U. S. 441) 1128
Illinois C., v. McKendree (203 U. S. 514) 298
Illinois C., Mississippi Railroad Commission v. 209
Railroad Co., Louisville & N., v. Smith, H. & Co. (204 U. S. 551).. 612
Mason City & Ft. D., v. Boynton (204 U. S. 570) 629
Michigan C., Knudsen-Ferguson Fruit Co. v. (Mem.) 672
New Orleans Great Northern, v. Mississippi Railroad Commission (Mem.) (205 U. S. 551) 925
New York C. & H. R., v. McGrath (Mem.) (205 U. S. 547) 924
New York, N. H. & H., Offield v. 231
North Chicago Street, v. Chicago Consol. Traction Co. (Mem.) (206 U. S. 565).. 1190
Oxford & C. L., v. Union Bank (Mem.) (206 U. S. 565)... 1190
Pennsylvania, White v. (Mem.) 923
Pittsburg & L. E., Martin v. .. 184
St. Louis & S. F., v. McSwean (Mem.) (205 U. S. 541).. 921
Union P., v. Fink (Mem.) (203 U. S. 599) 334
Union P., v. Fink (204 U. S. 585) 636
West Chicago Street, v. Chicago Consol. Traction Co. (Mem.) (206 U. S. 565) 1190
Railway Co., Alabama & V., v. Railroad Commission (203 U. S. 496) 289
Atchison, T. & S. F., Empire & D. Cattle Co. v. (Mem.) 672
Atchison, T. & S. F., Minnesota & D. Cattle Co. v. (Mem.). 672
Buffalo, R. & P., Schlemmer v. 681
Chicago, B. & Q., v. Babcock (204 U. S. 585) 636
Chicago, B. & Q., v. Carlson (Mem.) (203 U. S. 599) .. 334
Chicago, B. & Q., Green v. 916
Chicago, B. & Q., v. Williams (205 U. S. 444) 875
Chicago City, Chicago v. (Mem.) 925
Chicago, R. I. & P., v. Mumford (Mem.) (203 U. S. 601) .. 335
Chicago, St. P. M. & O., Knudsen-Ferguson Fruit Co. v. (Mem.) 672
Cincinnati, H. & D., v. Interstate Commerce Commission (206 U. S. 142) 995
Cleveland Electric, Cleveland v. 399
Cleveland Electric, v. Cleveland (204 U. S. 116) 399
Gila Valley, G. & N., v. Lyon (203 U. S. 465) 276
Gulf, C. & S. F., v. Texas (204 U. S. 403) 540
Mexican C., v. Eckman (Mem.) (205 U. S. 538) 920

Railway Co., Northern P. v. Slaght (205 U. S. 122) 738
Northern P., v. Slaght (205 U. S. 134) 742
Philadelphia & R., v. Klutt (Mem.) (204 U. S. 672) .. 673
Northern P., v. Slaught (205 U. S. 236) 784
St. Louis, B. & M., Sullivan v. (Mem.) 325
Seabord Air Line, v. Florida ex rel. Ellis (203 U. S. 261) 175
Southern, Heymann v..... 178
Southern, v. Hubbard Bros. & Co. (Mem.) (205 U. S. 544) 922
Southern, v. Stutts (Mem.) (203 U. S. 590) 331
Southern, v. Tift (206 U. S. 428) 1124
Texas & P., v. Abilene Cotton Oil Co. (204 U. S. 426) 553
Texas & P., Arthur v. 590
Texas & P., v. Cisco Oil Mill (204 U. S. 449) 562
Texas & P., v. Small (Mem.) (205 U. S. 550) 925
Ramsden v. Knowles (Mem.) (206 U. S. 562) 1189
Rawlins v. Passmore (Mem.) (203 U. S. 583) 327
Reardon, New York ex rel. Hatch v. .. 415
Rearick v. Pennsylvania (203 U. S. 507) 295
Red Bird v. United States (203 U. S. 76) 96
Reeve v. North Carolina Land & Timber Co. (Mem.) (203 U. S. 588) 329
Reinhardt, Travers v. 865
Re Moran (203 U. S. 96) 105
Pollitz (206 U. S. 323) 1081
Ughbanks (Mem.) (206 U. S. 561) 1189
Resto y Negron, Gonzales Resto v. (Mem.) 335
Reynolds v. Connecticut (Mem.) (203 U. S. 584) 328
R. Hoe & Co., United States v. (Mem.) 333
Rice, Montana ex rel. Haire v. 490
Richardson v. Shaw (Mem.) (203 U. S. 587) 329
Riggs, Northwestern Nat. L. Ins. Co. v. 168
Riley, Allen v. 216
Robinson v. American Car & Foundry Co. (Mem.) (203 U. S. 590) 330
Haight & F. Co. v. (Mem.) 327
Rochester, Rochester R. Co. v. 784
Rochester R. Co. v. Rochester (205 U. S. 236) 784
Romeu v. Todd (206 U. S. 358) 1093
Roming v. Gillett (Mem.) (205 U. S. 535) 919
Rose v. Kansas ex rel. Coleman (Mem.) (203 U. S. 580) 326
Rosenberger v. Harris (Mem.) (203 U. S. 591) 331
Royster v. Treat (205 U. S. 33) 695
Ruef v. O'Neil (Mem.) (205 U. S. 549) 924
Rutter, Delaware, L. & W. R. Co. v. (Mem.) 330

S.

Saginaw Match Co. v. Diamond Match Co. (Mem.) (203 U. S. 589) 330
St. Louis & S. F. R. Co. v. McSwean (Mem.) (205 U. S. 541) .. 921
St. Louis, B. & M. R. Co., Sullivan v. (Mem.) 325
St. Louis Min. & Mill. Co., Ex parte (Mem.) (206 U. S. 561) .. 1189
Montana Min. Co. v. 444
Montana Min. Co. v. (Mem.) 1191
St. Mary's Franco-American Petroleum Co. v. West Virginia (203 U. S. 183) 144
Samuel H. Cottrell & Son, Smokeless Fuel Co. v. (Mem.) 923
Sarnia, The, Greco v. (Mem.) 330
Sauer v. New York (206 U. S. 536) .. 1176
Saxlehner, Eisner v. (Mem.) 331
Saylor v. Frantz (Mem.) (205 U. S. 548) 924
Schlemmer v. Buffalo, R. & P. R. Co. (205 U. S. 1) 681
School Dist. No. 11 v. Chapman (Mem.) (205 U. S. 545) .. 923
Scott v. Guice (Mem.) (203 U. S. 592) 331
Seaboard Air Line R. Co. v. Florida ex rel. Ellis (203 U. S. 261) 175
Security Trust & S. V. Co. v. Lexington (203 U. S. 323) 204
Security Warehousing Co. v. Hand (206 U. S. 415) 1117
Seneca Nation, Ex parte (Mem.) (203 U. S. 577) 325
Serra v. Mortiga (204 U. S. 470) 571
Shaw, Richardson v. (Mem.) 329
v. United States (Mem.) (203 U. S. 591) 331
Wilson v. 351
Shea v. Mobile (Mem.) (205 U. S. 543) 922
Shipp, United States v. 319
Shropshire, W. & Co. v. Bush (204 U. S. 186) 436
Siegert, Gandolfi v. (Mem.) 922
Simon, New York Evening Journal Pub. Co. v. (Mem.) 330
Skene, Armour & Co. v. (Mem.) 1189
Slaght, Northern P. R. Co. v. 738
Northern P. R. Co. v. 742

Slaughter v. Loeb (Mem.) (203 U. S. 600) 334
Small, Texas & P. R. Co. v. (Mem.) 925
Smith, Ballentyne v. 803
Burt v. 121
v. Iverson (Mem.) (203 U. S. 586) 329
v. Jennings (206 U. S. 276) .. 1061
v. Look (Mem.) (203 U. S. 595) 332
Smithers v. 656
v. Tennessee (Mem.) (205 U. S. 548) 924
v. Treat (205 U. S. 33) 695
Smithers v. Smith (204 U. S. 632) .. 656
Smith, H. & Co., Louisville & N. R. Co. v. 612
Smokeless Fuel Co. v. Samuel H. Cottrell & Son (Mem.) (205 U. S. 544) 923
Sobey v. Holsclaw (Mem.) (203 U. S. 594) 332
South Carolina ex rel. Buchanan v. Jennings (Mem.) (204 U. S. 667) 671
South Dakota, Delamater v. 724
Southern Illinois & M. Bridge Co., Stone v. 1057
Southern R. Co., Heymann v. 178
v. Hubbard Bros. & Co. (Mem.) (205 U. S. 544) 922
v. Stutts (Mem.) (203 U. S. 590) 331
v. Tift (206 U. S. 428) 1124
Spalding, Lamar v. (Mem.) 328
Spaugh v. Fitts (Mem.) (205 U. S. 540) 921
Springer, Cunningham v. 662
Standard Oil Co. v. Anderson (Mem.) (205 U. S. 545) 923
Staplehurst, Yates v. 1015
State Council of Va., J. O. U. A. M., National Council of the J. O. U. A. M. v. 132
Stearns v. Todd (Mem.) (204 U. S. 669) 672
Stephens v. Brast (Mem.) (205 U. S. 541) 921
Stephenson, Deutsche Levante Linie v. (Mem.) 923
Stevenson Iron Min. Co. v. Kibbe (Mem.) (205 U. S. 537) .. 920
Stewart v. United States (206 U. S. 185) 1017
v. Wright (Mem.) (203 U. S. 590) 330
Stone v. Southern Illinois & M. Bridge Co. (206 U. S. 267) 1057
Stranahan, Pearcy v. 793
Strong v. Buffalo Land & Exploration Co. (Mem.) (203 U. S. 582) 327
Stuart v. Hauser (Mem.) (203 U. S. 585) 328
Stutts, Southern R. Co. v. (Mem.) 331
Sullivan v. St. Louis, B. & M. R. Co. (Mem.) (203 U. S. 578) .. 325
Sum Gay v. United States (Mem.) (204 U. S. 668) 671
Superior, National Exchange Bank v. (Mem.) 1190
Swing v. Weston Lumber Co. (205 U. S. 275) 799

T.

Taft, United States ex rel. Taylor v. 269
Taggard, Thomas v. (Mem.) 672
Taylor v. Burns (203 U. S. 120) 116
Patterson v. (Mem.) 924
v. United States (Mem.) (205 U. S. 540) 921
United States ex rel., v. Taft (203 U. S. 461) 269
Tenement House Department, Moeschen v. (Mem.) 328
Tennessee, Smith v. (Mem.) 924
Tennessee Copper Co., Georgia v. 1038
Teter-Heany Development Co., Downes v. (Mem.) 922
Texas, Garza de Villereal v. (Mem.) .. 920
Gulf, C. & S. F. R. Co. v..... 540
Texas & P. R. Co. v. Abilene Cotton Oil Co. (204 U. S. 426) .. 553
Arthur v. 590
v. Cisco Oil Mill (204 U. S. 449) 562
v. Small (Mem.) (205 U. S. 550) 925
Thomas v. Kansas (Mem.) (205 U. S. 535) 919
v. Taggart (Mem.) (204 U. S. 670) 672
Thorley v. Pabst Brewing Co. (Mem.) (203 U. S. 597) 333
Tift, Southern R. Co. v. 1124
Tilghman, Eidman v. (Mem.) 326
Tindle v. Birkett (205 U. S. 183) .. 762
Tinsley v. Treat (205 U. S. 20) 689
Todd, Romeu v. 1093
Stearns v. (Mem.) 672
Torrey Cedar Co., United States v. (Mem.) 925
Tracy v. Ginzberg (205 U. S. 170) .. 755
Travers v. Reinhardt (205 U. S. 423) 865
Treat, Braden v. 695
Burroughs v. 695
Carpenter v. 695
Kessler v. 695
McDowell v. 696
Morgan v. 695
Royster v. 695
Smith v. 695
Tinsley v. 689
Whittle v. 695
Wilcox v. 695
Trespalacios Rice & Irrig. Co., Borden v. (Mem.) 671
Trickey, Crowe v. 454

Tromp v. William Cramp & Sons Ship & Engine Bldg. Co. (Mem.) (204 U. S. 671) 673
Troy Wagon Works Co. v. Hancock (Mem.) (206 U. S. 563) .. 1190
Tucker, Curtin v. (Mem.) 1191
Turner, Duke v. 652

U.

Ughbanks, Re (Mem.) (206 U. S. 561) 1189
Union Bank, Oxford & C. L. R. Co. v. (Mem.) 1190
Union Bridge Co. v. United States (204 U. S. 364) 523
Union Nat. Bank, Neill v. (Mem.) .. 924
Union P. R. Co. v. Fink (204 U. S. 585) 636
v. Fink (Mem.) (203 U. S. 599) 334
Union Trust & D. Co., Euclid Park Nat. Bank v. (Mem.) 924
United Shirt & Collar Co., William Beattie & Son v. (Mem.) 924
United States, Allen v. 634
American News Co. v. (Mem.) 1190
Angle v. (Mem.) 922
Bay State Dredging Co. v..... 1047
v. Benjamin H. Howell, Son & Co. (Mem.) (204 U. S. 667) 671
v. Bethlehem Steel Co. (205 U. S. 105) 731
Bradford v. (Mem.)..... 1190
v. Brown (206 U. S. 240) 1046
Brown v. 1046
Cherokee Nation v. 96
Clement v. (Mem.) 1189
v. Dalcour (203 U. S. 408) 248
Davidson S. S. Co. v. 764
Eastern Dredging Co. v. 1047
Edelstein v. (Mem.) 922
Ellis v. 1047
v. Farenholt (206 U. S. 226).. 1036
Fields v. 807
Fite v. 96
Flickinger v. (Mem.) 673
Francis v. (Mem.) 1190
v. George Riggs & Co. (203 U. S. 136) 127
v. G. Falk & Bro. (204 U. S. 143) 411
Goat & Sheepskin Import Co. v. 1022
Grafton v. 1084
v. Heinszen (206 U. S. 370) .. 1098
Henry E. Frankenberg Co. v... 1034
v. Hite (204 U. S. 343) 514
Hodges v. 65
Kansas v. 510
v. Keatley (204 U. S. 562) 618
v. Kirk (Mem.) (204 U. S. 668) 671
McCarty v. (Mem.) 920
United States v. Marion Trust Co. (Mem.) 1191
v. Marion Trust Co. (Mem.) (203 U. S. 594) 332
v. Michigan (Mem.) (203 U. S. 601) 335
v. Mitchell (205 U. S. 161) 752
v. Morgan (Mem.) (203 U. S. 595) 333
v. Paine Lumber Co. (206 U. S. 467) 1139
Perovich v. 722
Persons Claiming Rights v. .. 96
Red Bird v. 96
v. R. Hoe & Co. (Mem.) (203 U. S. 595) 333
Shaw v. (Mem.) 331
v. Shipp (203 U. S. 563) 319
Stewart v. 1017
Sum Gay v. (Mem.) 671
Taylor v. (Mem.) 921
v. Torrey Cedar Co. (Mem.) (205 U. S. 550) 925
Union Bridge Co. v. 523
United States Fidelity & G. Co. v. 516
Wilder v. (Mem.) 674
v. William Cramp & Sons Ship & Engine Bldg. Co. (206 U. S. 118) 983
William Cramp & Sons Ship & Engine Bldg. Co. v. 983
Yee Yuen v. (Mem.) 674
United States ex rel. Lowry v. Allen (203 U. S. 476) 281
West v. Hitchcock (205 U. S. 80) 718
West v. Taft (203 U. S. 461).. 269
United States Fidelity & G. Co. v. United States (204 U. S. 349) 516
United States Sav. & L. Co., Convent of St. Rose v. (Mem.) .. 922
Urquhart v. Brown (205 U. S. 179) .. 760
Utica Bank, Yates v. 1015

V.

Van Buren v. Hennessey (Mem.) (203 U. S. 600) 334
Van Horn v. Wilson (204 U. S. 42) .. 360
Varick Bank, Hiscock v. 945
Vickers, Wilson v. (Mem.) 326
Vicksburg v. Vicksburg Waterworks Co. (206 U. S. 496) 1155
Vicksburg Waterworks Co., Vicksburg v. 1155
Victor Talking Mach. Co., Leeds & C. Co. v. (Mem.) 1190
Vietor v. Levi (Mem.) (203 U. S. 596) 333
Virginia v. West Virginia (206 U. S. 290) 1068

Vogt v. Vogt (Mem.) (203 U. S. 581) 327
Vollkommer, Frank v. 911

W.

Walker, Bacon v. 499
v. McLoud (204 U. S. 302) 495
Wallace v. Adams (204 U. S. 415) 547
Walling, Bown v. 503
Ward v. Dampskibsselskaber Kjoebenhabn (Mem.) (205 U. S. 544) 923
v. Hart (Mem.) (205 U. S. 542) 922
v. Ward (Mem.) (206 U. S. 564) 1190
Washington, Lawson v. (Mem.) 919
Waters v. Emmons (Mem.) (203 U. S. 578) 325
Watkins, Haynes v. (Mem.) 673
Webb v. King (204 U. S. 43) 360
Webber, Axtell v. (Mem.) 325
Webster Coal & Coke Co. v. Cassatt (Mem.) (205 U. S. 547) .. 924
Wecker v. National Enameling & Stamping Co. (204 U. S. 176) 430
Weeks, International Trust Co. v. 224
Weinreb v. Fink (Mem.) (203 U. S. 588) 329
Wells, Clark v. 138
West, United States ex rel., v. Hitchcock (205 U. S. 80) 718
West Chicago Street R. Co. v. Chicago Consol. Traction Co. (Mem.) (206 U. S. 565) . 1190
Western Turf Asso. v. Greenberg (204 U. S. 359) 520
Western U. Teleg. Co. v. Hughes (203 U. S. 505) 294
Weston Lumber Co., Swing v. 799
West Virginia, St. Mary's Franco-American Petroleum Co. v. 144
Virginia v. 1068
Wetmore v. Karrick (205 U. S. 141) 745
Wheeler, Mercantile Trust Co. v. (Mem.) 332
White v. Pennsylvania R. Co. (Mem.) (205 U. S. 546) 923
v. The Philadelphia (Mem.) (205 U. S. 546) 923
White Star Min. Co., Anderson v. (Mem.) 921
v. Hultberg (Mem.) (205 U. S. 540) 921
Johnson v. (Mem.) 921
Whitfield v. Aetna L. Ins. Co. (205 U. S. 489) 895
Whittle v. Treat (205 U. S. 33) 695
Whittredge, Hammond v. 606
Wicomico County v. Bancroft (203 U. S. 112) 112
Wightman v. Connecticut (Mem.) (203 U. S. 601) 335
Wilcox v. Treat (205 U. S. 33) 695
Wilder v. Blackford (Mem.) (205 U. S. 541) .....
v. United States (Mem.) (204 U. S. 674) .....
William Beattie & Son v. United Shirt & Collar Co. (Mem.) (205 U. S. 547) .....
William Cramp & Sons Ship & Engine Bldg. Co., Tromp v. (Mem.)
v. United States (206 U. S. 118) .....
United States v. .....
Williams, Chicago, B. & Q. R. Co. v...
Wilmington Star Min. Co. v. Fulton (205 U. S. 60) .....
Wilson, Bachtel v. .....
Bachtel v. .....
Davis v. .....
Honore v. (Mem.) .....
Miller v. .....
v. Murphy (Mem.) (203 U. S. 580) .....
v. Shaw (204 U. S. 24) .....
Van Horn v. .....
v. Vickers (Mem.) (203 U. S. 581) .....
Wisner, Ex parte (203 U. S. 449) ..
W. M. Laird Co., Frederick L. Grant Shoe Co. v. .....
Wood, Bay Prairie Irrig. Co. v. (Mem.)
Wright, Buster v. (Mem.) .....
Stewart v. (Mem.) .....
Wymore, Myers v. (Mem.) .....
Wyoming ex rel. Wyoming Agricultural College v. Irvine (206 U. S. 278) 10
Wyoming Agricultural College, Wyoming ex rel., v. Irvine (206 U. S. 278) 10

Y.

Yates v. Bailey (206 U. S. 181) .. 10
v. Jones Nat. Bank (206 U. S. 158) 10
v. Staplehurst (206 U. S. 181) 10
v. Utica Bank (206 U. S. 181) 10
Yee Yuen v. United States (Mem.) (204 U. S. 674) .....
Youngworth, Gillelen v. (Mem.) ....
Gould v. (Mem.) .....
Hedderly v. (Mem.) .....
Hynes v. (Mem.) .....

Z.

Zartarian v. Billings (204 U. S. 170)
Zell, Ex parte (Mem.) (203 U. S. 586)
v. Judges of Circuit Court (Mem.) (203 U. S. 577) ..
v. Leigh (Mem.) (204 U. S. 669) .....

CITATIONS

IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.

A.

ne Cotton Oil Co. v. Texas & P. R. Co. (Tex. Civ. App.) 85 S. W. 1052 563
ns v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512 546
v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372 157
v. Shirk, 55 C. C. A. 25, 117 Fed. 801 825
ns Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604 640
v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604 640
yston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96 244
rd v. Muldoon, 45 Ill. 193 815
ama Great Southern R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161 434
ny County v. Stanley, 105 U. S. 305, 26 L. ed. 1044 ....422, 840
right v. New Mexico, 200 U. S. 9, 50 L. ed. 346, 26 Sup. Ct. Rep. 210 85
tander v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. Rep. 356 .....327, 643
n v. Alleghany Co. 196 U. S. 458, 49 L. ed. 551, 25 Sup. Ct. Rep. 311 801
v. Blunt, 2 Woodb. & M. 129, Fed. Cas. No. 217 665
eyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427 .....76, 172, 730
r's Appeal, 67 Pa. 341, 5 Am. Rep. 433 1105
so v. United States, 6 Wall. 458, 18 L. ed. 721 750
rican & F. Christian Union v. Yount, 101 U. S. 352, 25 L. ed. 888 580
American Book Co. v. Kansas, 193 U. S. 49, 48 L. ed. 613, 24 Sup. Ct. Rep. 394 355
American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182 .....180, 297
American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 243 253
American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55 1025
American R. Co. v. Castro, 204 U. S. 453, 51 L. ed. 564, 27 Sup. Ct. Rep. 466 .....1098, 1187
American S. B. Co. v. Chase, 16 Wall. 522, 21 L. ed. 369 326
American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365 ..298, 423
American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646 214
Anderson v. Carkins, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905 .....303, 771
v. Philadelphia Warehouse Co. 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. Rep. 525 426
v. Reid, 14 D. C. App. 54.... 488
v. Watt, 138 U. S. 694, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449 447
Anna, The, 5 C. Rob. 273 797
Ansbro v. United States, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187 .....328, 919
Antigo Screen Door Co., Re, 59 C. C. A. 248, 123 Fed. 249 1124
Applegate v. Lexington & C. County Min. Co. 117 U. S. 255, 29 L. ed. 892, 6 Sup. Ct. Rep. 742 476
Arbuckle v. Blackburn, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148 213
Argonaut Min. Co. v. Kennedy Min. & Mill. Co. 131 Cal. 15, 82 Am. St. Rep. 317, 63 Pac. 148 480

Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232 309
Arthur v. Morrison, 96 U. S. 108, 24 L. ed. 764 1025
Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124 .....328, 1052
Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185 .. 792
Atlantic & P. R. Co. v. Mingus, 165 U. S. 413, 41 L. ed. 770, 17 Sup. Ct. Rep. 348 498
Atlantic City R. Co., Re, 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208 1084
v. Goodin, 62 N. J. L. 394, 45 L.R.A. 671, 72 Am. St. Rep. 652, 42 Atl. 333 872
Atlantic Coast Line R. Co. v. Florida ex rel. Ellis, 203 U. S. 256, 51 L. ed. 174, 27 Sup. Ct. Rep. 108 942
Atlee v. Northwestern Union Packet Co. 21 Wall. 389, 22 L. ed. 619 767
Atty. Gen. v. Mitchell, L. R. 6 Q. B. Div. 548 887
v. Upton, L. R. 1 Exch. 224 ... 887
Atty. Gen. ex rel. Kies v. Lowrey, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27 223
Auditor General v. Williams, 94 Mich. 180, 53 N. W. 1097 168
Aurora v. West, 7 Wall. 82, 19 L. ed. 42 742
Aurora, The, v. United States, 7 Cranch, 382, 3 L. ed. 378 .. 530
Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132 297

B.

Bache v. Hunt, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547.. 919
Bachtel v. Wilson, 204 U. S. 36, 51 L. ed. 357, 27 Sup. Ct. Rep. 243 .....686, 688
Backus v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445 329
Bacon v. Callender, 6 Mass. 303 1104
v. Hooker, 177 Mass. 335, 83 Am. St. Rep. 279, 58 N. E. 1078 1116
v. Park, 19 Utah, 246, 57 Pac. 28 366
v. Robertson, 18 How. 480, 15 L. ed. 499 553
v. Texas, 163 U. S. 219, 41 L. ed. 137, 16 Sup. Ct. Rep. 1023 920
Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289 504
Bailey v. Mosher, 74 Fed. 15 1008
v. Mosher, 95 Fed. 223 1008
Baker v. Drake, 66 N. Y. 518, 23 Am. Rep. 80 952
Baldwin v. Williams, 3 Met. 365 1117
Ball v. Ball, 2 Sim. 35 259
Ballard v. Davis, 3 J. J. Marsh, 656.. 749
Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. ed. 354 .. 351
Baltimore, C. & A. R. Co. v. Ocean City, 89 Md. 89, 42 Atl. 922 115
v. Wicomico County (Md.) 63 Atl. 678 .....115, 116
v. Wicomico County, 93 Md. 113, 48 Atl. 853 115
Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274 .....156, 580
Bank of Columbia v. Okely, 4 Wheat. 235, 4 L. ed. 559 760
Bank of Commonwealth v. Wistar, 3 Pet. 431, 7 L. ed. 731 751
Bank of Kentucky v. Adams Exp. Co. 93 U. S. 174, 23 L. ed. 872. 593
594
v. Stone, 88 Fed. 383 828
Bank of United States v. Bank of Washington, 6 Pet. 8, 8 L. ed. 299 96
Banks v. St. Francis Levee District, 66 Ark. 490, 51 S. W. 830 ... 475
Bank Tax Case, 2 Wall. 200, 17 L. ed. 793 908
Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000 914
Bardon v. Northern P. R. Co. 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856 441
Barker, Ex parte, 87 Ala. 4, 13 Am. St. Rep. 17, 6 So. 7 158
Re, 7 Hurlst & N. 116..... 887
Barnett v. Johnson, 15 N. J. Eq. 481.. 1187
Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224 .....973, 1183
Barreda v. Silsbee, 21 How. 167, 16 L. ed. 93 766
Barry v. Edmunds, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501 .....660, 661
Bartlet v. Ramsden, 1 Keble, 570 887
Bates v. Clark, 95 U. S. 204, 24 L. ed. 471 109
Bates's Case, 55 N. H. 325 324
Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966 744
Bausman v. Dixon, 173 U. S. 113, 43 L. ed. 633, 19 Sup. Ct. Rep. 316 328
Beals v. Cone, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275.. 328

Bean v. Stupart, 1 Dougl. K. B. 11 .. 1054
Beardsley v. Arkansas & L. R. Co. 158 U. S. 123, 39 L. ed. 919, 15 Sup. Ct. Rep. 786 327
Beatty v. Hanna. See MANITOBA, THE
Beaupre v. Noyes, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296 325
Beavers v. Henkel, 194 U. S. 73, 48 L. ed. 882, 24 Sup. Ct. Rep. 605 .....693, 695
Bedel v. Loomis, 11 N. H. 9..... 777
Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597 137
Beers v. Shannon, 73 N. Y. 292 1112
Bell's Gap. R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533 422
Benson v. Henkel, 198 U. S. 1, 49 L. ed. 919, 25 Sup. Ct. Rep. 569 695
Berger, Ex parte, 193 Mo. 16, 3 L.R.A. (N.S.) 530, 112 Am. St. Rep. 472, 90 S. W. 759 672
Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244 579
Berry v. Knights Templars' & M. Life Indemnity Co. 46 Fed. 439. 351, 898
Bessette v. W. B. Conkey Co. 194 U. S. 324, 48 L. ed. 997, 24 Sup. Ct. Rep. 665 ....643, 644
Bessette Case. See BESSETTE v. W. B. CONKEY CO.
Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272 889
Bindseil v. Smith, 61 N. J. Eq. 645, 47 Atl. 456 915
Birrell v. New York & H. R. Co. 198 U. S. 390, 49 L. ed. 1096, 25 Sup. Ct. Rep. 667 1186
Bissell v. Spring Valley Twp. 124 U. S. 225, 31 L. ed. 411, 8 Sup. Ct. Rep. 495 741
Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277 .....856, 1114, 1115, 1116
Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427 .....405, 510, 661
Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165 .....137, 173
Blisset's Case, Lofft. 748 259
Bloch, Re, 87 Fed. 981 164
Board of Trade v. Cella Commission Co. 145 Fed. 28 827
v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637 825, 826, 827
Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740 489
Bogle v. Gordon, 39 Kan. 31, 17 Pac. 857 605
Bond v. Newark, 19 N. J. Eq. 376 815
Bonnafon v. Wiltz, 10 La. Ann. 657.. 1096
Boone v. Purnell, 28 Md. 607, 92 Am. Dec. 713 872
Booth v. Clark, 17 How. 322, 15 L. ed. 164 1176
v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425 310
Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989..... 328
Bowditch v. Raymond, 146 Mass. 109, 15 N. E. 285 227
Bowers Hydraulic Dredging Co. v. Federal Contracting Co. 148 Fed. 290 1054
Bowker v. United States, 186 U. S. 135, 46 L. ed. 1090, 22 Sup. Ct. Rep. 802 329
Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375 429
v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524 973
Bradford v. Patterson, 1 A. K. Marsh, 464 749
Bradley v. Washington, A. & G. Steam Packet Co. 13 Pet. 89, 10 L. ed. 72 1033
Bradshaw v. Ashley, 14 App. D. C. 485 483
Brady v. Daly, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62 244
Branch v. Griffin, 99 N. C. 173, 5 S. E. 393 807
Brand v. Multnomah County, 38 Or. 79, 50 L.R.A. 389, 84 Am. St. Rep. 772, 60 Pac. 290, 62 Pac. 209 1181
Brawley v. United States, 96 U. S. 168, 24 L. ed. 622 736
Breadalbane Case. See CAMPBELL v. CAMPBELL.
Brechbill v. Randall, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362. 217
Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829 297
Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924 1015
Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858 482
Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585....856, 1113, 1115

Brobst v. Brock, 10 Wall. 526, 19 L. ed. 1002 665
Brockett v. Brockett, 2 How. 238, 17 L. ed. 251 130
Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797 .....749, 751
Bronson Case. See BRONSON v. SCHULTEN.
Brooke v. McCraken, Fed. Cas. No. 1,932 605
Brooklyn L. Ins. Co. v. Dutcher, 95 U. S. 269, 24 L. ed. 410 1033
Brooks v. Burlington & S. W. R. Co. 102 U. S. 107, 26 L. ed. 91. 749
Brown, Ex parte, 28 Fed. 653 164
Re, 4 Ben. 142, Fed. Cas. No. 1,974 437
Re, 39 Wash. 160, 1 L.R.A. (N.S.) 540, 109 Am. St. Rep. 868, 81 Pac. 552 761
v. Anderson, 4 Mart. N. S. 416 1116
v. Aspden, 14 How. 25, 14 L. ed. 311 749
v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091 423
v. Maryland, 12 Wheat. 419, 6 L. ed. 678 421
v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77 894
Browne v. Strode, 5 Cranch, 303, 3 L. ed. 108 518
Brownell's Case, 9 Comp. Dec. 676.... 1036
Bryan v. Spivey, 106 N. C. 95, 11 S. E. 510 619
Buccleuch v. Metropolitan Bd. of Works, L. R. 5 H. L. 418. 638
Buchanan v. Litchfield, 102 U. S. 278, 26 L. ed. 138 864
Buck v. Beach, 164 Ind. 37, 108 Am. St. Rep. 272, 71 N. E. 963. 1111
v. Miller, 147 Ind. 586, 37 L.R. A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8 .....1107, 1111
Bucklin v. United States, 159 U. S. 680, 40 L. ed. 304, 16 Sup. Ct. Rep. 182 144
Buckner v. Richmond & D. R. Co. 72 Minn. 873, 18 So. 449 687
Bulkley v. New York & N. H. R. Co. 27 Conn. 479 240
Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018 770
Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10 116
Burhans v. Hutcheson, 25 Kan. 625, 37 Am. Rep. 274 .....196, 197
Burnett v. Luttrell, 52 Ill. App. 19.. 665
Burrus, Re, 136 U. S. 586, 34 L. ed. 500, 10 Sup. Ct. Rep. 850. 259
Burt v. Smith, 203 U. S. 129, 51 L. ed. 121, 27 Sup. Ct. Rep. 37.. 880, 1063
Buster v. Wright, 68 C. C. A. 505, 135 Fed. 947 109
Butler v. Cornell, 148 Ill. 276, 35 N. E. 767 490
v. Gage, 138 U. S. 52, 34 L. ed. 869, 11 Sup. Ct. Rep. 235.. 328
v. Goreley, 146 U. S. 308, 36 L. ed. 984, 13 Sup. Ct. Rep. 84, 147 Mass. 8, 16 N. E. 734 251
v. Palmer, 1 Hill, 324 1104
Butte Hardware Co. v. Sullivan, 7 Mont. 312, 16 Pac. 588.... 449
Butterfield v. Reed, 160 Mass. 362, 35 N. E. 1128 612
v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349 532
Buttz v. Northern P. R. Co. 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100 166

C.

Cadwalader v. Zeh, 151 U. S. 171, 38 L. ed. 115, 14 Sup. Ct. Rep. 288 1023
Cahen v. Brewster, 203 U. S. 543, 51 L. ed. 310, 27 Sup. Ct. Rep. 174 889
Calder v. Bull, 3 Dall. 386, 1 L. ed. 648 551
Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229 .....297. 422
Caledonian Coal Co. v. Baker, 196 U. S. 432, 49 L. ed. 540, 25 Sup. Ct. Rep. 375..... 141
Calhoun Gold Min. Co. v. Ajax Gold Min. Co. 182 U. S. 499, 45 L. ed. 1200, 21 Sup. Ct. Rep. 885 481
California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073 .....357, 640
v. Southern P. Co. 157 U. S. 249, 39 L. ed. 690, 15 Sup. Ct. Rep. 591 1081
California Consol. Min. Co. v. Manley, 203 U. S. 579, 51 L. ed. 326, 27 Sup. Ct. Rep. 779..... 326, 327, 328, 919
California Ins. Co. v. Union Compress Co. 133 U. S. 387, 33 L. ed. 730, 10 Sup. Ct. Rep. 365.. 594
California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831 ....303, 328

California Powder Works v. Davis, 151 U. S. 393, 38 L. ed. 207, 14 Sup. Ct. Rep. 350 .... 919, 920
Cameron v. M'Roberts, 3 Wheat. 591, 4 L. ed. 467 .....749, 751
Campau v. Dewey, 9 Mich. 381 168
Campbell v. California, 200 U. S. 87, 50 L. ed. 382, 26 Sup. Ct. Rep. 182 889
v. Campbell, L. R. 1 H. L. Sc. App. Cas. 182 873
v. Gordon, 6 Cranch, 176, 3 L. ed. 190 429
v. Havernill, 155 U. S. 610, 39 L. ed. 280, 15 Sup. Ct. Rep. 217 244
v. Mackay, 1 Myl. & C. 603.... 1081
Canal Bank v. Hudson, 111 U. S. 66, 28 L. ed. 354, 4 Sup. Ct. Rep. 303 488
Capen v. Stoughton, 16 Gray, 364 751
Carey v. Houston & T. C. R. Co. 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63 783
Carlisle v. United States, 16 Wall. 147, 21 L. ed. 426 895
Carpenter v. Longan, 16 Wall. 271, 21 L. ed. 313 196
v. Pennsylvania, 17 How. 456, 15 L. ed. 127 314
Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66 .....137, 359
Carruthers v. McMurray, 75 Iowa, 173, 39 N. W. 255 665
Carson City Gold & S. Min. Co. v. North Star Min. Co. 28 C. C. A. 333, 48 U. S. App. 724, 83 Fed. 658 480
Carstairs v. Cochran, 193 U. S. 10, 48 L. ed. 596, 24 Sup. Ct. Rep. 318 1115
Carter v. Hawaii, 200 U. S. 255, 50 L. ed. 470, 26 Sup. Ct. Rep. 248 836
v. McClaughry, 183 U. S. 365, 46 L. ed. 236, 22 Sup. Ct. Rep. 181 1089
v. Roberts, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713 1089
Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N. E. 131 717
Cartwright's Case, 114 Mass. 230 ... 324
Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779 1122
Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229 .....472, 919
Caswell v. Worth, 51 El. & Bl. 849.. 687
Cau v. Texas & P. R. Co. 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663 593
Cavazos v. Thevino, 6 Wall. 773, 18 L. ed. 813 1033
Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80 473
Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 Sup. Ct. Rep. 346 147
Central Nat. Bank v. Stevens, 169 U. S. 433, 42 L. ed. 807, 18 Sup. Ct. Rep. 403..... 827
Central P. R. Co. v. California, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766, 105 Cal. 576, 38 Pac. 905 .....639, 640
Central R. & Bkg. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757.. 792
Central Trust Co. v. Louisville, St. L. & T. R. Co. 70 Fed. 282 .. 815
v. McGeorge, 151 U. S. 129, 38 L. ed. 98, 14 Sup. Ct. Rep. 286 268
Chapman v. Douglas County, 107 U. S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62 .....654, 655
v. United States, 164 U. S. 436, 41 L. ed. 504, 17 Sup. Ct. Rep. 76 811
Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255 147, 942
Charnley v. Sibley, 20 C. C. A. 157, 34 U. S. App. 705, 73 Fed. 980 490
Chase v. United States, 155 U. S. 489, 39 L. ed. 234, 15 Sup. Ct. Rep. 174 920
Chateaugay Ore & Iron Co. v. Blake, 144 U. S. 476, 36 L. ed. 510, 12 Sup. Ct. Rep. 731 281
Chattahoochee, The, 173 U. S. 540, 43 L. ed. 801, 19 Sup. Ct. Rep. 491 .....453, 454
Chattanooga Nat. Bldg. & L. Asso. v. Denson, 189 U. S. 408, 47 L. ed. 870, 23 Sup. Ct. Rep. 630 800
Cheong Ah Moy v. United States, 113 U. S. 216, 28 L. ed. 983, 5 Sup. Ct. Rep. 431 355
Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. ed. 25 166
v. Journeycake, 155 U. S. 196, 39 L. ed. 120, 15 Sup. Ct. Rep. 55 99
v. Southern Kansas R. Co. 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965 538
Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813 790
v. Virginia, 94 U. S. 718, 24 L. ed. 310 790

Chester v. Black, 132 Pa. 568, 6 L.R. A. 802, 19 Atl. 276 1104
Chetwood, Re, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385.. 227
Chicago v. Lonergan, 196 Ill. 518, 63 N. E. 1018 718
v. Mills, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286 661
v. Sheldon, 9 Wall. 50, 19 L. ed. 594 1033
Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400 942
Chicago & N. W. R. Co. v. Whitton, 13 Wall. 270, 20 L. ed. 571 351
Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.. 537
942
v. Cutts. See CHICAGO, B. & Q. R. Co. v. IOWA.
v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341 ....502, 537, 539, 540, 942
v. Iowa, 94 U. S. 155, 24 L. ed. 94 942
Chicago Great Western R. Co. v. Northern P. R. Co. 42 C. C. A. 25, 101 Fed. 792 1033
Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 128, 49 L. ed. 413, 25 Sup. Ct. Rep. 200.. 801
Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179, 24 L. ed. 99.. 942
v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462 942
v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289 .....86, 191
v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336 942
Chicago R. Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 268, 34 L. ed. 349, 10 Sup. Ct. Rep. 999 834
Chicago, S. F. & C. R. Co. v. Price, 138 U. S. 185, 34 L. ed. 917, 11 Sup. Ct. Rep. 290 815
China, The, 7 Wall. 53, 19 L. ed. 67.. 248
China, The, v. Walsh. See CHINA, THE.
Chinn v. Trustees, 32 Ohio St. 236 ... 654
655
Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 440 968
Chittenden v. Brewster, 2 Wall. 191, 17 L. ed. 839 90
Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24 ..686, 688
Chrisman v. Miller, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468 688
Christensen Case. See CHRISTENSEN ENGINEERING Co., RE.
Christensen Engineering Co., Re, 194 U. S. 458, 48 L. ed. 1072, 24 Sup. Ct. Rep. 729....643, 644
Christian v. Connecticut Mut. L. Ins. Co. 143 Mo. 460, 45 S. W. 268 172
Christie Case. See BOARD OF TRADE v. CHRISTIE GRAIN & STOCK Co.
Christopher v. Norwell, 201 U. S. 216, 50 L. ed. 732, 26 Sup. Ct. Rep. 502 1174
Churchill v. Utica. See VAN ALLEN v. ASSESSORS.
Cimiotti Unhairing Co. v. American Fur Ref. Co. 198 U. S. 399, 49 L. ed. 1100, 25 Sup. Ct. Rep. 697 652
Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 206 U. S. 142, 51 L. ed. 995, 27 Sup. Ct. Rep. 648 1138
Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700. 558
560, 1000, 1134, 1138
v. Interstate Commerce Commission, 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896 .....558, 560
Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St. 88 532
Citizens' Sav. & L. Asso. v. Perry County, 156 U. S. 692, 39 L. ed. 585, 15 Sup. Ct. Rep. 547 .....863, 864
City of Dundee, The, 47 C. C. A. 581, 108 Fed. 679, 103 Fed. 696. 248
Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18 .....74, 77, 882
Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833 915
Clark v. Allaman, 71 Kan. 206, 70 L. R.A. 971, 80 Pac. 571, 974, 977
v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284 .....422, 840
v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676. 236
501, 671
v. Roller, 199 U. S. 541, 50 L. ed. 300, 26 Sup. Ct. Rep. 141 326

Clawson v. United States, 114 U. S. 477, 29 L. ed. 179, 5 Sup. Ct. Rep. 949 108
Clay v. Bilby, 72 Ark. 101, 78 S. W. 749 .....474, 476
Clearwater v. Meredith, 1 Wall. 25, 17 L. ed. 604 742
Clement v. Cash, 21 N. Y. 253 737
Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756 405
v. Cleveland Electric R. Co. 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. Rep. 513 ..405, 408
Cleveland, C. C. & St. L. R. Co. v. Backus, 133 Ind. 513, 18 L.R.A. 729, 33 N. E. 421.. 639
v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722 215
Cleveland Trust Co. v. Lander, 184 U. S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 394 910
Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632.. 481, 546
Close v. Glenwood Cemetery, 107 U. S. 476, 27 L. ed. 412, 2 Sup. Ct. Rep. 267 241
Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429 75
Cochran v. Montgomery County, 199 U. S. 272, 50 L. ed. 188, 26 Sup. Ct. Rep. 58 .....267, 268
Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.. 546
Coffield v. Territory, 13 Haw. 478.... 836
Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257....969, 1079, 1103, 1181
Colclough v. Milwaukee, 92 Wis. 182, 65 N. W. 1039 1180
Collins v. Voorhees, 47 N. J. Eq. 555, 14 L.R.A. 364, 24 Am. St. Rep. 412, 22 Atl. 1054.... 874
Coloma v. Eaves, 92 U. S. 484, 23 L. ed. 579 .....863, 864
Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247 626
Columbus Gaslight & Coke Co. v. Columbus, 50 Ohio St. 65, 19 L.R.A. 510, 40 Am. St. Rep. 648, 33 N. E. 292 537
Columbus Watch Co. v. Robbins, 148 U. S. 266, 37 L. ed. 445, 13 Sup. Ct. Rep. 594 878
Com. v. Blanding, 3 Pick. 304, 15 Am. Dec. 214 881
v. Danziger, 176 Mass. 290, 57 N. E. 461 672
Com. v. Hart, 11 Cush. 130..... 685
v. Hitchings, 5 Gray, 482 305
v. Roberts, 155 Mass. 281, 16 L.R.A. 400, 29 N. E. 522.. 328
v. Roby, 12 Pick. 503 1090
v. Webster, 5 Cush. 295, 52 Am. Dec. 711 724
v. Williams, 171 Mass. 461, 50 N. E. 1035 723
Comstock v. Eagleton, 196 U. S. 99, 49 L. ed. 402, 25 Sup. Ct. Rep. 210 .....196, 858
Conboy v. First Nat. Bank, 203 U. S. 141, 51 L. ed. 128, 27 Sup. Ct. Rep. 50 901
Congress & E. Spring Co. v. Edgar, 99 U. S. 645, 25 L. ed. 487.... 281
Conkey Case. See BESSETTE v. W. B. CONKEY Co.
Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728 ....851, 853
Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431 ....244, 702
Conolly v. Taylor, 2 Pet. 556, 7 L. ed. 518 447
Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co. 47 Fed. 894 650
Consolidated Coal Co. v. Scheiber, 167 Ill. 539, 47 N. E. 1052.... 718
v. Seniger, 179 Ill. 370, 53 N. E. 733 716
Continental Improv. Co. v. Stead, 95 U. S. 161, 24 L. ed. 403... 666
Conway v. Rochester, 157 N. Y. 33, 51 N. E. 395 .....786, 788
Cook v. Hart, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40.. 152, 157
v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233 297
Cooke v. Boston & L. R. Corp. 133 Mass. 185 540
Cooper, Re, 143 U. S. 472, 36 L. ed. 232, 12 Sup. Ct. Rep. 453.. 356
Corbin Cabinet Lock Co. v. Eagle Lock Co. 150 U. S. 38, 37 L. ed. 989, 14 Sup. Ct. Rep. 28.. 650
Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230 68
Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 182, 50 L. ed. 143, 26 Sup. Ct. Rep. 41 .....494, 495
Cornelius v. Kessel, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122 770
Cornell v. Green, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969 .....327, 328

Corning v. Lowerre, 6 Johns. Ch. 439.. 1183
Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 488 783
Cotting v. Godard. See COTTING v. KANSAS CITY STOCK YARDS Co.
v. Kansas City Stock Yards Co. 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30 702
Coulter v. Louisville & N. R. Co. 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342....639, 640
Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547 580
Cowgill v. Long, 15 Ill. 202 1104
Cox v. Jordan, 86 Ill. 560 490
Craemer v. Washington, 168 U. S. 124, 42 L. ed. 407, 18 Sup. Ct. Rep. 1 .....327, 921
Craig v. Rochester City & B. R. Co. 39 N. Y. 404 1186
Cranson v. Smith, 37 Mich. 309, 26 Am. Rep. 514 218
Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9 .....763, 764
Credit Co. v. Arkansas C. R. Co. 128 U. S. 258, 32 L. ed. 448, 9 Sup. Ct. Rep. 107 130
Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337, 49 L. ed. 501, 25 Sup. Ct. Rep. 266 481
Crescent City L. S. L. & S. H. Co. v. Butcher's Union S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472 126
Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195 741
Cronin v. Adams, 192 U. S. 108, 48 L. ed. 365, 24 Sup. Ct. Rep. 219 .....422, 840
Crooke v. De Vandes, 9 Ves. Jr. 197.. 869
Cross v. Burke, 146 U. S. 82, 36 L. ed. 896, 13 Sup. Ct. Rep. 22.. 143
v. Evans, 167 U. S. 60, 42 L. ed. 77, 17 Sup. Ct. Rep. 733 878
Crow v. State, 24 Tex. 12 324
Crowell v. Randell, 10 Pet. 368, 9 L. ed. 458 627
Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13 919
v. United States, 194 U. S. 461, 48 L. ed. 1075, 24 Sup. Ct. Rep. 731 .....565, 1098
Cruger, Re, 84 N. Y. 619 641
Culbertson v. The Southern Belle, 18 How. 584, 15 L. ed. 493... 767

D.

Dalton-Ingersoll Co. v. Fiske, 175 Mass. 15, 55 N. E. 468 748
Damon v. Carrol, 163 Mass. 404, 40 N. E. 185 685
Damson v. Hawaii, 194 U. S. 154, 48 L. ed. 916, 24 Sup. Ct. Rep. 617 836
Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629.. 625, 626
Dartmouth College Case. See DARTMOUTH COLLEGE v. WOODWARD.
Davenport v. Ladd, 38 Minn. 545, 38 N. W. 622 605
Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616 472
Davis v. Elmira Sav. Bank, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep. 502 1014
v. Friedlander, 104 U. S. 570, 26 L. ed. 818 915
v. Hedges, L. R. 6 Q. B. 687.. 490
v. Lennen, 125 Ind. 185, 24 N. E. 885 742
v. Stevens, 17 Blatchf. 259, Fed. Cas. No. 3,653 427
Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498.. 202, 203
Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420 202
DeCambra v. Rogers, 189 U. S. 119, 47 L. ed. 734, 23 Sup. Ct. Rep. 519 721
Deering, Re, 93 N. Y. 361 537
Deland v. Platte County, 155 U. S. 221, 39 L. ed. 128, 15 Sup. Ct. Rep. 82 858
Delano, Re, 176 N. Y. 486, 64 L.R.A. 279, 68 N. E. 871 ....883, 889
Re, 82 App. Div. 147, 81 N. Y. Supp. 762 .....884, 889
De la Rama v. De la Rama, 201 U. S. 303, 50 L. ed. 765, 26 Sup. Ct. Rep. 485 859
Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569..... 767
v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669 ...638, 767, 855, 1111
De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743 ..... 490, 798, 1105, 1106

Delmas v. Merchants' Mut. Ins. Co. 14 Wall. 661, 20 L. ed. 757 921
Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895 480
DeLucca v. North Little Rock, 142 Fed. 597 1181
De Manneville v. De Manneville, 10 Ves. Jr. 52 259
Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372 .....472, 760
Denaby Main Colliery Co. v. Manchester, etc., R. Co. 3 Railway & Canal Traffic Cases, 426. 1136
Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231 .....472, 919
Denver & R. G. R. Co. v. Arrighi, 63 C. C. A. 649, 129 Fed. 347 687
v. Roller, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738 917
Deposit Bank v. Frankfort, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154 .....126, 741
Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158 .....1153, 1154
De Vaughn v. Hutchinson, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461 482
Devine v. Los Angeles, 202 U. S. 313, 50 L. ed. 1046, 26 Sup. Ct. Rep. 652 920
Dewey v. Campau, 4 Mich. 565 168
v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379 495
DeWolf v. Johnson, 10 Wheat. 386, 6 L. ed. 348 672
Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644 827
Diamond Plate Glass Co. v. Minneapolis Mut. F. Ins. Co. 55 Fed. 27 351
Diamond Rings, The. See 14 DIAMOND RINGS v. UNITED STATES.
Dick v. Foraker, 155 U. S. 404, 39 L. ed. 201, 15 Sup. Ct. Rep. 124 707
Dickson v. Patterson, 160 U. S. 584, 40 L. ed. 543, 16 Sup. Ct. Rep. 373 833
Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242 137
Diggs v. Wolcott, 4 Cranch, 179, 2 L. ed. 587 .....827, 828
Disbrow v. The Walsh Brothers, 36 Fed. 607 1054
District of Columbia v. Gallaher, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585..... 1033
Doe ex dem. Parrish v. Ferris. See PARRISH v. FERRIS.
Probst v. Roe. See PROBST v. BROCK.
Mann v. Wilson, 23 How. 457, 16 L. ed. 584 166
Domestic Sewing Mach. Co. v. Webster, 47 Iowa, 357 588
Donovan v. Pitcher, 53 Ala. 411, 25 Am. Dec. 634 1105
Dooley v. Pease, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. Rep. 308 1124
v. United States, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743 1101
v. United States, 183 U. S. 151, 46 L. ed. 128, 22 Sup. Ct. Rep. 62 1101
Dorr v. United States, 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. Rep. 808 1103
Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 1 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028 942
Dow's Case, 18 Pa. 37 158
Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452 ..... 328, 546, 859, 956
Dows, Re, 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 509, 60 N. E. 439 .....888– 890
Dowse v. Hammond, 64 C. C. A. 437, 130 Fed. 103 609
Doyle v. Martin, 55 Ark. 37, 17 S. W. 346 473
Drury v. Moors, 171 Mass. 252, 50 N. E. 618 1122
Dubuque & S. C. R. Co. v. Richmond, 15 Wall. 3, 21 L. ed. 118.. 303
Dugan v. Bridge Co. 27 Pa. 303, 67 Am. Dec. 464 540
Dunham v. Gould, 16 Johns. 378, 8 Am. Dec. 323 672
Dunlap v. Northeastern R. Co. 130 U. S. 649, 32 L. ed. 1058, 9 Sup. Ct. Rep. 647 766
Durkin v. Kingston Coal Co. 171 Pa. 193, 29 L.R.A. 808, 50 Am. St. Rep. 801, 33 Atl. 237.. 715
Dushane v. Beall, 161 U. S. 513, 40 L. ed. 791, 16 Sup. Ct. Rep. 637 .....611, 612

E.

Eagan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300.. 956
Earle v. Chesapeake & O. R. Co. 127 Fed. 235 918
Easton v. Iowa, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. Rep. 288 1014

East St. Louis v. Thomas, 102 Ill. 453 490
East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516 1134
v. Rush, 15 Lea, 145 687
Eckart, Re, 166 U. S. 481, 41 L. ed. 1085, 17 Sup. Ct. Rep. 638 921
Edmands v. Rust & R. Drug Co. 191 Mass. 123, 77 N. E. 713.... 227
Edwards v. Elliott, 21 Wall. 532, 22 L. ed. 487 .....325, 841
Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300 121
546
Ehrman v. Teutonia Ins. Co. 1 McCrary, 123, 1 Fed. 471 351
Eilenbecker v. District Court, 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424 .....324, 919
Ela v. Edwards, 16 Gray, 91..... 890
Eldred v. Kessler, 45 C. C. A. 454, 106 Fed. 509 .....1066, 1068
v. Kirkland, 64 C. C. A. 588, 130 Fed. 342 1066
Eldridge v. Trezevant, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345 535
Eliza Lines, The, 199 U. S. 119, 50 L. ed. 115, 26 Sup. Ct. Rep. 8 95
Elliot v. Fitchburg R. Co. 10 Cush. 191, 57 Am. Dec. 85 977
Elliott v. Toeppner, 187 U. S. 327, 47 L. ed. 200, 23 Sup. Ct. Rep. 133 .....293, 859
Ellis v. Cothran, 117 Ill. 458, 3 N. E. 411 490
v. New York, L. E. & W. R. Co. 95 N. Y. 546 280
Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367 423
Emory's Case, 19 Ct. Cl. 254 516
England v. Gebhardt, 112 U. S. 502, 28 L. ed. 811, 5 Sup. Ct. Rep. 287 859
Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 635 ..... 328, 627, 921
Essex Public Road Board v. Skinkle, 140 U. S. 334, 35 L. ed. 446, 11 Sup. Ct. Rep. 790 551
Etheridge v. Sperry, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 563 1124
Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131 .....327, 671
Everson v. State, 66 Neb. 154, 92 N. W. 137 .....668, 669
Excelsior Mfg. Co. v. Keyser, 62 Miss. 155 1104
Eyre v. Potter, 15 How. 42, 14 L. ed. 592 638
Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403 915

F.

Fairbank v. United States. 181 U. S. 283, 45 L. ed. 8 2, 21 Sup. Ct. Rep. 648 .....421, 972
Fairbanks Case. See THOMPSON v. FAIRBANKS.
Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498.. 638
639
Farmer v. National Life Asso. 138 N. Y. 265, 33 N. E. 1075 490
Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196. 1014
Farmers' Nat. Bank v. Venner, 192 Mass. 531, 78 N. E. 540 .. 952
Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 339.. 686
Fayerweather v. Ritch, 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58 638
Felts v. Murphy, 201 U. S. 123, 50 L. ed. 689, 26 Sup. Ct. Rep. 366 .....109, 921
Ferguson v. Meredith. See CLEARWATER v. MEREDITH.
Ferris v. Douglass, 20 Wend. 626.... 749
Ferry v. Campbell, 110 Iowa. 290, 50 L.R.A. 92, 81 N. W. 604.. 1104
Fetter, Re, 57 Am. Dec. 389..... 158
v. Beale, 1 Salk. 11..... 741
F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709. 921
Fidelity & D. Co. v. Courtney, 186 U. S. 342, 46 L. ed. 1193, 22 Sup. Ct. Rep. 833 920
Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662 95
Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784..90, 213
214, 329
Field Case. See MARSHALL FIELD & Co. v. CLARK.
Filhiol v. Torney, 194 U. S. 356, 48 L. ed. 1014, 24 Sup. Ct. Rep. 698 777
Finlay v. King, 3 Pet. 346, 7 L. ed. 701 869
Finney v. Guy, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558 1172
Fire Ins. Asso. v. Wickham, 128 U. S. 426, 32 L. ed. 503, 9 Sup. Ct. Rep. 113 878
Fireman's Fund Ins. Co. v. Norwood, 16 C. C. A. 136, 32 U. S. App. 490, 69 Fed. 71..... 111

First Nat. Bank v. Chehalis County, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629 910
v. Chicago Title & T. Co. 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. Rep. 693 915
v. Converse, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. Rep. 306 1172
v. Kentucky, 9 Wall. 353, 19 L. ed. 701 910
Fisher v. Shropshire, 147 U. S. 133, 37 L. ed. 109, 13 Sup. Ct. Rep. 201 490
Fisk, Ex parte, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724 323
v. Cuthbert, 2 Mont. 593 836
v. Henarie, 142 U. S. 459, 35 L. ed. 1079, 12 Sup. Ct. Rep. 207 268
Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162 95
Florida v. Georgia, 17 How. 491, 15 L. ed. 188 1081
Fluker v. Bullard, 2 La. Ann. 338.. 1116
Fobes v. Rome, W. & O. R. Co. 121 N. Y. 505, 8 L.R.A. 453, 24 N. E. 919 .....1184, 1186
Fonda, Ex parte, 117 U. S. 516, 29 L. ed. 994, 6 Sup. Ct. Rep. 848 152
Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016 70
Fontano v. Robbins, 22 App. D. C. 253 815
Foppiano v. Speed, 199 U. S. 501, 50 L. ed. 288, 26 Sup. Ct. Rep. 138 .....180, 421
Forrester v. Boston & M. Consol. Copper & S. Min. Co. 21 Mont. 544, 55 Pac. 229 449
Foster v. Alston, 6 How. (Miss.) 472. 260
v. Neilson, 2 Pet. 253, 7 L. ed. 415 777
Fourteen Diamond Rings v. United States, 183 U. S. 176, 46 L. ed. 138, 22 Sup. Ct. Rep. 59 1101
Fowler v. Equitable Trust Co. 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. Rep. 1..... 749
Fox v. Haarstick, 156 U. S. 674, 39 L. ed. 576, 15 Sup. Ct. Rep. 457 1146
v. Ohio, 5 How. 410, 12 L. ed. 213 1091
Freeborn v. Smith, 2 Wall. 160, 17 L. ed. 922 551
Freeland v. Williams, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. Rep. 763 551
Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493..... 1160
French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625..... 744
v. Hopkins, 124 U. S. 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589 895
v. Shoemaker, 14 Wall. 314, 20 L. ed. 852 638
v. Taylor, 199 U. S. 274, 50 L. ed. 189, 26 Sup. Ct. Rep. 76 127, 671, 880
French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563.. 956
Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586 672

G.

Gableman v. Peoria, D. & E. R. Co. 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171 328
Gage v. Pumpelly, 108 U. S. 164, 27 L. ed. 668, 2 Sup. Ct. Rep. 390 825
Gaines v. Chew, 2 How. 619, 11 L. ed. 402 1081
Galloway v. McKeithen, 27 N. C. (5 Ired. L.) 12, 52 Am. Dec. 153 749
Galpin v. Page, 18 Wall. 350, 21 L. ed. 959. 349
Gardner v. Michigan, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106 328
Garrison v. New York, 21 Wall. 196, 22 L. ed. 612 551
Gay v. Parpart, 101 U. S. 391, 25 L. ed. 841 263
Geary v. Stevenson, 169 Mass. 23, 47 N. E. 508 665
Geilfuss v. Corrigan, 95 Wis. 651, 37 L.R.A. 166, 60 Am. St. Rep. 143, 70 N. W. 306 1121
Generes v. Campbell, 11 Wall. 193, 20 L. ed. 110 859
Genesee Chief, The, v. Fitzhugh, 12 How. 443, 13 L. ed. 1058.. 973
Georgia v. Tennessee Copper Co. 206 U. S. 230, 51 L. ed. 1038, 27 Sup. Ct. Rep. 618 ..975, 1079
German Sav. & L. Soc. v. Dormitzer, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221 126
Gerner v. Mosher, 58 Neb. 135, 46 L.R.A. 244, 78 N. W. 384.. 1011
G. H. Nichols Lumber Co. v. Fransom, 203 U. S. 278, 51 L. ed. 181, 27 Sup. Ct. Rep. 102 508
Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23 .....68, 533
Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534 742
v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578 .....534, 535

Gibson Case. See GIBSON v. UNITED STATES.
Giles v. Austin, 62 N. Y. 491 366
Gilman v. Rives, 10 Pet. 298, 9 L. ed. 432 741
Giozza v. Tierman, 148 U. S. 662, 37 L. ed. 601, 13 Sup. Ct. Rep. 721 919
Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449 815
Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627 215
Globe Ref. Co. v. Landa Cotton Oil Co. 190 U. S. 540, 47 L. ed. 1171, 23 Sup. Ct. Rep. 754 660
Goldberg v. Harlan, 33 Ind. App. 465, 67 N. E. 707 605
Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559 ..... 141, 851, 853
Gonzales v. Cunningham, 164 U. S. 612, 41 L. ed. 572, 17 Sup. Ct. Rep. 182 ..... 144, 258
v. French, 164 U. S. 338, 41 L. ed. 458, 17 Sup. Ct. Rep. 102 770
Goode v. United States, 159 U. S. 663, 40 L. ed. 297, 16 Sup. Ct. Rep. 136 718
Goodman v. Goodman, 28 L. J. Ch. N. S. 745 872
Goodrich v. Chicago, 5 Wall. 566, 18 L. ed. 511 742
Goodtitle ex dem. Pollard v. Kibbe, 9 How. 471, 13 L. ed. 220 .. 973
Gordon v. Gilfoil, 99 U. S. 168, 25 L. ed. 383 828
v. Richardson, 185 Mass. 492, 69 L.R.A. 867, 70 N. E. 1027 366
v. United States, 117 U. S. 697, Appx. 552
Goshen v. Stonington, 4 Conn. 209, 10 Am. Dec. 121 1104
Goubeau v. New Orleans & N. R. Co. 7 Rob. (La.) 504 1116
Gould v. Evansville & C. R. Co. 91 U. S. 526, 23 L. ed. 416 741
Graff v. Shannon, 7 Iowa, 508 1116
Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839, 6 Sup. Ct. Rep. 686 807
Graham v. La Crosse & M. R. Co. 102 U. S. 148, 26 L. ed. 106 706
Graham & M. Transp. Co. v. Craig Ship-building Co. 203 U. S. 577, 51 L. ed. 335, 27 Sup. Ct. Rep. 777 841
Grand Island & W. C. R. Co. v. Sweeney, 43 C. C. A. 255, 103 Fed. 342, 37 C. C. A. 127, 95 Fed. 396 327
Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310 792
Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493 280
v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679 .. 724
Graver v. Faurot, 162 U. S. 435, 40 L. ed. 1030, 16 Sup. Ct. Rep. 799 878
Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576 116
Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770 1176
Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810. 1175
Green v. Van Buskerk, 3 Wall. 448, 18 L. ed. 245 326
Greenberg v. Western Turf Asso. 140 Cal. 357, 73 Pac. 1050 522
Greene, Re, 52 Fed. 106 694
v. Henkel, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218 694
Greenleaf v. Birth, 5 Pet. 132, 8 L. ed. 72 665
Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961 241
Gregory v. Bartlett, 55 Ark. 30, 17 S. W. 344 ..... 474, 476
Griffin v. Goldsboro Water Co. 122 N. C. 206, 41 L.R.A. 240, 30 S. E. 319 1161
Grignon v. Astor, 2 How. 319, 11 L. ed. 283 476
Grim v. Weissenberg School District, 57 Pa. 433, 98 Am. Dec. 237 1104
Groff v. Miller, 20 App. D. C. 353 ... 579
Grossmayer, Re, 177 U. S. 48, 44 L. ed. 665, 20 Sup. Ct. Rep. 535 .. 1084
Grove v. Kansas City, 75 Mo. 672 665
Guarantee Co. v. Hanway, 44 C. C. A. 312, 104 Fed. 369 227
Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co. 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. Rep. 124 920
Guaranty Trust Co. v. North Chicago Street R. Co. 65 C. C. A. 65, 130 Fed. 801 915
Guice v. Lawrence, 2 La. Ann. 226 ... 380
Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26 ..... 116, 791
Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255 702

Gulf C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802 560
Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep. 390 .....459, 863
Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252..741, 790
Guss v. Nelson, 200 U. S. 298, 50 L. ed. 489, 26 Sup. Ct. Rep. 260 196
Guthrie Nat. Bank v. Guthrie, 173 U. S. 528, 43 L. ed. 796, 19 Sup. Ct. Rep. 513.....653, 655
Gutierres v. Albuquerque Land & Irrig. Co. 188 U. S. 545, 47 L. ed. 588, 23 Sup. Ct. Rep. 338 972
Gwin v. United States, 184 U. S. 669, 46 L. ed. 741, 22 Sup. Ct. Rep. 526 251

H.

Hagar v. California, 154 U. S. 639, 24 L. ed. 1044, 14 Sup. Ct. Rep. 1186 627
v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.. 208, 472
Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244 .....1172, 1176
Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353 443
Hamilton v. Dillin, 21 Wall. 73, 22 L. ed. 528 .....1102, 1106
Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904.. 909
Hancock v. Singer Mfg. Co. 62 N. J. L. 289, 42 L.R.A. 852, 41 Atl. 846 .....287, 288
Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506 111
Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214 294
Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504 968
Hansen v. Boyd, 161 U. S. 397, 40 L. ed. 746, 16 Sup. Ct. Rep. 571 723
Hardee v. Wilson, 146 U. S. 179, 36 L. ed. 933, 13 Sup. Ct. Rep. 39 .327
Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808 973
Hardin v. Shedd, 190 U. S. 508, 47 L. ed. 1156, 23 Sup. Ct. Rep. 685 .....956, 974
Harding, Ex parte, 120 U. S. 782, 30 L. ed. 824, 7 Sup. Ct. Rep. 780 .....108, 921
Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237 489
v. Russell, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51 834
Harmon, Re, 128 Fed. 170 437
Harrington v. Providence, 20 R. I. 233, 38 L.R.A. 305, 38 Atl. 1.. 328
Harrison v. Morton, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742 326
v. Perea, 168 U. S. 311, 42 L. ed. 478, 18 Sup. Ct. Rep. 129 .....458, 802, 832
Haseltine v. Central Nat. Bank, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49.....326, 329
Haskell v. Jones, 86 Pa. 173 217
Havemeyer v. Cook County, 202 Ill. 446, 66 N. E. 1044 639
Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739 1175
Health Dept. v. Trinity Church, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833 328
Heath v. Withington, 6 Cush. 497..... 890
Hecht v. Boughton, 105 U. S. 235, 26 L. ed. 1018 832
Hedden v. Richards, 149 U. S. 346, 37 L. ed. 763, 13 Sup. Ct. Rep. 891 1025
Heff, Re, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506 ..132, 570
Hennessy v. Richardson Drug Co. 189 U. S. 25, 47 L. ed. 697, 23 Sup. Ct. Rep. 532 184
Henrietta Case. See HENRIETTA COAL CO. v. MARTIN.
Henrietta Coal Co. v. Martin, 221 Ill. 460, 77 N. E. 902 715
Henrietta Min. & Mill. Co. v. Gardner, 173 U. S. 123, 43 L. ed. 637, 19 Sup. Ct. Rep. 327..... 1146
Herdic v. Roessler, 109 N. Y. 127, 16 N. E. 198 217
Herrick v. Boquillas Land & Cattle Co. 200 U. S. 96, 50 L. ed. 388, 26 Sup. Ct. Rep. 192 802
Hervey v. Hervey, 2 W. Bl. 877..... 872
Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690....1122, 1123
Hewit Case. See HEWIT v. BERLIN MACH. WORKS.
Heymann v. Southern R. Co. 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104 991
Hibler v. State, 43 Tex. 197 165

Hickman v. Ft. Scott, 141 U. S. 415, 35 L. ed. 775, 12 Sup. Ct. Rep. 9 749
Hickson v. Lombard, L. R. 1 H. L. 324 638
Hill v. Merchants' Mut. Ins. Co. 134 U. S. 515, 33 L. ed. 994, 10 Sup. Ct. Rep. 589 1174
Hiscock v. Mertens, 205 U. S. 202, 51 L. ed. 771, 27 Sup. Ct. Rep. 488 .....952, 953
Hockett v. Alston, 49 C. C. A. 180, 110 Fed. 910 498
Hoggan v. Craigie, Macl. & Rob. 942.. 873
Hohorst, Re, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221 329, 1084
v. Hamburg-American Packet Co. 148 U. S. 262, 37 L. ed. 443, 13 Sup. Ct. Rep. 590.. 329
Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383 .....328, 472, 920
v. Starks, 159 Mass. 503, 38 Am. St. Rep. 451, 34 N. E. 1069 460
v. Stratton, 198 U. S. 214, 49 L. ed. 1022, 25 Sup. Ct. Rep. 660 774
Hollida v. Hunt, 70 Ill. 109, 22 Am. Rep. 63 218
Holt v. Cummings, 102 Pa. 212, 48 Am. Rep. 199 1054
Holum v. Chicago, M. & St. P. R. Co. 80 Wis. 299, 50 N. W. 99.. 687
Holyoke Water-Power Co. v. Lyman, 15 Wall. 522, 21 L. ed. 140 240
Home Bldg. & Conveyance Co. v. Roanoke, 91 Va. 52, 27 L.R.A. 551, 20 S. E. 895 1180
Home F. Ins. Co. v. Wood, 50 Neb. 381, 69 N. W. 941 111
Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84 328
Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593 .....906, 909
Home of the Friendless v. Rouse, 8 Wall. 430, 19 L. ed. 495.. 398
Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207 .....351, 730, 800
Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988.. 956
Houghton v. Hubbell, 33 C. C. A. 574, 63 U. S. App. 31, 91 Fed. 453 427
Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491 86
Howard v. Fleming, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49 .....126, 894
Howarth v. Angle, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489. 1176
v. Lombard, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888.. 1175, 1176
Hubbell v. United States, 179 U. S. 77, 45 L. ed. 95, 21 Sup. Ct. Rep. 24 650
Hudson River R. & Terminal Co. v. Day, 54 Fed. 545 634
Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452 214
Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617 126
Huling v. Kaw Valley R. & Improv. Co. 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603 471, 475
Humphrey v. Pegues, 16 Wall. 244, 21 L. ed. 326 789
v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567 .....952, 1122, 1123
Humphreys v. United States, 38 Ct. Cl. 689 755
Hunt v. Clarke, 58 L. J. Q. B. N. S. 490 881
v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589 .....119, 461
Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224 .....244, 474
v. McMahon, 48 Conn. 174 324
Hyatt v. New York, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456 .....153, 154, 159, 164
Hyde v. Curling, 10 Mo. 359..... 749
v. Shine, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760 695
Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 408, 48 L. ed. 1043, 24 Sup. Ct. Rep. 676 .....570, 571

I.

Illinois C. R. Co. v. Illinois, 108 U. S. 541, 27 L. ed. 818, 2 Sup. Ct. Rep. 839 942
v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096 214
v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700 1126
Indiana v. United States, 148 U. S. 148, 37 L. ed. 401, 13 Sup. Ct. Rep. 564 357

Indiana ex rel. Muncie v. Lake Erie & W. R. Co. 83 Fed. 284 540
Indiana, B. & W. R. Co. v. Allen, 113 Ind. 581, 15 N. E. 446 742
Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45 1134
v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563 685
v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844 558
v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896.. 558
v. Louisville & N. R. Co. 190 U. S. 275, 47 L. ed. 1048, 23 Sup. Ct. Rep. 687..... 560
Iosco, The, 1 Brown Adm. 495, Fed. Cas. No. 7,060 840
Iowa v. Rood, 187 U. S. 87, 47 L. ed. 86, 23 Sup. Ct. Rep. 49.... 956
Iowa R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344 .....472, 473
Iowa R. Land Co. v. Soper, 39 Iowa, 112 1104
Irwa Silver Min. Co. v. Cowie, 31 Colo. 450, 72 Pac. 1067 398
v. Elgin Min. & Smelting Co. 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177..... 480
Israel v. Arthur, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583 956

J.

Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358 328
Jamaica Pond Aqueduct Corp. v. Brookline, 121 Mass. 5.... 537
Jefferson College v. Washington & J. College. See PENNSYLVANIA COLLEGE CASES.
Jellenik v. Huron Copper Min. Co. 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559 ....706, 707
Jenkins v. Covenant Mut. L. Ins. Co. 171 Mo. 375, 71 S. W. 688 172
Jennings v. Dunphy, 174 Ill. 86, 50 N. E. 1045..... 807
Jewell v. Jewell, 1 How. 219, 11 L. ed. 108 872
v. Knight, 123 U. S. 426, 31 L. ed. 190, 8 Sup. Ct. Rep. 193 878
Johnson, Re, 167 U. S. 120, 42 L. ed. 103, 17 Sup. Ct. Rep. 735. 157
Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254.. 841
v. Drew, 171 U. S. 93, 43 L. ed. 88, 18 Sup. Ct. Rep. 800 770
v. Hunter, 127 Fed. 219....473, 474
v. M'Intosh, 8 Wheat. 543, 5 L. ed. 681 .....166, 1142
v. Richardson, 44 Ark. 365.... 1104
v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111 360
v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158 685
v. Towsley, 13 Wall. 72, 20 L. ed. 485 770
Jones v. Com. 86 Va. 661, 10 S. E. 1005 693
v. East Tennessee, V. & G. R. Co. 128 U. S. 443, 32 L. ed. 478, 9 Sup. Ct. Rep. 118 .. 766
v. Habersham, 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. Rep. 336 579
v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.. 166
v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611 355
v. United States, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80 ....356, 777, 794, 798
Jones Nat. Bank Case. See YATES v. JONES NAT. BANK.
Journeycake's Case, 155 U. S. 196, 39 L. ed. 120, 15 Sup. Ct. Rep. 55 104
Joy v. St. Louis, 201 U. S. 332, 50 L. ed. 776, 26 Sup. Ct. Rep. 478 777
Judson v. Corcoran, 17 How. 612, 15 L. ed. 231 96
Juniata, The, 93 U. S. 337, 23 L. ed. 930 454

K.

Kane v. New York Elev. R. Co. 125 N. Y. 164, 11 L.R.A. 640, 26 N. E. 278 1183
v. Northern C. R. Co. 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16 766
Kansas v. Colorado, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552 .....1079, 1081
v. United States, 204 U. S. 331, 51 L. ed. 510, 27 Sup. Ct. Rep. 388 969
Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566 441

Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. Rep. 135 589
Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173 .....686, 973
Kawananakoa v. Polyblank, 205 U. S. 349, 51 L. ed. 834, 27 Sup. Ct. Rep. 526 969
Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651 956, 973
Keller, Re, 36 Fed. 681 153
v. Travelers' Ins. Co. 58 Mo. App. 557 900
Kelley v. Laconia Levee District, 74 Ark. 202, 85 S. W. 249, 87 S. W. 638 473
Kelly v. Garrett, 6 Ill. 649 490
Kemmler, Re, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930.. 881
Kendall v. United States, 12 Pet. 630, 9 L. ed. 1223 259
Kennett's Petition, 24 N. H. 139.... 1105
Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717 163
Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592.....790, 792
Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797 .....573, 574, 1088
Keppel v. Tiffin Sav. Bank, 197 U. S. 356, 49 L. ed. 790, 25 Sup. Ct. Rep. 443 605
Ker v. Illinois, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225 154, 156, 157, 159
Kern v. Supreme Lodge A. L. of H. 167 Mo. 471, 67 S. W. 252.... 172
Kibbe v. Stevenson Iron Min. Co. 69 C. C. A. 145, 136 Fed. 147. 920
Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6 841
Kilpatrick v. Grand Trunk R. Co. 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531 687
King v. DeManneville, 5 East, 221.. 259
v. Greenhill, 4 Ad. & El. 624.. 259
v. Parke [1903] 2 K. B. 432 ... 881
v. Pomeroy, 58 C. C. A. 209, 121 Fed. 287 1176
Kingsbury's Case, 106 Mass. 223..... 164
Kinnavey v. Terminal R. Asso. 81 Fed. 802 560
Kinney v. Columbia Sav. & L. Asso. 191 U. S. 78, 48 L. ed. 103, 24 Sup. Ct. Rep. 30 268
Kirby v. American Soda Fountain Co. 194 U. S. 141, 48 L. ed. 911, 24 Sup. Ct. Rep. 619 509
Kirby v. Chicago & N. W. R. Co. 106 Fed. 551 .....
Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558 .....
Kline v. Minnesota Iron Co. 93 Minn. 63, 100 N. W. 681 .....
Knapp v. Lake Shore & M. S. R. Co. 197 U. S. 541, 49 L. ed. 871, 25 Sup. Ct. Rep. 538...112,
v. Morss, 150 U. S. 221, 37 L. ed. 1059, 14 Sup. Ct. Rep. 81 .....
Knapp, S. & Co. v. National Mut. F. Ins. Co. 30 Fed. 607.....
Knapp, S. & Co. Co. v. McCaffrey, 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 824 .....
Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258 .....
Knights Templars' & M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. Rep. 108 .....
Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747 .....313, 889,
Knox County v. Aspinwall, 21 How. 539, 16 L. ed. 208 863,
Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224 .....
Kock v. Emmerling, 22 How. 69, 16 L. ed. 292 .....
Krause v. Morgan, 53 Ohio St. 26, 40 N. E. 886 .....
Krementz v. S. Cattle Co. 148 U. S. 556, 37 L. ed. 558, 13 Sup. Ct. Rep. 719 .....

L.

Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451 .....
Lahr v. Metropolitan Elev. R. Co. 104 N. Y. 268, 10 N. E. 528.. 1184,
Lahr Case. See LAHR v. METROPOLITAN ELEV. R. Co.
Laing v. Burley, 101 Ill. 591 .....
Lake Erie & W. R. Co. v. Cluggish, 143 Ind. 347, 42 N. E. 743....
v. Smith, 61 Fed. 885 .....
Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465 173,
Lake Superior Ship Canal R. & Iron Co. v. Cunningham, 155 U. S. 354, 39 L. ed. 183, 15 Sup. Ct. Rep. 103 .....
Lampasas v. Bell, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368 .....422.

Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101 288
Lanfear v. Hunley, 4 Wall. 204, 18 L. ed. 325 956
Langdon v. Strong, 2 Vt. 234 1104
Langford v. King, 1 Mont. 33 836
Lansing, Re, 182 N. Y. 238, 74 N. Y. 882 890
Lascelles v. Georgia, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687 157
Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499 672
League v. Texas, 184 U. S. 156, 46 L. ed. 478, 22 Sup. Ct. Rep. 475 1176
Leavenworth Case. See LEAVENWORTH, L. & G. R. Co. v. UNITED STATES.
Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634 .....441, 442
Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249 770
v. Watson, 1 Wall. 337, 17 L. ed. 557 660
Leggett v. Avery, 101 U. S. 256, 25 L. ed. 865 650
Lehigh Min. & Mfg. Co., Re, 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375 508
Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390.. 473
569
Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681 297
Lennon, Re, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123 144
323, 782, 783
Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825 472
Leon v. Galceran, 11 Wall. 185, 20 L. ed. 74 326
Leonard v. Vicksburg, S. & P. R. Co. 198 U. S. 416, 49 L. ed. 1108, 25 Sup. Ct. Rep. 750 671
Lessassier v. Kennedy, 36 La. Ann. 539 427
Levy's Succession, 115 La. 377, 39 So. 37 314
Lewis v. Kirk, 28 Kan. 497, 42 Am. Rep. 173 197
v. New York & H. R. Co. 162 N. Y. 202, 56 N. E. 540.... 1185
Lexington v. Butler, 14 Wall. 282, 20 L. ed. 809 864
Libby v. Clark, 118 U. S. 250, 30 L. ed. 133, 6 Sup. Ct. Rep. 1045 1142
Life Asso. of America v. Rundle. See RELFE v. RUNDLE.
Light, Heat, & Water Co. v. Jackson, 73 Miss. 598, 19 So. 771.. 1162
1163
Lincoln v. United States, 197 U. S. 419, 49 L. ed. 816, 25 Sup. Ct. Rep. 455 ....794, 1105, 1106
Lionberger v. Rouse, 9 Wall. 468, 19 L. ed. 721 910
Little v. Banks, 85 N. Y. 258..... 737
Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716 532
Logan v. Fidelity & C. Co. 146 Mo. 114, 47 S. W. 948..... 899
v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617 .....72, 73
Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496..303, 1009
London & N. W. American Mortg. Co. v. St. Paul Park Improv. Co. 84 Minn. 144, 86 N. W. 872 1173
Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718 237
Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435 536
Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736 1160
Louisiana v. Mississippi, 202 U. S. 153, 50 L. ed. 913, 26 Sup. Ct. Rep. 408 797
Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463.. 855
1111
Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466 744
v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209 .....560, 1000, 1134, 1135
v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714 .....672, 942
v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193 .....789, 792
v. Schmidt, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620 328
Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293 268
v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119 919

Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933 366
Luxton v. North River Bridge Co. 153 U. S. 525, 38 L. ed. 808, 14 Sup. Ct. Rep. 891 357
Lyon v. Perin & G. Mfg. Co. 125 U. S. 698, 31 L. ed. 839, 8 Sup. Ct. Rep. 1024 126

M.

McAllister v. United States, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949 253
McClaine v. Rankin, 197 U. S. 154, 49 L. ed. 702, 25 Sup. Ct. Rep. 410 1176
McClaughry v. Deming, 186 U. S. 49, 46 L. ed. 1049, 22 Sup. Ct. Rep. 786 1046
McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433 ....303, 328
McCormick Harvesting Co. v. Walthers, 134 U. S. 41, 33 L. ed. 833, 10 Sup. Ct. Rep. 485 268
M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579.....357, 909, 968
McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134 626
McDonald v. Williams, 174 U. S. 397, 43 L. ed. 1022, 19 Sup. Ct. Rep. 743 1015
McDowell v. Chicago Steel Works, 124 Ill. 491, 7 Am. St. Rep. 381, 16 N. E. 854 952
McElrath v. United States, 102 U. S. 426, 26 L. ed. 189 635
McGavock v. Woodlief, 20 How. 221, 15 L. ed. 884..... 460
McHenry v. Alford, 168 U. S. 657, 42 L. ed. 616, 18 Sup. Ct. Rep. 242 878
McIntire v. Wood, 7 Cranch, 504, 3 L. ed. 420..... 266
McKinney, Re, 15 Fed. 535.....774, 775
McKusick v. Seymour S. & Co. 48 Minn. 158, 50 N. W. 1114. 1174
McLane v. Bonn, 70 Iowa, 752, 30 N. W. 478..... 1104
McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118 .....329, 434, 645
McMicken v. United States, 97 U. S. 204, 24 L. ed. 947 252
McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335 .....208, 472
McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722 86
McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11 363
McNutt v. Bland, 2 How. 9, 11 L. ed. 159 518
Mactier v. Osborn, 146 Mass. 399, 4 Am. St. Rep. 323, 15 N. E. 641 366
Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251 .....633, 634
Magann v. Segal, 34 C. C. A. 323, 92 Fed. 252 807
Mager v. Grima, 8 How. 490, 12 L. ed. 1168 889
Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594. 313 888, 889
Maguire v. Tyler, 1 Black, 195, 17 L. ed. 137 494
Mahon v. Justice, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204 .....155, 157- 159
Maine C. R. Co. v. Maine, 96 U. S. 499, 24 L. ed. 836 792
Mali v. Keeper of Common Jail. See WILDENHUS'S CASE.
Mandeville v. Riggs, 2 Pet. 482, 7 L. ed. 493 552
Manitoba, The, 122 U. S. 97, 30 L. ed. 1095, 7 Sup. Ct. Rep. 1158. 454
Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510 .. 323
Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894 472
Mariska, The, 47 C. C. A. 115, 107 Fed. 989 453
Markley v. Baldwin, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. Rep. 278 .....718, 873
Marks v. Townsend, 97 N. Y. 590 ... 120
Markuson v. Boucher, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76 162
Marsh v. Nichols, S. & Co. 128 U. S. 605, 32 L. ed. 538, 9 Sup. Ct. Rep. 168 749
Marshall County v. Schenck, 5 Wall. 772, 18 L. ed. 556 863
Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495.530, 531, 533
Marten v. Louisville & N. R. Co. 9 Inters. Com. Rep. 589 1131
Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97 .....968, 970
v. Waddell, 16 Pet. 367, 10 L. ed. 997 973

Martinsburg & P. R. Co. v. March, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035 815
Martinton v. Fairbanks, 112 U. S. 670, 28 L. ed. 862, 5 Sup. Ct. Rep. 301 859
Marvin v. Trout, 199 U. S. 212, 50 L. ed. 157, 26 Sup. Ct. Rep. 31 303
Maryland use of Markley v. Baldwin, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. Rep. 278.. 518
519
Mason. Ex parte, 105 U. S. 696, 26 L. ed. 1213 1088
v. McLeod, 57 Kan. 105, 41 L. R.A. 548, 57 Am. St. Rep. 327, 45 Pac. 76 217
v. Moore, 73 Ohio St. 275, 4 L. R.A.(N.S.) 597, 76 N. E. 932 1014
v. United States, 136 U. S. 581, 34 L. ed. 545, 10 Sup. Ct. Rep. 1062 327
Masterson v. Herndon, 10 Wall. 416, 19 L. ed. 953 327
v. Howard. See MASTERSON v. HERNDON.
Mather v. Chapman, 6 Conn. 54 1104
Mattingly v. District of Columbia, 97 U. S. 687, 24 L. ed. 1098 .. 1103
Mattox v. United States, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50 638
Maxwell v. Atchison, T. & S. F. R. Co. 34 Fed. 286 918
May v. New Orleans, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976 297
Mayhew v. West Virginia Oil & Oil Land Co. 24 Fed. 205 807
Maynard v. Hecht, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353 878
Mead v. Portland, 45 Or. 1, 76 Pac. 347, Affirmed in 200 U. S. 148, 50 L. ed. 413, 26 Sup. Ct. Rep. 171 1181
Meister v. Moore, 96 U. S. 76, 24 L. ed. 826 873
Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 33 L. ed. 178, 9 Sup. Ct. Rep. 781 706
Memphis & L. R. R. Co. v. Berry. See MEMPHIS & L. R. R. Co. v. RAILROAD COMRS.
v. Railroad Comrs. 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299 .....789, 792
Memphis, C. & L. R. Co. v. Wilcox, 48 Pa. 161 815
Memphis Land & Timber Co. v. St. Francis Levee District, 70 Ark. 409, 68 S. W. 242 ... 475
Mercantile Mut. Ins. Co. v. Folsom, 18 Wall. 249, 21 L. ed. 833.. 766
Mercer v. Jones, 3 Campb. 477 1116
Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829 .....422, 910
Merchants' Nat. Bank v. Minnesota Thresher Mfg. Co. 90 Minn. 144, 95 N. W. 767 1172
Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197 288
Merritt v. American Steel-Barge Co. 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed. 228 828
v. Cameron, 137 U. S. 542, 34 L. ed. 772, 11 Sup. Ct. Rep. 174 414
Mertens, Re, 131 Fed. 972 953
Metcalf v. Watertown, 153 U. S. 671, 38 L. ed. 861, 14 Sup. Ct. Rep. 947 111
v. Williams, 144 Mass. 452, 11 N. E. 700 833
Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499 ....1111, 1112, 1114, 1116
Metropolitan L. Ins. Co. Case. See METROPOLITAN L. INS. CO. v. NEW ORLEANS.
Metropolitan Nat. Bank v. Claggett, 141 U. S. 520, 35 L. ed. 841. 12 Sup. Ct. Rep. 60...303, 1009
Metropolitan R. Co. v. District of Columbia, 132 U. S. 1, 33 L. ed. 231, 10 Sup. Ct. Rep. 19 836
Mexican C. R. Co. v. Eckman, 187 U. S. 432, 47 L. ed. 246, 23 Sup. Ct. Rep. 211 183
Mexican Nat. R. Co. v. Davidson, 157 U. S. 208, 39 L. ed. 675, 15 Sup. Ct. Rep. 563 207
Meyer v. Richmond, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106 1181
Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459 421
Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 42 L. ed. 591, 18 Sup. Ct. Rep. 208 770
Midway Co. v. Eaton, 183 U. S. 602, 46 L. ed. 347, 22 Sup. Ct. Rep. 261 327
Milburn Mfg. Co. v. Johnson, 9 Mont. 541, 24 Pac. 17 449
Miles v. United States, 103 U. S. 304, 26 L. ed. 481 724

Miller v. Clark, 138 U. S. 223, 34 L. ed. 966, 11 Sup. Ct. Rep. 300 672
v. Graham, 17 Ohio St. 1 1104
v. New York, 15 Wall. 478, 21 L. ed. 98 398
Mills v. Duryee, 7 Cranch, 481, 3 L. ed. 411 348
v. Geer, 111 Ga. 275, 52 L.R.A. 934, 36 S. E. 673 1105
v. Green, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132 .....143, 355
Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900 .....942, 944
v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396 942
Minneapolis R. Terminal Co. v. Minnesota Debenture Co. 81 Minn. 66, 83 N. W. 485 .. 473
Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862 538
v. Brundage, 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455 .....152, 162
v. Hitchcock, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650 513
Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159 920
Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627 973
Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311.. 827
Missouri v. Dockery, 191 U. S. 165, 48 L. ed. 133, 24 Sup. Ct. Rep. 53 .....638, 880
v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331 .....969, 975, 1044, 1079
v. Illinois, 200 U. S. 496, 50 L. ed. 572, 26 Sup. Ct. Rep. 268 .....1044, 1045
Missouri ex rel. Walker v. Walker, 125 U. S. 339, 31 L. ed. 769, 8 Sup. Ct. Rep. 929 461
Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446 ....126, 295
v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488 86
v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095 441
Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 43 L. ed. 474, 19 Sup. Ct. Rep. 179 672
Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389 1084
v. McFadden, 154 U. S. 155, 38 L. ed. 944, 14 Sup. Ct. Rep. 990 596
Moers v. Reading, 21 Pa. 188 532
Mohr, Re, 73 Ala. 503, 49 Am. Rep. 63 165
Mondel v. Steel, 8 Mees. & W. 858... 490
Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622 .....357, 538
Montana ex rel. Haire v. Rice, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281 ....1063, 1064
Montana Min. Co. v. St. Louis Min. & Mill. Co. 204 U. S. 204, 51 L. ed. 444, 27 Sup. Ct. Rep. 254 482
Montello, The, 11 Wall. 411, 20 L. ed. 191 530
Moore, Re, 75 Fed. 821 157
v. Illinois, 14 How. 13, 14 L. ed. 306 1091
v. United States, 91 U. S. 270, 23 L. ed. 346 974
Moran, Ex parte, 144 Fed. 594 ..108, 109
v. Sturges, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019 840
Moreland v. Page, 20 How. 522, 15 L. ed. 1009 956
Morgan v. Chicago & A. R. Co. 96 U. S. 716, 24 L. ed. 743 488
v. Louisiana, 93 U. S. 217, 23 L. ed. 860 789
Morgan County v. Allen, 103 U. S. 498, 26 L. ed. 498 706
Morrissey, Re, 137 U. S. 157, 34 L. ed. 644, 11 Sup. Ct. Rep. 57.. 144
v. Perry. See MORRISSEY, RE.
Mosle v. Bidwell, 65 C. C. A. 533, 130 Fed. 334 414
Motes v. United States, 178 U. S. 458, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993 72
Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. ed. 699 90
Moyer, Ex parte (Idaho) 85 Pac. 897 151, 160
Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269 .....915, 953
Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273 919
Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522.. 1183, 1185–1187
Muhlker Case. See MUHLKER v. NEW YORK & H. R. Co.

Mumma v. Potomac Co. 8 Pet. 281, 8 L. ed. 945 706
Munsey v. Clough, 196 U. S. 364, 49 L. ed. 515, 25 Sup. Ct. Rep. 282 .....153, 154
Murdock v. Memphis, 20 Wall. 590, 22 Wall. 429 .....671, 1182
Mutual Ben. L. Ins. Co. v. Huntington, 57 Kan. 744, 48 Pac. 19... 196
197
Mutual L. Ins. Co. v. Brune, 96 U. S. 588, 24 L. ed. 737 828
Myers v. Chicago & N. W. R. Co. 118 Iowa, 312, 91 N. W. 1076. 633
v. State, 46 Ohio St. 473, 15 Am. St. Rep. 638, 22 N. E. 43 881

N.

Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298 ... 689
Nathan v. Louisiana, 8 How. 73, 12 L. ed. 992 423
National Bank v. Baker, 128 Ill. 533, 4 L.R.A. 586, 21 N. E. 510 952
National Council v. State Council, 203 U. S. 151, 51 L. ed. 132, 27 Sup. Ct. Rep. 46 147
National Council, J. O. of U. A. M. v. State Council, J. O. of U. A. M. 64 N. J. Eq. 470, 53 Atl. 1082, 66 N. J. Eq. 429, 57 Atl. 1132 137
National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111 1016
National L. Ins. Co. v. Scheffer, 131 U. S. cciii, appx. 26 L. ed. 1110 325
National Waterworks Co. v. Kansas City, 28 Fed. 921 537
Neal v. Delaware, 103 U. S. 386, 26 L. ed. 570 77
Neely v. Henkel, 180 U. S. 109, 45 L. ed. 448, 21 Sup. Ct. Rep. 302 .....794, 796
Neilson v. Garza, 2 Woods, 287, Fed. Cas. No. 10,091 86
Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. Rep. 358 327
Nevitt, Re, 54 C. C. A. 622, 117 Fed. 461 645
New v. Oklahoma, 195 U. S. 252, 49 L. ed. 182, 25 Sup. Ct. Rep. 68 108
v. Walker, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386..... 217
Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 L. ed. 795, 24 Sup. Ct. Rep. 553 565
Newland, Re, 6 Ben. 342, Fed. Cas. No. 10,170 .....774, 775
New Mexico ex rel. Caledonian Coal Co. v. Baker. See CALEDONIAN COAL CO. v. BAKER.
New Orleans v. Citizens Bank, 167 U. S. 396, 42 L. ed. 210, 17 Sup. Ct. Rep. 905 741
v. Houston, 119 U. S. 265, 30 L. ed. 411, 7 Sup. Ct. Rep. 198 906
v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142 328
v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110 .....856, 1113, 1114, 111
New Orleans City & Lake R. Co. v. Louisiana, 157 U. S. 219, 39 L. ed. 679, 15 Sup. Ct. Rep. 581 1174
New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471 537
New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691 565
v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273 1160
Newport & C. Bridge Co. v. United States, 105 U. S. 470, 26 L. ed. 1143 1061
Newport Light Co. v. Newport, 151 U. S. 527, 38 L. ed. 259, 14 Sup. Ct. Rep. 429 326
New York v. Eno, 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30. 152
New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705 288
Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188 .....501, 840
New York Electric Lines Co. v. Squire, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880 147
Bank of Commonwealth v. Tax & A. Comrs. See BANK TAX CASE
Bank of Commerce v. Tax Comrs. 2 Black, 620, 17 L. ed. 451 908
New York, The, 175 U. S. 187, 44 L. ed. 126, 20 Sup. Ct. Rep. 67 453
New York & N. E. R. Co. v. Waterbury, 60 Conn. 1, 22 Atl. 439 240

New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531 766
New York Economical Printing Co., Re, 49 C. C. A. 133, 110 Fed. 514 1123
New York Elev. R. Co., Re, 43 N. Y. S. R. 651, 17 N. Y. Supp. 778, Affirmed in 133 N. Y. 690, 31 N. E. 627 792
New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952 .....398, 1111
New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272 1147
Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522. 421
Niles v. Cedar Point Club, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124 956
Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336..144, 430
N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co. 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 420 918
Noble v. Union River Logging R. Co. 147 U. S. 176, 37 L. ed. 127, 13 Sup. Ct. Rep. 271 770
Noland v. State, 19 Ohio, 131 619
Nonconnah Turnp. Co. v. Tennessee, 131 U. S. clviii, appx. 24 L. ed. 368 326
Nones v. Northouse, 46 Vt. 587 665
Norfolk & W. R. Co. v. Pendleton, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. Rep. 413 ....789, 792
Norman v. Heist, 5 Watts & S. 171, 40 Am. Dec. 493 1105
North American Transp. & Trading Co. v. Morrison, 178 U. S. 262, 44 L. ed. 1061, 20 Sup. Ct. Rep. 869 .....183, 660
North Carolina Car Co., Re, 127 Fed. 178 437
Northern Assur. Co. v. Grand View Bldg. Asso. 203 U. S. 106, 51 L. ed. 109, 27 Sup. Ct. Rep. 27 833
Northern C. R. Co. v. Maryland, 187 U. S. 258, 47 L. ed. 167, 23 Sup. Ct. Rep. 62 .....115, 116
Northern P. R. Co., Re, 31 Land Dec. 33 440
v. DeLacey, 174 U. S. 622, 43 L. ed. 1111, 19 Sup. Ct. Rep. 791 443
Northern P. R. Co. v. Hambly, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983 1146
v. Holmes, 155 U. S. 137, 39 L. ed. 99, 15 Sup. Ct. Rep. 28 901
v. Musser-Sauntry Land, Logging & Mfg. Co. 168 U. S. 604, 42 L. ed. 596, 18 Sup. Ct. Rep. 205 442
v. Slaght, 205 U. S. 122, 51 L. ed. 738, 27 Sup. Ct. Rep. 442 1016
Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336 535
North Star, The, 106 U. S. 17, 27 L. ed. 91, 1 Sup. Ct. Rep. 41.. 453
454
Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 243, 51 L. ed. 168, 27 Sup. Ct. Rep. 126.. 147
522, 898
Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187 744
Noyes v. Anderson, 124 N. Y. 175, 21 Am. St. Rep. 657, 26 N. E. 316 366
Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216. 303
604
Nutting v. Massachusetts, 183 U. S. 553, 46 L. ed. 324, 22 Sup. Ct. Rep. 238 730

O.

Oakes v. Manufacturers' F. & M. Ins. Co. 135 Mass. 248 833
Oak Island Hotel Co. v. Oak Island Grove Co. 165 Mass. 260, 42 N. E. 1124 665
O'Connor v. Varney, 10 Gray, 231 ... 490
O'Conor v. Texas, 202 U. S. 501, 50 L. ed. 1120, 26 Sup. Ct. Rep. 726 920
Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co. 174 U. S. 492, 43 L. ed. 1058, 19 Sup. Ct. Rep. 641 650
Offield v. Davis, 100 Va. 250, 40 S. E. 910 871
v. New York, N. H. & H. R. Co. 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72... 501
O'Gara v. Eisenlohr, 38 N. Y. 296.. 872
Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576 501
Oklahoma City v. McMaster, 196 U. S. 529, 49 L. ed. 587, 25 Sup. Ct. Rep. 324 196

Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236. 489 748
Oliver v. Piatt, 3 How. 333, 11 L. ed. 622 1081
Orchard v. Alexander, 157 U. S. 372, 39 L. ed. 737, 15 Sup. Ct. Rep. 635 770
Oregon v. Hitchcock, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568 513
Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281 147
Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213.. 888–890
Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204.. 357
Oster v. Broe, 161 Ind. 114, 64 N. E. 918 389
Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168 .....421, 919
Owen v. Miller, 10 Ohio St. 136, 75 Am. Dec. 502 1112
Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537 910
Otan Lumber Co. v. Union County Nat. Bank, 145 Fed. 344.. 218

P.

Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552 730
Pacific Railroad Removal Cases, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113 357
Packer v. Bird, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210 973
Paige v. Banks, 13 Wall. 608, 20 L. ed. 709 1033
Palairet's Appeal, 67 Pa. 479, 5 Am. Rep. 450 1105
Palmer v. McMaster, 8 Mont. 186, 19 Pac. 585 449
Palmyra, The, 12 Wheat. 1, 6 L. ed. 531 .....750, 751
Pam-to-pee v. United States, 187 U. S. 371, 47 L. ed. 221, 23 Sup. Ct. Rep. 142 251
Paquete Habana, The, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290 .....251, 974
Parker v. Anglesey, 20 Week. Rep. 162, 25 L. T. N. S. 482 775
v. United States, 1 Pet. 293, 7 L. ed. 150 755
Parks, Ex parte, 93 U. S. 18, 23 L. ed. 787 574
Parrish v. Ferris, 2 Black, 606, 17 L. ed. 317 742
Parsons v. Bedford, 3 Pet. 446, 7 L. ed. 736 766
v. Chicago & N. W. R. Co. 167 U. S. 447, 42 L. ed. 231, 17 Sup. Ct. Rep. 887 558
v. Venzke, 164 U. S. 89, 41 L. ed. 360, 17 Sup. Ct. Rep. 27 770
Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862 .....86, 88
Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115 218
v. Philbrook, 9 Mass. 151 1104
v. Pittsburg & C. R. Co. 76 Pa. 389, 18 Am. Rep. 412.686, 689
Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357 351
Pauly v. State Loan & T. Co. 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465 426
Payne v. Treadwell, 16 Cal. 220 223
Peacock v. Bell, 1 Wms. Saund. 74.... 350
Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705 942
Peck v. Jenness, 7 How. 625, 12 L. ed. 846 828
Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97 942
Pell, Re, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789 .....889, 890
Pendleton County v. Amy, 13 Wall. 297, 20 L. ed. 579 864
Pennoyer v. Neff, 95 U. S. 715, 25 L. ed. 565 .....141, 748
Pennsylvania College Cases, 13 Wall. 190, 20 L. ed. 550 137
Pennsylvania Co., Re, 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141 268
Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132 ..86, 190, 327 841
People v. American Bell Teleph. Co. 117 N. Y. 241, 22 N. E. 1057 852
v. Kerr, 27 N. Y. 188 1186
v. McLeod, 1 Hill, 377, 37 Am. Dec. 328 895
v. New York, L. E. & W. R. Co. 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856 945
v. Pratt, 78 Cal. 345, 20 Pac. 731 158

People ex rel. Kimball v. Boston & A. R. Co. 70 N. Y. 569 945
Union Trust Co. v. Coleman, 126 N. Y. 433, 12 L.R.A. 762, 27 N. E. 818 907
Green v. Dutchess & C. R. Co. 58 N. Y. 152 945
Bristol v. Ingham County, 20 Mich. 95 1104
Miller v. Johnson, 86 Pac. 233. 382
Crawford v. Lothrop, 3 Colo. 428 1146
Westbrook v. Ogdensburgh, 48 N. Y. 390 1113
Jefferson v. Smith, 88 N. Y. 576 1114
Hoyt v. Tax & A. Comrs. 23 N. Y. 224 1111
McPike v. Van De Carr, 178 N. Y. 425, 66 L.R.A. 189, 102 Am. St. Rep. 516, 70 N. E. 965 700
Chicago v. West Chicago Street R. Co. 203 Ill. 551, 68 N. E. 78 539
People's Ferry Co. v. Beers, 20 How. 393, 15 L. ed. 961 ..325, 841
People's Nat. Bank v. Marye, 191 U. S. 272, 48 L. ed. 180, 24 Sup. Ct. Rep. 68 422
Perry v. Haines. See ROBERT W. PARSONS, THE.
Petri v. Commercial Nat. Bank, 142 U. S. 644, 35 L. ed. 1144, 12 Sup. Ct. Rep. 325 579
Pettibone, Ex parte (Idaho) 85 Pac. 902 151
v. Nichols, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111 .....161, 165
Pewabic Min. Co. v. Mason, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887 807
Phenix Ins. Co. v. Pollard, 63 Miss. 641 1104
Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. 367, 19 L. ed. 948 1033
Phillips v. Negley, 117 U. S. 665, 29 L. ed. 1013, 6 Sup. Ct. Rep. 901 750
Phipps v. London & N. W. R. Co. [1892] 2 Q. B. 229 1136
Phœnix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471 790
Picard v. East Tennessee, V. & G. R. Co. 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640.. 789
790
Pickett v. Legerwood, 7 Pet. 145, 8 L. ed. 638 748
Pierce v. Lamper, 141 Mass. 20, 6 N. E. 233 748
Pinney v. First Nat. Bank, 68 Kan. 223, 75 Pac. 119 217
Platt v. Wilmot, 193 U. S. 603, 48 L. ed. 809, 24 Sup. Ct. Rep. 542 1176
Platteville Foundry & Mach. Co., Re, 147 Fed. 828 915
Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829 .....889, 909
Poland v. Brownell, 131 Mass. 138, 41 Am. Rep. 215 665
Pollard v. Hagan, 3 How. 212, 11 L. ed. 565 .....973, 974
Pollitz, Re, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729 1189
Post v. United States, 161 U. S. 583, 40 L. ed. 816, 16 Sup. Ct. Rep. 611 109
Potter v. United States, 155 U. S. 438, 39 L. ed. 214, 15 Sup. Ct. Rep. 144 1015
Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992 328
Powers v. Detroit, G. H. & M. R. Co. 201 U. S. 543, 50 L. ed. 860, 26 Sup. Ct. Rep. 556 398
Price v. Huey, 22 Ind. 18 1104
v. Pennsylvania R. Co. 113 U. S. 221, 28 L. ed. 981, 5 Sup. Ct. Rep. 427 190
Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060 73
Pritchard v. Norwood, 155 Mass. 539, 30 N. E. 80 1116
Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398 213
Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907.. 906
Provident Life & T. Co. v. Mercer County, 170 U. S. 593, 42 L. ed. 1156, 18 Sup. Ct. Rep. 788 86
Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808 447
v. Missouri P. R. Co. 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194 85
v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876 111
Putnam v. Story, 132 Mass. 205 61

Q.

Queen v. Dayton Coal & I. Co. 95 Tenn. 458, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460. 68

R.

Radclyffe v. Barton, 154 Mass. 159, 28 28 N. E. 148 748
Rahrer, Re, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865. 180
Rankin v. Fidelity Ins. Trust & S. D. Co. 189 U. S. 242, 47 L. ed. 792, 23 Sup. Ct. Rep. 553. 427
Rawlins v. Georgia, 201 U. S. 638, 50 L. ed. 899, 26 Sup. Ct. Rep. 560, 124 Ga. 31, 52 S. E. 1. 108
127, 327, 880
Read v. Nichols, 118 N. Y. 224, 7 L.R. A. 130, 23 N. E. 468 665
Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047 ....213, 942
Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159 .....422, 423
Rector v. City Deposit Bank Co. 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289 ..303, 604
Redfield v. Parks, 132 U. S. 239, 33 L. ed. 327, 10 Sup. Ct. Rep. 83 742
Redgrave v. Redgrave, 38 Md. 97 872
Reed, Ex parte, 100 U. S. 13, 25 L. ed. 538 1088
v. Merchant's Mut. Ins. Co. 95 U. S. 23, 24 L. ed. 348 1033
Reggel, Ex parte, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148 .....153, 154, 163, 164
Reid v. Jones, 187 U. S. 153, 47 L. ed. 116, 23 Sup. Ct. Rep. 89.. 152
762
v. Trowbridge, 78 Miss. 542, 29 So. 167 1162
Reining v. New York, L. & W. R. Co. 128 N. Y. 157, 14 L.R.A. 133, 28 N. E. 640 1184
Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 337 1176
Respublica v. Oswald, 1 Dall. 319, 1 L. ed. 155, 1 Am. Dec. 246.... 881
Rex v. Delaval, 3 Burr. 1434 259
v. Drake, Comb. 35..... 259
v. Smith, 2 Strange, 982 259
Reynolds v. Hindman, 32 Iowa, 146.. 687
v. Vanderbilt. See NORTH STAR, THE.
Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233 969
Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664 .....179, 180, 991
Rice, Re, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149 1189
v. Ames, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406 144
Rice v. Minnesota & N. W. R. Co. 21 How. 85, 16 L. ed. 32 ..750, 751
Rich v. Flanders, 39 N. H. 310 1104
Richardson v. Smith, 80 Md. 89, 30 Atl. 568 872
v. United States, 38 Ct. Cl. 182 1036
1037
Richardson Case. See RICHARDSON v. UNITED STATES.
Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788 1176
Richmond & D. R. Co. v. Powers, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748 767
Richmond Min. Co. v. Eureka Min. Co. 103 U. S. 846, 26 L. ed. 557 448
Rickert Case. See UNITED STATES v. RICKERT.
Riggins v. United States, 199 U. S. 547, 50 L. ed. 303, 26 Sup. Ct. Rep. 147 152
Rio Grande Western R. Co. v. Leak, 163 U. S. 280, 41 L. ed. 160, 16 Sup. Ct. Rep. 1020 724
Ritter v. Mutual L. Ins. Co. 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300 898
Roach v. Chapman, 22 How. 129, 16 L. ed. 294 .....325, 841
Robb v. Connolly, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544 152
154
Robbins v. Taxing District, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592 .....297, 422
Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291 153
163, 164
Robert W. Parsons, The, 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8 .....325, 326, 1054
Robinson, Ex parte, 19 Wall. 505, 22 L. ed. 205 323
Ex parte, 2 Biss. 309, Fed. Cas. No. 11,932 218
Rock v. Dennett, 155 Mass. 500, 30 N. E. 171 .....611, 612
Rodliff v. Dallinger, 141 Mass. 1, 55 Am. Rep. 439, 4 N. E. 805. 95
Rodriguez v. United States, 198 U. S. 156, 49 L. ed. 994, 25 Sup. Ct. Rep. 617 .....565, 1098
Romie v. Casanova, 91 U. S. 379, 23 L. ed. 374 956
Rose v. Himely, 4 Cranch, 241, 2 L. ed. 608 348
Rosenbaum v. Bauer, 120 U. S. 450, 30 L. ed. 743, 7 Sup. Ct. Rep. 633 325
Rowland, Ex parte, 104 U. S. 604, 26 L. ed. 861 323

Royal Ins. Co. v. Martin, 192 U. S. 149, 48 L. ed. 385, 24 Sup. Ct. Rep. 247 376
Royall, Ex parte, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734 .....152, 162
Ruggles v. Illinois, 108 U. S. 536, 27 L. ed. 816, 2 Sup. Ct. Rep. 832 942
Ruhstrat v. People, 185 Ill. 133, 49 L. R. A. 181, 76 Am. St. Rep. 30, 57 N. E. 41 700
Runkle v. Burnham, 153 U. S. 216, 38 L. ed. 694, 14 Sup. Ct. Rep. 837 723
Ryan v. Carter, 93 U. S. 78, 23 L. ed. 807 685

S.

Sadler v. Hoover, 7 How. 646, 12 L. ed. 855 879
St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157 973
St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354 851
St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578 441
St. Louis v. Myers, 113 U. S. 566, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640 973
St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484 ....789, 942, 944
v. McBride. 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982 268
St. Louis Ice Mfg. & Storage Co., Re, 147 Fed. 752 437
St. Louis, I. M. & S. R. Co. v. Berry, 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529.. 792
v. Commercial Union Ins. Co. 139 U. S. 223, 35 L. ed. 154, 11 Sup. Ct. Rep. 554 595
St. Louis Public Schools v. Walker, 9 Wall. 603, 19 L. ed. 650. 749
St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389 .....440, 443
St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575 ..202, 203
Sampeyreac v. United States, 7 Pet. 222, 8 L. ed. 665 551
San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. Rep. 261 792
San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804 .....
San Francisco v. Canavan, 42 Cal. 541
v. Scott, 111 U. S. 768, 28 L. ed. 593, 4 Sup. Ct. Rep. 688..
San Jose Gas Co. v. January, 57 Cal. 614 .....
San Jose Land & Water Co. v. San Jose Ranch Co. 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487 126,
Sannoner v. Jacobson, 47 Ark. 31, 14 S. W. 458 .....
Sargeant v. State Bank, 12 How. 371, 13 L. ed. 1028 .....
Satterlee v. Matthewson, 16 Serg. & R. 169, 2 Pet. 380, 7 L. ed. 458 1
Savin, Re, 131 U. S. 267, 33 L. ed. 150, 9 Sup. Ct. Rep. 699..
Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392. 1 1113, 1
Sawyer, Re, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482..
Saylor v. Taylor, 23 C. C. A. 343, 42 U. S. App. 206, 77 Fed. 476 1
Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777 919,
Schacker v. Hartford F. Ins. Co. 93 U. S. 241, 23 L. ed. 862 ....
Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407 1
Schlosser v. Hemphill, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654 326-329,
Schmidt, Re, G. A. 4214, T. D. 19715
Schollenberger, Ex parte, 96 U. S. 369, 24 L. ed. 853 .....
Schroeder v. Young, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512 .....
Schrubbe v. Connell, 69 Wis. 476, 34 N. W. 503 .....
Schuerman v. Union Cent. L. Ins. Co. 165 Mo. 641, 65 S. W. 723.
Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551 .....
Schunk v. Moline M. & S. Co. 147 U. S. 500, 37 L. ed. 255, 13 Sup. Ct. Rep. 416 .....
Schus v. Powers-Simpson Co. 85 Minn. 447, 69 L.R.A. 887, 89 N. W. 68 .....
Scott, Ex parte, 9 Barn. & C. 446 ....
v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265 .....180, 181,

Scott v. Donald, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262 827
v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108 .....348, 474
v. Sandford, 19 How. 393, 15 L. ed. 691 968
Scottish Union & Nat. Ins. Co. v. Bowland, 196 U. S. 611, 49 L. ed. 619, 25 Sup. Ct. Rep. 345 1115
Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48 535
Seaboard Air Line R. Co. v. Florida ex rel. Ellis, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. Rep. 109 942
Seaman, Re, 147 N. Y. 69, 41 N. E. 401 889
Seamans v. Temple Co. 105 Mich. 400, 28 L.R.A. 430, 55 Am. St. Rep. 457, 63 N. W. 408 .. 800
Searl v. School Dist. No. 2, 133 U. S. 553, 33 L. ed. 740, 10 Sup. Ct. Rep. 374 488
Sears v. Crocker, 184 Mass. 588, 100 Am. St. Rep. 577, 69 N. E. 327 1181
Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619. 137, 800
Seeberger v. Wright & L. Oil & Lead Mfg. Co. 157 U. S. 183, 39 L. ed. 665, 15 Sup. Ct. Rep. 583 413
Seitz v. Brewers' Refrigerating Mach. Co. 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46.. 588
Selden v. Jacksonville, 28 Fla. 558, 14 L.R.A. 370, 29 Am. St. Rep. 278, 10 So. 457 1180
Sellman v. Bowen, 8 Gill & J. 50, 29 Am. Dec. 524 872
Serrelles v. Esbri, 200 U. S. 103, 50 L. ed. 391, 26 Sup. Ct. Rep. 176 .....565, 1098
Shaw, Ex parte. See SHAW v. QUINCY MIN. CO.
v. Quincy Min. Co. 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935 267
Sheets v. Selden, 7 Wall. 416, 19 L. ed. 166 .....365, 366
Sheets Case. See SHEETS v. SELDEN.
Sheffield & B. Coal, Iron & R. Co. v. Gordon, 151 U. S. 285, 38 L. ed. 164, 14 Sup. Ct. Rep. 343 815
Sheldon v. Sill, 8 How. 441, 12 L. ed. 1147 266
Shepard v. Carrigan, 116 U. S. 593, 29 L. ed. 723, 6 Sup. Ct. Rep. 493 650
Sheppard v. Graves, 14 How. 505, 14 L. ed. 518 825
Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819 841
Sherman, Re, 153 N. Y. 1, 46 N. E. 1032 889
Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570 508
v. Ohio, 95 U. S. 319, 24 L. ed. 357 .....241, 792
Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548 .....535, 973, 974
Shuman v. Fleckenstein, 4 Sawy. 174, Fed. Cas. No. 12,826 605
Sibbald v. Bethlehem Iron Co. 83 N. Y. 378, 38 Am. Rep. 441 .. 460
v. United States, 12 Pet. 488, 9 L. ed. 1167 .....749- 751
Sifers v. Johnson, 7 Idaho, 798, 54 L. R.A. 785, 97 Am. St. Rep. 271, 65 Pac. 709 502
Simmerman v. Nebraska, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333 627
Simpson v. United States, 199 U. S. 397, 50 L. ed. 245, 26 Sup. Ct. Rep. 54 .....736, 1033
Sinclair v. District of Columbia, 192 U. S. 16, 48 L. ed. 322, 24 Sup. Ct. Rep. 212 811
Sinking Fund Cases, 99 U. S. 720, 25 L. ed. 502 241
Sioux City & I. F. Town Lot & Land Co. v. Griffey, 143 U. S. 32, 36 L. ed. 64, 12 Sup. Ct. Rep. 362 1153
Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745.. 766, 767
Sioux City & St. P. R. Co. v. United States, 159 U. S. 349, 40 L. ed. 177, 16 Sup. Ct. Rep. 17 513
Sipperley v. Smith, 155 U. S. 86, 39 L. ed. 79, 15 Sup. Ct. Rep. 15 327
Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790 915
Skinner, Ex parte, 9 J. B. Moore, 278. 259
Slater v. Mexican Nat. R. Co. 194 U. S. 120, 48 L. ed. 900, 24 Sup. Ct. Rep. 581 920
Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394 .....68, 69
Slingluff, Re, 106 Fed. 154 774
Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289 .....309, 326, 910

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564 973
v. Bell, 6 Pet. 68, 8 L. ed. 322. 869
v. Eals, 81 Iowa, 235, 25 Am. St. Rep. 486, 46 N. W. 1110 1116
v. Greenhow, 109 U. S. 669, 27 L. ed. 1080, 3 Sup. Ct. Rep. 421 660
v. Lyon, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303.. 268
v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490 508
v. Reeves, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919 836
v. Swormstedt, 16 How. 288, 14 L. ed. 942 .....552, 742
v. United States, 10 Pet. 331, 9 L. ed. 444 167
v. Whitney, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570 811
Smith Case. See HY-YU-TSE-MIL-KIN v. SMITH.
Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418 .....213, 942, 944
Snow v. Alley, 156 Mass. 193, 30 N. E. 691 .....111, 834
v. United States, 118 U. S. 346, 30 L. ed. 207, 6 Sup. Ct. Rep. 1059 85
Snyder, Re, 103 N. Y. 178, 8 N. E. 479 324
v. Bettman, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803 889
Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897 909
Somerby v. Buntin, 118 Mass. 279, 19 Am. Rep. 459 1117
South Carolina v. Georgia, 93 U. S. 4, 23 L. ed. 782 535
v. Seymour, 153 U. S. 353, 38 L. ed. 742, 14 Sup. Ct. Rep. 871 275
South Dakota v. North Carolina, 192 U. S. 286, 48 L. ed. 448, 24 Sup. Ct. Rep. 269 969
Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44 489
Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18 741
Southwestern R. Co. v. Georgia, 92 U. S. 676, note, 23 L. ed. 762. 790
Southworth v. United States, 151 U. S. 179, 38 L. ed. 119, 14 Sup. Ct. Rep. 274, 161 U. S. 639, 40 L. ed. 835, 16 Sup. Ct. Rep. 694 635
Speed v. McCarthy, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613 .....327, 328
Spencer v. McDougal, 159 U. S. 62, 40 L. ed. 76, 15 Sup. Ct. Rep. 1026 .....442, 443
Spies, Ex parte. See SPIES v. ILLINOIS.
v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21 895
Spitzer, Re, 66 C. C. A. 35, 130 Fed. 879 915
Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241 241
Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983 828
Star Brass Works v. General Electric Co. 49 C. C. A. 409, 111 Fed. 398 650
State v. Brewster, 7 Vt. 118 158
v. Cook, 107 Tenn. 499, 62 L.R. A. 174, 64 S. W. 720..217, 220
v. Dunwell, 3 R. I. 127 777
v. Hart, 24 W. Va. 416, 49 Am. Rep. 257 881
v. Kealy, 89 Iowa, 94, 56 N. W. 283 158
v. Lockwood, 43 Wis. 405 218
v. McGinnis, 138 N. C. 724, 51 S. E. 50 .....307, 308, 310
v. Matthews, 37 N. H. 450 324
v. Rogers, 6 Baxt. 563 619
v. Ross, 21 Iowa, 467 158
v. Smith, 1 Bailey, 283, 19 Am. Dec. 679 158
v. Squires, 26 Iowa, 340 1104
v. Wagner, 61 Me. 178 777
State ex rel. Grigsby v. Buechler, 10 S. D. 156, 72 N. W. 114 731
Mason v. Harper's Ferry Bridge Co. 16 W. Va. 864 324
Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098 672
Clapp v. Minnesota Thresher Mfg. Co. 40 Minn. 215, 3 L. R.A. 510, 41 N. W. 1020.. 1172
Burner v. Richter, 37 Minn. 436, 35 N. W. 9 164
Bee Bldg. Co. v. Savage, 65 Neb. 714, 91 N. W. 716 640
Columbia County v. Suwannee County, 21 Fla. 1 175
State use of M. E. Church v. Warren, 28 Md. 338 1105
State Assessors v. Comptoir National D'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109 ..856, 1113, 1115, 1116
State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663 ....639, 640

State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179.. 1111, 1114, 1116
Steiner v. United States, 24 C. C. A. 690, 26 U. S. App. 778, 79 Fed. 1003 1036
Stephen Morgan, The, 94 U. S. 599, 24 L. ed. 266 90
Stephen Morgan, The, v. Good. See STEPHEN MORGAN, THE.
Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722. 102, 550, 551
Stephens Case. See STEPHENS v. CHEROKEE NATION.
Sterling, The, 106 U. S. 647, 27 L. ed. 98, 1 Sup. Ct. Rep. 89.... 453
Sterling, The, v. Peterson. See STERLING, THE.
Stevens v. Stevens, 56 N. J. Eq. 488, 38 Atl. 460 872
Stevenson v. Fain, 195 U. S. 165, 49 L. ed. 142, 25 Sup. Ct. Rep. 6 266
Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105 ....518, 519
v. Harmon, 98 Fed. 190..... 351
v. Wheeling & L. E. R. Co. 52 Ohio St. 151, 29 L.R.A. 438, 41 N. E. 247 1095
Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576 422
Stockton v. Stanbrough, 3 La. Ann. 390 1116
v. Williams, Walk, Ch. (Mich.) 120 167
v. Williams, 1 Dougl. (Mich.) 546 168
Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334 942
v. Illinois C. R. Co. 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. Rep. 348 942
v. New Orleans & N. E. R. Co. 116 U. S. 352, 29 L. ed. 651, 6 Sup. Ct. Rep. 349 .. 942
v. Wisconsin, 94 U. S. 181, 24 L. ed. 102 942
v. Yazoo & M. Valley R. Co. 62 Miss. 607, 52 Am. Rep. 193 1161
Stoomvaart Maatschappy Nederland v. Peninsular & O. Steam Nav. Co. L. R. 7 App. Cas. 795 454
Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146.. 1181, 1183, 1184, 1186
Story Case. See STORY v. NEW YORK ELEV. R. Co.
Strauder v. West Virginia, 100 U. S. 306, 25 L. ed. 665 .....73, 77
Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36..... 1173
Streep v. United States, 160 U. S. 128, 40 L. ed. 365, 16 Sup. Ct. Rep. 244 104
Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301.. 236, 501, 671
Stringfellow v. Cain, 99 U. S. 610, 25 L. ed. 421 832
Strong v. Wilkins, 1 Barb. Ch. 9.... 890
Stuart v. Bank of Staplehurst, 57 Neb. 570, 78 N. W. 298 1008
v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289 208
Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529 1174
Sullivan v. Lowell & D. Street R. Co. 162 Mass. 536, 39 N. E. 185 665
Sumner v. Sessoms, 94 N. C. 371..... 807
Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240.. 737
Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783 328
Swearingen, Ex parte, 13 S. C. 74..... 165
Sweeney v. Grand Island & W. C. R. C. 61 Fed. 3 327
v. Lomme, 22 Wall. 208, 22 L. ed. 727 .....920, 1146
v. United States, 109 U. S. 618, 27 L. ed. 1053, 3 Sup. Ct. Rep. 344 815
Sweet v. Ballentyne, 8 Idaho, 431, 69 Pac. 995 .....501, 502
v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43 538
Swift v. Bank of Washington, 52 C. C. A. 339, 114 Fed. 643.... 196
Swift & Co. v. Philadelphia & R. R. Co. 5 Inters. Com. Rep. 116, 64 Fed. 59 560
v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276 297
Swope v. Leflingwell, 105 U. S. 3, 26 L. ed. 939 303

T.

Talbot v. New York & H. R. Co. 151 N. Y. 155, 45 N. E. 382.. 1184
Tappan v. Merchants' Nat. Bank 19 Wall. 490, 22 L. ed. 189... 1111
Taylor v. Barclay, 2 Sim. 213 794
v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890 385
v. Carew Mfg. Co. 143 Mass. 470, 10 N. E. 308 687

Telegram Newspaper Co. v. Com. 172 Mass. 294, 44 L.R.A. 159, 70 Am. St. Rep. 280, 52 N. E. 445 881
Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245, 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178.....327
Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654 267
v. Whitworth, 117 U. S. 139, 29 L. ed. 833, 6 Sup. Ct. Rep. 649 .....790, 792
Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 48 L. ed. 1124, 24 Sup. Ct. Rep. 767. 686
Territory v. Doty, 1 Pinney (Wis.) 396 836
v. Ye Wan, 2 Mont. 478 449
Territory ex rel. Blake v. Virginia Road Co. 2 Mont. 96..... 449
Terry, Ex parte, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77 323
881
Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350.. 1126
1127, 1138
v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666 .....292, 1134, 1135
v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628 561
Thayer v. Daniels, 113 Mass. 129.... 612
v. Spratt, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576 546
Thomas v. Holtzman, 7 Mackey, 62... 872
v. Ohio State University, 195 U. S. 211, 49 L. ed. 164, 25 Sup. Ct. Rep. 24 183
v. Reynolds, 29 Kan. 304 197
v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305 .....421. 422
Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306 952
1122, 1123
v. Whitman, 18 Wall. 457, 21 L. ed. 897 348
Tibbetts v. Cate, 66 N. H. 550, 22 Atl. 559 366
Tinsley v. Anderson, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805 921
v. Treat, 205 U. S. 20, 51 L. ed. 689, 27 Sup. Ct. Rep. 430 .. 920
Tod v. Wick Bros. 36 Ohio St. 370 ... 217
Toltec Ranch Co. v. Cook, 191 U. S. 532, 48 L. ed. 291, 24 Sup. Ct. Rep. 166 .....1153, 1154
Tomlinson v. Branch, 15 Wall. 460, 21 L. ed. 188 792
Topliff v. Topliff, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057 1033
Toplitz v. Bauer, 161 N. Y. 325, 55 N. E. 1059 952
Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550 305
Tradesmen's Nat. Bank v. Kent Mfg. Co. 186 Pa. 556, 65 Am. St. Rep. 876, 40 Atl. 1018.... 1122
Trask v. Hartford & N. H. R. Co. 2 Allen, 331 741
v. Maguire, 18 Wall. 391, 21 L. ed. 938 792
Truitt v. United States, 38 Ct. Cl. 398 755
Tuchband v. Chicago & A. R. Co. 115 N. Y. 437, 22 N. E. 360 ... 917
Tullock v. Mulvane, 184 U. S. 497, 46 L. ed. 357, 22 Sup. Ct. Rep. 372 1009
Turner v. Bank of North America, 4 Dall. 8, 1 L. ed. 718..... 266
v. Guthrie, 14 Okla. 285, 28 Pac. 108 654
Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20 473
Two Hundred Chests of Tea, 9 Wheat. 430, 6 L. ed. 128 1025

U.

Union Associated Press v. Times-Star Co. 84 Fed. 419..... 918
Union Mut. L. Ins. Co. v. Kirchoff, 160 U. S. 374, 40 L. ed. 461, 16 Sup. Ct. Rep. 318 326
Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 588, 41 L. ed. 273, 16 Sup. Ct. Rep. 1173 1061
v. Daniels, 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756 723
v. O'Brien, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618 688
v. Snyder. See UNION P. R. Co. v. DANIELS.
v. United States, 99 U. S. 402, 25 L. ed. 274 1137
v. Wyler, 158 U. S. 285, 39 L. ed. 583, 15 Sup. Ct. Rep. 877 251
252
Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36 .....421, 638, 855, 1111

Union S. B. Co., Ex parte, 178 U. S. 317, 44 L. ed. 1084, 20 Sup. Ct. Rep. 904 453
Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. ed. 1154, 25 Sup. Ct. Rep. 766 .....1118, 1122
United States v. American Bell Teleph. Co. 29 Fed. 17 .....852, 853
v. Baca, 184 U. S. 653, 46 L. ed. 733, 22 Sup. Ct. Rep. 541 253
v. Ball, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192. 574
v. Barber, 140 U. S. 164, 35 L. ed. 396, 11 Sup. Ct. Rep. 749 635
v. Brindle, 110 U. S. 688, 28 L. ed. 286, 4 Sup. Ct. Rep. 180 1021
v. Buettner, 66 C. C. A. 289, 133 Fed. 163 1035
v. Burchard, 125 U. S. 176, 31 L. ed. 662, 8 Sup. Ct. Rep. 832 635
v. California & O. Land Co. 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266 ....252, 741
v. Churchyard, 132 Fed. 82 ... 518
v. Clamorgan, 101 U. S. 822, 25 L. ed. 836 252
v. Clark, 200 U. S. 601, 50 L. ed. 613, 26 Sup. Ct. Rep. 340 96
v. Cook, 17 Wall. 168, 21 L. ed. 538 685
v. Cook, 19 Wall. 591, 22 L. ed. 210 .....166, 1142
v. Crosley, 196 U. S. 332, 49 L. ed. 499, 25 Sup. Ct. Rep. 261 1037
v. Cruikshank, 1 Woods, 308, Fed. Cas. No. 14,897 74
v. Cruikshank, 92 U. S. 542, 23 L. ed. 588 .....77, 882
v. Dawson, 101 U. S. 569, 25 L. ed. 791 859
v. Des Moines Nav. & R. Co. 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308..328
v. Detroit Timber & Lumber Co. 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282..... 96
v. Dickson, 15 Pet. 141, 10 L. ed. 689 685
v. Ewing, 140 U. S. 142, 35 L. ed. 388, 11 Sup. Ct. Rep. 743 635
v. Finnell, 185 U. S. 236, 46 L. ed. 890, 22 Sup. Ct. Rep. 633 1147
v. Hailey, 118 U. S. 233, 30 L. ed. 173, 6 Sup. Ct. Rep. 1049 858
v. Harris. 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601 970
United States v. Hite, 204 U. S. 343, 51 L. ed. 514, 27 Sup. Ct. Rep. 386 754
v. Hudson, 7 Cranch, 32, 3 L. ed. 259 266
v. Jones, 193 U. S. 528, 48 L. ed. 776, 24 Sup. Ct. Rep. 561 619
v. Juniata. See JUNIATA, THE.
v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644 .....305, 422
v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109 166
v. Kentucky River Mills, 45 Fed. 273 518
v. Lacher, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625 1057
v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240 513
v. Lee Yen Tai, 185 U. S. 213, 46 L. ed. 878, 22 Sup. Ct. Rep. 629 820
v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349 538
v. Lynch, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114 .....85, 276
v. Lynde, 11 Wall. 632, 20 L. ed. 230 252
v. Marigold, 9 How. 560, 13 L. ed. 257 1091
v. Michigan, 190 U. S. 379, 47 L. ed. 1103, 23 Sup. Ct. Rep. 742 .....969, 1079, 1080
v. Morant, 123 U. S. 335, 31 L. ed. 171, 8 Sup. Ct. Rep. 189 .....251, 252
v. More, 3 Cranch, 159, 2 L. ed. 397 811
v. Morris, 10 Wheat. 246, 6 L. ed. 314 1104
v. North, 112 U. S. 510, 28 L. ed. 808, 5 Sup. Ct. Rep. 285 515
v. North Carolina, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. Rep. 920 .....1079, 1080
v. Old Settlers, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650 553
v. Oregon & C. R. Co. 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 261 442
v. Parkhurst Davis Mercantile Co. 176 U. S. 317, 44 L. ed. 485, 20 Sup. Ct. Rep. 423.. 827
v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073 .....313, 888. 889

United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234 818
v. Reese, 92 U. S. 214, 23 L. ed. 563 .....72, 73, 77, 304
v. Reid, 90 Fed. 522 518
v. Rice, 4 Wheat. 246, 4 L. ed. 562 798
v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478 .....569, 571
v. Rider, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983 .....183, 878
v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770 970
v. Santa Fé, 165 U. S. 675, 41 L. ed. 874, 17 Sup. Ct. Rep. 472 223
v. Sarabia, 3 Off. Gaz. No. 29. 573
v. Sayward, 160 U. S. 493, 40 L. ed. 508, 16 Sup. Ct. Rep. 371 518
v. Shaw, 3 L.R.A. 232, 39 Fed. 433 518
v. Shipp, 203 U. S. 563, 51 L. ed. 319, 27 Sup. Ct. Rep. 165 881
v. Southern P. R. Co. 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152 442
v. Stone, 2 Wall. 525, 17 L. ed. 765 770
v. Sweet, 189 U. S. 471, 47 L. ed. 907, 23 Sup. Ct. Rep. 638 1147
v. Texas, 143 U. S. 621, 36 L. ed. 285, 12 Sup. Ct. Rep. 488 .....513, 969, 1079
v. Texas, 162 U. S. 1, 40 L. ed. 867, 16 Sup. Ct. Rep. 725 969
v. The Glamorgan, 2 Curt. C. C. 236, Fed. Cas. No. 15,214.. 749
v. The Montello. See MONTELLO, THE.
v. Union P. R. Co. 168 U. S. 505, 41 L. ed. 559, 18 Sup. Ct. Rep. 167 878
v. Waddell, 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. Rep. 35 72
v. Whitridge, 197 U. S. 143, 49 L. ed. 698, 25 Sup. Ct. Rep. 408 414
v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456 .....429, 430, 973
United States ex rel. Steinmetz v. Allen, 192 U. S. 543, 48 L. ed. 555, 24 Sup. Ct. Rep. 416 276
United States ex rel. Knapp v. Lake Shore & M. S. R. Co. See KNAPP v. LAKE SHORE & M. S. R. Co.
Drury v. Lewis, 200 U. S. 1, 50 L. ed. 343, 26 Sup. Ct. Rep. 229 702
South Carolina v. Seymour. See SOUTH CAROLINA v. SEYMOUR.
United States Bank v. Moss, 6 How. 38 12 L. ed. 334 750
Urquhart v. Brown, 205 U. S. 179, 51 L. ed. 760, 27 Sup. Ct. Rep. 459 921
Utley v. Hill, 155 Mo. 232, 49 L.R.A 323, 78 Am. St. Rep. 569, 55 S. W. 1091 1015

V.

Valentina v. Mercer, 201 U. S. 131, 50 L. ed. 693, 26 Sup. Ct. Rep. 368 921
Van Allen v. Assessors, 3 Wall. 573, 18 L. ed. 229 909
Vanbussum v. Maloney, 2 Met. (Ky.) 550 807
Vance v. Vandercook, 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.179-181, 660, 730, 991
Vanderbilt, Re, 50 App. Div. 246, 63 N. Y. Supp. 1079, Affirmed in 163 N. Y. 597, 57 N. E. 1127 890
Van Patten v. Chicago, M. & St. P. R. Co. 81 Fed. 545 1137
Van Winkle v. Crowell, 146 U. S. 42, 36 L. ed. 880, 13 Sup. Ct. Rep. 18 833
Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585.. 203 204, 1155
v. Vicksburg, 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660 .....203, 1155
Victor Coal Co. v. Muir, 20 Colo. 320, 26 L.R.A. 435, 46 Am. St. Rep. 299, 38 Pac. 378 687
Victorian, The, 24 Or. 121, 41 Am. St. Rep. 838, 32 Pac. 1040.... 840
Virginia, Ex parte, 100 U. S. 345, 25 L. ed. 679 77
Ex parte. See VIRGINIA v. RIVES.
v. Paul, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536 1084
v. Rives, 100 U. S. 313, 25 L. ed. 667 .....77, 880
Voorhees, Re, 32 N. J. L. 141 165
v. Jackson, 10 Pet. 449, 9 L. ed. 490 476

Voorhees v. John T. Noye Mfg. Co. 151 U. S. 135, 38 L. ed. 101, 14 Sup. Ct. Rep. 295 901
v. Voorhees, 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172 872

W.

Wabash, St. L. & P. R. Co. v. Ham, 114 U. S. 587, 29 L. ed. 235, 5 Sup. Ct. Rep. 1081 707
Wabash Western R. Co. v. Brow, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126 141
Waggoner v. Flack, 188 U. S. 595, 47 L. ed. 609, 23 Sup. Ct. Rep. 345 1174
Walish v. Milwaukee, 95 Wis. 16, 69 N. W. 818 1180
Walker v. Dreville, 12 Wall. 440, 20 L. ed. 429 858
v. Great Northern R. Co. Ir. L. R. 28 Eq. 69 137
Wall, Ex parte, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569 880
Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.. 203, 1160
Ward v. Hudson River Bldg. Co. 125 N. Y. 230, 26 N. E. 256 ... 737
Warner, B. & Co. v. United States, 197 U. S. 419, 49 L. ed. 816, 25 Sup. Ct. Rep. 455 1101
Wartman v. Wartman, Taney, 362, Fed. Cas. No. 17,210..... 324
Washburn v. Great Western Ins. Co. 114 Mass. 175 111
Washington & G. R. Co. v. Hickey, 166 U. S. 521, 41 L. ed. 1101, 17 Sup. Ct. Rep. 661. 716
v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044 767
Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518 .....147, 351
Waterville v. Van Slyke, 116 U. S. 699, 29 L. ed. 772, 6 Sup. Ct. Rep. 662 878
Watson v. Jones, 13 Wall. 679, 20 L. ed. 666 .....827, 828
v. Mercer, 8 Pet. 88, 8 L. ed. 876 1104
Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253 530
Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565 218
Welch v. Wadsworth, 30 Conn. 149, 79 Am. Dec. 236 1104
Welling, Re, 51 C. C. A. 151, 113 Fed. 189 774
West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518...241, 538
Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561..... 974
v. Mississippi Railroad Commission, 74 Miss. 80, 21 So. 15 213
v. Missouri, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730 640
v. Reynolds, 100 Va. 459, 93 Am. St. Rep. 971, 41 S. E. 856 294
v. Texas, 105 U. S. 460, 26 L. ed. 1067 423
Westlund, Re, 99 Fed. 399 437
Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481 908
Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293 .....508, 660, 661, 825
Weyerhauser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485 208
Wheless v. St. Louis, 180 U. S. 379, 45 L. ed. 583, 21 Sup. Ct. Rep. 402 672
White, Re, 5 C. C. A. 29, 14 U. S. App. 87, 55 Fed. 54 164
v. Solomon, 164 Mass. 516, 30 L.R.A. 537, 42 N. E. 104.. 834
Whiteside v. Brawley, 152 Mass. 133, 24 N. E. 1088 764
Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477 1174
Whitmire v. Cherokee Nation, 30 Ct. Cl. 138 102
Whitmore v. Cherokee Nation, 30 Ct. Cl. 138 104
Whitney v. State, 53 Neb. 287, 73 N. W. 696 668
v. Taylor, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796.. 442
Wiggins Ferry Co. v. Ohio & M. R. Co. 142 U. S. 396, 35 L. ed. 1055, 12 Sup. Ct. Rep. 188. 741
Wight, Re, 134 U. S. 136, 33 L. ed. 865, 10 Sup. Ct. Rep. 487 749
v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616 743
v. Nicholson. See WIGHT, RE.
Wilch v. Phelps, 14 Neb. 134, 15 N. W. 361 218
Wilcox v. Eastern Oregon Land Co. 176 U. S. 51, 44 L. ed. 368, 20 Sup. Ct. Rep. 269..120, 443
v. Jackson, 13 Pet. 498, 10 L. ed. 264 441
Wildenhus's Case, 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 383 895

Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17. 660
Wilkerson v. Rahrer. See RAHRER, RE.
Wilkinson v. Leland, 2 Pet. 627, 7 L. ed. 542 1104
Willets Mfg. Co. v. Mercer County, 62 N. J. L. 95, 40 Atl. 782.... 1181
Williams v. Gibbes, 20 How. 535, 15 L. ed. 1013 488
v. Nottawa, 104 U. S. 209, 26 L. ed. 719 661
v. Thacker Coal & Coke Co. 44 W. Va. 599, 40 L.R.A. 812, 30 S. E. 107 715
v. United States Trust Co. 133 N. Y. 660, 31 N. E. 29.... 952
Williamson v. Berry, 8 How. 495, 12 L. ed. 1170 348
Willis v. Mabon, 48 Minn. 140, 16 L.R. A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110..... 1174
v. St. Paul Sanitation Co. See WILLIS v. MABON.
v. Winona City, 59 Minn. 27, 26 L.R.A. 142, 60 N. W. 814 1180 1181
Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72..... 790
v. Reid, 13 Wall. 264, 20 L. ed. 568 287
Wilson, Ex parte, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935 973
Re, 140 U. S. 575, 35 L. ed. 513, 11 Sup. Ct. Rep. 870.. 108
v. Gaines, 103 U. S. 417, 26 L. ed. 401 789
v. Standefer, 184 U. S. 399, 46 L. ed. 612, 22 Sup. Ct. Rep. 384 1174
v. The Ohio, Gilpin, 505, Fed. Cas. No. 17,825 1054
Winkler v. Philadelphia & R. R. Co. 4 Penn. (Del.) 80, 53 Atl. 90 688
Winnebago, The. 73 C. C. A. 295, 141 Fed. 945 840
Winona & St. P. R. Co. v. Blake, 94 U. S. 180, 24 L. ed. 99..... 942
Wiscart v. Dauchy, 3 Dall. 321, 1 L. ed. 619 859
Wiscomb v. Cubberly, 51 Kan. 580, 33 Pac. 320 197
Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370 969
Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107 115
Wisconsin C. R. Co. v. Forsythe, 159 U. S. 46, 40 L. ed. 71, 15 Sup. Ct. Rep. 1020 443
Wisconsin C. R. Co., v. United States, 164 U. S. 190, 41 L. ed. 399, 17 Sup. Ct. Rep. 45..... 635
Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115 .....942, 945
Wisner, Ex parte, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150 1084
Witherspoon v. Duncan, 4 Wall. 217, 18 L. ed. 342 472
Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 18 L. ed. 689 442 443
Wolsey v. Chapman, 101 U. S. 755, 25 L. ed. 915 443
Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382 423
Woodworth v. Spring, 4 Allen, 321.... 260
Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483 166
v. Norwich & W. R. Co. 109 Mass. 112 945
World's Columbian Exposition v. United States, 6 C. C. A. 71, 18 U. S. App. 159, 56 Fed. 657 782
Wright v. Denn, 10 Wheat. 204, 6 L. ed. 303 869
v. Skinner, 136 Fed. 694 605
W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307 244
Wyatt v. Wallace, 67 Ark. 575, 55 S. W. 1105 .....217, 220
Wylie v. Coxe, 14 How. 1, 14 L. ed. 301 130
Wyman v. Halstead, 109 U. S. 654, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417 1112
v. United States. See WYMAN v. HALSTEAD.

Y.

Yaites v. Gough, Yelv. 33..... 297
Yarbrough, Ex parte, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152 72
Yates v. Jones Nat. Bank, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. Rep. 638 ...1016, 1017
v. Milwaukee, 10 Wall. 497, 19 L. ed. 984 536
Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240 792
York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481 ..... 915 952, 953, 1122, 1123
Young v. Amy, 171 U. S. 179, 43 L. ed. 127, 18 Sup. Ct. Rep. 802 458

STATUTES AND CONSTITUTIONS CITED, CONSTRUED, ETC.

Cherokee Nation.

Constitution, 1839.

Art. 1, § 2. Common property..99, 101
Art. 3, § 5. Eligibility to seat in National Council 100, 101
Art. 3, § 14. Powers of National Council 99

Constitution, 1866.

§ 5. Eligibility to seat in National Council 101

Code, 1874.

Art. 15, § 75. Rights of intermarried whites 100, 102

Laws.

1877, Nov. 28. Rights of intermarried whites....100, 104
1880, Nov. 27. Intermarried whites.. 101
1892, § 669. Office found 105
1895, Dec. 16. Intermarried whites 104
1902, August 7. Ratification of Cherokee agreement 102

Choctaw Nation.

Laws.

1888, Oct. 30. Sheriff's sale .. 496, 498
1895, Oct. 30. Appropriation to defend suits 497, 499

Cuba.

Mortgage Law.

Arts. 2, 23. Recording act. 1096
Art. 42. Cautionary notice 1096
Arts. 71, 107. Lis pendens 1095, 1096

France.

Code Napoleon.

Art. 299. Community property .. 377
Art. 1421. Community property ... 378, 380
Art. 1443. Community property 379

Spain.

Laws.

Law 13, tit. 7, pt. 3. Lis pendens .. 1095

Mortgage Law for Cuba, Porto Rico, and Philippine Islands.

Arts. 2, 23. Recording act 1096
Art. 42. Cautionary notice 1096
Arts. 71, 107. Lis pendens 1095, 1096

United States.

Constitution.

Art. 1, § 8. Power of Congress .. 968, 970, 971, 973
Art. 1, § 8. Commerce clause 86, 112, 180, 181, 190, 191, 213–215, 296, 421, 728, 729, 841, 987–992
Art. 1, § 8. Patents 217
Art. 1, § 8. Postoffices and post roads 190
Art. 1, § 9. Suspension of habeas corpus 142
Art. 1, § 10. Impairing contract obligations 136, 203, 235–241, 393–397, 399–411, 788, 886, 1062, 1159–1163, 1174, 1178, 1182
Art. 1, § 10. Duties on imports or exports 85, 86
Art. 3. Judiciary 266, 968, 1181
Art. 3, § 2, cl. 3. Venue of criminal trial 693, 695
Art. 4, § 1. Full faith and credit .. 111, 347–351
Art. 4, § 2. Extradition 153, 159, 160, 162
Art. 4, § 3. Power of Congress..971, 972
Art. 4, § 4. Republican form of government. 384
5th Amend. Criminal prosecutions 108, 109
5th Amend. Self-crimination 894
5th Amend. Former jeopardy..573, 1088, 1091
5th Amend. Due process of law. .. 1104
6th Amend. Venue of criminal trial 573, 693, 695
10th Amend. Reserved powers 971, 972
11th Amend. Suits against state .. 1080
13th Amend. Slavery 66, 68–70, 73–77
14th Amend. Due process of law .. 136, 147, 171–173, 175, 177, 185, 191, 206–208, 236, 239, 308–310, 312, 313, 348, 351, 399–411, 421, 466, 471, 474, 501, 504, 522, 573, 638, 668, 700, 716, 748, 760, 761, 855, 886, 888, 939, 942, 944, 945, 1111, 1113, 1172, 1178, 1182

14th Amend. Equal protection of the laws 136, 147 171–173, 175, 185, 191 308–310, 312, 317, 358–360 421, 466, 471, 501, 504 522, 573, 638, 700, 716 942, 944, 945

14th Amend. Privileges and immunities 185, 191, 317 466, 471, 522, 700, 716 880–882

14th Amend. Personal liberty ...58, 73 75–77

Statutes.

1789, Sept. 24 (1 Stat. at L. 73, chap. 20). Judiciary act 112

1802, April 14 (2 Stat. at L. 153, chap. 28). Citizenship 429

1806, April 10 (2 Stat. at L. 359, chap. 20), art. 97. Composition of court-martial 1047

1817, March 1 (3 Stat. at L. 348, chap. 23). Admission of Mississippi to the Union 777

1819, Feb. 22 (8 Stat. at L. 258). Treaty with Spain 251 252

1819, Sept. 4 (7 Stat. at L. 203). Treaty with Chippewa Nation 166–168

1822, March 30 (3 Stat. at L. 654, chap. 13), § 6. Establishing territorial court 253

1822, May 8 (3 Stat. at L. 709, chap. 129). Private land claims 253

1823, March 3 (3 Stat. at L. 750, chap. 28), § 7. Establishing territorial court 253

1823, March 3 (3 Stat. at L. 754, chap. 29). Private land claims 253

1824, May 26 (4 Stat. at L. 52, chap. 173). Private land claims 253

1827, Feb. 8 (4 Stat. at L. 202, chap. 9). Private land claims 253

1828, May 23 (4 Stat. at L. 284, chap. 70), § 6. Private land claims 251, 253 254

1834, June 30 (4 Stat. at L. 729, chap. 161). Indians; including whites 99

1835, Dec. 29 (7 Stat. at L. 478). Cherokee treaty ... 99

1836, June 15 (5 Stat. at L. 50, chap. 100). Admission of Arkansas into the Union 777

1842, August 9 (8 Stat. at L. 572–576). Art. 10. Treaty with Great Britain; extradition 818 819

1846, August 6 (9 Stat. at L. 871). Cherokee treaty .. 99

1848, July 19 (9 Stat. at L. 248, chap. 104). § 5. Extra pay to Navy and Army officers 515. 516

1850, Sept. 28 (9 Stat. at L. 519. chap. 84). Swamp land act 955

1854, March 16 (10 Stat. at L. 1043). Indian treaty 131

1854, Dec. 26 (10 Stat. at L. 1132). Indian treaty 131

1855, Jan. 31 (10 Stat. at L. 1159). Indian treaty 132

1856, Feb. 5 (11 Stat. at L. 663). Treaty with Indians 1141 1142

1856, May 15 (11 Stat. at L. 9, chap. 28). Railway land grant 1149, 1150 1153

1860, June 22 (12 Stat. at L. 85, chap. 188), § 1. Private land claims 252

§ 3. Confirmation of Florida land claims 252–254

§ 11. Appeals in private land claim cases 250. 251

1862, Feb. 25 (12 Stat. at L. 346, chap. 33). State taxation of national banks 908

1862. July 2 (12 Stat. at L. 503, chap. 130). Land grant to promote education in agricultural and mechanic arts 1064

1862, Dec. 31 (12 Stat. at L. 633, chap. 6). West Virginia enabling act.. 1071 1078

1863, Feb. 25 (12 Stat. at L. 665, chap. 58). National banks 1011, 1012

§ 24. Official reports .. 1011

§ 39. Oath of directors 1012

§ 45. Official reports .. 1012

§ 50. Liability of directors 1012, 1013

§ 52. Liability of directors 1012

1864, May 5 (13 Stat. at L. 64, chap. 79). Railroad land grant 439
1864, June 3 (13 Stat. at L. 109, chap. 106). National banks; official reports 1012
§ 9. Oath of directors 1012
§ 28. Acquisition of real estate 1013
§ 29. Loans 1013
§ 35. Loans 1013
§ 36. Indebtedness ... 1013
§ 37. Circulation 1013
§ 38. Withdrawing capital 1013
§ 39. Use of notes of other banks 1013
§§ 53, 55. Liability of directors 1012, 1013
1864, July 2 (13 Stat. at L. 365, 367, chap. 217). Railroad land grant ..439–441 740
1865, Sept. 29 (14 Stat. at L. 687). Treaty with Osage Indians 1018
1866, July 19 (14 Stat. at L. 799). Cherokee treaty 99
1866, July 25 (14 Stat. at L. 236, chap. 241). Railroad land grant 512
1866, July 26 (14 Stat. at L. 251, chap. 262). Mining claims 480
1866, July 26 (14 Stat. at L. 289, chap. 270). Railroad land grant .. 512
1867, Feb. 25 (14 Stat. at L. 409, chap. 77). Dalles military wagon road land grant 120
1868, March 2 (15 Stat. at L. 38, chap. 16). Railway land grants 1149
1869, March 3 (15 Stat. at L. 326, chap. 130). National banks; official reports 1012
1869, April 6 (16 Stat. at L. 7, chap. 11). Offenses against national bank act 1013
1870, July 8 (16 Stat. at L. 195, chap. 226). Offenses against national bank act 1013
1871, Feb. 6 (16 Stat. at L. 404, chap. 38). Indian allotments ...1141, 1142
1872, May 10 (17 Stat. at L. 91, chap. 152). Mining claims 480 481
§ 2. Parallelism of end lines 480, 481
§ 3. Preservation of existing rights..480, 481
§§ 9, 12, 16. Preservation of existing rights 481
1875, March 3 (18 Stat. at L. 470, chap. 137). Judiciary act 112
Removal of causes ..141, 266 267
§ 1. Jurisdiction 659
§ 1. Venue of suit 917
§ 4. Preserving attachment liens 141
§ 5. Jurisdiction of circuit court 659
§ 8. Jurisdiction; proper district; bringing in absent defendants 706–708
1875, March 3 (18 Stat. at L. 482, chap. 152). Railroad land grants..740–742
1875, March 3 (18 Stat. at L. 485, chap. 156), § 3. Seamen 1054
1879, Feb. 19 (20 Stat. at L. 316, chap. 90). Extra pay to Navy and Army officers 515
1883, March 3 (22 Stat. at L. 484, chap. 102). Land grant to promote education in agricultural and mechanic arts 1064
1884, July 5 (23 Stat. at L. 133, chap. 229). River and harbor act 527, 534
1885, March 3 (23 Stat. at L. 340, chap. 319). Indian allotments 567, 569
1885, March 3 (23 Stat. at L. 443, chap. 355), § 2. Appeals from territorial supreme court.. 85
1887, Feb. 4 (24 Stat. at L. 382, chap. 104). Act to regulate commerce ..558, 560 612–617, 996–1002, 1127 1133–1138
§ 8. Power of Interstate Commerce Commission 558
§ 9. Pecuniary redress 558 559
§ 10. Obtaining less than regular rates.. 564 51

§ 16. Judicial enforcement of orders 1127
§ 22. Existing remedies 558 561
1887, Feb. 8 (24 Stat. at L. 388, chap. 119). Indian allotment 131, 569
1887, March 2 (24 Stat. at L. 440, chap. 314). Appropriation for agricultural experiment station 1064
1887, March 3 (24 Stat. at L. 505, chap. 359). § 1. Set-off in court of claims 635
1887, March 3 (24 Stat. at L. 522, chap. 373). Removal of causes 266–268
Jurisdiction of circuit court 112, 518, 520
1888, Feb. 18 (25 Stat. at L. 35, chap. 13). Railway right of way through Indian Territory 496
1888, April 11 (25 Stat. at L. 400, chap. 860). River and harbor act..... 527
§§ 9, 10. Obstructions to navigation 527
1888, August 13 (25 Stat. at L. 435, chap. 866). Judiciary act...518, 520, 1015
Removal of causes....266-268
§ 1. Jurisdiction of circuit court 659
§ 1. Venue of suit..... 917
1889, Feb. 22 (25 Stat. at L. 676, chap. 180). Montana enabling act 491, 492
§ 17. Grant of public lands..491, 492, 494, 495
1889, March 2 (25 Stat. at L. 855, chap. 382), § 6. Establishing interstate tariffs 563, 564
1889, July 12 (26 Stat. at L. 1508). Extradition treaty with Great Britain 817 818
1890, May 2 (26 Stat. at L. 81, chap. 182, §§ 1, 4, 6. Oklahoma organic act; territorial powers... 109
§§ 9, 10. Venue of criminal trial 109
1890, June 10 (26 Stat. at L. 140, chap. 407). Customs administrative act 412 414
§ 20. Duty on withdrawals from bonded warehouses 412–414
1890, July 2 (26 Stat. at L. 209, chap. 647), § 7. Anti-trust act; action for three-fold damages.. 244
1890, August 8 (26 Stat. at L. 313, chap. 728). Wilson act...179–181, 728, 729 991
1890, August 30 (26 Stat. at L. 417, chap. 841). Appropriation to promote education in agricultural and mechanic arts 1064
1890, Sept. 19 (26 Stat. at L. 426, chap. 907). Appropriations 527, 1055
§§ 2, 6, 7. Rivers and harbors 1055
§§ 4, 5. Obstructions to navigation 527
1890, Oct. 1 (26 Stat. at L. 624, chap. 1244). Amendment to customs administrative act 412
§ 50. Duties; withdrawals from bonded warehouses 412, 415
1891, March 3 (26 Stat. at L. 826, chap. 517), § 5. Direct appeal from circuit court..140, 171 183
198, 202, 251, 323 433
434, 507, 659, 782 783
§ 6. Jurisdiction of circuit court of appeals ..250, 643, 810 875
1892, May 5 (27 Stat. at L. 25, chap. 60). Chinese exclusion 70
1892, July 13 (27 Stat. at L. 88, chap. 158), § 3. Rivers and harbors 1055
1892, July 22 (27 Stat. at L. 255, chap. 230). Public improvements 743
1892, August 1 (27 Stat. at L. 340, chap. 352). Eight hour law 1052, 1053
1893, Feb. 9 (27 Stat. at L. 436, chap. 74). Patents; interference cases; appeal 283
1893, March 2 (27 Stat. at L. 531, chap. 196), § 2. Automatic couplers... 684
685 687
§ 6. Four-wheeled cars 685
§ 8. Assumption of risk 686
687
1893, March 3 (27 Stat. at L. 612, 633, chap. 209). Indian appropriation act 131
§ 16. Indian allotments 550

1893, March 3 (27 Stat. at L. 744, chap. 219). Confirming title in Indian allottees 1141, 1142
1893, March 3 (27 Stat. at L. 751, chap. 226). Habeas corpus 323
1894, August 13 (28 Stat.at L. 278, chap. 280). Mechanics' and materialmens' liens.....517, 520
1894, August 13 28 Stat. at L. 279, chap. 282), § 5. Suits against surety companies 518, 520
1894, August 15 (28 Stat. at L. 286, chap. 290). Indian allotments 570
1894, August 24 (28 Stat. at L. 501, chap. 328). Public improvements 743
1895, March 2 (28 Stat. at L. 876, 895–897, chap. 188). Indian allotments .. 720
1896, June 10 (29 Stat. at L. 339, chap. 398). Indian citizenship 550
1897, July 24 (30 Stat. at L. 151, chap. 11). Tariff act 794, 1022, 1035
§ 33. Withdrawals from bonded warehouses 412–415
¶ 193. Articles not specially provided for 1035
¶¶ 306, 307. Duties on cotton cloth....127, 128
¶ 313. Duty on figured cotton cloth....127, 128
¶ 351. Wools ...1022, 1023
¶ 358. Wools on the skin 1022
¶ 360. Wools on the skin 1022, 1023, 1026
¶ 408. Loose beads... 1035 1036
¶ 571. Hair 1022
¶ 664. Skins and hides 1022 1026
1898, April 26 (30 Stat. at L. 364, 365, chap. 191), § 7. Pay of officer exercising higher command 753–755
1898, May 4 (30 Stat. at L. 369, chap. 234). Volunteer officer 515
1898, June 28 (30 Stat. at L. 495, chap. 517), § 21. Indian enrolment...102–104
1898, July 1 (30 Stat. at L. 544, chap. 541), Bankrupt act
§ 17, subd. 4. Discharge 764
§ 19. Bankruptcy; jury trial 293, 294
§ 23b. Suits by trustee 914
§ 25a. Appeals 294
§ 25b, ¶ 2. Appeals in bankruptcy cases... 129
§ 57. Filing claims 391, 392
§ 57g. Preferences 604
§ 57h. Secured creditors 948
§ 60a. Preferences 599, 605
§ 60b. Preferences 597, 599 914
§ 63a. Provable debts.. 764
§ 64. Preferences 437
§ 64a. Preferences 284, 286–289
§ 67d. Preservation of liens 953
§ 67e. Suits by trustee 914
§ 70. Assets; life insurance; cash surrender value 772, 774–776
§ 70a. Title of trustee 915 953, 1124
§ 70e. Title of trustee 953 1124
1898, July 1 (30 Stat. at L. 591, chap. 545). Appeals in Indian citizenship cases 550, 552
1898, August 12 (30 Stat. at L. 1742). Protocol with Spain 794
1898, Dec. 10 (30 Stat. at L. 1754). Treaty with Spain.. 515
1899, Jan. 12 (30 Stat. at L. 784, chap. 46). Extra pay to Army officers; muster out and discharge 1046, 1047
1899, March 2 (30 Stat. at L. 977, chap. 352), § 15. Muster out of volunteer Army 1047
1899, March 3 (30 Stat. at L. 1007, chap. 143). Navy personnel act..... 1037
§ 13. Relative pay of Army and Navy officers 1037
1899, March 3 (30 Stat. at L. 1121, chap. 425). River and harbor act...527–530 1055
§ 9. Bridge over navigable stream 1059
§ 18. Obstruction to navigation 527–530
1899, March 3 (30 Stat. at. L. 1228, chap. 427). Extra pay of naval officers 515
1899, April 11 (30 Stat. at L. 1754). Treaty of peace with Spain 794, 1100
1900, April 12 (31 Stat. at L. 85, chap. 191). Government of Porto Rico 564 565, 1097

§ 8. Continuing local laws in force..... 1097
§ 34. Application of Federal laws to Porto Rico 376
§ 34. Porto Rico district court 565, 566, 1097
§ 35. Appeals to Supreme Court..... 565
1900, April 30 (31 Stat. at L. 141, chap. 339). Hawaiian organic act..836, 1030
§ 6. Continuing laws in force 836
§ 55. Legislative power 836
§ 55. Sectarian education 1030
§ 86. Error to Hawaiian supreme court 901
§ 96. Fishing rights... 836
1900, May 26 (31 Stat. at L. 205, chap. 586). Extra pay to Army officers 1047
1900, May 31 (31 Stat. at L. 221, chap. 598). Indian enrolment 102, 103
1900, June 6 (31 Stat. at L. 677, chap. 813). Indian allotment 109
1900, June 7 (31 Stat. at L. 697, chap. 859). Naval surgeons 1037
1901, Jan. 26 (31 Stat. at L. 741, chap. 181). Bridge over navigable stream... 1059
1901, Feb. 6 (31 Stat. at L. 760, chap. 217). Indian allotments 571
1901, March 2 (31 Stat. at L. 895, chap. 803). Army appropriation act; Platt amendment... 796 797
1901, March 2 (31 Stat. at L. 910, chap. 803). Temporary civil government for Philippine Islands 1100
1901, March 2 (31 Stat. at L. 953, chap. 812, § 3. Jurisdiction of district court for Porto Rico 376
1901, March 3 (31 Stat. at L. 1093, chap. 846). Public lands 109
1901, March 3 (31 Stat. at L. 1189, chap. 854). District of Columbia Code.. 273 808
§ 233. Appellate jurisdiction of Federal Supreme Court 273, 808 810
§ 669. Trusts in favor of cemetery associations 579, 580
§ 841. Embezzlement.. 808
§ 1023. Perpetuities .. 576 579–581
1902, March 8 (32 Stat. at L. 54, chap. 140). Tariff act for Philippine Islands..1101, 1102, 1106
1902, June 28 (32 Stat. at L. 481, chap. 1302). Construction of Panama canal 352, 356
1902, July 1 (32 Stat. at L. 641, chap. 1362). Choctaw and Chickasaw citizenship court 550, 552
1902, July 1 (32 Stat. at L. 691, chap. 1369). Civil government in Philippine Islands...1088, 1092 1101, 1105, 1106
Former jeopardy...1088, 1092
Bill of rights for Philippine Islands 573
§ 5. Philippine act; suspension of writ of habeas corpus 142
§ 10. Appeals 143
1902, July 1 (32 Stat. at L. 716, chap. 1375). Cherokee agreement 102
§§ 25–31. Enrollment.. 102 104
1902, Dec. 15 (32 Stat. at L. 753, chap. 1). Duties on withdrawals from bonded warehouses 413
1903, Feb. 2 (32 Stat. at L. 791, chap. 349). Quarantine of infected animals .. 299 300, 303
1903, Feb. 5 (32 Stat. at L. 797, chap. 487). Suits by trustee 914
§ 19. Effect of pending cases 914
1903, Feb. 19 (32 Stat. at L. 847, chap. 708). Elkins act 562
§ 1. Published tariffs.. 562
§ 3. Enforcing published tariffs 562
1903, March 2 (32 Stat. at L. 943, chap. 976). Automatic couplers..... 985
1903, March 3 (32 Stat. at L. 1010, chap. 994). Indian appropriation act... 1018
§ 13. Claims for selling Osage lands 1018

1903, March 3 (32 Stat. at L. 1213, chap. 1012), § 2. Immigration; exclusion of diseased alien 429, 430

1903, Nov. 18 (33 Stat. at L. 2234). Treaty with Panama 356

1904, Jan. 18 (33 Stat. at L. 6, chap. 5). Bridge over navigable stream... 1060

1904, April 28 (33 Stat. at L. 429, chap. 1758). Temporary government for Panama Canal Zone 356

1905, Feb. 24 (33 Stat. at L. 811, chap. 778). Jurisdiction of circuit court 520

1905, March 2 (33 Stat. at L. 843, chap. 1311). Panama canal 356

1905, March 3 (33 Stat. at L. 1035, chap. 1465), § 3. Error to Hawaiian supreme court..... 901

1905, March 3 (33 Stat. at L. 1048, 1071, chap. 1479). Cherokee enrolment 97

1906, March 23 (34 Stat. at L. 84, chap. 1130). River and harbor act..... 527

§§ 4, 5. Obstructions to navigation 527

1906, June 15 (34 Stat. at L. 267). Private land claims 224

1906, June 29 (34 Stat. at L. 611, chap. 3597). Panama canal 356

1906, June 30 (34 Stat. at L. 636, chap. 3912). Ratification of duties collected in Philippine Islands...1102, 1103, 1106

Joint Resolution.

1898, April 20 (30 Stat. at L. 738). Cuban independence 794, 795

1898, July 7 (30 Stat. at L. 750). Annexation of Hawaii 1030

Revised Statutes.

§ 3. Vessels 1054

§§ 441, 463. Indian affairs 721

§§ 482, 483. Patent office regulations 283, 284

§ 572. Regular terms 565

§ 581. Special term 565

§ 658. Regular term 565

§§ 664–669. Regular and special terms 566

§ 670. Regular and special terms .. 564, 566

§ 709. Error to state court 299, 303, 384, 494, 604, 302, 895, 1182

§ 720. Enjoining proceedings in a state court 213, 827, 828

§ 725. Contempt 324

§ 738. Jurisdiction; proper district; bringing in absent defendants 706, 707

§ 753. Habeas corpus 108, 323

§ 766. Habeas corpus 323

§§ 823, 847. Fees of clerk 635

§ 828. Fees of clerk.....618, 619, 635

§ 905. Full faith and credit....111, 126, 748

§ 1000. Supersedeas on appeal 262

§ 1014. Removal to another Federal district 692–695

§ 1047. Limitations 244, 245

§ 1059. Set-off in court of claims.. 635

§§1261, 1262. Army pay 1037

§ 1342. Articles of War..... 1046

Arts. 75, 77, 79. Composition of courts-martial 1046

§ 1466. Respective rank of Army and Navy officers... 1037

§ 1851. Territorial legislation..... 85

§ 1909. Appeals from territorial courts 258

§§ 1977–1979. Civil rights....66, 68, 71

§ 1986. Fees in civil rights cases.. 635

§ 2027. Certifying complaints in civil rights cases... 635

§§ 2134, 2135, 2147, 2148. Indians; including whites ... 99

§ 2172. Citizenship 428, 429

§§ 2237, 2238, 2240, 2241. Compensation of registers and receivers 1021

§ 2320. Mining claims; parallelism of end lines 480

§ 2322. Mining claims; preservation of existing rights... 480

§ 2970. Duties; abandonment for loss or leakage..... 414

§ 2983. Duties; abandonment for loss or leakage..412, 413

§ 2998. Duties 413

§ 3701. State taxation of national banks 908

§ 3717. Public works 1055

§ 4612. Vessels and seamen..... 1054

§ 4898. Assignment of patent rights 217

§§ 4904, 4909–4911. Interference cases; appeal 282–284

§ 5044. Assignment by register in bankruptcy 611

§§ 5046, 5047. Title of assignee 611
§ 5057. Limitation of actions in bankruptcy cases... 608, 609, 611, 612
§ 5137. Acquiring real estate..... 1013
§ 5143. National banks; reduction of capital stock..... 344
§ 5147. Oath of directors 1012
§ 5151. Liability of stockholders in national bank 426, 427
§§ 5200, 5201. Loans 1013
§ 5202. Indebtedness 1013
§ 5203. Circulation 1013
§ 5204. Withdrawing capital..... 1013
§ 5206. Use of notes of other banks 1013
§ 5209. Offenses against national bank act 1013
§ 5211. Official report 1012
§ 5219. State taxation of shares in national banks 909
§ 5239. Liability of directors of national banks...1009, 1010, 1013–1015
§§ 5272, 5275. Extradition 818
§ 5278. Extradition....153, 160, 162–164
§ 5339. Homicide 109
§ 5440. Conspiracy 816
§ 5444. Admitting imports for less than legal duty 816, 817
§ 5508. Civil rights....66, 68, 70, 72, 76, 77
§ 5510. Civil rights.....66, 67, 71

Arizona.

Revised Statutes.

§§ 3849, 3861, 3874, 3877. Taxation 1147
§ 3880. Taxes; equalization 1147

Revised Statutes, 1901.

¶¶ 1485, 1582. Record on appeal 459

Arkansas.

Acts.

1893, Feb. 15. Levee taxes..464, 471, 475
1895, April 2. Levee taxes 465

Kirby's Digest.

§ 513. Sale of patent rights 220

California.

Acts.

1866, April 2, § 2. Private land claims 223
1893, March 3 (Laws 1893, p. 220). Admission to places of public amusement 522

Colorado.

Constitution.

Art. 20. Incorporation of Denver county 384

Laws.

1897, chap. 51, § 1. Foreign corporations 394
1901, chap. 52, § 10. Foreign corporations 394
1902, March 22, §§ 64, 65. Foreign corporations 394
§ 66. Foreign corporations 394, 398

General Laws, 1877.

§ 2282. Taxes; equalization 1147

Mills's Annotated Statutes.

§ 499. Foreign corporations 393
§ 500. Foreign corporations 394

Connecticut.

Laws.

1860, June 20. Street railway charter 238
1864, July 9. Amending street railway charter....238, 241
1893, chap. 169, § 6. Street railways; keeping street in repair 239, 241
1895, July 1. Duty of street railway company to pave and repave street 238–241
1899, April 28. Assessment for street improvement 238–240

Public Laws.

§§ 3694, 3695. Condemnation of shares of railway stock.... 236

District of Columbia.

Code.

§ 233. Appellate jurisdiction of Federal Supreme Court 273, 808, 810
§ 669. Trusts in favor of cemetery associations 579, 580
§ 841. Embezzlement 808
§ 1023. Perpetuities 576, 579–581

Florida.

Laws.

1899, chap. 4700, § 8. Regulation of railroad rates..... 175

Georgia.

Laws.

1902, Dec. 3. Municipal waterworks construction ...199, 202

Hawaii.

Laws.

1850 (F. C. 1850) 158. Acceptance of transfer of mission.. 1023

Civil Code, 1859.

§ 783. Acceptance of transfer of mission 1028

Idaho.

Revised Statutes.

§§ 1210, 1211. Sheep grazing ..500, 501, 504

Illinois.

Constitution, 1870.

Art. 4, § 29. Mine employees 714

Laws.

1895, p. 301. Inheritance tax ...317, 318
1899, April 18. Mining act 714
1901, May 10. Inheritance tax..317, 318

Revised Statutes.

Chap. 93. Mining act 714
Chap. 110, §§ 30, 31. Cross demands 490
Chap. 110, § 57. Verdict on several counts where one is defective 718

Iowa.

Code.

§§ 1321, 1322, 1325. Corporate taxation 907

Code, 1897.

§§ 1999, 2009–2013. Eminent demain 630, 633

Acts.

1856. July 14. Acceptance of railway land grant 1149
1868, April 7. Designating beneficiary of railway land grant 1149

Kansas.

Laws.

1889, chap. 182. Sale of patent rights 216

Dassler's General Statutes.

§ 4234, ¶ 19. Recording act 196
§ 4241, ¶ 26. Recording act 196
§ 4251, ¶ 36. Satisfaction of chattel mortgage 196

Kentucky.

Acts.

1869–70, Vol. 2, pp. 225,–231. Railroad aid bonds...860–864

Statutes.

§ 3179. Assessment of back taxes.. 207
§ 3180. Taxation 207
§ 3181. Equalization of taxes..... 207
§§ 4079, 4080. Franchise tax 112

Statutes, 1903.

§ 2557b, subs. 4. C. O. D. shipments of intoxicating liquors 988

Louisiana.

Code.

Art. 2404. Community property 378

Acts.

1898, No. 170, § 7. Taxation 855
1904, June 28. Inheritance tax..... 312

Maryland.

Code, 1888.

Art. 23, §§ 187, 188. Railway reorganization 115

Acts.

1886, chap. 133, §§ 2–5. Railway incorporation; consolidation 114
1896, chap. 120. Railway taxation.. 115, 116

Massachusetts.

Revised Laws.

Chap. 193, § 22. Review of judgments rendered without notice 752
Vol. 2, 1382, § 24. Sittings of courts 748

Michigan.

Compiled Laws.

Vol. 3, p. 3254. Lien on vessel..... 839
1897, § 5157. Foreign insurance companies 800
§ 10467. Foreign corporations 800

Minnesota.

Constitution.

Art. 10, § 3. Stockholder's liability 1173

General Statutes, 1894.

Chap. 76. Stockholder's liability 1174

General Laws, 1899.

Chap. 272. Stockholder's liability ... 1172, 1174

Mississippi.

Code, 1857.

P. 64. State boundary 778

Code, 1892.

§ 3550. Stopping passenger trains at county seats 214
§ 4302. Stopping trains at depots... 214

Laws.

1886, chap. 358, § 5. Vicksburg charter; water rates.....1156 1161

1900, March 18. Municipal ownership of waterworks.. 1156

1904, p. 231. Municipal regulation of water rates..1157, 1160

Missouri.

Revised Statutes, 1879.

§ 5982. Insurance; suicide as defense 897 899

Revised Statutes, 1889.

§ 5855. Insurance; suicide as defense 897 899, 900

Revised Statutes, 1899.

§ 2517. Criminal procedure 895

§§ 7890, 7891. Misrepresentation in insurance application 171 172

§ 7896. Insurance; suicide as defense 897

Montana.

Constitution.

Art. 11, § 12. Funds of educational institutions ....:491, 492

Code of Civil Procedure.

§§ 637, 638. Substituted service 140

§§ 890, et seq. Attachment 140

Acts.

1905, Feb. 2. Normal school lands....491 492

Nebraska.

Acts.

1903, July 3. Protection of national flag 699

Criminal Code.

§ 124. Embezzlement; punishment.. 668

Cobbey's Annotated Statutes, 1903.

Vol. 1, chap. 139. Protection of national flag..... 700

New Jersey.

General Statutes, 1895.

§§ 251, 252, 257, 258, 260. Franchise tax 286

New Mexico.

Statutes.

§§ 2922, 3002. Instructions to jury.. 665

Laws.

1901, March 19. Hide inspection.... 85

New York.

Laws.

1839, chap. 156. § 6. Trust in favor of cemetery association 580

1850, chap. 140. Street railway incorporation 785

1867, chap. 254. Railway consolidation 785

1879, chap. 503. Railway consolidation 785

1884, chap. 252. Street railway incorporation 785

1890, chap. 565. Street railways; paving obligation 784

1892, chap. 688, § 55. Limitation of action; stockholder's liability 1176

1897, chap. 284. Inheritance tax .. 886

1905, chap. 241. Stock transfer tax 421

Code of Civil Procedure.

§§ 382, 394. Limitation of actions .. 1176

North Carolina.

Laws.

1889, chap. 221. Dealing in futures 307

1905, chap. 538. Dealing in futures 307–310

Ohio.

Acts.

1851, March 21, § 30. Free banking act; criminal liability of bank officials 358 359

70 Ohio Laws, 40 (1873, Feb. 26). Incorporation of savings and loan associations 358

76 Ohio Laws, 74 (1879, April 24). Criminal liability of bank officials 358

Revised Statutes, 1880.

§ 3235. Banking act 358

Bates's Annotated Statutes.

Vol. 2, 6th ed. §§ 3821–3885. Criminal liability of bank officials 358

Oklahoma.

Code.

§§ 18, 23. Limitation of actions.. 654 655

§§ 687, 694. Mandamus 655

Wilson's Revised Statutes.

Vol. 2, pp. 973, 975. Limitation of actions 654

Vol. 2, p. 1131. Mandamus 655

Pennsylvania.

Acts.

1868, April 4. Liability of carrier for negligence 190

1883, June 20. Service of process on foreign insurance company 349

Philippine Islands.

Public Laws of Philippine Commission; Code of Procedure, 1901.

Chap. 22, § 497, subd. 3. Review of facts in Supreme Court 859

Mortgage Law.

Arts. 2, 23. Recording act 1096
Art. 42. Cautionary notice 1096
Arts. 71, 107. Lis pendens 1095, 1096

Penal Code.

Art. 402. Parricide 1087
Art. 403. Assassination 1087, 1089
Art. 404. Homicide 1087, 1089
Arts. 433, 434. Adultery 572

Porto Rico.

Civil Code, 1889.

Art. 73, ¶ 3. Community property; effect of divorce .. 377, 380, 381
Arts. 1412, 1413. Community property; power of husband 378
Art. 1417. Community property; effect of nullity of marriage 377
Arts. 1434, 1435. Community property 380
Art. 1733. Community property 380

Civil Code, 1902.

§ 173. Community property; effect of divorce 381
§ 174, tit. 5, chap. 5. Community property; effect of divorce 377, 380
§§ 1327, 1328. Community property; power of husband.. 378, 380
§ 1330. Community property; effect of nullity of marriage 377

Mortgage Law.

Arts. 2, 23. Recording act 1096
Art. 42. Cautionary notice 1096
Arts. 71, 107. Lis pendens 1095, 1096

South Carolina.

Joint Resolution.

1903, Feb. 20. Writing state bonds off the treasurer's books 1062

Tennessee.

Code.

§§ 2769, 2772, 2773, 2776. Limitations 244, 245

Shannon's Code.

§§ 4466, 4469, 4470, 4473. Limitations 245

Texas.

General Laws.

1905. p. 30, §§ 2, 3. Service on foreign corporation ... 851, 853

Sayles's Civil Statutes.

Art. 1194, § 25. Service on foreign corporations 851

Virginia.

Acts.

1861, April 17. Secession act 1070
1862, May 13. Consent to creation of West Virginia 1080
1863, Feb. 3. Transfer of public property to West Virginia 1071, 1079
1863, Feb. 4. Transfer of public property to West Virginia 1072, 1079
1871, March 30. Public debt ..1073, 1081
1879, March 28. Public debt ..1073, 1081
1882, Feb. 14. Public debt 1073, 1081
1892, Feb. 20. Public debt 1073, 1081
1894, March 6. Public debt ...1075, 1081
1900, March 6. Public debt ...1075, 1081

Code, 1887.

§§ 1955, 1960, 1963, 1965, 1969, 1976, 1978–1982, 1985. Pilots 247

Ordinance of Restored State.

1861, August 20, § 9. Creation of West Virginia; assumption of Virginia public debt 1071, 1078, 1080

Washington.

Laws.

1889, 1890, p. 499. § 1. Alienation of property by Indians 131

Ballinger's Code.

§ 6959. Commitment of insane criminal 761

West Virginia.

Constitution.

Art. 8, §§ 5, 7, 8. Public debt 1072, 1079

Code.

Chap. 53, § 8. Amending corporate charters 145
Chap. 54, § 24. Service of process on corporation 145

Acts.

1905, chap. 39. Service of process on nonresident domestic corporation 145

Wyoming.

Laws.

1890–91, chap. 92. Establishing agricultural college 1063

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1906,

Vol. 203.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1906,

AND REPORTED HEREIN,

VOLUME 203,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 201 U. S.	Title.	Here in.
1-2	Hodges v. United States	65
2-3	" "	66
4	" "	67
14-16	" "	68
16-18	" "	69
18-21	" "	70
21-23	" "	71
23-25	" "	72
25-28	" "	73
28-31	" "	74
31-33	" "	75
33-36	" "	76
36-38	" "	77
39	New Mexico ex rel. McLean v. Denver & R. G. R. Co.	78
46-47	" "	84
47-49	" "	85
49-51	" "	86
51-54	" "	87
54-55	" "	88
56	Landram v. Jordan	88
60	" "	89
60-62	" "	90
62-66	" "	91
66	Fidelity Mut. L. Ins. Co. v. Clark	91
72-74	" "	95
74-75	" "	96
75	Red Bird v. United States Cherokee Nation v. United States Fite v. United States Persons Claiming Rights in the Cherokee Nation v. United States	96
77	" "	97
78-80	" "	98
80-82	" "	99
82-85	" "	100
85-86	" "	101
86-89	" "	102
89-92	" "	103
92-95	" "	104
95-96	" "	105
96	Moran, Re	105
102-104	"	108
104-105	"	109
106	Northern Assur. Co. v. Grand View Bldg. Asso.	109
106-108	" "	111
109	Covington & C. Bridge Co. v. Hager	111
110-111	" "	112
112	Wicomico County Comrs. v. Bancroft	112
114-115	" "	114
115-118	" "	115
118-119	" "	116
120	Taylor v. Burns	116
120-121	" "	117
124-125	" "	118
125-126	" "	119
127	Andrews v. Eastern Oregon Land Co.	119
127-128	" "	120
128-129	" "	121
129	Burt v. Smith	121
133	" "	125
133-135	" "	126
135	" "	127
136-139	United States v. George Rigge & Co.	127
139-141	" "	128
141	Conley v. First Nat. Bank	128
142-144	" "	129
144-146	" "	130
146	Goudy v. Meath	130
146-148	" "	131
148-150	" "	132
151	National Council v. State Council	132
158	" "	135
158-161	" "	136
161-163	" "	137
163-164	" "	138
164	Clark v. Wells	138
168-170	" "	140
170-172	" "	141
172-173	" "	142

Off. Rep. Vol. & Page	Title.	Here In	Off. Rep. Vol. & Page	Title.
171–176	Fisher v. Baker	132	311–317	Mercantile Trust & T. Co. v. Tillinghast
176–182	" "	133		" "
182–183	" "	134	317–324	" "
183–184	St. Mary's Franco-American Petroleum Co. v. West Virginia		324–326	" "
			326–327	" "
		135	327–328	" "
		136	328	" "
184–186	" "	137	328–335	Security Trust & S. V. Co. v. Lexington
186–188	" "	138		" "
191–192	" "	139	335–338	" "
192	" "	140	338–340	" "
192	Petitions v. Nichols	141	340–342	" "
192	" "	142	342–345	" "
193–195	" "	143	345–348	" "
195–197	" "	144	348–350	Mississippi R. Commission v. Illinois C. R. Co.
200–205	" "	145		" "
205–207	" "	146	350–352	" "
207–209	" "	147	352–354	" "
209–212	" "	148	354–356	" "
212–214	" "	149	356–358	" "
214–217	" "	150	358–360	" "
217–219	" "	151	360–362	" "
219–221	" "	152	362–364	" "
221–222	Meyer v. Nichols	153	364–366	Allen v. Riley
222	" "	154		" "
222–224	Appleyard v. Massachusetts	155	366–368	" "
224–226	" "	156	368–370	" "
226–228	" "	157	370	John Woods & Sons v. Carr
228–231	" "	158	370–372	" "
231–232	" "	159	372	Attorney v. Jaffa
232	Francis v. Francis	160	372–374	" "
236–238	" "	161	374–376	" "
238–241	" "	162	376	" "
241–242	" "	163	376	International Trust Co. v. Woods
242	Northwestern Nat. L. Ins. Co. v. Riggs	164	376–378	" "
		165	378–380	" "
247–248	" "	166	380–382	" "
248–250	" "	167	382	Cyrus v. Owen
250–253	" "	168	382–384	" "
253–255	" "	169	384–386	" "
255	" "	170	386–388	" "
256–257	Atlantic Coast Line R. Co. v. Florida ex rel. Ellis	171	388	Offield v. New York, N. H. & H. R. Co.
257–260	" "	172		" "
261	Seaboard Air Line R. v. Florida ex rel. Ellis	173	388–390	" "
		174	390–392	" "
261–262	" "	175	392	" "
262–266	" "	176	392	Fair Haven & W. R. Co. v. New Haven
266–270	" "	177		" "
270–271	Heyman v. Southern R. Co.	178	394–396	" "
271–273	" "	179	396–398	" "
273–276	" "	180	398–400	" "
276–278	" "	181	400	Chattanooga Foundry & P. Works v. Atlanta
278	C. H. Nichols Lumber Co. v. Franson	182	400–402	" "
		183	402–404	" "
280–282	" "	184	404	Coy v. Donald
282–283	" "		404	" "
284	Martin v. Pittsburg & L. R. R. Co.	185	404–406	" "
		186	406–408	" "
284–285	" "	187	408	United States v. Dotson
285–288	" "	188	420	" "
289–290	" "	189	420–422	" "
290	" "	190	422–424	" "
290–298	National Live Stock Bank v. First Nat. Bank	191	424–426	" "
		192	426–428	" "
298–300	" "	193	428–430	" "
305	" "	194	430–434	New York Pneumatic Hose Co. v. Gatti
305–307	" "	195		" "
307–310	" "	196	434	" "
310	" "	197	434–436	" "

28 Fed. No.	Title.	Here in.	Off. Rep. 208 U. S.	Title.	Here in.
[illegible]	New York Foundling Hospital v. Gatti	257	499	Alabama & V. R. Co. v. Railroad Commission	291
[illegible]	" "	258	499–501	" "	292
[illegible]	" "	259	502	Frederick L. Grant Shoe Co. v. W. M. Laird Co.	292
[illegible]	" "	260			
[illegible]	Jacobs v. Buckley	260	502–504	" "	293
[illegible]	" "	261	504–505	" "	294
[illegible]	" "	262	505–506	Western U. Teleg. Co. v. Hughes	294
[illegible]	" "	263			
[illegible]	Ex parte Ferry	264	506–507	" "	295
[illegible]	" "	266	507	Rearick v. Pennsylvania	295
[illegible]	" "	267	509–510	" "	296
[illegible]	" "	268	510–512	" "	297
[illegible]	" "	269	512–513	" "	298
[illegible]	United States ex rel. Taylor v. Taft		514–515	Illinois C. R. Co. v. McKendree	298
[illegible]	" "	269	515–517	" "	299
[illegible]	" "	270	517–520	" "	300
[illegible]	" "	271	520	" "	301
[illegible]	" "	272	524	" "	302
[illegible]	" "	273	524–527	" "	303
[illegible]	" "	274	527–529	" "	304
[illegible]	" "	275	529–530	" "	305
[illegible]	" "	276	531	Illinois C. R. Co. v. Edwards	305
[illegible]	Little Valley, G. N. R. Co. v. Lynn		531	Gatewood v. North Carolina	305
[illegible]	" "	276	535–536	" "	307
[illegible]	" "	277	536–539	" "	308
[illegible]	" "	278	539–541	" "	309
[illegible]	" "	279	541–543	" "	310
[illegible]	" "	280	543	Caben v. Brewster	310
[illegible]	" "	281	546–549	" "	312
[illegible]	United States ex rel. Lowry v. Allen		549–551	" "	312
[illegible]	" "	281	551–553	" "	314
[illegible]	" "	282	553	Board of Education v. Illinois	314
[illegible]	" "	283	558–559	" "	317
[illegible]	" "	284	559–562	" "	318
[illegible]	New Jersey v. Anderson	284	562–563	" "	319
[illegible]	" "	285	563	United States v. Shipp	319
[illegible]	" "	286	571	" "	322
[illegible]	" "	287	571–573	" "	323
[illegible]	" "	288	573–575	" "	324
[illegible]	" "	289	577–600	Memorandum Cases	325–334
[illegible]	Alabama & V. R. Co. v. Railroad Commission	289			

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1906.

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[1]*REUBEN HODGES, William R. Clampit, and Wash McKinney, Plffs. in Err.,

v.

UNITED STATES.†

(See S. C. Reporter's ed. 1–38.)

Civil rights—power of Congress to protect against individual interference.

Congress was not empowered by U. S. Const., 13th Amend., to make it an offense against the United States, cognizable in the Federal courts, for private individuals to compel negro citizens, by intimidation and force, to desist from performing their contracts of employment, but the remedy must be sought through state action and in state tribunals, subject to the supervision of the Supreme Court of the United States by writ of error in proper cases.

[No. 14, 1905 Term.]

Submitted October 19, 1905. Ordered for oral argument November 6, 1905. Argued April 23, 1906. Decided May 28, 1906.

IN ERROR to the District Court of the United States for the Eastern District of Arkansas to review a judgment convicting individual citizens of compelling negro citizens, by force and intimidation, to desist from performing their contracts of employment. Reversed and remanded with instructions to sustain a demurrer to the indictment.

Statement by Mr. Justice Brewer:

On October 8, 1903, the grand jury returned into the district court of the United States for the eastern district of Arkansas an indictment charging that the defendants (now plaintiffs in error), with others, "did knowingly, wilfully, and unlawfully conspire to oppress, threaten, and intimidate Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton, citizens of the United States of African descent, in the free exercise and enjoyment of rights and privileges secured to them and each of them by the Constitution and laws of the United States, and because of their having exercised the same, to wit: The said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton, being then and there persons of African descent and citizens of the United States and of the state of Arkansas, had then and there made and entered into contracts and agreements with James A. Davis and James S. Hodges, persons then and there doing business under the name of Davis & Hodges as copartners, carrying on the business of manufacturers of lumber at White Hall, in said county, the said contracts being for the employment by said firm of the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton as

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NOTE.—As to civil rights of negroes—see notes to Ferguson v. Gies, 9 L.R.A. 589; Louisville Safety Vault & T. Co. v. Louis- R. Co. 14 L.R.A. 579; Civil Rights d. U. S. 836; Carter v. Texas, S. 839; Cumming v. County 44 L. ed. U. S. 262; United 23 L. ed. U. S. 563; and D. R. Co. v. Kentucky, 45 244.

was decided at the October, but dissent was not filed until 1906.—Ed.]

laborers and workmen in and about their said manufacturing establishment, by which contracts the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton were, on their part, to perform labor and [3] services at *said manufactory, and were to receive, on the other hand, for their labor and services, compensation, the same being a right and privilege conferred upon them by the 13th Amendment to the Constitution of the United States and the laws passed in pursuance thereof, and being a right similar to that enjoyed in said state by the white citizens thereof, and while the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton were in the enjoyment of said right and privilege the said defendants did knowingly, wilfully, and unlawfully conspire as aforesaid to injure, oppress, threaten, and intimidate them in the free exercise and enjoyment of said right and privilege, and because of their having so exercised the same, and because they were citizens of African descent, enjoying said right, by then and there notifying the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton that they must abandon said contracts and their said work at said mill and cease to perform any further labor thereat, or receive any further compensation for said labor, and by threatening, in case they did not so abandon said work, to injure them, and by thereafter then and there wilfully and unlawfully marching and moving in a body to and against the place of business of the said firm while the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton were engaged thereat, and while they were in the performance of said contracts thereon, the said defendants being then and there armed with deadly weapons, threatening and intimidating the said workmen there employed, with the purpose of compelling them, by violence and threats and otherwise, to remove from said place of business, to stop said work, and to cease the enjoyment of said right and privilege, and by then and there wilfully, deliberately, and unlawfully compelling said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George [4] Shelton to quit said work and *abandon said place and cease the free enjoyment of all advantages under said contracts, the same being so done by said defendants and each of them for the purpose of driving the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall,

and George Shelton from said place (ness and from their labor because th colored men and citizens of Afric scent, contrary to the form of the sta such case made and provided, and the peace and dignity of the United S

A demurrer to this indictment, ground that the offense created by and 5508, Rev. Stat. (U. S. Comp 1901, pp. 1259, 3712), under which found, was not within the jurisdic the courts of the United States, b judicially cognizable by state tribuna was overruled, a trial had, and th plaintiffs in error found guilty, se separately to imprisonment for d terms and to fine, and to be therea eligible to any office of profit or tr ated by the Constitution or laws United States. Sections 1977, 1978 5508, and 5510 (U. S. Comp. Stat. 1 1259-1262, 3712, 3713) read as follow

"Sec. 1977. All persons within th diction of the United States shall h same right in every state and terri make and enforce contracts, to parties, give evidence, and to the f equal benefit of all laws and proceedi the security of persons and propert enjoyed by white citizens, and shall ject to like punishment, pains, pe taxes, licenses, and exactions of ever and to no other.

"Sec. 1978. All citizens of the States shall have the same right, i state and territory, as is enjoyed b citizens thereof to inherit, purchase sell, hold, and convey real and p property.

"Sec. 1979. Every person who, und of any statute, ordinance, regulatio tom, or usage of any state or territo jects, or causes to be subjected, any of the United States or other perso in the jurisdiction thereof to the dep of any rights, privileges, or immunit cured by the Constitution and laws, liable to the party injured in an at law, suit in equity, or other pro ceeding for redress."

"Sec. 5508. If two or more perso spire to injure, oppress, threaten, timidate any citizen in the free exe enjoyment of any right or privilege to him by the Constitution or law United States, or because of his ha exercised the same; or if two or m sons go in disguise on the highway the premises of another, with intent vent or hinder his free exercise o ment of any right or privilege so se they shall be fined not more than fi sand dollars and imprisoned not mo

ten years; and shall, moreover, be thereafter ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States."

"Sec. 5510. Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any state or territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both."

There being constitutional questions involved, the judgment was brought directly to this court on writ of error.

Mr. James P. Clarke submitted the cause for plaintiffs in error. Messrs. L. C. Going and J. F. Gautney were on the brief:

The right enjoyed by the African citizens set out in the indictment was not a right secured to them under the Constitution and the laws of the United States.

United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Logan v. United States, 144 U. S. 263, 286, 36 L. ed. 429, 437, 12 Sup. Ct. Rep. 617; Civil Rights Cases, 109 U. S. 3-13, 27 L. ed. 835-840, 3 Sup. Ct. Rep. 18; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601.

The right to pursue or follow any of the ordinary vocations of life is not created by the Constitution or laws of the United States, but is among the inherent and inalienable rights of man, and is, therefore, not dependent for its existence upon the Constitution.

Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.

Some of the rights guaranteed or secured by the Constitution and laws of the United States are patent or trademark rights, the right to homestead public lands, to vote in Federal elections, etc.

United States v. Waddell, 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. Rep. 35.

But a conspiracy to intimidate and compel officers of a mining company to discharge their employees, or to compel the employees to leave the service of the company, is not an offense against the laws of the United States.

Pettibone v. United States, 148 U. S. 202, 37 L. ed. 422, 13 Sup. Ct. Rep. 542.

The Emancipation Proclamation, by removing the disability of slavery, made the negro a citizen, and placed him upon the same plane before the law as the white race.

United States v. Rhodes, 1 Abb. (U. S.) 28, Fed. Cas. No. 16,151; 1 Kent, Com. 298 and note; State v. Manuel, 20 N. C. 144, (4 Dev. & B. L. 20); State v. Newsom, 27 N. C. (5 Ired. L.) 250.

Assistant Attorney General Purdy, for defendant in error on original submission. Mr. Otis J. Carlton was on the brief:

The 13th Amendment was intended to secure to the colored race practical freedom.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; United States v. Rhodes, 1 Abb. (U. S.) 28, Fed. Cas. No. 16,151; United States v. Cruikshank, 1 Woods, 308, Fed. Cas. No. 14,897; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; Re Turner, 1 Abb. (U. S.) 84, Fed. Cas. No. 14,247; Smith v. Moody, 26 Ind. 299; People v. Washington, 36 Cal. 658.

For this purpose the people used in the Amendment language which this court has said permits Congress to enact legislation operating directly to punish the acts of individuals, not sanctioned by any color of state authority.

Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429.

Cases upholding the constitutionality of the fugitive slave laws are important because they give us the rule by which to determine what is appropriate legislation.

Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; Ableman v. Booth, 21 How. 506, 16 L. ed. 169.

Attorney General Moody for defendant in error on oral argument:

The right to vote at a Federal election (Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152); the right to remain on a homestead entry for the purpose of perfecting the title (United States v. Waddell, 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. Rep. 35); the right of protection while in the custody, upon a charge of crime, of the officers of the United States (Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617); and the right to furnish information to the authorities of violations of the laws of the United States (Re Quarles, 158 U. S. 532, 39 L. ed. 1080, 15 Sup. Ct. Rep. 959; Motes v. United States, 178 U S. 458, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993),—have each been held to be rights belonging to the citizen derived from the Constitution and laws of the

United States; or, to use the words of U. S. Rev. Stat. § 5508, U. S. Comp. Stat. 1901, p. 3712, secured by the Constitution or laws of the United States, the deprivation of which by a conspiracy was punishable by this section.

The benefits of the 13th Amendment are not confined to the negro race.

Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326; Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429.

The deprivation of a constitutional right may be punished under this section even though the right may not be specifically set forth in any provision of the law or of the Constitution.

Logan v. United States and Ex parte Yarbrough, supra.

There is a valid distinction between the denial to a person of the right to labor by forcible action, which is inspired by motives of personal hostility or ill will, or which results incidentally or necessarily from the commission of an ordinary crime, and the same denial of the right to labor which is inspired by race hostility.

United States v. Cruikshank, 1 Woods, 308, Fed. Cas. No. 14,897; Civil Rights Cases, 109 U. S. 3, 22, 27 L. ed. 835, 843, 3 Sup. Ct. Rep. 18.

Mr. Justice Brewer delivered the opinion of the court:

While the indictment was founded on §§ 1977 and 5508, we have quoted other sections to show the scope of the legislation of Congress on the general question involved.

That prior to the three *post bellum* amendments to the Constitution the national government had no jurisdiction over a wrong like that charged in this indictment is conceded; that the 14th and 15th Amendments do not justify the legislation is also beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the state is complained of. Unless, therefore, the 13th Amendment vests in the nation the jurisdiction claimed, [15] the remedy must be sought through *state action and in state tribunals, subject to the supervision of this court by writ of error in proper cases.

In the Slaughter-House Cases, 16 Wall. 36, 76, 21 L. ed. 394, 408, in defining the privileges and immunities of citizens of the several states, this is quoted from the opinion of Mr. Justice Washington in Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3230:

"'The inquiry,' he says, 'is, What are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.'"

And after referring to other cases this court added (p. 77, L. ed. p. 409):

"It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments no claim or pretense was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the states,—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But, with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the Federal government."

*Notwithstanding the adoption of these three amendments, the national government still remains one of enumerated powers, and the 10th Amendment, which reads, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people," is not shorn of its vitality. True, the 13th Amendment grants certain specified and additional power to Congress, but any congressional legislation directed against individual action which was not warranted before the 13th Amendment must find authority in it. And in interpreting the scope of that Amendment it is well to bear in mind the words of Mr. Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. 1, 188, 6 L. ed. 23, 68, which, though spoken more than four score years ago, are still the rule of construction of constitutional provisions:

"As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened

patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

The 13th Amendment reads:

"Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Sec. 2. Congress shall have power to enforce this article by appropriate legislation."

The meaning of this is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the nation. It is the denunciation of a con-[17]dition, and not a declaration* in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the nation, it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon, are as much within its compass as slavery or involuntary servitude of the African. Of this Amendment it was said by Mr. Justice Miller in Slaughter-House Cases, 16 Wall. 69, 21 L. ed. 406: "Its two short sections seem hardly to admit of construction." And again: "To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government . . . requires an effort, to say the least of it."

A reference to the definitions in the dictionaries of words whose meaning is so thoroughly understood by all seems an affectation, yet in Webster slavery is defined as "the state of entire subjection of one person to the will of another," and a slave is said to be "a person who is held in bondage to another." Even the secondary meaning given recognizes the fact of subjection, as "one who has lost the power of resistance; one who surrenders himself to any power whatever; as a slave to passion, to lust, to strong drink, to ambition," and servitude is by the same authority declared to be "the state of voluntary or compulsory subjection to a master."

It is said, however, that one of the disabilities of slavery, one of the *indicia* of its existence, was a lack of power to make or perform contracts, and that when these defendants, by intimidation and force, compelled the colored men named in the indictment to desist from performing their contract, they, to that extent, reduced those parties to a condition of slavery,—that is, of subjection to the will of defendants, and deprived them of a freeman's power to perform his contract. But every wrong done to an individual by another, acting singly or in concert with others, operates *pro tanto* to abridge some of the freedom to which the individual is entitled. A freeman has a right to be protected in his person from an assault and battery. He is entitled to hold his property safe from trespass* or ap-[18] propriation; but no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery. Indeed, this is conceded by counsel for the government, for in their brief (after referring to certain decisions of this court) it is said:

"With these decisions, and many others that might be cited, before us, it is vain to contend that the Federal Constitution secures to a citizen of the United States the right to work at a given occupation or particular calling free from injury, oppression, or interference by individual citizens.

"Even though such right be a natural or inalienable right, the duty of protecting the citizen in the enjoyment of such right, free from individual interference, rests alone with the state.

"Unless, therefore, the additional element, to wit, the infliction of an injury upon one individual citizen by another, solely on account of his color, be sufficient ground to redress such injury, the individual citizen suffering such injury must be left for redress of his grievance to the state laws."

The logic of this concession points irresistibly to the contention that the 13th Amendment operates only to protect the African race. This is evident from the fact that nowhere in the record does it appear that the parties charged to have been wronged by the defendants had ever been themselves slaves, or were the descendants of slaves. They took no more from the Amendment than any other citizens of the United States. But if, as we have seen, that denounces a condition possible for all races and all individuals, then a like wrong perpetrated by white men upon a Chinese, or by black men upon a white man, or by any men upon any man on account of his race, would come within the jurisdiction of Congress, and that protection of individual rights which, prior to the 13th Amendment, was unquestionably within the jurisdiction

solely of the states, would, by virtue of that Amendment, be transferred to the nation, and subject to the legislation of Congress.

[19] *But that it was not the intent of the Amendment to denounce every act done to an individual which was wro g if done to a free man, and yet justified in a condition of slavery, and to give authority to Congress to enforce such denunciation, consider the legislation in respect to the Chinese. In slave times in the slave states not infrequently every free negro was required to carry with him a copy of a judicial decree or other evidence of his right to freedom or be subject to arrest. That was one of the incidents or badges of slavery. By the act of May 5, 1892 [27 Stat. at L. 25, chap. 60, U. S. Comp. Stat. 1901, p. 1319], Congress required all Chinese laborers within the limits of the United States to apply for a certificate, and any one who, after one year from the passage of the act, should be found within the jurisdiction of the United States without such certificate, might be arrested and deported. In Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016, the validity of the Chinese deportation act was presented, elaborately argued, and fully considered by this court. While there was a division of opinion, yet at no time during the progress of the litigation, and by no individual, counsel, or court connected with it, was it suggested that the requiring of such a certificate was evidence of a condition of slavery, or prohibited by the 13th Amendment.

One thing more: at the close of the Civil War, when the problem of the emancipated slaves was before the nation, it might have left them in a condition of alienage, or established them as wards of the government, like the Indian tribes, and thus retained for the nation jurisdiction over them, or it might, as it did, give them citizenship. It chose the latter. By the 14th Amendment it made citizens of all born within the limits of the United States and subject to its jurisdiction. By the 15th it prohibited any state from denying the right of suffrage on account of race, color, or previous condition of servitude, and by the 13th it forbade slavery or involuntary servitude anywhere within the limits of the land. Whether this was or was not the wiser way to deal with the great problem is not a mat-

[20] ter for the courts to *consider. It is for us to accept the decision, which declined to constitute them wards of the nation or leave them in a condition of alienage where they would be subject to the jurisdiction of Congress, but gave them citizenship, doubtless believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the states where they should make their homes.

For these reasons we think that the United States court had no jurisdiction of the wrong charged in the indictment. The judgments are reversed, and the case remanded with instructions to sustain the demurrer to the indictment.

Mr. Justice Brown concurs in the judgments.

Mr. Justice Harlan (with whom concurs Mr. Justice Day), dissenting:

The plaintiffs in error were indicted with eleven others in the district court of the United States, eastern district of Arkansas, for the crime of having knowingly, wilfully, and unlawfully conspired to oppress, threaten, and intimidate Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton, persons of African descent and citizens of the United States and of Arkansas, in the free exercise and enjoyment of the right and privilege—alleged to be secured to them respectively by the Constitution and laws of the United States—of disposing of their labor and services by contract and of performing the terms of such contract without discrimination against them because of their race or color, and without illegal interference or by violent means.†

*The indictment was based primarily upon § 5508 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3712), which provides: "§ 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen

†The indictment charged that "the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, being then and there persons of African descent, and citizens of the United States and of the state of Arkansas, had then and there made and entered into contracts and agreements with James A. Davis and James S. Hodges, persons then and there doing business under the name of Davis & Hodges, as copartners carrying on the business of manufacturers of lumber at White Hall, in said county, the said contracts being for the employment by said firm of the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill Dan Shelton, Jim Hall, and George Shelton as laborers and workmen in and about their said manufacturing establishment, by which contracts the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill Dan Shelton, Jim Hall, and George Shelton were, on their part, to perform labor and services at said manufactory, and were to receive, on the other hand, for their labor and services, compensation, the same being

in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or [22]because of his having so exercised the *same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars, and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution or laws of the United States."

Other sections of the statutes relating to civil rights, and referred to in the discussion at the bar, although not, perhaps, vital to the decision of the present case, are as follows: "§ 1977 (U. S. Comp. Stat. 1901, p. 1259). All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, and be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. § 1978. All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property. § 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution *and [23] laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." "§ 5510 (U. S. Comp. Stat. 1901, p. 3713). Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any state or territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both."

A demurrer to the indictment was overruled, and the defendants having pleaded not guilty, they were tried before a jury, and some of them—the present plaintiffs in error—were convicted of the crime charged, were each fined $100, and ordered to be imprisoned for one year and a day. A motion for new trial having been denied, they have brought the case to this court.

In our consideration of the questions now raised it must be taken, upon this record,

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a right and privilege conferred upon them by the 13th Amendment to the Constitution of the United States and the laws passed in pursuance thereof, and being a right similar to that enjoyed in said state by the white citizens thereof; and while the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton were in the enjoyment of said right and privilege the said defendants did knowingly, wilfully, and unlawfully conspire as aforesaid to injure, oppress, threaten, and intimidate them in the free exercise and enjoyment of said right and privilege, and because of their having so exercised the same, and because they were citizens of African descent, enjoying said right, by then and there notifying the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton that they must abandon said contracts and their said work at said mill, and cease to perform any further labor thereat, or receive any further compensation for said labor, and by threatening, in case they did not so abandon said work, to injure them, and by thereafter then and there wilfully and unlawfully marching and moving in a body to and against the places of business of the said firm while the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton were engaged thereat, and while they were in the performance of said contracts thereon, the said defendants being then and there armed with deadly weapons, threatening and intimidating the said workmen there employed, with the purpose of compelling them, by violence and threats and otherwise, to remove from said place of business, to stop said work, and to cease the enjoyment of said right and privilege, and by then and there wilfully, deliberately, and unlawfully compelling said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton to quit said work and abandon said place and cease the free enjoyment of all advantages under said contracts, the same being so done by said defendants and each of them for the purpose of driving the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton from said place of business and from their labor because they were colored men and citizens of African descent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

as conclusively established by the verdict and judgment,—

That certain persons—the said Berry Winn and others above named with him—citizens of the United States, and of Arkansas, and of African descent, entered into a contract whereby they agreed to perform, for compensation, service and labor in and about the manufacturing business in that state of a private individual;

That those persons, in execution of their contract, entered upon and were actually engaged in performing the work they agreed to do, when the defendants—the present plaintiffs in error—knowingly and wilfully conspired to injure, oppress, threaten, and intimidate such laborers, solely because of their having made that contract, and *because of their race and color*, in the free exercise of their right to dispose of their labor, [24] and *prevent them from carrying out their contract to render such service and labor;

That, in the prosecution of such conspiracy, the defendants, by violent means, compelled those laborers, simply, "*because they were colored men and citizens of African descent*," to quit their work and abandon the place at which they were performing labor in execution of their contract; and

That, in consequence of those acts of the defendant conspirators, the laborers referred to were hindered and prevented, *solely because of their race and color*, from enjoying the right by contract to dispose of their labor upon such terms and to such persons as to them seemed best.

Was the right or privilege of these laborers thus to dispose of their labor secured to them "by the Constitution or laws of the United States?" If so, then this case is within the very letter of § 5508 of the Revised Statutes, and the judgment should be affirmed if that section be not unconstitutional.

But I need not stop to discuss the constitutionality of § 5508. It is no longer open to question, in this court, that Congress may, by appropriate legislation, protect any right or privilege arising from, created or secured by, or dependent upon, the Constitution or laws of the United States. That is what that section does. It purports to do nothing more. In Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152, it was distinctly adjudged that § 5508 was a valid exercise of power by Congress. In Logan v. United States, 144 U. S. 263, 286, 293, 36 L. ed. 429, 437, 439, 12 Sup. Ct. Rep. 617, 623, 626, this court stated that the validity of § 5508 had been sustained in the Yarbrough Case, and, speaking by Mr. Justice Gray, said: "In United States v. Reese, 92 U. S. 214, 217, 23 L. ed. 563, 564, decided at October term, 1875, this court, speaking by Chief Justice Waite, said: 'Rights and im munities created by or dependent upon th Constitution of the United States can b protected by Congress. The form and th manner of the protection may be such a Congress, in the legitimate exercise of it legislative discretion, shall provide. The may be varied to meet the necessities of th particular right to be *protected.'" Aft referring to prior adjudications the court the Logan Case also unanimously declared "The whole scope and effect of this seri of decisions is that, while certain fundamen tal rights, recognized and declared, but no granted or created, in some of the amend ments to the Constitution, are thereby gua anteed only against violation or abridgmen by the United States or by the states as the case may be, and cannot therefore b affirmatively enforced by Congress again unlawful acts of individuals, yet that ever right *created by, arising under, or depen ent upon, the Constitution of the Unit States*, may be protected and enforced b Congress, by such means and in such man ner as Congress, in the exercise of the co relative duty of protection, or of the legi lative powers conferred upon it by the Co stitution, may, in its discretion, deem mo eligible and best adapted to attain the o ject."

In Motes v. United States, 178 U. S. 45 44 L. ed. 1150, 20 Sup. Ct. Rep. 993, the la guage of the court was: "We have see that by § 5508 of the Revised Statutes it made an offense against the United Stat for two or more persons to conspire to in jure, oppress, threaten, or intimidate an citizen in the free exercise or enjoyment any right or privilege secured to him by th Constitution or laws of the United States, the punishment prescribed being a fine not more than $5,000, imprisonment no more than ten years, and ineligibility to an office or place of honor, profit, or trust cr ated by the Constitution or laws of th United States. And by § 5509 (U. S. Com Stat. 1901, p. 3712), it is provided that if, committing the above offense, any other fe ony or misdemeanor be committed, the o fender shall suffer such punishment as attached to such felony or misdemeanor b the laws of the state in which the offense committed. No question has been made indeed, none could successfully be made as to the constitutionality of these sta utory provisions. Ex parte Yarbrough, s *pra;* United States v. Waddell, 112 U. S. 7 28 L. ed. 673, 5 Sup. Ct. Rep. 35. Referri to those provisions and to the clause of th Constitution giving Congress authority pass all laws *necessary and proper for ca rying into execution the powers specifical granted to it, and all other powers vested

the government of the United States, . . . this court has said: 'In the exercise of this general power of legislation, Congress may use any means appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and the spirit of the Constitution.' Logan v. United States, 144 U. S. 263, 283, 36 L. ed. 429, 435, 12 Sup. Ct. Rep. 617, 622."

In view of these decisions it is unnecessary to examine the grounds upon which the constitutionality of § 5508 rests; and I may assume that the power of the national government, by appropriate legislation, to protect a right created by, derived from, or dependent in any degree upon, the Constitution of the United States, cannot be disputed.

I come now to the main question,—whether a conspiracy or combination to forcibly prevent citizens of African descent, *solely because of their race and color*, from disposing of their labor by contract upon such terms as they deem proper, and from carrying out such contract, infringes or violates a right or privilege created by, derived from, or dependent upon, the Constitution of the United States.

Before the 13th Amendment was adopted the existence of freedom or slavery within any state depended wholly upon the Constitution and laws of such state. However abhorrent to many was the thought that human beings of African descent were held as slaves and chattels, no remedy for that state of things as it existed in some of the states could be given by the United States in virtue of any power it possessed prior to the adoption of the 13th Amendment. That condition, however, underwent a radical change when that Amendment became a part of the supreme law of the land, and, as such, binding upon all the states and all the people, as well as upon every branch of government, Federal and state. By the Amendment it was ordained that "neither slavery nor involuntary servitude, except as [27] a punishment for *crime where of the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction;" and "Congress shall have power to enforce this article by appropriate legislation." Although in words and form prohibitive, yet, in law, by its own force, that Amendment destroyed slavery and all its incidents and badges, and established freedom. It also conferred upon every person within the jurisdiction of the United States (except those legally imprisoned for crime) the right, without discrimination against them on account of their race, to enjoy all the privileges that inhere in freedom. It went further, however, and by its 2d section, invested Congress with power, by appropriate legislation, to enforce its provisions. To that end, by direct, primary legislation, Congress may not only prevent the re-establishing of the institution of slavery, pure and simple, but may make it impossible that any of its incidents or badges should exist or be enforced in any state or territory of the United States. It therefore became competent for Congress, under the 13th Amendment, to make the establishing of slavery, as well as all attempts, whether in the form of a conspiracy or otherwise, to subject anyone to the badges or incidents of slavery, *offenses against the United States*, punishable by fine or imprisonment or both. And legislation of that character would certainly be appropriate for the protection of whatever rights were given or created by the Amendment. So, legislation making it an offense against the United States to conspire to injure or intimidate a citizen in the free exercise of any right secured by the Constitution is broad enough to embrace a conspiracy of the kind charged in the present indictment. "A right or immunity, whether created by the Constitution or only guaranteed by it, may be protected by Congress." This court so adjudged in Strauder v. West Virginia, 100 U. S. 303, 310, 25 L. ed. 664, 666, as it had previously adjudged in Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060, and in United States v. Reese, 92 U. S. 214, 23 L. ed. 563. The colored laborers against whom the conspiracy in question was directed *owe their freedom as well as their [28] exemption from the incidents and badges of slavery alone to the Constitution of the United States. Yet it is said that their right to enjoy freedom and to be protected against the badges and incidents of slavery is not secured by the Constitution or laws of the United States.

It may be also observed that the freedom created and established by the 13th Amendment was further protected against assault when the 14th Amendment became a part of the supreme law of the land; for that Amendment provided that no state shall deprive any person of life, liberty, or property without due process of law. To deprive any person of a privilege inhering in the freedom ordained and established by the 13th Amendment is to deprive him of a privilege inhering in the liberty recognized by the 14th Amendment. It is true that the present case is not one of the deprivation, by the Constitution or laws of the *state*, of the privilege of disposing of one's labor as he deems proper. But it is one of a combination and conspiracy by individuals acting in hostility to rights conferred by the Amendment that ordained and estab-

lished freedom and conferred upon every person within the jurisdiction of the United States (not held lawfully in custody for crime) the privileges that are fundamental in a state of freedom, and which were violently taken from the laborers in question solely because of their race and color.

Let us see whether these principles do not find abundant support in adjudged cases.

One of the earliest cases arising under the 13th Amendment was that of United States v. Cruikshank, 1 Woods, 308, 318, 320, Fed. Cas. No. 14,897. It became necessary in that case for Mr. Justice Bradley, holding the circuit court, to consider the scope and effect of the 13th Amendment and the extent of the power of Congress to enforce its provisions. Referring to the 13th Amendment, that eminent jurist said that "this is not merely a prohibition against the [29] passage *or enforcement of any law inflicting or establishing slavery or involuntary servitude, but it is a positive declaration that *slavery shall not exist*. . . . So, undoubtedly, by the 13th Amendment, Congress has power to legislate for the entire eradication of slavery in the United States. This Amendment had an affirmative operation the moment it was adopted. It enfranchised four millions of slaves, if, indeed, they had not previously been enfranchised by the operation of the Civil War. Congress, therefore, acquired the power not only to legislate for the eradication of slavery, but the power to give full effect to this bestowment of liberty on these millions of people. All this it essayed to do by the civil rights bill passed April 9, 1866 (14 Stat. at L. 27, chap. 31), by which it was declared that all persons born in the United States, and not subject to a foreign power (except Indians, not taxed), should be citizens of the United States; and that such citizens, of every race and color, without any regard to any previous condition of slavery or involuntary servitude, should have *the same right*, in every state and territory, *to make and enforce contracts*, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, nd convey, real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and should be subject to like punishment, pains, and penalties, and to none other, any law, etc., to the contrary notwithstanding. It was supposed that the eradication of slavery and involuntary servitude of every form and description required that the slave should be made a citizen and placed on an entire equality before the law with the white citizen, and, therefore, that Congress had the power, under the Amendment, to declare and effectuate these objects. . . . Conceding this to be true (which I think it is), Congress then had the right to go further and to enforce its declaration by passing laws *for the prosecution and punishment of those who should deprive or attempt to deprive any person of the rights thus conferred upon them*. Without having this power, Congress* could not enforce the [30] Amendment. *It cannot be doubted, therefore, that Congress had the power to make it a penal offense to conspire to deprive a person of, or to hinder him in, the exercise and enjoyment of the rights and privileges conferred by the 13th Amendment and the laws thus passed in pursuance thereof.* But this power does not authorize Congress to pass laws for the punishment of ordinary crimes and offenses against persons or the colored race or any other race. That belongs to the state government alone. All ordinary murders, robberies, assaults, thefts and offenses whatsoever are cognizable only in the state courts, unless, indeed, the state should deny to the class of persons referred to the equal protection of the laws. . . . To illustrate: If in a community or neighborhood composed principally of whites, a citizen of African descent, or of the Indian race, not within the exception of the Amendment, should propose to lease and cultivate a farm, *and a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race or color, it cannot be doubted that this would be a case within the power of Congress to remedy and redress.* It would be a case of interference with that person's exercise of his equal rights as a citizen *because of his race*. But if that person should be injured in his person or property by any wrongdoer for the mere felonious or wrongful purpose of malice, revenge, hatred, or gain, without any design to interfere with his rights of citizenship or equality before the laws, as being a person of a different race and color from the white race, it would be an ordinary crime, punishable by the state laws only."

This was followed by the Civil Rights Cases, 109 U. S. 3, 20, 22, 27 L. ed. 835, 842, 843, 3 Sup. Ct. Rep. 18, 28, 29, in which the court passed upon the constitutionality of an act of Congress providing for the full and equal enjoyment by every race, equally, of the accommodations, advantages, and facilities of theaters and public conveyances, and other places of public amusement; and in which the court also considered the scope and effect of the 13th Amendment. In that case the court, speaking by Mr. Justice Bradley —*who, as we have seen, delivered [31] the judgment in the case just cited,—said: "*By its own unaided force and effect* it abolished slavery and *established universal free-*

dom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation *may be primary and direct in its character; for the Amendment is not a mere prohibition of state laws* establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States. It is true that slavery cannot exist without law, any more than property in lands and goods can exist without law; and, therefore, the 13th Amendment may be regarded as nullifying all state laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed that the power vested in Congress to enforce the article by appropriate legislation clothes Congress with power to pass all laws *necessary and proper for abolishing all badges and incidents of slavery in the United States.* . . . The long existence of African slavery in this country gave us very distinct notions of what it was and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, *to make contracts*, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, *were the inseparable incidents of the institution.* Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. . . . We must not forget that the province and scope of the 13th and 14th Amendments are different; the former simply abolished slavery; the latter prohibited the states from abridging the privileges or immunities of citizens of the United States, by depriving them of life, liberty, or property without due proc-
[32] ess of law, and *from denying to any the equal protection of the laws. The Amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the 13th Amendment it has only to do with slavery and its incidents. Under the 14th Amendment it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. Under the 13th Amendment, the legislation, so far as necessary or proper to eradicate *all forms and incidents of slavery* and involuntary servitude, *may be direct and primary*, operating upon the acts of *individuals, whether sanctioned by state legislation or not;* under the 14th, as we have already shown, it must necessarily be and can only be corrective in its character, addressed to counteract and afford relief against state regulations or proceedings."

I participated in the decision of the Civil Rights Cases, but was not able to concur with my brethren in holding the act there involved to be beyond the power of Congress. But I stood with the court in the declaration that the 13th Amendment not only established and decreed universal civil and political freedom throughout this land, but abolished the incidents or badges of slavery, among which, as the court declared, was the disability, based merely on race discrimination, to hold property, to make contracts, to have a standing in court, and to be a witness against a white person.

One of the important aspects in the present discussion of the Civil Rights Cases is that the court there proceeded distinctly upon the ground that although the Constitution and statutes of a state may not be repugnant to the 13th Amendment, nevertheless, Congress, by legislation of a direct and primary character, may, in order to enforce the Amendment, reach and punish individuals whose acts are in hostility *to[33] rights and privileges derived from, or secured by, or dependent upon, that Amendment.

These views were explicitly referred to and reaffirmed in the recent case of Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429. That was an indictment against a single individual for having unlawfully and knowingly returned, forcibly and against their will, two persons from Florida to Georgia, to be held in the latter state in a condition of peonage, in violation of the statutes of the United States (Rev. Stat. 1990, 5526, U. S. Comp. Stat. 1901, pp. 1266, 3715). A person arbitrarily or forcibly held against his will for the purpose of compelling him to render personal services in discharge of a debt is in a condition of peonage. It was not claimed in that case that peonage was sanctioned by or could be maintained under the Constitution or laws either of Florida or Georgia. The argument there on behalf of the accused was, in part, that the 13th Amendment was directed solely against the states and their laws, and that its provisions could not be made applicable to individuals whose illegal conduct was not authorized, permitted, or sanctioned by some act, resolution, order, regulation, or usage of the state.

That argument was rejected by every member of this court, and we all agreed that Congress had power, under the 13th Amendment, not only to forbid the existence of peonage, but to make it an offense against the United States for any *person* to hold, arrest, return, or cause to be held, arrested or returned, or who in any manner aided in the arrest or return, of another person, to a condition of peonage. After quoting the above sentences from the opinion in the Civil Rights Cases, Mr. Justice Brewer, speaking for the court, said: "Other authorities to the same effect might be cited. It is not open to doubt that Congress may enforce the 13th Amendment by direct legislation, punishing the holding of a person in slavery or in involuntary servitude, except as a punishment for crime. In the exercise of that power Congress has enacted these sections denouncing peonage, and punising one who holds another in that condi-
[34] tion of involuntary servitude. *This legislation is not limited to the territories or other parts of the strictly national domain, but is operative in the states and wherever the sovereignty of the United States extends. We entertain no doubt of the validity of this legislation, or of *its applicability to the case of any person holding another in a state of peonage, and this whether there be municipal ordinance or state law sanctioning such holding. It operates directly on every citizen of the republic, wherever his residence may be.*" The Clyatt Case proceeded upon the ground that, although the Constitution and laws of the state might be in perfect harmony with the 13th Amendment, yet the compulsory holding of one individual by another individual for the purpose of compelling the former, by personal service, to discharge his indebtedness to the latter, created a condition of involuntary servitude or peonage, was in derogation of the freedom established by that Amendment, and, therefore, could be reached and punished by the nation. Is it consistent with the principle upon which that case rests to say that an organized body of individuals who forcibly prevent free citizens, solely because of their race, from making a living in a legitimate way, do not infringe any right secured by the national Constitution, and may not be reached or punished by the nation? One who is shut up by superior or overpowering force, constantly present and threatening, from earning his living in a lawful way of his own choosing, is as much in a condition of involuntary servitude as if he were forcibly held in a condition of peonage. In each case his will is enslaved, because illegally subjected, by a combination that he cannot resist, to the will of others in respect of matters which a freeman is entitled to control in such way as to him seems best. It would seem impossible, under former decisions, to sustain the view that a combination or conspiracy of individuals, albeit acting without the sanction of the state, may not be reached and punished by the United States, if the combination and conspiracy has for its object, by force, to prevent or burden the free exercise or enjoyment *of a[
right or privilege created or secured by the Constitution or laws of the United States.

The only way in which the present case can be taken out of § 5508 (U. S. Comp. Stat. 1901, p. 3712), is to hold that a combination or conspiracy of individuals to prevent citizens of African descent, because of their race, from freely disposing of their labor by contract, does not infringe or violate any right or privilege secured by the Constitution or laws of the United States. But such a proposition, I submit, is inadmissible, if regard be had to former decisions. As we have seen, this court has held that the 13th Amendment, by its own force, without the aid of legislation, not only conferred freedom upon every person (not legally held in custody for crime) within the jurisdiction of the United States, but the right and privilege of being free from the badges or incidents of slavery. And it has declared that one of the insuperable incidents of slavery, as it existed at the time of the adoption of the 13th Amendment, was the disability of those in slavery to make contracts. It has also adjudged—no member of this court holding to the contrary—that any attempt to subject citizens to the incidents or badges of slavery could be made an offense against the United States. If the 13th Amendment established freedom, and conferred, without the aid of legislation, the right to be free from the badges and incidents of slavery, and if the disability to make or enforce contracts for one's personal services was a badge of slavery, as it existed when the 13th Amendment was adopted, how is it possible to say that the combination or conspiracy charged in the present indictment, and conclusively established by the verdict and judgment, was not in hostility to rights secured by the Constitution?

I have already said that the liberty protected by the 14th Amendment against state action inconsistent with due process of law is neither more nor less than the freedom established by the 13th Amendment. This I think, cannot be doubted. In Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427, 431, *we said that[
such liberty "means not only the right of

the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment *of all his faculties; to be free to use them in all lawful ways; to live and work when he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.*" All these rights, as this court adjudged in the Allgeyer Case, are embraced in the liberty which the 14th Amendment protects against hostile state action, when such state action is wanting in due process of law. They are rights essential in the freedom conferred by the 13th Amendment. If, for instance, a person is prevented, because of his race, from living and working where and for whom he will, or from earning his livelihood by any lawful calling that he may elect to pursue, then he is hindered in the exercise of rights and privileges secured to freemen by the Constitution of the United States. If secured by the Constitution of the United States, then, unquestionably, rights of that class are embraced by such legislation as that found in § 5508.

The opinion of the court, it may be observed, does not, in words, adjudge § 5508 to be unconstitutional. But if its scope and effect are not wholly misapprehended by me, the court does adjudge that Congress cannot make it an offense against the United States for individuals to combine or conspire to prevent, even by force, citizens of African descent, solely because of their race, from earning a living. Such is the import and practical effect of the present decision, although the court has heretofore unanimously held that the right to earn one's living in all legal ways, and to make lawful contracts in reference thereto, is a vital part of the freedom *established by the Constitution*, and although it has been held, time and again, that Congress may, by ap-
[37] propriate *legislation, grant, protect, and enforce *any* right, derived from, secured or created by, or dependent upon, that instrument. These general principles, it is to be regretted, are now modified, so as to deny to millions of citizen-laborers of African descent, deriving their freedom from the nation, the right to appeal for national protection against lawless combinations of individuals who seek, by force, and solely because of the race of such laborers, to deprive them of the freedom established by the Constitution of the United States, so far as that freedom involves the right of such citizens, without discrimination against them because of their race, to earn a living in all lawful ways, and to dispose of their labor by contract. I cannot assent to an interpretation of the Constitution which denies national protection to vast numbers of our people in respect of rights derived by them from the nation. The interpretation now placed on the 13th Amendment is, I think, entirely too narrow, and is hostile to the freedom established by the Supreme Law of the land. It goes far towards neutralizing many declarations made as to the object of the recent Amendments of the Constitution, a common purpose of which, this court has said, was to secure to a people theretofore in servitude, the free enjoyment, without discrimination merely on account of their race, of the essential rights that appertain to American citizenship and to freedom. United States v. Reese, 92 U. S. 214, 217, 23 L. ed. 563, 564; United States v. Cruikshank, 92 U. S. 542, 555, 23 L. ed. 588, 592; Virginia v. Rives (Ex parte Virginia) 100 U. S. 334, 25 L. ed. 675; Ex parte Virginia, 100 U. S. 345, 25 L. ed. 679; Strauder v. West Virginia, 100 U. S. 306, 25 L. ed. 665; Neal v. Delaware, 103 U. S. 386, 26 L. ed. 570; Civil Rights Cases, 109 U. S. 3, 23, 27 L. ed. 835, 843, 3 Sup. Ct. Rep. 18.

The objections urged to the view taken by the court are not met by the suggestion that this court may revise the final judgment of the state court, if it should deny to the complaining party a right secured by the Federal Constitution: for the revisory power of this court would be of no avail to the complaining party if it be true, as seems now to be adjudged, that a conspiracy to deprive colored citizens, solely because of *their race, of the right to earn a living in a [38] lawful way, infringes no right secured to them by the Federal Constitution.

As the nation has destroyed both slavery and involuntary servitude everywhere within the jurisdiction of the United States, and invested Congress with power, by appropriate legislation, to protect the freedom thus established against all the badges and incidents of slavery as it once existed; as the disability to make valid contracts for one's services was, as this court has said, an inseparable incident of the institution of slavery which the 13th Amendment destroyed; and as a combination or conspiracy to prevent citizens of African descent, solely because of their race, from making and performing such contracts, is thus in hostility to the rights and privileges that inhere in the freedom established by that Amendment,—I am of opinion that the case is within § 5508, and that the judgment should be affirmed.

For these reasons, I dissent from the opinion and judgment of the court.

TERRITORY OF NEW MEXICO EX REL. E. J. McLEAN & COMPANY, Appt.,
v.
DENVER & RIO GRANDE RAILROAD COMPANY.

(See S. C. Reporter's ed. 38–55.)

Appeal—from territorial supreme court—Federal question.

1. A controversy as to the constitutional right of a territorial legislature to pass a specified law under the broad legislative power conferred by U. S. Rev. Stat. § 1851, involves the validity of an authority exercised under the United States within the meaning of the act of March 3, 1885 (23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572), § 2, defining the appellate jurisdiction of the Supreme Court of the United States over the supreme courts the territories.

Appeal—from territorial supreme court amount in dispute.

2. Some sum or value must be in di pute in order to sustain the appellate juri diction of the United States Supreme Cou over the supreme courts of the territori which is conferred by the act of March 1885 (23 Stat. at L. 443, chap. 355, U. Comp. Stat. 1901, p. 572), § 2, without r gard to the sum or value in dispute, in cas involving the validity of a treaty or statu of, or authority exercised under, the Unit States.

Appeal—from territorial supreme court amount in dispute.

3. A suit in which the matter in di pute is the right of consignors to have consignment shipped by a common carri

NOTE.—As to Federal question as sustaining appellate jurisdiction of Federal Supreme Court over territorial supreme courts—see note to New York Foundling Hospital v. Gatti, post. 254.

On judicial notice—see note to Olive v. State, 4 L.R.A. 44.

Inspection laws as regulations of commerce.

I. In general.
  a. General principles.
  b. Illustrative cases.
    1. Merchandise generally.
    2. Food.
    3. Intoxicating liquors.
    4. Vessels and cargo.
II. Discrimination.
III. Inspection fees.

The constitutionality of state legislation regulating the importation of infected animals, having been discussed in a note to Reid v. Colorado, 47 L. ed. U. S. 108, is not herein considered. Nor are state quarantine laws discussed here. Inspection laws have reference only to personal property, and are inapplicable to free human beings. New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87.

I. In general.

a. General principles.

So far as commerce with foreign nations is concerned, the Federal Constitution, in article 1, § 10, expressly reserves the right of the states, subject to the revision and control of Congress, to enact inspection laws and to collect the amounts necessary for their execution. "We think the same principle," said Mr. Chief Justice Fuller in Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862, "must apply to interstate commerce."

Inspection laws for the protection of the people against fraudulent practices and for the suppression of fraud may be enacted by the states, although such legislation h an incidental and indirect effect upon i terstate commerce. Ibid.

A state inspection law must not substa tially hamper or burden the constitution right, on the one hand, to make, and, on t other hand, to receive, an interstate shi ment. Vance v. W. A. Vandercook Co. 1 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Re 674.

To forbid trade in respect to any knov article of commerce irrespective of its co dition and quality, merely on account of i intrinsic nature and the injurious cons quences of its use or abuse, has never be regarded as within the legitimate scope state inspection laws. Bowman v. Chica & N. W. R. Co. 125 U. S. 465, 31 L. ed. 70 1 Inters. Com. Rep. 823, 8 Sup. Ct. Re 689, 1062.

Inspection laws act as well on import tions as on exportations. Green v. Sava nah, R. M. Charlt. (Ga.) 368; Neilson Garza, 2 Woods, 287, Fed. Cas. No. 10.09 Patapsco Guano Co. v. Board of Agricu ture,—supra.

b. Illustrative cases.

1. Merchandise generally.

The removal or destruction of infectio or unsound articles was said by Mr. Chi Justice Marshall, in Brown v. Maryland, Wheat. 419, 6 L. ed. 678, to be an exerci of the power of inspection.

The state of Louisiana may, without i fringing the commerce clause of the Feder Constitution, require hay offered for s at New Orleans to be inspected. State Fosdick, 21 La. Ann. 256. See also infr III., Hay Inspectors v. Pleasants, 23 I Ann. 349.

A municipal ordinance requiring co sold within the city to be measured by city inspector is a valid inspection la Charleston v. Rogers, 2 M'Cord, L. 495, Am. Dec. 751.

A state law relative to the exportation hides imported from Mexico is no less an i spection law because it in terms provid

to its destination involves a valuable right, measurable in money, and therefore satisfies the requirements of the act of March 3, 1885, conferring upon the Supreme Court of the United States appellate jurisdiction over the supreme courts of the territories without regard to the sum or value in dispute, where the validity of a treaty or statute of, or authority exercised under, the United States is involved.

Commerce—duties on imports or exports.

4. Only articles imported from, or exported to, foreign countries, are within the purview of U. S. Const. art. 1, § 10, forbidding any state, without the consent of Congress to lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws.

Evidence—judicial notice.

5. Judicial notice will be taken by the Supreme Court of the United States of the fact that, in the territory of New Mexico and in other similar parts of the West, cattle are required to be branded in order to identify their ownership, and that they run at large in great stretches of country, with no other means of determining their separate ownership than by the brand or marks upon them.

Commerce—territorial regulation—inspection law.

6. The prohibition against the receipt by common carriers for transportation beyond the limits of the territory of hides which do not bear the evidence of inspection required by N. M. act of March 19, 1901, is a valid exercise of the police power, and does not—there being no congressional legis-

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that such hides need not be inspected, where the thing which is required, though not such an inspection as is usual and customary in other cases, is nevertheless an actual inspection, such as procuring a certificate certifying the date of importation, with the name of the importer and owner and of the person in charge, and the name of the place where imported, together with the number of hides and the description of any identifying marks and brands. Neilson v. Garza, supra.

It is no objection to the validity of a state statute making it unlawful to carry out of the state any hogsheads of tobacco raised in the state unless such hogsheads shall have been inspected, passed, and marked agreeably to its provisions, that it requires the articles to be brought to a state warehouse instead of sending an officer to them. Turner v. Maryland, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44.

The Wisconsin grain inspection law which attempts to destroy the inspection system of Minnesota by obstructing or preventing delivery, storage, or reshipment, except by the Wisconsin system, is an unconstitutional regulation of interstate commerce. Globe Elevator Co. v. Andrew, 144 Fed. 871.

2. Food.

A law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exertion of the police powers of the state if the inspection prescribed is of such character, or is burdened with such conditions, as will prevent altogether the introduction into the state of sound meats, the product of animals slaughtered in other states. Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

A state statute which requires, as a condition of sale within the state of fresh meats intended for human consumption, that the animals from which such meats are taken shall have been inspected in the state within twenty-four hours before being slaughtered, is an unconstitutional regulation of interstate commerce. Swift v. Sutphin, 2 Inters. Com. Rep. 656, 39 Fed. 630; Re Christian, 39 Fed. 636, note; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862, Affirming 39 Fed. 641.

A similar statute which differs principally from the Minnesota law in fixing forty-eight hours as the time limit before slaughtering within which the inspection in the state must be made was held to be an invalid regulation of interstate commerce in Schmidt v. People, 18 Colo. 78, 31 Pac. 498.

A state statute which requires inspection of all fresh meat slaughtered 100 miles or more from the place of sale, and exacts a fee of 1 cent a pound therefor, is a regulation of interstate commerce beyond the state to establish. Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213.

The selling, offering, or exposing for sale, in any city in the state, of fresh meat intended for human consumption, which has not been inspected alive within the county, cannot be penalized by the state without interfering with interstate commerce. Harvey v. Huffman, 39 Fed. 646.

Municipal ordinances which require an inspection of animals whose meat is intended for human consumption, as well as an inspection of the meat after slaughtering, and require the slaughtering to be done within one mile of the city limits, have the effect of preventing interstate traffic in dressed meat, and therefore violate the commerce clause of the Federal Constitution. Ex parte Kieffer, 40 Fed. 399.

A state cannot make it a misdemeanor to sell cattle and sheep without inspection before slaughtering within the state, and authorize cities to appoint inspectors for that purpose. State v. Klein, 126 Ind. 68, 3 Inters. Com. Rep. 573, 25 N. E. 873.

A state statute which makes it unlawful to ship to or from any part of the state any carcass of a calf unless a tag is attached containing certain information, including the age of the calf when slaughtered, is not a regulation or interference

lation covering the subject and making a different provision violate the commerce clause of the Federal Constitution, although hides not offered for transportation are not required to be inspected after thirty days in slaughterhouses, and not at all outside of the slaughterhouses, and although the incidental effect of the statute may be to levy a tax upon this class of property.

Commerce—territorial legislation—inspection fee

7. The amount of the fee imposed by N. M. act of March 19, 1901, for the inspection of hides offered for transportation beyond the limits of the territory, does not render that statute if otherwise valid—repugnant to the commerce clause of the Federal Constitution, where it is not so unreasonable and disproportionate to the services rendered as to challenge the good faith of the law.

[No. 18.]

Argued March 14, 15, 1906. Decided October 15, 1906.

APPEAL from the Supreme Court of tl Territory of New Mexico to review judgment which affirmed a judgment of tl District Court of Santa Fe County, in th territory, sustaining a motion to quash a alternative writ of mandamus to comp a common carrier to receive for transport tion beyond the limits of the territory hid which did not bear the evidence of inspe tion required by the territorial laws. A firmed.

See same case below, 12 N. M. 425, 78 Pa 74, 79 Pac. 295.

The facts are stated in the opinion.

Mr. William B. Childers argued the caus and, with Mr. T. B. Catron, filed a bri for appellant:

The New Mexico statute under consider tion is not an "inspection law."

Gibbons v. Ogden, 9 Wheat. 1, 6 L. e 23; Brown v. Maryland, 12 Wheat. 419, L. ed. 678; New York v. Compagnie Généra

with interstate commerce, but is a reasonable exercise of the police power to protect the people of the state against the sale of unwholesome food. People v. Bishopp, 44 Misc. 12, 89 N. Y. Supp. 709.

A state statute under which every prepared article used for food, drink, flavoring, or condiment by man or domestic animals, whether simple, mixed, or compound, is required to be marked with the true name of the manufacturer and the location of the factory where it is prepared, constitutes an unreasonable interference with interstate and foreign commerce. Jewett Bros. & Jewett v. Smail (S. D.) 105 N. W. 738.

If a Georgetown ordinance providing for the inspection of flour could be deemed applicable to a shipment in transit between a point in the state of Maryland to the city of New York, it would violate the commerce clause of the Federal Constitution. Georgetown v. Davidson, 6 D. C. 278.

The incompleteness and inefficiency of the inspection of flour provided for by a state statute raises no question as to its validity under the commerce clause of the Federal Constitution. Glover v. Flour Inspectors, 18 Fed. 348.

See supra, I. b. 1. Globe Elevator Co. v. Andrew, 144 Fed. 871.

3. Intoxicating liquors.

A municipal ordinance which subjects to a fine any person selling intoxicating liquors without having them gauged and measured by a city official, and requires the payment of a small compensation to such official for the services performed, as when [illegible] a [illegible] by an [illegible] [illegible] a [illegible] package [illegible] [illegible] v. Savannah, [illegible] 365.

A [illegible] carrier from bringing within the state ar intoxicating liquors from any other sta or territory without first having the ce tificate of the county auditor, therein r quired, that the consignee or person whom the liquor is to be transported authorized to sell intoxicating liquor such county, burdens interstate commer and is not sustainable as an inspection la Bowman v. Chicago & N. W. R. Co. 125 U S. 465, 31 L. ed. 700, 1 Inters. Com. Re 823, 8 Sup. Ct. Rep. 689, 1062.

A requirement that a sample shall sent in advance for inspection before i toxicating liquors are brought into tl state cannot be supported as an inspecti law; but such law must at least provi for some inspection of the article importe Vance v. W. A. Vandercook Co. 170 U. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.

A state statute which absolutely pr hibits the importation of intoxicati liquors by private citizens for their ow use, regardless of their purity or impurit cannot be sustained as an inspection la because it empowers the state chemist pass upon the "alcoholic purity" of ir portations by the state functionaries wl are alone permitted to import such liquo into the state. Scott v. Donald, 165 U. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265.

The Wilson act of August 8, 1890, su jects intoxicating liquors arriving in tl state to laws enacted by such state "in tl exercise of its police powers."

A state statute imposing an inspecti fee upon beer or other malt liquors shipp from other states into that state, and be there for sale and consumption therei must, although producing a revenue, a not providing for an adequate inspectio be deemed enacted by the state "in the exe cise of its police powers," within the mea ing of this act, where the highest sta court has upheld, as a valid police regul

Transatlantique, 107 U. S. 61, 27 L. ed. 383, 2 Sup. Ct. Rep. 87; Leisy v. Hardin, 135 U. S. 112, 34 L. ed. 133, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Clintsman v. Northrop, 8 Cow. 45; 16 Am. & Eng. Enc. Law, p. 808, and note; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

Articles cannot be specially taxed, simply by reason of, or because of, their intended exportation.

Coe v. Errol, 116 U. S. 525, 29 L. ed. 718, 6 Sup. Ct. Rep. 475; Turpin v. Burgess, 117 U. S. 506, 29 L. ed. 989, 6 Sup. Ct. Rep. 835; Cornell v. Coyne, 192 U. S. 426, 48 L. ed. 507, 24 Sup. Ct. Rep. 383.

To impose a discriminating and special tax on the property of one class of citizens, as upon butchers or hide dealers, or upon one kind of property, as upon hides, to protect the property of another class of citizens, as cattle raisers, or another kind of property, as cattle, is in violation of fundamental principles of government and natural right.

1 Tucker, Const. 77.

The New Mexico statute in question is not a reasonable law, properly devised for preventing the evil at which it may be aimed, if it is aimed at any evil; and not so devised as to no more than effectuate that purpose.

Lawton v. Steele, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 300, 43 L. ed. 707, 19 Sup. Ct. Rep. 465; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213, 3 Inters Com. Rep. 126, 41 Fed. 867; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454.

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tion, so much of the statute as imposes the same fee on beer of domestic manufacture, over the objection that it is a revenue measure, and not an inspection law. Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552.

An inspection law enacted by a state "in the exercise of its police powers," within the meaning of the Wilson act, is not void as an interference with interstate commerce because it operates to deter shipments into the state. Ibid.

Interstate commerce in intoxicating liquors is not unlawfully burdened by an inspection law enacted by a state "in the exercise of its police powers," within the meaning of the Wilson act, because the statute does not provide for an adequate inspection, and imposes a burden beyond the cost of inspection. Ibid.

4. Vessels and cargo.

A state statute which provides for the appointment of a gauger for the port of San Francisco, whose compensation is to be derived from the fees charged for inspections, is not an unconstitutional regulation of commerce. Addison v. Saulnier, 19 Cal. 83.

A state statute providing for gauging any coal or coke boat or barge in a port of the state, with a fee to the gauger, does not make an unconstitutional regulation of interstate commerce. Pittsburg & S. Coal Co. v. Louisiana, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459.

A state statute conferring upon the master and wardens of the port of New Orleans a monopoly of surveying the hatches of sea-going vessels arriving at that port, and of surveying damaged goods on board such vessels, imposes a burden on commerce, and is in no sense sustainable as an inspection law. Foster v. Master & Wardens, 94 U. S. 246, 24 L. ed. 122.

If Louisiana had the power to legislate respecting the inspection of vessels engaged in interstate commerce, such legislation ceased to operate after the passage by Congress of the act of July 7, 1838, to provide for the better security of the lives of passengers on vessels propelled by steam. Caldwell v. St. Louis Perpetual Ins. Co. 1 La. Ann. 85.

II. Discrimination.

Uniformity is an essential of an inspection law. Hence, a statute relating to the inspection of lime, which only affects lime manufactured within the state or imported from Maine, violates the commerce clause of the Federal Constitution, and is not sustainable as an inspection law. Higgins v. 300 Casks of Lime, 130 Mass. 1.

A state cannot, under the guise of enacting inspection laws, make discriminations against the products and industries of another state, in favor of its own products and industries. Voight v. Wright, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855. See also cases cited, supra, I. b, 2.

A state law which subjects flour brought into that state from other states to an inspection, and exacts a fee therefor, cannot be sustained as a inspection law, where flour made in the state need not be inspected before offering it for sale. Ibid.

Whether a state statute establishing a board of flour inspectors at a certain port to inspect all flour coming there "for sale" discriminates in favor of persons importing flour for their own use, and hence is an unauthorized interference with interstate or foreign commerce, is so doubtful that a demurrer to a bill to enjoin its enforcement will be overruled, to allow proof of

A statute may be void by reason of its operation, although valid on its face.

Poindexter v. Greenhow, 114 U. S. 295, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962.

A specific tax obliging mining companies to pay more upon mineral obtained in the state, and exported before it is smelted, than on that which is smelted within the state, is a tax on interstate and foreign commerce, and is void.

Jackson Min. Co. v. Auditor General, 32 Mich. 488.

The law in question, in charging a fee of 10 cents per hide for an inspection made, as we contend, at the port of shipment, where hides must be assumed to be in existence in shipping quantities or car-load lots, imposes a charge which is apparently largely in excess of the cost of such inspection.

American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179, 3 Inters. Com. Rep. 532, 43 Fed. 609; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862.

This statute imposes the burden of inspection, and the payment of 10 cents per hide, only upon hides offered to a common carrier for shipment to a market without the territory.

Voight v. Wright, 141 U. S. 65, 35 L. ed. 639, 11 Sup. Ct. Rep. 855.

The validity of the act of the legislative assembly of the territory of Utah, making the office of the auditor of public accounts elective by the joint vote of the two of the legislative assembly, was c question in Clayton v. Utah, 132 U. 33 L. ed. 455, 10 Sup. Ct. Rep. 190, s court took jurisdiction of the case.

In Clough v. Curtis, 134 U. S. 36 ed. 945, 10 Sup. Ct. Rep. 573, whic mandamus proceeding, the validity acts of a territorial legislature was upon, although no money judgment ever, exclusive of costs, could ha in the record.

See also United States v. Lynch. S. 286, 34 L. ed. 702, 11 Sup. Ct. R Maricopa & P. R. Co. v. Arizona, 1 350, 39 L. ed. 449, 15 Sup. Ct. Rep

Messrs. Charles A. Spiess and A. C bell argued the cause, and, with J. Leahey, filed a brief for appellee:

This court has, in numerous cas that it was without jurisdiction to judgments such as this one, wher drawn in question, not the validit statute of, or authority exercised the United States, but the validity thing done or act performed by thority.

Snow v. United States, 118 U. 30 L. ed. 207, 6 Sup. Ct. Rep. 1059 more & P. R. Co. v. Hopkins, 13 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 50 ingar v. Hartupee, 6 Wall. 258, 18 829; United States v. Lynch, 137 U. 34 L. ed. 700, 11 Sup. Ct. Rep. 114; C v. United States, 146 U. S. 533, 3

its operation. Glover v. Flour Inspectors, 48 Fed. 348.

A state tobacco inspection law is not an unconstitutional regulation of commerce because it permits the exportation of tobacco in hogsheads by persons who pack it in the locality where grown, when marked with the owner's name, without opening the hogsheads for the internal inspection required if otherwise exported, or because it does not apply to tobacco which is to remain in the state, as to which the state laws only prescribe that it shall not be passed or accounted lawful tobacco unless it is packed in hogsheads of a specified size. Turner v. Maryland, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44.

Discrimination against interstate traffic was unsuccessfully urged in NEW MEXICO EX REL. MCLEAN v. DENVER & R. G. R. Co. to invalidate a territorial statute for the inspection of hides, which does not require hides not offered to a common carrier for transportation beyond the limits of the territory to be inspected after thirty days in slaughterhouses, and not at all outside of slaughterhouses.

An inspection law imposing a burden upon interstate commerce is not to be sustained simply because it applies alike to the people of all the states, including the people of the state enacting it. Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Com. Rep. 185, 10 Sup. Ct. Rep. 862 mer v. Rehman, 138 U. S. 78, 34 L. 3 Inters. Com. Rep. 485, 11 Sup. C 213.

III. Inspection fees.

Whether the prescribed fees a muneration are excessive seems t question more properly for Congre for the courts, if the law is really spection measure. But the charges so unreasonable and disproportionate services rendered as to justify the c invalidating the statute as not ena good faith as an inspection law. Ne Garza, 2 Woods, 287, Fed. Cas. No. Patapsco Guano Co. v. Board of Agri 171 U. S. 345, 43 L. ed. 191, 18 Sup. C 862; NEW MEXICO EX REL. MCLEAN VER & R. G. R. Co.

A state license tax on the privi selling fertilizers cannot be upheld inspection law in respect to fe brought from another state, wh amount of the tax ($500 per annum excess of what is required for the of inspection, and the proceeds are to other uses. American Fertilizing Board of Agriculture, 11 L.R.A. 17

1077, 13 Sup. Ct. Rep. 184; South Carolina v. Seymour (United States ex rel. South Carolina v. Seymour) 152 U. S. 353, 38 L. ed. 742, 14 Sup. Ct. Rep. 871; Linford v. Ellison, 155 U. S. 503, 39 L. ed. 239, 15 Sup. Ct. Rep. 179.

In order to sustain the appellate jurisdiction of this court the matter in dispute must have been money, or something the value of which can be estimated in money. Perrine v. Slack, 164 U. S. 452, 41 L. ed. 510, 17 Sup. Ct. Rep. 79; Durham v. Seymour, 161 U. S. 235, 40 L. ed. 682, 16 Sup. Ct. Rep. 452; Kurtz v. Moffitt, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 148; Caffrey v. Oklahoma, 177 U. S. 346, 44 L. ed. 799, 20 Sup. Ct. Rep. 664; De Krafft v. Barney, 2 Black, 704, 17 L. ed. 350; Re Chapman, 156 U. S. 211, 39 L. ed. 401, 15 Sup. Ct. Rep. 331; Cross v. Burke, 146 U. S. 82, 36 L. ed. 896, 13 Sup. Ct. Rep. 22; Re Heath, 144 U. S. 92, 36 L. ed. 358, 12 Sup. Ct. Rep. 615; Farnsworth v. Montana, 129 U. S. 104, 32 L. ed. 616, 9 Sup. Ct. Rep. 253; Sinclair v. District of Columbia, 192 U. S. 16, 48 L. ed. 322, 24 Sup. Ct. Rep. 212; Washington & G. R. Co. v. District of Columbia, 146 U. S. 227, 36 L. ed. 951, 13 Sup. Ct. Rep. 64; Chapman v. United States, 164 U. S. 436, 41 L. ed. 504, 17 Sup. Ct. Rep. 76.

The collateral effect of the judgment cannot be inquired into in this inquiry for the purpose of determining whether this court has jurisdiction. The judgment itself must carry with it the elements which confer jurisdiction.

Elgin v. Marshall, 106 U. S. 578, 27 L. ed. 249, 1 Sup. Ct. Rep. 484; Bruce v. Manchester & K. R. Co. 117 U. S. 514, 29 L. ed. 990, 6 Sup. Ct. Rep. 849; Durham v. Seymour, 161 U. S. 235, 40 L. ed. 682, 16 Sup. Ct. Rep. 452.

All inspection laws which operate upon personal property at a period when such property is not interstate commerce, or not foreign commerce, as a matter of course do not come in collision with the commerce clauses of the Federal Constitution.

Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345-357, 43 L. ed. 191-195, 18 Sup. Ct. Rep. 862.

There is complete analogy between the case at bar and the case of Turner v. Maryland, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44.

This court has, in numerous cases, differentiated between legislative acts operating upon interstate or foreign commerce, and such acts which act upon articles about to become interstate commerce.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266.

This court has also drawn a distinction between "articles manufactured for export or intended to be exported to another state, and interstate commerce in such articles."

Kidd v. Pearson, 128 U. S. 1, 32 L. ed.

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ters. Com. Rep. 532, 43 Fed. 609. See also supra, I. b, 2,—Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213.

The state inspection fee of 25 cents per ton on commercial fertilizers is not, as applied either to foreign or interstate commerce, so in excess of what is necessary to pay the cost of analysis, salaries of inspectors, cost of tags, and other charges, as to justify the imputation of bad faith and show tnat it is not a proper exercise of the police power. Patapsco Guano Co. v. Board of Agriculture, supra; State ex rel. Goodwin v. Caraleigh Phosphate & Fertilizer Works, 119 N. C. 120, 25 S. E. 795. See also supra, I. b, 3,—Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552.

A state statute requiring persons desiring to sell fertilizers in the state to furnish a sample for analysis and test of its quality at the state experimental station does not levy an impost upon interstate commerce beyond what is necessary to secure the inspection, where the fees collected are to be used for the single purpose of supporting and maintaining such station. Vanmeter v. Spurrier, 94 Ky. 22, 21 S. W. 337.

The charge for outage to reimburse the state for expenses incurred in inspecting tobacco intended for exportation, and in consideration of storage, is proper. Turner v. Maryland, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44.

A city may, so far as the Federal Constitution is concerned, enact an ordinance under which coals imported from Great Britain must be inspected when sold within the city, at a cost of 25 cents a ton, to be paid the inspector for his services. Charleston v. Rogers, 2 M'Cord, L. 495, 13 Am. Dec. 751. See also supra, I. b, 3,—Green v. Savannah, R. M. Charlt. (Ga.) 368; I. b, 4, —Addison v. Saulnier, 19 Cal. 83; Pittsburg & S. Coal Co. v. Louisiana, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459.

The charge of 10 cents per bale for inspecting and weighing hay does not, as applied to an interstate shipment, make the legislation imposing it repugnant to the Federal Constitution, whether or not it is absolutely necessary for executing the inspection law, because the charge is in no sense "an impost or duty on imports and exports." and, not being included in the prohibition, is not dependent for its validity upon a compliance with the rule of absolute necessity, laid down in the exception to that prohibition. Hay Inspectors v. Pleasants, 23 La. Ann. 349.

346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

This court has also directly distinguished between laws which act upon a product of the state while it is yet in the state, and products which are articles of interstate commerce, coming into the state

Turner v. Maryland, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44; Diamond Match Co. v. Ontonagon, supra; United States v. Boyer, 85 Fed. 425; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; United States v. E. C. Knight Co. 156 U. S. 13, 39 L. ed. 329, 15 Sup. Ct. Rep. 249; Cornell v. Coyne, 192 U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383; Re Greene, 52 Fed. 113; People v. Bishopp, 106 App. Div. 266, 94 N. Y. Supp. 774.

In Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527, this court held it to be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others, and that the police powers of a state justified the adoption of precautionary measures against social evils, and the enactments of such laws as would have immediate connection with the protection of persons and property against the noxious acts of others.

Even if the hides in question should be considered interstate commerce at the time the law acts upon them, still the act is not in collision with the commerce clause of the Constitution, and is valid, being a legitimate inspection law.

New York v. Miln, 11 Pet. 102, 9 L. ed. 648; Pabst Brewing Co. v. Crenshaw, 198 U. S. 17–41, 49 L. ed. 925–935, 25 Sup. Ct. Rep. 552.

The legislature and courts of New Mexico must be presumed to be perfectly familiar with conditions as they exist in New Mexico, and understand the necessities of her people in regard to legislation designed to protect the property of her citizens. Whether such a law as the one now in question is necessary should be referred to the legislative department of the territory. And, the legislature having enacted it, this court will hesitate to deny its validity.

Clark v. Nash, 198 U. S. 361, 365, 369, 49 L. ed. 1085, 1088, 49 Sup. Ct. Rep. 676.

The scope of inspection laws can no more be defined or limited than can the scope of police power, of which it is a branch.

State ex rel. Barton County v. Kansas City, Ft. S. & G. R. Co. 32 Fed. 722; Voight v. Wright, 141 U. S. 62, 65, 35 L. ed. 638, 639, 11 Sup. Ct. Rep. 855; Slaughter-House Cases, 16 Wall. 36, 62, 21 L. ed. 394, 404.

The police power of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime or pauperism or disturbance of the peace. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive.

Hannibal & St. J. R. Co. v. Husen, supra.

The term "import," as used in that clause of the Constitution which says that no state shall levy any imposts or duties on imports or exports, does not refer to the articles imported from one state into another, but only to the articles imported from foreign countries into the United States.

Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382.

Upon principle, the states have a right to make inspection laws which operate upon interstate commerce.

Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 361, 43 L. ed. 197, 18 Sup. Ct. Rep. 862; Neilson v. Garza, 2 Woods, 287, Fed. Cas. No. 10,091.

The reasonableness of the fee charged for inspection is a matter for the determination of the legislature.

Neilson v. Garza, supra; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; Turner v. Maryland, supra.

The fee of 10 cents per hide is not excessive.

Chester City v. Western U. Teleg. Co. 154 Pa. 464, 25 Atl. 1134; Western U. Teleg. Co. v. New Hope, 187 U. S. 425, 47 L. ed. 243, 23 Sup. Ct. Rep. 204.

Whenever the law operates alike upon all persons and property similarly situated, equal protection is not denied. All that is required is that all persons subject to a law shall be treated alike.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721.

Mr. Justice Day delivered the opinion of the court:

This is an appeal from the judgment of the supreme court of New Mexico, affirming the judgment of the district court of Santa Fe county, sustaining a motion to quash an alternative writ of mandamus issued on the relation of E. J. McLean & Company against the Denver & Rio Grande Railroad Company.

*From the allegations of the writ it appears that the relators, the appellants here,

had delivered to the railroad company at Santa Fe, New Mexico, a bale of hides consigned to Denver, Colorado, a point on the line of the defendant's railroad. The railroad company refused to receive and ship the hides for the reason that they did not bear the evidence of inspection required by the act of the legislature of New Mexico, approved March 19, 1901, which act, to be more fully noticed hereafter, made it an offense for any railroad company to receive hides for shipment beyond the limits of the territory which had not been inspected within the requirements of the law.

An objection is made to the jurisdiction of this court upon the ground that the case is not appealable under the act of Congress of March 3, 1885. 23 Stat. at L. 443, chap. 355 (U. S. Comp. Stat. 1901, p. 572).

Section 1 of the act provides, in substance, that no appeal or writ of error shall be allowed from any judgment or decree of the supreme court of a territory unless the matter in dispute, exclusive of costs, exceeds the sum of $5,000. Section 2 of the act makes exception to the application of § 1 as to the sum in dispute, in cases wherein is involved the validity of a treaty or statute of or authority exercised under the United States, and in all such cases an appeal or writ of error will lie without regard to the sum or value in dispute.

Confessedly, $5,000 is not involved; and in order to be appealable to this court the case must involve the validity of an authority exercised under the United States, and also be a controversy in which some sum or value is involved. This court, in the case of United States v. Lynch, 137 U. S. 280–285, 34 L. ed. 700–702, 11 Sup. Ct. Rep. 114–116, laid down the test of the right to appeal under the statute in the following terms:

"The validity of a statute, or the validity of an authority, is drawn in question when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry."

The right to legislate in the territories [48] is conferred, under *constitutional authority, by the Congress of the United States, and the passage of a territorial law is the exertion of an authority exercised under the United States. While this act was passed in pursuance of the authority given by the United States to the territorial legislature, it is contended by the relators below, appellants here, that it violates the Constitution of the United States, and is therefore invalid, although it is an attempted exercise of power conferred by Congress upon the territory. The objection of the relator to the law raises a controversy as to the right of the legislature to pass it under the broad power of legislation conferred by Congress upon the territory. In other words, the validity of an authority exercised under the United States in the passage and enforcement of this law is directly challenged, and the case does involve the validity of an authority exercised under the power derived from the United States. It is not a case merely involving the construction of a legislative act of the territory, as was the fact in Snow v. United States, 118 U. S. 346, 30 L. ed. 207, 6 Sup. Ct. Rep. 1059. The power to pass the act at all, in view of the requirements of the Constitution of the United States, is the subject-matter of controversy, and brings the case in this aspect within the 2d section of the act.

Is there any sum or value in dispute in this case? While the act does not prescribe the amount, some sum or value must be in dispute. Albright v. New Mexico, 200 U. S. 9, 50 L. ed. 346, 26 Sup. Ct. Rep. 210. The matter in dispute is the right to have the goods which were tendered for shipment transported to their destination. As a common carrier, the railroad was bound to receive and transport the goods. Its refusal so to do was based upon the statute in question because of the noninspection of the goods tendered. The relators claimed the right to have their goods transported because the statute was null and void, being an unconstitutional enactment. The controversy, therefore, relates to the right of the appellants to have their goods transported by the railroad company to the place of destination. We think this was a valuable right, measurable *in money. At [49] common law, a cause of action arose from the refusal of a common carrier to transport goods duly tendered for carriage. Ordinarily, the measure of damages in such case is the difference between the value of the goods at the point of tender and their value at their proposed destination, less the cost of carriage. We are of the opinion that this controversy involves a money value within the meaning of the statute, and the motion to dismiss the appeal will be overruled.

Passing to the merits of the controversy, Congress has conferred legislative power upon the territory to an extent not inconsistent with the Constitution and laws of the United States. U. S. Rev. Stat. § 1851. It is contended that the act under consideration contravenes that part of article 1, § 10, of the Constitution of the United States, which reads: "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports,

except what may be absolutely necessary for executing its inspection laws." And also that part of the 8th section of article 1 of the Constitution of the United States, which gives to Congress the power to regulate commerce with foreign nations, and among the states, and with the Indian tribes.

As to the objection predicated on § 10 of article 1, that section can have no application to the present case, as that provision directly applies only to articles imported or exported to foreign countries. Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345-350, 43 L. ed. 191-193, 18 Sup. Ct. Rep. 862, and cases cited. Moreover, that paragraph of the Constitution expressly reserves the right of the states to pass inspection laws, and if this law is of that character it does not run counter to this requirement of the Constitution.

The question principally argued is as to the effect of this law upon interstate commerce, and it is urged that it is in violation of the Constitution, because it undertakes to regulate interstate commerce, and lays upon it a tax not within the power of the local legislature to exact. It has been too frequently decided by this court to re-
[50] quire the restatement *of the decisions, that the exclusive power to regulate interstate commerce is vested by the Constitution in Congress, and that other laws which undertake to regulate such commerce or impose burdens upon it are invalid. This doctrine has been reaffirmed and announced in cases decided as recently as the last term of this court. Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722. While this is true, it is equally well settled that a state or a territory, for the same reasons, in the exercise of the police power, may make rules and regulations not conflicting with the legislation of Congress upon the same subject, and not amounting to regulations of interstate commerce. It will only be necessary to refer to a few of the many cases decided in this court holding valid enactments of legislatures having for their object the protection, welfare, and safety of the people, although such laws may have an effect upon interstate commerce. Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613-635, 42 L. ed. 878-885, 18 Sup. Ct. Rep. 488; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132. The principle decided in these cases is that a state or territory has the right to legislate for the safety and welfare of its people, and that this right is not taken from it because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority by the legislature is in conflict with an act of Congress, or is an attempt to regulate interstate commerce. In Patapsco Guano Co. v. Board of Agriculture, supra, it was directly recognized that the state might pass inspection laws for the protection of its people against fraudulent practices and for the suppression of frauds, although such legislation had an effect upon interstate commerce. The same principle was recognized in Neilson v. Garza, 2 Woods, 287, Fed. Cas. No. 10,091,—a case decided by Mr. Justice Bradley on the circuit and quoted from at length with approval by Mr. Chief Justice Fuller in the Patapsco Case.

Applying the principles recognized in these cases to the *case at bar, does the act in question do violence to the exclusive right of Congress to regulate interstate commerce? We take judicial notice of the fact that, in the territory of New Mexico, and in other similar parts of the West, cattle are required to be branded in order to identify their ownership, and that they run at large in great stretches of country with no other means of determining their separate ownership than by the brands or marks upon them. In view of these considerations, and for the purpose of protecting the owners of cattle against fraud and criminal seizures of their property, the territory of New Mexico has made provision, by means of a system of laws enacted for the purpose, for the protection of the ownership of cattle and the prevention of fraudulent appropriations of this kind of property. The legislation upon the subject in the territory is thus summarized in the opinion, in this case, of the supreme court of New Mexico (78 Pac. 74):

"The first act relating to inspection of hides was passed in 1884, and provided that all butchers should keep a record of all animals slaughtered, and keep the hides and horns of such animals for thirty days after slaughter, free to the inspection of all persons (Comp. Laws, § 84); and provided a penalty for failure to keep the record and the hides and horns (§ 86), and a penalty for refusal of inspection of the record or hides (§ 87). In 1891 all persons were required to keep hides for thirty days for the inspection of any sheriff, deputy sheriff, or any constable, or any board or inspector, or any officer authorized to inspect hides (§ 89), and provided a penalty (§ 90). In 1889, amended in 1895 (Laws 1895, chap. 29, § 4, p. 70), a cattle sanitary board was created (§ 183), with power to adopt

and enforce quarantine regulations and regulations for the inspection of cattle for sale and slaughter (§ 184), and pay inspectors not to exceed $2.50 per day and their expenses (§ 190). In 1891 the cattle sanitary board was authorized and required to make regulations concerning inspection of cattle for shipment, and hides and slaughter-[52]houses (§ 208), and there was provided *the details of arrangement for inspection of cattle (§ 212), and the duties of cattle inspectors were enlarged by providing: 'Every slaughterhouse in this territory shall be carefully inspected by some one of the inspectors aforesaid, and all hides found in such slaughterhouses shall be carefully compared with the records of such slaughterhouses, and a report in writing setting forth the number of cattle killed at any such slaughterhouse since the last inspection, . . . the names of the persons from whom each of said cattle was bought, the brands and marks upon each hide, and any information that may be obtained touching the violation by the owner of any such slaughterhouse, or any other person, of the provisions of an act entitled "An Act for the Protection of Stock, and for Other Purposes," approved April 1, 1884. For the purpose of making the inspection authorized by this act, any inspector employed by the said sanitary board shall have the right to enter, in the day or nighttime, any slaughterhouse or other place where cattle are killed in this territory, and to carefully examine the same, and all books and records required by law to be kept therein, and to compare the hides found therein with such records' (§ 213). In 1893 it was provided that the cattle sanitary board might fix fees for the inspection of cattle and hides (§ 221) (repealed in 1899 [Laws 1899 chap. 53, p. 107]) and that such fees shall be paid to the secretary of the board and placed to the credit of the cattle sanitary board (§ 222), and shall be used, together with funds realized from taxes levied and assessed, or to be levied and assessed, upon cattle only, to defray the expenses of the board (§ 220). Chapter 44, p. 94, of the Laws of 1899, makes no changes in the law material to the consideration of this case. Section 2, chap. 53, p. 107, of the Laws of 1899, provides a fee of 3 cents for inspection of cattle."

In pari materia with this legislation the act of 1901, now under consideration, was passed. Sections 3 and 4 of that act are as follows:

"Sec. 3. Hereafter it shall be unlawful [53]for any person, firm, *or corporation to offer, or any railroad company or other common carrier to receive, for the purpose of shipment or transportation beyond the limits of this territory, any hides that have not been inspected and tagged by a duly authorized inspector of the cattle sanitary board of New Mexico, for the district in which such hides originate. For each hide thus inspected there shall be paid by the owner or holder thereof a fee or charge of 10 cents, and such fee or charge shall be a lien upon the hides thus inspected, until the same shall have been paid. Each inspector of hides shall keep a complete record of all inspections made by him, and shall at once forward to the secretary of the cattle sanitary board, on blanks furnished him for that purpose, a complete report of each inspection, giving the names of the purchaser and shipper of the hides, as well as all the brands thereon, which said report shall be preserved by the secretary as a part of the records of his office.

"Sec 4. Any person, firm, or corporation, common carrier, railroad company, or agent thereof, violating any provision of this act, or refusing to permit the inspection of any hides as herein provided, shall, upon conviction thereof, be deemed guilty of a misdemeanor, and shall be fined in any sum not exceeding $1,000 for each and every violation of the provisions of this act."

The purpose of these provisions is apparent, and is to prevent the criminal or fraudulent appropriation of cattle by requiring the inspection of hides and registration by a record which preserves the name of the shipper and purchaser of the hides, as well as the brands thereon, and by which is afforded some evidence, at least, tending to identify the ownership of the cattle. It is evident that the provision as to the shipment of the hides beyond the limits of the territory is essential to this purpose, for if the hides can be surreptitiously or criminally obtained and shipped beyond such limits, without inspection or registration, a very convenient door is open to the perpetration of fraud and the prevention of discovery.

*It is argued that this act lays a special [54] burden upon interstate commerce, because, under the law, hides not offered for transportation are not required to be inspected after thirty days in slaughterhouses and not at all outside of slaughterhouses. But legislation is not void because it meets the exigencies of a particular situation. Other statutory provisions apply to property remaining in the territory, where possibly it may be found and identified. When shipped beyond the limits of the territory the means of reaching it are beyond local control, and it is the purpose of §§ 3 and 4 of the act of 1901 to preserve within the

territory a record of the brands identifying the property and naming the purchaser or shipper. Certainly we cannot judicially say that there can be no valid reason for making the inspection in question apply only to hides offered for transportation beyond the territory, and that for that reason the tax is an arbitrary discrimination against interstate traffic.

It is urged further that this is a mere revenue law and in no just sense an inspection law, and, therefore, not within the police power conferred upon the territory. It is true that inspection laws ordinarily have for their object the improvement of quality, and to protect the community against fraud and imposition in the character of the article received for sale or to be exported, but in the Patapsco Case, supra, it was directly recognized that inspection laws such as the one under consideration might be passed in the exercise of the police power, and such was the view of Mr. Justice Bradley in Neilson v. Garza, supra, decided on the circuit. We see no reason why an inspection law which has for its purpose the protection of the community against fraud and the promotion of the welfare of the people cannot be passed in the exercise of the police power, when the legislation tends to subserve the purpose in view. In the territory of New Mexico, and other parts of the country similarly situated, it is highly essential to protect large numbers of people against criminal aggression upon this class of property. The exercise of the police [55] power *may and should have reference to the peculiar situation and needs of the community. The law under consideration, designed to prevent the clandestine removal of property in which a large number of the people of the territory are interested, seems to us an obviously rightful exercise of this power. It is true it affects interstate commerce, but we do not think such was its primary purpose, and while it may have an effect to levy a tax upon this class of property, the main purpose evidently was to protect the people against fraud and wrong.

It is further urged that this law is invalid because it imposes an unreasonable fee for the inspection, which goes into the treasury of the sanitary board, and the allegations of the writ tend to show that an inspector might make a considerable sum in excess of day's wages in the work of inspecting hides under the provisions of this act. The law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack th faith of the law. Patapsco Guano Board of Agriculture, 171 U. S. 345-3 L. ed. 191-193, 18 Sup. Ct. Rep. 862.

We are of the opinion that the alleg of the relator as to the cost of insp compared with the fees authorized charged, and the profit which mig crue to the inspector, in view of oth necessary incidental expense connecte the inspection and registration, do not the case within that class which hold under the guise of inspection, othe different purposes are to be subserved rendering the legislation invalid.

Upon the whole case, we are of the ion that, in the absence of congre legislation covering the subject, and n a different provision, the act in contr is a valid exercise of the police po the territory, and not in violation Constitution giving exclusive pow Congress in the regulation of interstat merce.

Affirmed.

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*CHARLES S. LANDRAM and Jo Broaddus, Executors of Constan Vertner, Deceased, and Lillie K. V Appts.,

v.

GABRIELLA K. JORDAN.

(See S. C. Reporter's ed. 56-64.)

Appeal—questions reviewable—who m heard.

1. One who succeeds, on a bill view, in having upheld as to her al trust declared void by the original cannot, on appeal, where she does not appeal, go beyond supporting the m decree and opposing every assignme error.

Testamentary trust—effect of partial iidity—perpetuities.

2. An equitable life estate given niece of the testator in the income f specified piece of land excepted fro general scheme for the creation of a fund from the rents of the testator' property for the benefit of his grandch does not fail because of the repugna this scheme to the rule against perpet the effect of which is to give the tes daughter all the rest of the propert cluding the remainder in the life estat does this result follow because the tr are directed to keep such income up

NOTE.—As to bills of review gener see Bank of United States v. Ritchie ed. U. S. 891.

On the right to maintain a bill of r as dependent upon interest—see n Thorington v. Thorington, 36 L.R.A. 3

per month from the other property included in the trust.

Bill of review—parties.

3. The objection that the widow of the testator's son should have been made a party to a bill to review a decree declaring that a trust created by the will in favor of the testator's grandchildren violated the rule against perpetuities is too late when first raised on the hearing of a demurrer to the bill of review, where the fact of her existence does not appear of record.

[No. 179.]

Argued October 9, 1906. Decided October 22, 1906.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, modifying, on demurrer to a bill of review, a decree which declared a trust to violate the rule against perpetuities, and upholding such trust as to the party filing such bill. Affirmed.

See same case below, 25 App. D. C. 291.

The facts are stated in the opinion.

Mr. **John J. Hemphill** argued the cause, and, with Mr. James Hemphill, filed a brief for appellants:

If the trust attempted to be created by the testator covering the Washington property is void, does the provision for the appellee fall with it?

The answer to this question depends upon the further inquiries as to whether the attempted trust embodies the main scheme or plan of the testator as to his Washington property; and whether the $40 per month which the trustees are directed to pay to appellee, out of the income from the trust property, is dependent upon, or connected with, his general plan or scheme.

Knox v. Jones, 47 N. Y. 393; Pitzel v. Schneider, 216 Ill. 87, 74 N. E. 779; Lawrence v. Smith, 163 Ill. 149, 45 N. E. 259; Harris v. Clark, 7 N. Y. 242; Barnum v. Barnum, 26 Md. 119, 90 Am. Dec. 88; Coster v. Lorillard, 14 Wend. 265; Re Christie, 133 N. Y. 473, 31 N. E. 515; Amory v. Lord, 9 N. Y. 403; 28 Am. & Eng. Enc. Law, 2d ed. p. 866.

The rule holding that one trust may be valid and another void is applied only in aid and assistance of the manifest intent of the testator, and never where it would lead to a result contrary to the purpose of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property.

Tilden v. Green, 130 N. Y. 29, 14 L.R.A. 33, 27 Am. St. Rep. 487, 28 N. E. 880.

Mary B. Kearney, widow of Edmund Kearney, son of the testator, who died after his father, is a necessary party to the bill of review.

Debell v. Foxworthy, 9 B. Mon. 228; Turner v. Berry, 8 Ill. 541; Bank of United States v. White, 8 Pet. 262, 268, 8 L. ed. 938, 940; Story, Eq. Pl. 420; Dan. Ch. Pl. & Pr. 6th ed. § 1580; Singleton v. Singleton, 8 B. Mon. 349; 2 Am. & Eng. Enc. Law, p. 264; Creed v. Lancaster Bank, 1 Ohio St. 1; Fletcher, Eq. Pl. § 925.

Parties who have not appealed are not entitled to be heard in this court, except in support of the decree in the court below.

The Slavers (Coggeshall v. United States) 2 Wall. 383, 17 L. ed. 911; Loudon v. Taxing District, 104 U. S. 771, 774, 26 L. ed. 923, 924; Mt. Pleasant v. Beckwith, 100 U. S. 514, 527, 25 L. ed. 699, 702; Chittenden v. Brewster, 2 Wall. 196, 17 L. ed. 841; United States v. Blackfeather, 155 U. S. 180, 186, 39 L. ed. 114, 116, 15 Sup. Ct. Rep. 64; Bolles v. Outing Co. 175 U. S. 262, 44 L. ed. 156, 20 Sup. Ct. Rep. 94; 2 Enc. Pl. & Pr. pp. 157, 158.

Mr. **Charles F. Wilson** argued the cause, and, with Mr. Frank W. Hackett, filed a brief for appellee.

Mr. Frank Sprigg Perry filed a brief on behalf of Mary B. Kearney, widow of Edmund Kearney:

Upon a bill of review all parties in interest should be made parties defendant to the suit.

Friley v. Hendricks, 27 Miss. 412; Ralston v. Sharon, 51 Fed. 703; Shields v. Barrow, 17 How. 130, 140, 15 L. ed. 158, 160; Williams v. Bankhead, 19 Wall. 563, 22 L. ed. 184.

Where the complainants have no rights separable from, or independent of, the rights of persons not made parties, and where a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others, not made parties, a court of equity will not proceed to a decree.

Mallow v. Hinde, 12 Wheat. 193, 198, 6 L. ed. 599, 600; Cameron v. M'Roberts, 3 Wheat. 591, 4 L. ed. 467.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a decree of the court of appeals of the District of Columbia affirming a decree of the supreme court upon a bill of review brought by Gabriella K. Jordan, the appellee. The decree under review was rendered in a suit for the construction of the will of Thomas Kearney and for the determination of the validity of a trust created by it, so far as the same concerned land in the District of Columbia. That decree declared the trust bad as attempting to create a perpetuity. Under

the bill of review the decree was modified, on demurrer, to the extent of the interest of Gabriella K. Jordan, and the trust was declared valid as to her. 25 App. D. C. 291. The executors of the testator's heirs and a daughter of the said heir appealed to this court.

Thomas Kearney died on July 5, 1896. The will disposes of land in various places. [61] In item 3 it enumerates the testator's* property in Washington. In item 5 it devises this and other property upon a trust to be continued until January 1, 1928, and there and elsewhere, with the following exception, makes a fund from the Washington rents and profits to be disposed of as directed in the will. Item 6 is as follows:

"I hereby authorize and direct that my said trustee shall, during the natural life of my beloved niece, Gabriella K. Jordan, pay over to her regularly each month, as soon as collected, all rents and revenues collected or derived from that certain property described in the third item hereof as lot No. 611 'M' Street, N. W., Washington, D. C.; but, in case said rents and revenues shall at any time be less than the sum of $40 for any one or more months, then my said trustees are hereby authorized and instructed to add to the sum so collected a sufficient amount to make the said amount of $40 for each and every month; it being my desire that she shall have a regular income of at least $40 per month, and that the same shall be paid over to her monthly; but if the income derived from said premises shall amount to a sum in excess of $40 per month, she shall have the whole thereof." (Rec. 10.)

Item 7 directs the trustee to let all the Washington property, except 611 M street, and out of the rents to pay $90 a month to the testator's daughter, Constance K. Vertner, as ordered in item 5; the residue, so far as necessary, to be applied to the support and education of her three children, named, with further provisions. Item 8 gives the remainder in fee of 611 M street to the testator's grandson, provided that if Gabriella Jordan dies before January 1, 1928, he shall only receive the rents and profits, and if she dies before the grandson reaches the age of twenty-two the rents shall be disposed of as provided in item 7 as to other Washington property. In item 21, the testator, "for fear that there may be some difficulty in construing the different provisions" of the will, states his in- [62] tention that all the money *arising from the Washington rents, "except that which is to go to Gabriella K. Jordan, shall be placed in a common fund for the payment (1) of taxes, insurance and repairs on said property and of the premises at Luray, Vi ginia; (2) of (90) ninety dollars per mon to my said daughter, Constance K. Vertn during her natural life; (3) for the suppo education, and maintenance of my s three Vertner grandchildren until Lillie Vertner shall have arrived at the age nineteen years, and until Edmund K. a Thomas K. shall have arrived at the age twenty-two years respectively."

The persons in whose favor were ma the provisions which were adjudged b were one of the testator's heirs, his daug ter, Constance K. Vertner, and the childr of Constance. The daughter pleaded th the other heir, Edmund Kearney, also pr vided for in the will, died, leaving her l heir, that the trust was bad, and, by i plication, that she was entitled to the pro erty which it embraced. She now is des By the original decree the whole trust fur including that given to Gabriella Jorda went to the testator's heirs as property u disposed of by the will. The only pers dissatisfied with that decree was Gabriel Jordan, and, on the other hand, the exec tors and the children of Constance are t only appellants from the decree on revie According to the rule that has been la down in this court, Gabriella, as she did n appeal, cannot go beyond supporting the d cree and opposing every assignment of erro Mt. Pleasant v. Beckwith, 100 U. S. 51 527, 25 L. ed. 699, 702; The Stephen Morg (The Stephen Morgan v. Good) 94 U. 599, 24 L. ed. 266; Chittenden v. Brewst 2 Wall. 191, 196, 17 L. ed. 839, 841; Fie v. Barber Asphalt Paving Co. 194 U. S. 61 621, 48 L. ed. 1142, 1153, 24 Sup. Ct. Re 784. We assume this rule to be corre Although her counsel attempted to arg the validity of the trust as a whole, a other questions, we assume, without d ciding, the decree to be unimpeachable a right except so far as appealed fro Therefore we shall confine ourselves to co sidering whether the gift to Gabriella is intimately connected with the failing schem as to fail with it.

*It would be a strong thing to say th we gather from this will an intent tha if the trust so far as it concerns the test tator's descendants should fail because th prefer to take the property by intestacy fr from the limitations of the will, therefo the one gift outside his family should l defeated also. The trust is not a met physical entity or a Prince Rupert's dr which flies to pieces if broken in any pa It is a provision to benefit descendants a a niece. There is no general principle l which the benefits must stand or fall t gether. It is true that all the Washingt property was given to the trustees in o

clause and that a part of the scheme in favor of the testator's grandchildren was the creation of a fund from the rents. But, as is stated in item 21, 611 M street was excepted from the scheme, and the whole income of this lot, or, in other words, an equitable estate in the specified land, is given to Gabriella Jordan for life by item 6. If that were all we see no reason for a doubt that that gift would be good, whether the gift to the other beneficiaries were good or not. The fact that the testator's daughter takes all the rest of the property, instead of her children getting a postponed interest in a part, is no ground for denying to the niece the life estate given to her in an identified and excepted piece of land. It does not make the case any worse that a part of the property thus going to the testator's daughter is the remainder in the estate given to his niece.

The appellants lay hold of the instructions to the trustees to add to the rents enough to make Gabriella's income up to $40 a month, and argue as if the gift were in substance only a gift of $40 a month from a fund that cannot be established. Such is not the fact. The gift is primarily and in any event a gift of the income of 611 M street. But whatever may be the fate of the rest of the trust we see nothing to hinder the trustees from keeping the income up to $40 from the other property devised to them. Of course, they could not derive income from property not included in the trust, and only the property in-
64 cluded is charged with *the liability. The decree may be modified by inserting after the words "against his entire estate" the words "in the District of Columbia."

It is objected in argument, although not in the pleadings, that the widow of Edmund Kearney has a right of dower in the Washington estate which descended to him, and that she should have been made party to the bill of review. The fact of the widow's existence does not appear of record as against the appellees, and we agree with the court of appeals that the objection is made too late.

Decree affirmed.

FIDELITY MUTUAL LIFE INSURANCE COMPANY, Appt.,

v.

WILLIAM H. CLARK, Morris A. Spoonts, Charles A. Culberson, and Phillips Investment Company.

(See S. C. Reporter's ed. 64–75.)

Judgment—fraud—notice.

1. Notice of the fraud in recovering a judgment on a policy of life insurance which induces the payment into court of the amount of recovery, out of which the clerk of court pays over the sums called for in certain assignments by way of contingent fees for professional services in collecting the insurance, cannot be established by the mere fact that, while the assignees held an interest in the policy only, they were assignees of a chose in action, and took it subject to the equities.

Judgment—fraud—notice.

2. Notice of the denial of the death of the insured in the answer in an action on a policy of insurance is not notice of the fraud in recovering judgment on the policy while the insured was alive which will impeach such judgment as to the parties to whom the clerk of court pays over, out of the money paid into court in satisfaction of such judgment, the sums called for in certain assignments of an interest in the policy by way of contingent fees for professional services, rendered in good faith in collecting the insurance.

[No. 25.]

Argued October 15, 16, 1906. Decided October 29, 1906.

APPEAL from the Circuit Court of the United States for the Northern District of Texas to review a decree enjoining the setting up of a judgment at law on policies of life insurance as to the beneficiary, but dismissing the bill as against the assignees of partial interests in the policies. Affirmed.

The facts are stated in the opinion.

Mr. **Maurice E. Locke** argued the cause, and, with Mr. Eugene P. Locke, filed briefs for appellant:

A court of equity will grant relief under such circumstances as we have here.

Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; Graver v. Faurot, 64 Fed. 241, 73 Fed. 1022, 162 U. S. 435, 40 L. ed. 1030, 16 Sup. Ct. Rep. 799, 22 C. C. A. 156, 46 U. S. App. 268, 76 Fed. 257; Maddox v. Apperson, 14 Lea, 596; Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. ed. 362; New York L. Ins. Co. v. Bangs, 103 U. S. 780, 26 L. ed. 608; Coddrington v. Webb, 2 Vern. 240; Wonderly v. Lafayette County, 150 Mo. 635, 45 L.R.A. 386, 73 Am. St. Rep. 474, 51 S. W. 745; Guild v. Phillips, 44 Fed. 461; Ocean Ins. Co. v. Fields, 2 Story, 59, Fed. Cas. No. 10,406; Trefz v. Knickerbocker L. Ins. Co. 8 Fed. 177; Stowell v. Eldred, 26 Wis. 504; State v. Fraker, 148 Mo. 143, 49 S. W. 1017.

If one person gets possession of another's money by fraud, the law raises a promise to return it, and upon such implied promise an action may be maintained.

Bishop, Contr. § 226; Moses v. Macfer-

lan, 2 Burr. 1005; Buller v. Harrison, 2 Cowp. 565; Northwestern Mut. L. Ins. Co. v. Elliott, 5 Fed. 225; National L. Ins. Co. v. Minch, 53 N. Y. 144; Gaines v. Miller, 111 U. S. 395, 28 L. ed. 466, 4 Sup. Ct. Rep. 426; Merryfield v. Willson, 14 Tex. 224, 65 Am. Dec. 117; Michigan v. Phœnix Bank, 33 N. Y. 9.

The fraud in this case consisted in obtaining, by wrongful means, a judgment that William A. Hunter had died, thereby rendering the plaintiff liable to Mrs. Smythe. Whether he had so died was the question directly in issue in the action at law, and the verdict and judgment therein are conclusive between the parties and privies, save upon such direct or collateral attack as may be permissible under the circumstances.

Bigelow, Estoppel, 90; Outram v. Morewood, 3 East, 346; Hazen v. Reed, 30 Mich. 331; Monks v. McGrady, 71 Tex. 134, 8 S. W. 617; McGrady v. Monks, 1 Tex. Civ. App. 611, 20 S. W. 959.

The Federal courts and the courts of all the states in which the various defendants reside agree in holding that a judgment cannot be collaterally attacked for fraud.

Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475; Peninsular Iron Co. v. Eells, 15 C. C. A. 189, 32 U. S. App. 348, 68 Fed. 24; Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 468, 47 U. S. App. 1, 76 Fed. 429; Lake County v. Platt, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 567; Maddox v. Summerlin, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567; Anderson v. Anderson, 8 Ohio, 109; State ex rel. Klotz v. Ross, 118 Mo. 23, 23 S. W. 196.

Moreover, the Federal decisions probably are controlling in this matter, as the judgment was rendered by a Federal court.

Embry v. Palmer, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25.

The defendants Clark, Culberson, Spoonts, and Phillips Investment Company are all privies to the judgment by assignment of interests in its subject-matter, and are protected by it to the same extent as Mrs. Smythe.

Bigelow, Estoppel, 142–149; 2 Black, Judgm. §§ 549, 550; Lake County v. Platt, supra; Porter v. Bagby, 50 Kan. 412, 31 Pac. 1058.

Therefore, as to all the defendants, equitable relief is necessary and proper in the case, if the facts are sufficient to warrant interfering with the judgment.

In the present case, having jurisdiction to restrain the defendants from setting up the judgment as an adjudication, the court should not turn the plaintiff over to sundry law courts in Texas, Ohio, and Missouri, for the recovery of its money, but, if otherwise proper, itself should administer f relief by ordering the return of the mon

1 Story, Eq. Jur. §§ 64K–71, 456, 457; Id. § 885; 1 Pom. Eq. Jur. §§ 181, 231, 2 2 Id. § 910; Roy v. Beaufort, 2 Atk. 1 Rickle v. Dow, 39 Mich. 91; Young v. Sig 48 Fed. 182; Ocean Ins. Co. v. Fields a Michigan v. Phœnix Bank, supra.

When property has been obtained fraud, its true owner may recover it fr any person except a bona fide purchaser value, without notice. The authorities this subject are numerous, and are belie to be unanimous in support of the pro sition.

Buller v. Harrison, supra; Thurston Blanchard, 22 Pick. 18, 33 Am. Dec. 7 Devoe v. Brandt, 53 N. Y. 462.

The exception relates only to those ki of property whose purchasers for value protected by the policy of the law fr equities outstanding against their vend of which they had no notice. Such money, negotiable paper, land, and m chantable chattels, naming them in a scending scale of negotiability. A ju ment is not such property. The policy the law is to protect litigants, not outsid dealing with judgments. The assignee a judgment takes it subject to all equit existing between the litigants, whether had notice of the same or not, and rega less of the consideration paid therefor.

2 Black, Judgm. §§ 953, 955; 1 High, § 190; Taylor v. Nashville & C. R. Co. Tenn. 228, 6 S. W. 393; Blakesley v. Jo son, 13 Wis. 530; Independent School D trict v. Schreiner, 46 Iowa, 172; Rea Forrest, 88 Ill. 275; Northam v. Gord 23 Cal. 255; Weber v. Tschetter, 1 S. 205, 46 N. W. 201; Ellis v. Kerr (Tex. App.) 23 S. W. 1050, 11 Tex. Civ. App. 32 S. W. 444; Wright v. Treadwell, 14 T 255; Minnesota Thresher Mfg. Co. v. H 10 N. D. 16, 84 N. W. 581; Brisbin v. N hall, 5 Minn. 273, Gil. 217; McJilton v. L 13 Ill. 486, 54 Am. Dec. 449; Wright Levy, 12 Cal. 257; Jeffries v. Evans, Mon. 119, 43 Am. Dec. 158; Devoll v. Sc 49 Me. 320; Padfield v. Green, 85 Ill. Mulford v. Stratton, 41 N. J. L. 466; M v. Lamb, 43 Minn. 80, 19 Am. St. Rep. 44 N. W. 675; Fred Miller Brewing Co Hansen, 104 Iowa, 307, 73 N. W. 827; Ric v. Alderman, 132 N. C. 62, 43 S. E. 5 Frankel v. Garrard, 160 Ind. 209, 66 N. 687.

A policy of insurance is not a negotia instrument, and the purchaser of it ta it subject to all equities. 1 May, Ins. 3 3 Joyce, Ins. § 2326. The same is true an order drawn against a specific f therein named. 7 Cyc. Law & Proc. p. Nor do we see how it can be contended t

a fund of money deposited in the registry of a court, or which it is expected will be so deposited, possesses any of the elements of negotiability. The assignee of an interest in such a fund, it seems to us, takes only the title which the assignor had.

An order drawn against a particular fund constitutes an equitable assignment thereof *pro tanto*; and, if such be the intention of the parties it will be so held, even though the order be general in its form. The fund so assigned need not be actually in existence at the time of the giving of the order, provided it is to come into existence as the result of arrangements already made.

3 Pom. Eq. Jur. §§ 1280–1284; Fourth Street Nat. Bank v. Yardley, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439; Brill v. Tuttle, 81 N. Y. 454, 37 Am. Rep. 515.

Any fact which clearly proves it to be unconscionable to execute the judgment, and of which the judgment debtor might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.

Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. ed. 362; Graver v. Faurot, 22 C. C. A. 136, 46 U. S. App. 268, 76 Fed. 257; Stowell v. Eldred, 26 Wis. 504; Birch v. Birch [1902] P. 62, 130; Boswell v. Coaks, 6 Reports, 167; Cole v. Langford [1898] 2 Q. B. 36; Priestman v. Thomas, L. R. 9 Prob. Div. 210; Barnesly v. Powel, 1 Ves. Sr. 119, 284; Bandon v. Becher, 9 Bligh, N. R. 532.

Mr. F. M. Etheridge argued the cause, and, with Messrs. Alexander & Thompson, McLaurin & Wozencraft, Spoonts, Thompson, & Barwise, and Etheridge & Baker, filed a brief for appellees:

A circuit court of the United States, sitting in equity, will not re-examine and revise a judgment at law, simply upon an allegation of fraud intrinsic in the law judgment.

United States v. Throckmorton, 98 U. S. 61, 68, 25 L. ed. 93, 96; Greene v. Greene, 2 Gray, 361, 61 Am. Dec. 454; Pacific R. Co. v. Missouri P. R. Co. 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583; Pico v. Cohn, 91 Cal. 129, 13 L.R.A. 336, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537; Pepin v. Lautman, 28 Ind. App. 74, 62 N. E. 60; Homer v. Fish, 1 Pick. 435, 11 Am. Dec. 218; United States v. Gleeson, 33 C. C. A. 272, 62 U. S. App. 311, 90 Fed. 778; Friese v. Hummel, 26 Or. 145, 46 Am. St. Rep. 610, 37 Pac. 458; Smith v. Lowry, 1 Johns. Ch. 320; Cotzhausen v. Kerting, 29 Fed. 821, 140 U. S. 678, 35 L. ed. 754, 11 Sup. Ct. Rep. 1019; Hilton v. Guyot, 159 U. S. 207, 40 L. ed. 123, 16 Sup. Ct. Rep. 139; Vance v. Burbank, 101 U. S. 514, 25 L. ed. 929; Steele v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; Dixon v. Graham, 16 Iowa, 310; Haas v. Billings, 42 Minn. 63, 43 N. W. 797; Loucheine v. Strouse, 49 Wis. 623, 6 N. W. 360; Moffatt v. United States, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10; United States v. Minor, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; Gray v. Barton, 62 Mich. 196, 28 N. W. 813; Amador Canal & Min. Co. v. Mitchell, 59 Cal. 179; United States v. White, 9 Sawy. 125, 17 Fed. 561; United States v. Hancock, 30 Fed. 858; Marriot v. Hampton, 7 T. R. 269; Richards v. Symes, 2 Atk. 319; Sewel v. Freeston, 1 Ch. Cas. 65; Flower v. Lloyd, L. R. 10 Ch. Div. 327.

The respondents here obtained none of the company's funds until the alleged duty of inquiry imputed to them had been prosecuted to the very highest source and exploded.

Bank of United States v. Bank of Washington, 6 Pet. 8, 8 L. ed. 299; Holly v. Missionary Soc. 180 U. S. 284, 45 L. ed. 531, 21 Sup. Ct. Rep. 395; Merchants Ins. Co. v. Abbott, 131 Mass. 397; Walker v. Conant, 69 Mich. 321, 13 Am. St. Rep. 391, 37 N. W. 292; Langley v. Warner, 3 N. Y. 327; Stephens v. Board of Education, 79 N. Y. 183, 35 Am. Rep. 511; Justh v. National Bank, 56 N. Y. 483; Webb v. Burney, 70 Tex. 322, 7 S. W. 841; Rector v. Fitzgerald, 8 C. C. A. 277, 19 U. S. App. 423, 59 Fed. 808; Eylar v. Eylar, 60 Tex. 315; McAusland v. Pundt, 1 Neb. 211, 93 Am. Dec. 358; Steele v. Renn, 50 Tex. 467, 32 Am. Rep. 605; Wadhams v. Gay, 73 Ill. 415; Glover v. Coit, 36 Tex. Civ. App. 104, 81 S. W. 136; Gould v. McFall, 118 Pa. 455, 4 Am. St. Rep. 606, 12 Atl. 336; Macklin v. Allenberg, 100 Mo. 337, 13 S. W. 350.

Wrongful conduct of the party sued is an essential element of his liability, and, without such showing, he cannot be held.

Schneider v. Sellers, 98 Tex. 380, 84 S. W. 417; 2 Pom. Eq. Jur. § 1051; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282.

Where the funds have become once lawfully titled in an outsider, the party injured cannot follow them, and, by his action, make illegal that which had a lawful inception.

Winston v. Masterson, 87 Tex. 200, 27 S. W. 768; McDonald v. Napier, 14 Ga. 89; Little v. Bunce, 7 N. H. 485, 28 Am. Dec. 363; Wright v. Aldrich, 60 N. H. 161; Florida C. R. Co. v. Bisbee, 18 Fla. 66; Kalmbach v. Foote, 86 Mich. 240, 49 N. W. 132; Gray v. Alexander, 7 Humph. 16; Costigan v. Newland, 12 Barb. 456; Butcher v. Henning 90 Hun, 565, 35 N. Y. Supp. 1006.

The complainant has proceeded throughout in the prosecution of this suit upon the

theory that it was coerced into paying off the Hunter policies. The contrary, however, is established. Being a voluntary payment, made not under duress, nor under mistake of law or fact, the company could not prevail in this proceeding, even if the equities of these respondents did not so greatly preponderate.

Gould v. McFall, supra; Dickerman v. Lord, 21 Iowa, 338, 89 Am. Dec. 579; McDonald v. Napier, Kalmbach v. Foote, and Butcher v. Henning, supra; Radich v. Hutchins, 95 U. S. 210, 24 L. ed. 409; Elston v. Chicago, 40 Ill. 514, 89 Am. Dec. 361; Groves v. Sentell, 13 C. C. A. 386, 30 U. S. App. 119, 66 Fed. 179.

There has been a payment, and the complainant seeks to reopen the payment, and recover, not the judgment, which has been discharged, but money that has been paid in the transaction.

People's Sav. Bank v. Bates, 120 U. S. 556, 30 L. ed. 754, 7 Sup. Ct. Rep. 679; Youngs v. Lee, 12 N. Y. 551; Meads v. Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331; Padgett v. Lawrence, 10 Paige, 170, 40 Am. Dec. 232; Struthers v. Kendall, 41 Pa. 214, 80 Am. Dec. 610; Goodman v. Simonds, 20 How. 343, 15 L. ed. 934.

The jurisdiction of the United States circuit court having been invoked and acquired entirely on the ground of diversity of citizenship by appellant, it should have appealed to the circuit court of appeals of the United States, and not to this court.

Carey v. Houston & T. C. R. Co. 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63; United States v. Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; Florida C. & P. R. Co. v. Bell, 176 U. S. 321, 325, 44 L. ed. 486, 488, 20 Sup. Ct. Rep. 399; Muse v. Arlington Hotel Co. 168 U. S. 430, 436, 42 L. ed. 531, 533, 18 Sup. Ct. Rep. 109; Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; Borgmeyer v. Idler, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; Ex parte Jones, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; Loeb v. Columbia Twp. 179 U. S. 472, 477, 45 L. ed. 280, 285, 21 Sup. Ct. Rep. 174.

In order to give the Supreme Court jurisdiction direct from the circuit court on a constitutional question, it must appear that the suit is one in which the question was really involved in the rendition of the judgment complained of, and that the question was controlling, or, at least, material.

Carey v. Houston & T. C. R. Co. 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63; Muse v. Arlington Hotel Co. 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; Re Lennon, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123; Ansbro v. United States, 159 U. S. 695, 40 L. ed. 310, 16 S Ct. Rep. 187; Lampasas v. Bell, 180 U 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 1 Newburyport Water Co. v. Newburyp 193 U. S. 561, 48 L. ed. 795, 24 Sup. Rep. 553; Western U. Teleg. Co. v. Arbor R. Co. 178 U. S. 239, 44 L. ed. 1 20 Sup. Ct. Rep. 867; McCain v. Des Moi 174 U. S. 168, 43 L. ed. 936, 19 Sup. Rep. 644; New Orleans v. Benjamin, U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 1

The fact that this suit was brought the circuit court to vacate the judgment the same court in the law case does make this a suit arising under the Con tution or laws or treaties of the Uni States, or give this court jurisdiction.

Carey v. Houston & T. C. R. Co. sup Metcalf v. Watertown, 128 U. S. 586, 32 ed. 543, 9 Sup. Ct. Rep. 173; Pope v. Lo ville, N. A. & C. R. Co. 173 U. S. 573, 43 ed. 814, 19 Sup. Ct. Rep. 500.

The party defeated on final judgment the circuit court must elect whether he go to the Supreme Court on the quest of jurisdiction alone, or to the circuit co of appeals on the whole case.

McLish v. Roff, 141 U. S. 661, 35 L. 893, 12 Sup. Ct. Rep. 118.

To give jurisdiction to the Supreme Co under the 5th section of the 7th Ame ment. there must be an assignment specification of error, stating the error c mitted by the court below. Appellant no such assignment or specification of e in the record, for the good reason the c below ruled in its favor in reference to "constitutional question" on demurrer, chambers, before answer and trial, and pellant has no right to now import the qu tion into the cause to give this court ju diction.

Ansbro v. United States, 159 U. S. 6 40 L. ed. 310, 16 Sup. Ct. Rep. 187.

The appellant, in its bill of complaint the circuit court, depended, to support t jurisdiction of that court, upon diversity citizenship between it and the respondea It also suggests, by way of argument, in brief herein on the merits, that its bill w in the nature of an ancillary bill to t original action. That circumstance d not, of course, affect the jurisdiction of t appeal.

Carey v. Houston & T. C. R. Co. 150 S. 179, 37 L. ed. 1043, 14 Sup. Ct. Rep. Marshall v. Holmes, 141 U. S. 589, 35 ed. 870, 12 Sup. Ct. Rep. 62.

The question of jurisdiction may not made the basis of a direct appeal to t court at the instance of the party in wh favor it was decided in the trial court; a a certificate from the circuit court, p

senting the question to this court, is indispensable.

Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity, brought in the circuit court to enjoin the setting up of a judgment at law recovered in the same circuit court upon three policies of life insurance, on the ground that the judgment was obtained by fraud. It also seeks to compel the plaintiff in the action at law, and other parties to whom interests in the policies were assigned, to repay the sums which they received upon them. The judgment was rendered in a case which came before this court, and the dramatic circumstances of the alleged death are set forth in the report. Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662. The appellant is the plaintiff in error in that case, having changed its name. After the date of the judgment the appellant discovered that Hunter, the party whose life was insured, was alive, and that the recovery was the result of a deliberate plot. Thereupon it forthwith brought this bill. One of the defenses set up and argued below and here was that, by the 7th Amendment to the Constitution, no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. On the facts alleged and proved the circuit court entered a decree against the plaintiff at law, Mettler, now Smythe, but dismissed the bill as against the assignees of partial interests in the policies. The insurance company appealed to this court.

The material facts are these: By way of a contingent fee for the services in collecting the insurance, Mrs. Mettler assigned to the present defendant Clark and his partners one-third interest in the policies, with an additional sum in case statutory damages and attorney's fees were recovered. This afterwards came to Clark alone. Clark and Mrs. Mettler assigned $500 each, from [73] their respective *interests, to the defendant Culberson, as a contingent fee for argument and services in this court. Clark also employed the defendant Spoonts, it would seem, on a contingent fee. Finally he mortgaged his right to the Phillips Investment Company. When the judgment was recovered, before execution, the insurance company paid the amount ($24,028.25) into court. Out of this the clerk paid to Mrs. Mettler $11,616; to Clark, $8,346; to Spoonts on Clark's order, $1,500; to Culberson, $1,026; and to the Phillips Investment Company, $1,540.24. It is these sums, other than that paid to Mrs. Mettler, that are in question here.

It will not be necessary to consider the constitutional question under the 7th Amendment, to which we have referred, or some other questions which were raised, because we are of opinion that the appellees are entitled to keep their money, even if the judgment can be impeached for fraud. They all got the legal title to the money which was paid to them, or, what is the same thing, got the legal title transferred to their order. That being so, the appellant must show some equity before their legal title can be disturbed. It founds its claim to such an equity on the mode in which the judgment which induced it to part with the title to its money was obtained. But fraud, of course, gives rise only to a personal claim. It goes to the motives, not to the formal constituents, of a legal transfer (Rodliff v. Dallinger, 141 Mass. 1, 6, 55 Am. Rep. 439, 4 N. E. 805), and the rule is familiar that it can affect a title only when the owner takes with notice or without having given value (Fletcher v. Peck, 6 Cranch, 87, 133, 3 L. ed. 162, 177; 2 Wms. Vend. & P. 674. See The Eliza Lines, 199 U. S. 119, 131, 50 L. ed. 115, 26 Sup. Ct. Rep. 8). The question is whether the appellant can make out such a case as that.

It is said that the title of the appellees stands on the judgment, and that if the judgment fails the title fails. But that mode of statement is not sufficiently precise. The judgment hardly can be said to be part of the appellees' title. It simply afforded the appellant a motive for its payment into court. *The appellees derive their [74] title immediately from Mrs. Mettler, and remotely from the act of the appellant. They stand exactly as if the appellant had handed over the $24,000 in gold to her and she thereupon had handed their proportion to them. We are putting no emphasis on the fact that the thing transferred was money. The appellees knew from what fund they were paid, from what source it came, and why it was paid to Mrs. Mettler. We are insisting only that the title had passed to them. But we repeat that, as the title had passed, the appellant must find some equity before it can disturb it, and we now add that, as there is no question that the appellees took for value, that is, in payment for their services, or, if it be preferred, in performance of Mrs. Mettler's contingent promise, the equity must be founded upon notice.

The notice to be shown is notice of the fact that the judgment which induced the

appellant's payment was obtained by fraud. But notice cannot be established by the mere fact that, while the appellees held an interest in the policies only, they were assignees of choses in action, and took them subject to the equities. That is due to a chose in action not being negotiable. It does not stand on notice. The general proposition was decided in United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 333, 334, 50 L. ed. 499, 26 Sup. Ct. Rep. 282; and United States v. Clark, 200 U. S. 601, 607, 608, 50 L. ed. 613, 26 Sup. Ct. Rep. 340; and earlier in Judson v. Corcoran, 17 How. 612, 615, 15 L. ed. 231, 232; and, we have no doubt, is the law of England. Of course, the assignee of an ordinary contract can only stand in the shoes of the party with whom the contract was made. In the discussions of the rule which we have seen we have found no other reason offered, as no other is necessary. But the assumption of the good faith of the assignee occurs in more cases than one.

The principle which we apply is further illustrated by the priority given to the later of two equitable titles, if the legal title be added to it (2 Pom. Eq. Jur. 3d ed. §§ 727, 768) by the doctrine of tacking, and, in [75] some degree, by the great distinction *recognized in other respects between the holder of title under an executed contract and a party to a contract merely executory. See 1 Wms. Vend. & P. 540, and cases cited. We may add further that, even if we were wrong, the equities to which an assignee takes subject are equities existing at the time of the assignment (1 Wms. Vend. & P. 584), and that the notice with which he is supposed to be charged as assignee can be of nothing more. Therefore, merely as assignees, the appellees had not notice of the, as yet, unaccomplished fraud in obtaining the judgment. The policies were honest contracts, and it was an interest in the policies which was assigned, at least to Clark.

The appellant is driven, therefore, to contend, as it did contend at the argument, that notice of the denial that Hunter was dead, in the suit on the policy, was notice of the fraud. But it is admitted that the appellees all acted in good faith; that they believed the plaintiff's case. In such circumstances, even if the answer had gone further, and had charged the plaintiff with all that the present bill charges against her, when a jury had decided that the charges were groundless, a judgment had been entered on the verdict, and the insurance company had accepted the result by paying the money into court without waiting for an execution, it would be impossible to say that the supposed notice was not purged. The appellees were not bound to contemplate future discoveries of what they honestly believed untrue, and a bill to impeach the final act of the law. See Bank of United States v. Bank of Washington, 6 Pet. 8, 19, 8 L. ed. 299, 304.

Decree affirmed.

Mr. Justice Harlan and Mr. Justice White dissent.

Mr. Justice McKenna took no part in the decision of this case.

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*DANIEL RED BIRD et al., Citizens of the [7
Cherokee Nation by Blood, Appts.,

v.

UNITED STATES. (No. 125.)

CHEROKEE NATION, Appt.,

v.

UNITED STATES. (No. 126.)

FRANCIS B. FITE et al., Intermarried White Persons, Claiming to be Entitled to Citizenship in the Cherokee Nation, Appts.,

v.

UNITED STATES. (No. 127.)

PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, Appts.,

v.

UNITED STATES. (No. 128.)

(See S. C. Reporter's ed. 76-96.)

Cherokee enrolment—rights of intermarried whites.

1. White persons residing in the Cherokee Nation who became Cherokee citizens under the Cherokee laws by intermarriage with Cherokees by blood prior to November 1, 1875, when a Cherokee law became effective which declared that such persons by intermarriage acquired no rights of soil or interest in the vested funds of the Nation, are equally interested, and have equal *per capita* rights with Cherokee Indians by blood in the lands constituting the public domain of the Cherokee Nation, and are entitled to be enrolled for that purpose.

Cherokee enrolment—rights of intermarried whites.

2. No rights, interest, or share in any funds belonging to the Cherokee Nation, except where such funds were derived by lease, sale, or otherwise from the lands of the Cherokee Nation conveyed to it by the United States by the patent of December, 1838, were acquired by white persons residing in the Cherokee Nation who became Cherokee citizens under the Cherokee laws by intermarriage with Cherokees by blood

prior to November 1, 1875, when a Cherokee law became effective which declared that such persons by intermarriage acquired no rights of soil or interest in the vested funds of the Nation.

Statutes—effect of compilation.

3. The original Cherokee law as duly passed and approved must prevail as against omissions in subsequent compilations, where the acts providing for such compilations did not declare that they should be effective as laws of the Cherokee Nation.

Indians—rights of adopted whites.

4. Civil and political, and not property, rights, were alone within the purview of the amendment made in 1866 to the 5th section of the Cherokee Constitution of 1839, relating to eligibility to a seat in the National Council, by which "whites legally members of the Nation by adoption" were declared to be citizens of the Cherokee Nation.

Cherokee enrolment—rights of intermarried whites.

5. White persons who intermarried with Cherokees after November 1, 1875, when a Cherokee law became effective which declared that such persons by intermarriage acquired no right of soil or interest in the vested funds of the Cherokee Nation, are not entitled to share in the allotment of the lands or in the distribution of any of the funds belonging to such Nation, and are not entitled to be enrolled for that purpose.

Indians—rights of intermarried whites.

6. The ratification by the Cherokee Nation of the act of Congress of July 1, 1902 (32 Stat. at L. 716, chap. 1375), which in § 26 declares that no white person intermarried since December 16, 1895, shall be entitled to enrolment or to participate in the distribution of the tribal property of the Cherokee Nation, does not amount to a concession of property rights by the Indians to all who intermarried prior to that date.

Cherokee enrolment—rights of intermarried whites.

7. White persons who have intermarried with Delaware or Shawnee citizens of the Cherokee Nation, not thereby becoming citizens themselves under the Cherokee laws, have no part or share in the Cherokee property, and are not entitled to participate in the allotment of the lands or in the distribution of the funds belonging to such Nation, and are not entitled to be enrolled for that purpose.

Cherokee enrolment—rights of intermarried whites — married out and abandoned whites.

8. White persons who intermarried with Cherokees by blood, and, after the death of the Cherokee wife or husband, intermarried with persons not of Cherokee blood, and white men who, having married Cherokee women, abandoned them, have no part or share in the Cherokee property, and are not entitled to share in the allotments of the lands or in the distribution of any of the funds belonging to the Cherokee Nation, or to be enrolled for that purpose, although the proceedings in the nature of office found authorized by the Cherokee laws have not been instituted to deprive them of the rights and privileges acquired by intermarriage.

[Nos. 125, 126, 127, 128.]

Argued February 19, 20, 1906. Decided November 5, 1906.

APPEALS from the Court of Claims to review a decree which adjudged that only such white persons as intermarried with Cherokees by blood prior to November 1, 1875, were entitled to any share in the Cherokee property, or to be enrolled for that purpose. Affirmed.

See same case below, 40 Ct. Cl. 411.

Statement by Mr. Chief Justice Fuller:

*The subject-matter of this suit consists of [77] 4,420,406 acres of land in the Cherokee country about to be allotted among the Cherokee people entitled to participate in the distribution of the common property of the Cherokee Nation. The case was transmitted to the court of claims by the Secretary of the Interior, on the 24th of February, 1903, the nature of the controversy being thus stated:

"A controversy has arisen as to the rights of white persons intermarried with Cherokee citizens, and a protest has been filed with this Department on behalf of a large number of citizens of the Cherokee Nation by blood against the enrolment of intermarried persons, 'so as to recognize their right to participate in the distribution of any of the common property of the Cherokee Nation of whatever kind or character.' It is asserted, on the one hand, that the Cherokee laws have never recognized the right of 'intermarried citizens' to share in the distribution of the property of the Nation, and, on the other hand, that the Cherokee laws as well as the laws of Congress recognize those persons who have been married to Cherokee citizens in accordance with the laws of the Cherokee Nation relating to marriage as full citizens of such nation, entitled to share equally with full blooded citizens in the property of the tribe."

Thereafter, Congress, by the act of March 3, 1905 (33 Stat. at L. 1048, 1071, chap. 1479), provided as follows:

"That in the case entitled 'In the Matter of Enrolment of Persons Claiming Rights in the Cherokee Nation by Intermarriage against the United States, Departmental, Numbered Seventy-six,' now pending in the court of claims, the said court is hereby authorized and empowered to render final judgment in said case, and either party feeling itself aggrieved by said judgment

shall have the right of appeal to the Supreme Court of United States within thirty days from the filing of said judgment in the court of claims. And the said Supreme Court of the United States shall advance said case on its calendar for early hearing."

[78] *The court of claims filed its opinion May 15, 1905, and on May 18 findings of fact and conclusions of law, and on that day entered its decree as follows:

"This case having been transmitted to this court by the Secretary of the Interior by letter dated February 24, 1903, for the findings and opinion of the court in accordance with the provisions of § 2 of the act of Congress of March 3, 1883, entitled 'An Act to Afford Assistance and Relief to Congress and the Executive Departments in the Investigation of Claims and Demands against the Government' (22 Stat. at L. 485, chap. 116, U. S. Comp. Stat. 1901, p. 748), and Congress, by the act of March 3, 1905, entitled 'An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department and for Fulfilling Treaty Stipulations with Various Indian Tribes for the Fiscal Year Ending June 30, 1906, and for Other Purposes,' having made the following enactment:

"'That in the case entitled "In the Matter of Enrolment of Persons Claiming Rights in the Cherokee Nation by Intermarriage against the United States, Departmental, Numbered Seventy-six," now pending in the court of claims, the said court is hereby authorized and empowered to render final judgment in said case, and either party feeling itself aggrieved by said judgment shall have the right of appeal to the Supreme Court of the United States within thirty days from the filing of said judgment in the court of claims. And the said Supreme Court of the United States shall advance said case on its calendar for early hearing;'

"And the cause coming on to be heard upon the petition, answers, agreed facts, proofs, and arguments submitted by the attorneys of the parties to the cause, respectively, and the court having heard and fully considered the same;

"And it appearing to the court that all those white persons who married Cherokee Indians by blood subsequently to the enactment of the Cherokee law which became effective November 1, 1875, and which declared that such persons by intermarriage acquired no rights of soil or interest in the

[79] *vested funds of the Nation, had due notice of the limitations set upon their rights and privileges as citizens; and that those white persons who married Cherokee citizens by blood prior to said date acquired rights as citizens in the lands belonging to the Nation

and held and owned as national lands, cept such of these intermarried persons lost their rights as Cherokee citizens abandoning their Cherokee wives or by m rying other white or nontribal men women having no rights of citizenship blood in said Cherokee Nation:

"It is by the court ordered, adjudged, decreed that such white persons residing the Cherokee Nation as became Cherok citizens under Cherokee laws by interm riage with Cherokees by blood prior to 1st day of November, 1875, are equally terested in and have equal *per capita* rig with Cherokee Indians by blood in the la constituting the public domain of the Ch okee Nation, and are entitled to be enrol for that purpose; but such intermarr whites acquired no rights and have no int est or share in any funds belonging to Cherokee Nation except where such fu were derived by lease, sale, or otherw from the lands of the Cherokee Nation c veyed to it by the United States by the p ent of December, 1838; and that the rig and privileges of those white citizens w intermarried with Cherokee citizens sub quent to the 1st day of November, 1875, not extend to the right of soil or interes any of the vested funds of the Cherokee tion, and such intermarried persons are entitled to share in the allotment of lands or in the distribution of any of funds belonging to said Nation, and are entitled to be enrolled for such purp that those white persons who interma with the Delaware or Shawnee citizens of Cherokee Nation, either prior or subsequ to November 1, 1875, and those who int married with Cherokees by blood, a subsequently, being left a widow or widow by the death of the Cherokee wife or hu band, intermarried with persons not Cherokee blood, and those white men wh having married Cherokee women and sub quently abandoned *their Cherokee wiv have no part or share in the Cherokee pro erty, and are not entitled to participate the allotment of the lands or in the dist bution of the funds of the Cherokee Nati or people, and are not entitled to be rolled for such purpose."

Cherokee citizens by blood took an app to this court from so much of that dec as adjudged that persons intermarryi with Cherokee citizens prior to November 1875, were entitled to share in the Cherok property, which appeal is numbered in t court 125; and the Cherokee Nation pro cuted a similar appeal, numbered 126. Th certain intermarried whites appealed fr the decree except that portion which h that the whites who intermarried prior November 1, 1875, were entitled to sha

numbered 127. And thereafter other intermarried whites appealed generally, numbered 128.

The case is reported in 40 Ct. Cl. 411, where will be found an elaborate statement of the facts, including the acts of the Cherokee National Council, etc., bearing on the subject-matter.

Mr. John J. Hemphill argued the cause, and, with Mr. K. S. Murchison, filed a brief on behalf of Cherokee citizens by blood.

Mr. Edgar Smith argued the cause and filed a brief for the Cherokee Nation.

Messrs. James S. Davenport and William T. Hutchings argued the cause and filed a brief on behalf of persons claiming rights in the Cherokee Nation by intermarriage.

Mr. William Henry White also argued the cause, and, with Mr. A. E. L. Leckie, filed a brief on behalf of the intermarried whites.

Mr. Chief Justice Fuller delivered the opinion of the court:

Article 1 of the treaty of 1846 declared "that the lands now occupied by the Cher-[81]okee Nation shall be secured to the *whole Cherokee people for their common use and benefit" [9 Stat. at L. 871]; and article 4, that these lands "shall be and remain the common property of the whole Cherokee people."

Section 2 of article 1 of the Cherokee Constitution (1839) provided that "the lands of the Cherokee Nation shall remain common property."

The amendments of 1866 (art. 1, § 2) declared that the lands of the Cherokee Nation "shall remain common property until the National Council shall request the survey and allotment of the same, in accordance with the provisions of article 20 of the Treaty of 19th of July, 1866 [14 Stat. at L. 799], between the United States and the Cherokee Nation." This request was subsequently duly made and an allotment is taking place accordingly.

The intermarried whites have not acquired the right to share in the lands or funds of the Cherokee Nation by grant in express terms, but that right is claimed in virtue of an alleged citizenship in the Cherokee Nation derived from intermarriage under Cherokee laws.

The Nation, under the treaties, possessed the right of local self-government with authority to make such laws as it deemed necessary for the government and protection of persons and property within the country, belonging to its people, "or such persons as have connected themselves with them." Treaty, Dec. 29, 1835, art. 5, 7 Stat. at L. 478. And § 14 of article 3 of the Cherokee Constitution provided: "The National Council shall have power to make all laws and regulations which they shall deem necessary and proper for the good of the Nation, which shall not be contrary to this Constitution."

Prior to 1855 certain white persons had married Cherokees, which had given rise to serious questions respecting the status of these persons and the jurisdiction of the Nation over them. The act of Congress of June 30, 1834 [4 Stat. at L. 729, chap. 161] (carried forward into §§ 2134, 2135, 2147, and 2148 of the Revised Statutes), provided that a citizen of the United States should not go *into the Indian country with-[82]out a passport, and that he might be removed therefrom as an intruder. The promise of the United States to remove unauthorized citizens from the Nation appears in the treaties, and even as late as 1893, in the convention by which the Cherokee outlet was ceded to the United States. But the Council could permit certain white persons to reside in the Nation, subject to its laws, though free from the laws relating to intruders.

In these circumstances the Cherokee act of 1855 "regulating intermarriage with white men" was passed. Its purpose is plain and is disclosed by the preamble in these words: "Whereas the peace and prosperity of the Cherokee people require that, in the enforcement of the laws, the jurisdiction should be exercised over all persons whatever who may, from time to time, be privileged to reside within the territorial limits of this Nation, therefore," etc., etc. The act was administrative and aimed at subjecting the intermarried whites to the control and dominion of the Cherokee laws instead of leaving them responsible solely to the laws and authorities of the government of the United States. It contains nothing indicating the intention to confer property rights on intermarried whites. But in respect of the public domain, the court of claims, in the present case, because of the opinion in Cherokee Nation v. Journeycake, 155 U. S. 196, 39 L. ed. 120, 15 Sup. Ct. Rep. 55, assumed that the acquisition of citizenship under Cherokee laws carried the right to share therein, unless forbidden by such legislation. And Mr. Chief Justice Nott, speaking for the court, said: "In 1874 the rapidly growing value of the Cherokee lands was becoming perceptible. On the one hand there were white men who desired to marry into the tribe, and, marrying and residing in the Nation, desired the rights and privileges of citizens; on the other hand, there were white adventurers desiring to share in the wealth of the Nation, soon, it was believed, to become available to individual citizens. The public welfare might be benefited by allowing the one, and most certainly

[83] would be conserved by excluding the *other. No restriction appeared to exist in the Constitution which would forbid the National Council from admitting white men to citizenship upon the condition that they should not acquire an estate or interest in the communal or common property of the Nation."

Accordingly, in 1874, the Cherokee National Council adopted a new code containing sections relating to intermarriage, which became effective November 1, 1875, and carried a provision in article XV., § 75, reading as follows:

"Provided, also, that the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this Nation, unless such admitted citizen shall pay into the general funds of the national treasury a sum of money, to be ascertained and fixed by the National Council, equal to the '*pro rata*' share of each native Cherokee in the lands and vested wealth of the Nation, estimated at $500, and thereafter conform to the Constitution of the Nation, and the laws made or to be made in pursuance thereof, in which case he shall be deemed a Cherokee to all intent, and be entitled to all the rights of other Cherokees."

On November 28, 1877, the Council amended this proviso by striking out all after the words "this Nation" in the second line thereof, so that the proviso read:

"Provided, also, that the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this Nation."

The court of claims found that the Cherokee law remained unchanged, in this particular, from 1877 to the date of the decree. Something is said about certain compilations of the Cherokee laws of 1880 and 1892, which omitted this part of § 75, but we agree that this omission did not operate to change the existing law, as the acts providing for the compilations did not provide that they should be effective as laws of the Nation, and, where an error was committed by the compiler, the original law, as duly passed and approved, must prevail.

[84] *Thus it is seen that the privilege of paying $500 into the Cherokee treasury and becoming thereby entitled to "all the rights of other Cherokees" existed only from November 1, 1875, to November 28, 1877. Assuming that the National Council had authority, under the Cherokee Constitution of 1839 and the amendments of 1866, to confer on white intermarried citizens the privilege of purchasing a right in the soil and funds of the Nation, that privilege was withdrawn in two years, and, according to the facts found, was only availed of by two persons, neither of whom was an individual party to the suit. No right in the Nation's property flowed from the Cherokee citizenship act, which merely subjected the white man to the jurisdiction of the Nation, but that right resulted from express grant and the payment of a price. As to the Delawares and Shawnees, their participation was specifically provided for by convention, approved by the United States, and depended upon payments made. As to the freedmen, their participation in property distribution was secured by the terms of the treaty of 1866 (the result of the Civil War), and of the constitutional amendments thereupon adopted. The court of claims referred to them thus: "These constitutional amendments were brought about by the action of the United States at the close of the Civil War in dictating that the slaves or freed persons of color in the Cherokee country should not only be admitted to the rights of citizenship, but to an equal participation in the communal or common property of the Cherokees. The Cherokees seem to have veiled their humiliation by these general declarations of the persons who should be taken and deemed to be citizens; but be that as it may, the overthrow of the Cherokee Nation and the treaty of peace, 1866, and the terms dictated by the United States, whereby their former slaves were made their political equals, and the common property of the Cherokees was to be shared in with their servants and dependents, was in effect a revolution. The constitutional amendment quoted was simply declaratory of the new order *of things. It is not necessarily prospective, and does not impose limitations upon the legislative power with regard to the naturalization or future adoption of aliens as citizens. Under the polity of the Cherokees, citizenship and communal ownership were distinct things. The citizen who annually received an annuity derived from the communal fund held by the United States, and the citizen who never received a dollar from the fund, or never so much as thought of receiving it, form a concrete object lesson in constitutional law not easily effaced from the common mind."

Section 5 of article 3 of the Constitution of 1839 was as follows:

"Sec. 5. No person shall be eligible to a seat in the National Council but a free Cherokee male citizen, who shall have attained to the age of twenty-five years.

"The descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife according to the customs and laws of this Nation, shall be entitled to all the rights and privileges of this Nation, as well as the posterity of Cherokee women by all free men. No person who is of negro or mulatto parentage, either by the father's or

mother's side, shall be eligible to hold any office of profit, honor, or trust under this government.

"Sec. 6. The electors and members of the National Council shall in all cases, except those of treason, felony, or breach of the peace, be privileged from arrest during their attendance at elections and at the National Council in going to and returning."

The amendment of § 5, in 1866, reads:

"Sec. 5. No person shall be eligible to a seat in the National Council but a male citizen of the Cherokee Nation, who shall have attained to the age of twenty-five years and who shall have been a bona fide resident of the district in which he may be elected at least six months immediately preceding such election. All native-born Cherokees, all Indians and whites legally members of the Na-[86] tion by adoption, and all freedmen *who have been liberated by voluntary act of their former owners, or by law, as well as free colored persons who were in the country at the commencement of the Rebellion and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation."

We cannot accept the view that this amendment amounted to a grant of property rights, or operated to enlarge the authority of the National Council in respect of the readmission of former members of the Nation.

The amendment (found in that part of the Constitution in respect to offices and elections) must be taken as a whole, and related to eligibility to a seat in the National Council, and not to property rights. The contention that the words "citizens of the Cherokee Nation" should be construed as relating to the constitutional provision of 1839, that the lands of the Nation should be common property, is without merit in view of the provisions themselves.

By § 2 of article 1 of the Constitution of 1839 it was provided that "whenever any citizen shall remove with his effects out of the limits of this Nation, and becomes a citizen of any other government, all his rights and privileges as a citizen of this Nation shall cease; provided, nevertheless, that the National Council shall have power to readmit, by law, to all the rights of citizenship, any such person or persons who may, at any time, desire to return to the Nation, on memorializing the National Council for such readmission." By its terms this referred to those who had been citizens, and their readmission gave no rights not originally possessed, and this was true under the amendments of 1866. Many special Cherokee laws demonstrate that the Council did not venture to assume, nor desire to assume, the power to impart to the white adopted citizen other than civil and political rights.

For instance, the acts of 1878, readmitting Greenway and his children and Allen and his family "to all the rights and *priv-[87] leges of citizens of the Cherokee Nation" specifically provided that no rights should be acquired except such as attach to white men, "adopted citizens of the Cherokee Nation."

The acts relating to intermarriage with whites contained many restrictions, but by the act in respect of the intermarriage of Cherokees with other Indians no such restrictions were imposed. Cherokee act of Nov. 27, 1880. That act provided that the marriage should be contracted according to the law regulating marriages between "our own citizens," and declared that such Indian "shall be and is hereby deemed a Cherokee to all intents and purposes, and entitled to the rights of other Cherokees." There is no such language in the acts relating to intermarried whites.

The treaty of 1866, between the United States and the Cherokee Nation, provided as to the former slaves, that they should be free and they "and their descendants shall have all the rights of native Cherokees." [Art. 9.]

Article 15 of the same treaty, after providing for the settlement of friendly Indians amongst the Cherokees and the manner in which the latter shall be paid therefor, then stipulates that "they shall be incorporated into and ever after remain a part of the Cherokee Nation on *equal terms* in every respect with *native citizens*." When the Delawares were about to be moved into the Cherokee country as friendly Indians, it was stipulated in the agreement that "on the fulfilment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided, shall become *members* of the Cherokee Nation, with the *same rights and immunities* and the same participation (and no other) in the national funds as *native Cherokees*. . . . And the children hereafter born of such Delawares so incorporated into the Cherokee Nation shall *in all respects be regarded as native Cherokees*." Later, when an agreement was made with the Shawnees, were de- the amount of money to be paid was provided for, the rights of Shawnees were defined as follows: "and that *the said Shaw-[88] nees shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms *in every respect* and with all the privileges and immunities of native citizens of said Cherokee Nation."

These intermarried whites show no grant of equal rights as members of the Cherokee

Nation by treaty or otherwise, nor have they (excepting the two individuals heretofore referred to) paid any sum into the Nation's treasury for a *pro rata* share of its money and lands.

The Delawares, the Shawnees, and the freedmen acquired their property rights by the express words of treaties, but the intermarried whites cannot point out any such in their favor. Doubtless because of this they have heretofore asserted no claim, although the Cherokee courts were open to them to do so, and have allowed repeated payments of money to be made to every other citizen without question.

The distinction between different classes of citizens was recognized by the Cherokees in the differences in their intermarriage law, as applicable to the whites and to the Indians of other tribes: by the provision in the intermarriage law that a white man intermarried with an Indian by blood acquires certain rights as a citizen, but no provision that if he marries a Cherokee citizen not of Indian blood he shall be regarded as a citizen at all; and by the provision that if, once having married an Indian by blood, he marries the second time a citizen not by blood, he loses all of his rights as a citizen. And the same distinction between citizens as such and citizens with property rights has also been recognized by Congress in enactments relating to other Indians than the Five Civilized Tribes. Act August 9, 1888, 25 Stat. at L. 392, chap. 818; act May 2, 1890, 26 Stat. at L. 96, chap. 182; act June 7, 1897, 30 Stat. at L. 90, chap. 3.

In Whitmire v. Cherokee Nation, 30 Ct. Cl. 138, 152, the court of claims said: "Here it should be noted that when the treaty was made there had long been a peculiar class of citizens in the Cherokee country,— [89] white men who became *citizens by intermarriage." And, after quoting the proviso to § 75, art. 15, of the Cherokee Code of 1874, the court added: "The idea, therefore, existed both in the mind and in the laws of the Cherokee people, that citizenship did not necessarily extend to or invest in the citizen a personal or individual interest in what the Constitution termed the 'common property,'—'the lands of the Cherokee Nation.'"

In Stephens v. Cherokee Nation, 174 U. S. 445, 488, 43 L. ed. 1041, 1056, 19 Sup. Ct. Rep. 722, 738, this court, in respect of certain acts of Congress, observed:

"It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898 [30 Stat. at L. 495, chap. 517], a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former."

Referring to this, the court of claims said in its opinion in the present case, 40 Ct. Cl. 411, 442:

"It cannot be supposed for a moment that Congress intended by this legislation to take away from some of the Cherokee people property which was constitutionally theirs, or to confer upon white citizens property which they were not legally entitled to have. The term 'citizens' in these statutes of the United States must be construed to mean those citizens who were constitutionally or legally entitled to share in the allotment of the lands."

The doctrine is familiar that the language of a statute is to be interpreted in the light of the particular matter in hand and the object sought to be accomplished, as manifested by other parts of the act, and the words used may be qualified by their surroundings and connections.

In accepting the conclusion of the court of claims in this regard we, nevertheless, deem it proper to somewhat consider the congressional legislation relied on by the claimants.

The act of Congress of July 1, 1902 (32 Stat. at L. 716, chap. 1375), ratified by the Cherokee Nation, August 7, 1902, and often called the Cherokee agreement, contained these sections:

*"Sec. 25. The roll of citizens of the Cher- [9 okee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrolment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

"Sec. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born there after to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrolment or to participate in the distribution of the tribal property of the Cherokee Nation.

"Sec. 27. Such rolls shall, in all other respects, be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (30 Stat. at L. 495, chap. 517), and the act of Congress approved May thirty-first, nineteen hundred (31 Stat. at L. 221, chap. 598).

"Sec. 28. No person whose name appears upon the roll made by the Dawes Commission as a citizen or freedman of any other

tribe shall be enrolled as a citizen of the Cherokee Nation.

"Sec. 29. For the purpose of expediting the enrolment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrolment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and ap-[91] proved by the *Secretary of the Interior lists embracing the names of all those lawfully entitled to enrolment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

"Sec. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrolment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrolment shall be received after the thirty-first day of October, nineteen hundred and two.

"Sec. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: Provided, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of any one on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard *labor for a [92] period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained."

It thus appears that the roll of citizens of the Cherokee Nation was to be made up as of September 1, 1902, of the persons then living and entitled to enrolment on that date; that all such persons should be placed upon the roll, and that (§ 29) on the lists to be finally approved by the Secretary of the Interior there should be placed only the names of those persons found to be entitled to enrolment. In all other respects the roll was to be made in compliance with § 21 of the Act of Congress of June 28, 1898, and of the Act of Congress of May 31, 1900.

Section 21 provided: "That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, . . . with such intermarried white persons as may be entitled to citizenship under Cherokee laws." The roll of 1880, made by the Cherokees, was a census roll, and its confirmation was not intended to create any rights which citizens of the Cherokee Nation had not before enjoyed, but merely to furnish the basis for making up the roll of citizens. Section 21 was in reality a statement that no previous act of Congress was intended to confirm any other roll of the Cherokee Nation.

The act of May 31, 1900 (31 Stat. at L. 221, 236, chap. 598), provided: "That said Commission shall continue to exercise all authority heretofore conferred on it by law. But it shall not receive, consider, or make any record of any application of any person for enrolment as a member of any tribe in Indian territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal *of such application shall be final when ap-[93] proved by the Secretary of the Interior." Section 31 of the act of July 1, 1902, says that no person whose name does not appear on the roll made by the Commission to the Five Civilized Tribes "shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act." In other words, the roll

must be made up of citizens who, under the laws of the Cherokee Nation, were entitled to participation in the distribution of the common property of the Cherokee tribes.

The concluding words of § 21, "with such intermarried white persons as may be entitled to citizenship under Cherokee laws," emphatically indicate that Congress had the Indian citizen in mind in all that went before and limited enrolment of white persons to such as might be entitled to citizenship under Cherokee laws.

Counsel for claimants speak of the act of 1902 as a "treaty," but it is only an act of Congress, and can have no greater effect. It is a singular commentary on the situation that the majority of the native Cherokees voted against its acceptance, which was carried by the vote of the whites. The suggestion is wholly inadmissible that they would vote themselves an interest in the property of the Cherokee people, including a share in the money paid in by the Delawares and the Shawnees, and become thereby wards of this government.

Referring to § 21 of the act of 1902, which declares that no white person intermarried since December 16, 1895, shall be entitled to enrolment or to participate in the distribution of the tribal property of the Cherokee Nation, and to an act of the Cherokee Council to the same effect, approved December 16, 1895, counsel contend that the act of Congress shows that there was a class of persons who, having married prior to December 16, 1896, were to be enrolled, embracing all lawfully married according to the law of the Nation, and were to participate in the dis-[94] tribution of the tribal property. *The doctrine that the denial of a right is the grant of a right is a poor basis for a grant of land. Not a single word of the act intimates that these intermarried persons have or are to have any interest in the property of the Nation, and to hold that because the act of 1902 declares that white persons intermarrying after 1895 should acquire no property rights the Indians, in excepting the act, intended property rights to all who intermarried prior thereto, would put a construction on the act entirely inconsistent with the settled rule that, as between the whites and the Indians, the laws are to be construed most favorably to the latter.

After the decision in [illegible] Case, 155 U. S. [illegible], and in that of Whitmore v. Cherokee Nation, [illegible], the Cherokee National Council passed the act of December 16, 1895, amending certain sections of the compiled laws, from which the provisions of the act of November [illegible] which had all intermarriages with persons in Cherokee property, and been intentionally omitted, by re-enacting the same, but this only evidenced the determination to prevent the encroachment of the whites upon the property rights of the Cherokee people. The act was clearly passed out of abundant caution, and was quite unnecessary in view of the fact that the act of 1877 remained in force, as was found by the court of claims.

We are dealing with the right of enrolment so as to entitle the persons enrolled to participate in the distribution of the lands and vested funds of the Cherokee Nation, and not with questions arising in respect of improvements on the public domain. As to improvements, they seem to have been treated as those of a tenant who had made them under an agreement that they should remain his. Any citizen of the Nation could use the public domain, and it is not asserted that the intermarried whites failed to obtain their share of such use, but because they have enjoyed that benefit, free from tax or burden, is no reason for giving them a share in the lands and vested funds, which has never been granted to them, and for which they have never paid.

*We concur in the conclusions of the court [95] of claims, including the disposition of the particular contention presented in appeal No. 128.

This involved certain claimants, before the court known as "married out and abandoned whites," who alleged that they became citizens of the Cherokee Nation by intermarriage, but conceded that they had since married persons having no rights of Cherokee citizenship by blood, or had abandoned their Cherokee wives. They contended that they could not be deprived of the rights and privileges acquired by intermarriage save by proceedings in the nature of office found. As to this the court of claims said:

"These intermarried whites are not grantees or devisees seised and in possession of land, occupying the position of defendants. They occupy the contrary position—of plaintiffs seeking to recover money—and it is obligatory upon them to establish their right to it. To say that a white man can share in the property of the Cherokees for the reason that at one time in his life he was the husband of a Cherokee woman, and to say that this court or the Secretary of the Interior must hold that he is still the husband of a Cherokee woman because the contrary has not been established in another proceeding, is an appeal to technicality which the court cannot uphold. These claimants, like other plaintiffs, must prove their case, asserting a present right, they must establish present conditions. The laws and usages of the Cherokees, their earliest history, the fundamental principles of their national policy, their Constitution and stat-

utes, all show that citizenship rested on blood or marriage; that the man who would assert citizenship must establish marriage; that when marriage ceased (with a special reservation in favor of widows or widowers), citizenship ceased; that when an intermarried white married a person having no rights of Cherokee citizenship by blood, it was conclusive evidence that the tie which bound him to the Cherokee people was severed and the very basis of his citizenship obliterated.

[96] "The Cherokee statute which has been cited (Laws of 1892, § 669) gives a proceeding in the nature of office found, but, nevertheless, is confirmatory of the views hereinbefore expressed. It relates to cases where the Cherokee government takes the initiative to accomplish a purpose. That is to say, where an intermarried white man has forfeited his rights of citizenship in the Nation by acts which declare such forfeiture 'and the Nation requires his removal beyond the limits of its territory,' this proceeding must be resorted to, to be followed by a call on the United States Indian agent 'to remove such a white man.' It is in principle precisely like the common-law procedure of office found, and exists for the same reason, —that the government may exercise a right dependent upon only the alienage of a person living within its territory, presumably a citizen."

Decree affirmed.

IN THE MATTER OF GEORGE MORAN, Petitioner.

(See S. C. Reporter's ed. 96–105.)

Habeas corpus—grounds—jurisdiction below.

1. The failure to specify a building in the order of the supreme court of the territory of Oklahoma fixing Lawton as the place where the district court should be held in and for the county of Comanche, there being at the time of making the order and at the time of trial no county or court buildings in such county, did not go to the jurisdiction of such district court so as to justify relief by habeas corpus in favor of a person convicted of crime therein who makes no showing of any opportunities lost because no building was named.

Habeas corpus—grounds—selection of grand jurors.

2. A person imprisoned under a conviction in an Oklahoma court is not entitled to his release on habeas corpus, under U. S. Rev. Stat. § 753, U. S. Comp. Stat. 1901, p. 592, because the grand jurors were summoned from the body of the county, which resulted in the selection as such jurors of persons who were not electors nor residents of the territory, since the Federal Constitution does not control the method of selection, and if any laws have been violated by this method they are territorial enactments, which are not laws of the United States.

Habeas corpus—grounds—jurisdiction below.

3. Disobeying the law governing the selection of grand jurors does not affect the jurisdiction of the court so as to justify the release by habeas corpus of a person convicted under an indictment found by such jurors.

Venue—of criminal trial.

4. The trial in Comanche county, Oklahoma, of an offense committed within territory which, at the time of trial, had been organized as such county, with a term of court fixed for it by order of the territorial supreme court, satisfies the requirements of the organic act of May 2, 1890, chap. 182, § 10, that crimes shall be tried in the county to which territory not embraced in any organized county "shall be attached," although at the date of the commission of the offense Comanche county had not been organized, but was attached for judicial purposes to Canadian county.

Territories—jurisdiction over land not open to settlement.

5. Land now embraced within the limits of Comanche county, Oklahoma, had become part of that territory on August 4, 1901, so as to make a murder committed therein on that date an offense against the territorial rather than the Federal statutes, although the land had not then been opened for settlement.

Habeas corpus—grounds—jurisdiction below.

6. Compelling the accused to stand up and walk before the jury, and stationing the jury during a recess so as to observe his size and walk, even if contrary to the 5th Amendment to the Federal Constitution, do not affect the jurisdiction of the court so as to justify relief by habeas corpus.

[No. 8, Original.]

Argued October 15, 1906. Decided November 5, 1906.

ORIGINAL PETITION for habeas corpus and certiorari brought by a person imprisoned on a conviction for murder. Rule discharged. Writs denied.

The facts are stated in the opinion.

NOTE.—On habeas corpus in the Federal courts—see notes to Re Reinitz, 4 L.R.A. 236; State ex rel. Cochran v. Winters, 10 L.R.A. 616; Re Huse, 25 C. C. A. 4; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

As to questions reviewable by habeas corpus—see notes to State v. Jackson, 1 L.R.A. 373; Bion's Appeal, 11 L.R.A. 694; United States v. Hamilton, 1 L. ed. U. S. 490; Re Carll, 27 L. ed. U. S. 288; Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; Pearce v. Texas, 39 L. ed. U. S. 164; and Glass v. The Betsey, 1 L. ed. U. S. 489.

On collateral attack by habeas corpus on decison against constitutional rights—see note to Hovey v. Elliott, 39 L.R.A. 450.

Mr. Finis E. Riddle argued the cause, and with Mr. William I. Cruce, filed a brief for petitioner:

A court created by the legislature can only be organized in the manner and as provided by the law creating it, and if it is not organized as provided by the law creating it, then it has no power or authority to try cases and to render a valid judgment.

[illegible] Law, 2d ed. p. 284; [illegible] 45 Iowa, 503; Columbus [illegible] Woolen Mills Co. 88 Ind. 486; [illegible] v. Brainard, 128 Mass. 296; King v. [illegible] Ry. & W. Co. Ex Allison, 13 [illegible] 16 Am. St. Rep. [illegible] 2 Enc. Pl. & Pr. p. 605; [illegible] v. People, 8 N. Y. 203; Ex parte [illegible] 67 Ala. 382; [illegible] v. Nelson, [illegible] v. Dunn, 65 Ala. 404; [illegible] v. [illegible] 21 Ala. 441; [illegible] v. [illegible] 1 Port. Ala. 215; [illegible] v. [illegible] 1 Ala. 200; [illegible] v. State, 40 Ark. 257; [illegible] v. State, [illegible] v. Williams, 45 Ark. 257; [illegible] v. [illegible] 45 Ark. 137; [illegible] v. [illegible] 27 Ark. [illegible] 28 Ark. 207; [illegible] v. [illegible] 27 Ark. [illegible] v. Jones, 27 Ark. [illegible] v. State, 2 Ark. [illegible] v. State, 29 Ark. [illegible] v. State, 40 Ala. [illegible] v. Indiana, [illegible] v. Paine, [illegible] v. Irvin, 1 [illegible]

[illegible]

511, 10 L. ed. 270; Thompson v. 18 Wall. 457, 21 L. ed. 897; K Logansport Gaslight & Coke Co. 58, 22 L. ed. 70; Brown, Juris Courts, 2d ed. §§ 101–103, pp. 377

The failure of the court to sul follow the provisions of the statu purposely disregarding the statu manner of organizing a grand jur that body and its proceedings v

Crowley v. United States, 194 45 L. ed. 1075, 24 Sup. Ct. Rep.

The pretended indictment upon petitioner was convicted, under a thorities was no indictment at all same as though he had been convi on an indictment. It was whol ment to give the court jurisdictio person of the defendant.

Ex Bonner, 151 U. S. 254, 38 L 14 Sup. Ct. Rep. 323; Levy v. [illegible] 105, 31 Pac. 272; People v. [illegible] 68; Brunner v. Superior [illegible] 230, 28 Pac. [illegible] State v. [illegible] Conn. 40; 1 Hawk. P. C. chap. [illegible] 28; Nichols v. State, 7 K. J. L. [illegible] v. Alabama, 67 Ala. 26; Doyle v. [illegible] Conn. 26; Turner v. State, 4 [illegible] Aucoulier v. State, 4 Smedes & [illegible] State v. State, 2 Miss. 67; [illegible] Williams, 7 Port. Ala. 120; [illegible] State, 4 Tex. App. 67; People v. [illegible] 230; McNeese v. State, 19 [illegible] State, 27 Miss. 679; [illegible] Law v. [illegible] Thompson & [illegible] 502, 504, 520; United States [illegible] 17 Fed. 110; United [illegible] State v. McKannon, [illegible] State v. [illegible] State v. [illegible] State v. [illegible] 21; Bonner v. [illegible] 49; State v. [illegible] 44; State v. [illegible] 29; United States [illegible] 29; Bonner v. [illegible] State v. [illegible]

[illegible]

[illegible]

6, 21 Am. Rep. 493; Walker v. State, 7 ex. App. 245, 32 Am. Rep. 595; State v. ordstrom, 7 Wash. 506, 35 Pac. 382; Unrhill, Crim Ev. p. 65, § 53, p. 67, § 54; lackwell v. State, 67 Ga. 76, 44 Am. Rep. 17; Rice v. Rice, 47 N. J. Eq. 559, 11 L. .A. 591, 21 Atl. 286; People v. Wolcott, 51 lich. 612, 17 N. W. 78; Emery's Case, 107 lass. 181, 9 Am. Rep. 22; Boyd v. United States, 116 U. S. 616–641, 29 L. ed. 746, 754, 1 Sup. Ct. Rep. 524; Counselman v. Hitchcock, 142 U. S. 547–586, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195.

If the errors were such that the trial court failed to obtain jurisdiction over the petitioner, or lost jurisdiction by errors committed in invading the petitioner's constitutional rights and in transcending plain statutes enacted for the guidance of the court and the protection of the petitioner, then this court will not fail to do its duty and release the petitioner, simply because the trial court committed grievous errors, which errors resulted in the unconstitutional and void conviction, especially as the petitioner has exhausted every other remedy given him under the law.

Rogers v. Peck, 199 U. S. 425, 50 L. ed. 256, 26 Sup. Ct. Rep. 87; Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; Re Converse, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191; Hodgson v. Vermont, 168 U. S. 262, 42 L. ed. 461, 18 Sup. Ct. Rep. 80; Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; Re Frederich, 149 U. S. 70, 37 L. ed. 653, 13 Sup. Ct. Rep. 793.

Mr. **Don C. Smith** argued the cause, and, with Mr. W. O. Cromwell, filed a brief for respondent:

Excepting in cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party, this court can issue the writ of habeas corpus only in aid of its appellate jurisdiction.

Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Ex parte Bollman, 4 Cranch, 75, 2 L. ed. 554; Ex parte Watkins, 3 Pet. 202, 7 L. ed. 653; Ex parte Wells, 18 How. 307–328, 15 L. ed. 421–431; Ableman v. Booth, 21 How. 506, 16 L. ed. 169; Ex parte Yerger, 8 Wall. 85, 19 L. ed. 332.

This court having no jurisdiction of criminal cases by writ of error or appeal cannot discharge, on habeas corpus, a person imprisoned under the sentence of a circuit or district court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence.

Ex parte Wilson, 114 U. S. 420, 29 L. ed. 90, 5 Sup. Ct. Rep. 935; Re Nielsen, 131 U. S. 184, 185, 33 L. ed. 118, 9 Sup. Ct. Rep. 672.

Even if this court should be of the opinion that the method of selecting these grand jurors was irregular or unauthorized by law, yet the fact remains that they were a part of the machinery of the court, acting, at least, under color of authority, and, if not a *de jure* grand jury, were at least a *de facto* grand jury, and their acts cannot be collaterally attacked, nor the jurisdiction of the court devested on habeas corpus.

Ex parte Harding, 120 U. S. 782–784, 30 L. ed. 824, 825, 7 Sup. Ct. Rep. 780; State ex rel. Dunn v. Noyes, 87 Wis. 340, 27 L.R.A. 776, 41 Am. St. Rep. 45, 58 N. W. 386; People v. Petrea, 92 N. Y. 128; People v. Dolan, 6 Hun, 232; Dolan v. People, 6 Hun, 493, 64 N. Y. 485; Carpenter v. People, 64 N. Y. 483; Thompson v. People, 6 Hun, 135; People v. Jewett, 3 Wend. 314; Cox v. People, 80 N. Y. 500; Friery v. People, 2 Keyes, 450; Ferris v. People, 31 How. Pr. 145; People v. Fitzpatrick, 65 How. Pr. 365; Re Gannon, 69 Cal. 541, 11 Pac. 240; Ex parte Haymond, 91 Cal. 545, 27 Pac. 859; State v. Belvel, 89 Iowa, 405, 27 L.R.A. 846, 56 N. W. 545; Ex parte Springer, 1 Utah, 214; Re Burke, 76 Wis. 357, 45 N. W. 24; Re Wilson, 140 U. S. 575–585, 35 L. ed. 513–517, 11 Sup. Ct. Rep. 870; Ex parte Siebold, 100 U. S. 375, 25 L. ed. 717; Ex parte Bigelow, 113 U. S. 330, 331, 28 L. ed. 1006, 5 Sup. Ct. Rep. 542; Ex parte Watkins, 3 Pet. 193, 7 L. ed. 650; Ex parte Parks, 93 U. S. 18–23, 23 L. ed. 787; Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; Ex parte Crouch, 112 U. S. 178, 28 L. ed. 690, 5 Sup. Ct. Rep. 96; Ex parte Wilson, 114 U. S. 421, 29 L. ed. 90, 5 Sup. Ct. Rep. 935; Miller v. People, 183 Ill. 430, 56 N. E. 60.

There is a complete analogy between the case of a *de facto* judge and a *de facto* grand jury. The proposition that a *de facto* judge may lawfully preside in the trial of a criminal case and impose a valid sentence has been settled beyond any controversy.

Ex parte Ward, 173 U. S. 452–456, 43 L. ed. 765, 19 Sup. Ct. Rep. 459; Sheehan's Case, 122 Mass. 445, 23 Am. Rep. 374; Fowler v. Bebee, 9 Mass. 231, 6 Am. Dec. 62; People ex rel. Ballou v. Bangs, 24 Ill. 184; Re Burke, 76 Wis. 357, 45 N. W. 24; Re Manning (Manning v. Weeks) 139 U. S. 504, 35 L. ed. 264, 11 Sup. Ct. Rep. 624; Church, Habeas Corpus, 256, 257, 259.

The district court of Comanche county, being a court of general original jurisdiction, clothed not only with these powers specially conferred by statute, but with common-law jurisdiction by the organic law of the territory, bestowed upon it by the act of Congress creating the territorial government, and having authority for the redress of all wrongs committed against the

Constitution or laws of the United States or of the territory, as a necessary incident to the exercise of the jurisdiction and powers conferred upon said court, was necessarily clothed with the inherent power to summon for its use those integral elements of the machinery of the court which were necessary for the carrying into effect of the express powers granted to it.

Clawson v. United States, 114 U. S. 477-488, 29 L. ed. 179-183, 5 Sup. Ct. Rep. 949; 1 Chitty, Crim. Law, 518; 2 Hale, P. C. 265, 266; United States v. Hill, 1 Brock. 156, Fed. Cas. No. 15,364; Mackey v. People, 2 Colo. 13; Stone v. People, 3 Ill. 326; Straughan v. State, 16 Ark. 37; Wilburn v. State, 21 Ark. 198; Gibson v. Com. 2 Va. Cas. 111; Shaffer v. State, 1 How. (Miss.) 238; Woodsides v. State, 2 How. (Miss.) 655; Thompson & M. Juries, chap. 22; 2 Cooley's Bl. Com. p. 301, ¶ 2, chap. 23.

Mr. Justice Holmes delivered the opinion of the court:

This is a petition for a writ of habeas corpus and a writ of certiorari, brought by a person imprisoned on a conviction for murder, alleging that the judgment under which he is held is void. A rule to show [103] cause was issued and the case *was heard on the petition and answer. The various grounds upon which the petition is supported are alleged to go to the jurisdiction of the trial court. Ex parte Harding, 120 U. S. 782, 30 L. ed. 824, 7 Sup. Ct. Rep. 780. See New v. Oklahoma, 195 U. S. 252, 49 L. ed. 182, 25 Sup. Ct. Rep. 68. A writ of habeas corpus for the same causes was heard by the circuit court of appeals and discharged. Ex parte Moran, 144 Fed. 594. The judgment also was affirmed by the supreme court of the territory in which the petitioner was tried. 14 Okla. 544, 78 Pac. 111.

The petitioner was tried in the district court for Comanche county in the territory of Oklahoma. The first ground now relied upon is that the court was not duly organized under the act of Congress requiring the supreme court to define the judicial districts, and to fix the times and places at each county seat where the district court shall be held. The order of the supreme court went no further in the way of fixing the place than to specify Lawton for the county of Comanche. This order was made on January 15, 1902, about six months after the land, which had been Indian territory, was opened for settlement and the county created. At that time and at the time of the trial there were no county or court buildings in the county. The order of the supreme court was as precise as the circumstances permitted it to be, and the failure to specify a building did not go to the jurisdiction of the trial court. There is no pretense that the petitioner lost any opportunities by reason of no building being named.

The next ground argued is that the laws of the territory were not followed in the selection of the grand jury, because the persons selected were not electors of the territory, and some of them were nonresidents, with other subordinate matters. The order for the summons stated the reason, which was that there had been no election held in the county, and there were no names of jurors in the jury box; whereupon the presiding judge ordered the sheriff to summon twenty persons from the body of the county. We have heard no answer to the material portion of the reasoning of the circuit court of appeals *upon this point. If the legisla- [104] ture of Oklahoma had prescribed the method of selection followed, that method would not have violated the Constitution or any law or treaty of the United States. If it did prescribe a different one, a departure from that was a violation of the territorial enactment alone. The acts of the legislature of Oklahoma are not laws of the United States within the meaning of Rev. Stat. § 753, U. S. Comp. Stat. 1901, p. 592. If any laws have been violated it is the latter one.† Therefore the petitioner is not entitled to release on this ground under Rev. Stat. § 753. The 5th Amendment, requiring the presentment or indictment of a grand jury, does not take up unto itself the local law as to how the grand jury should be made up, and raise the latter to a constitutional requirement. See Rawlins v. Georgia, 201 U. S. 638, 50 L. ed. 899, 26 Sup. Ct. Rep. 500. It is unnecessary to consider whether the judge went beyond his powers under the circumstances. See Clawson v. United States, 114 U. S. 477, 29 L. ed. 179, 5 Sup. Ct. Rep. 949. But it is proper to add that while the reason which we have given is logically the first to be considered by this court, we do not mean to give any countenance to the notion that, if the law was disobeyed, it affected the jurisdiction of the court. Ex parte Harding, 120 U. S. 782, 30 L. ed. 824, 7 Sup. Ct. Rep. 780; Re Wilson, 140 U. S. 575, 35 L. ed. 513, 11 Sup. Ct. Rep. 870.

The third ground on which the jurisdiction of the trial court is denied is that, on August 4, 1901, the date of the commission of the crime, the place was within territory not embraced in any organized county, and was attached for judicial purposes to Canadian county. By the Oklahoma organic

†[Obviously the court here intended to convey the idea that, if any law has been violated, the territorial enactment is the one.—Ed.]

act, May 2, 1890, chap. 182, § 9 (26 Stat. at L. 85, 86), this is provided for, and by § 10 such offenses shall be tried in the county to which the territory "shall be attached." It is argued that there had been no law passed changing the place of trial or affecting the order of the supreme court attaching the territory to Canadian county. But the very words quoted from § 10 look to the state of things at the time of trial. At that time Comanche county had been organized, and a term of court fixed for it by the order of the supreme court dated January 15, 1902. The [85]meaning of this order, so far as the *power of the supreme court went, is plain. The statute gave the petitioner no vested right to be tried in Canadian county, and his trial in Comanche county conformed to its intent. See Post v. United States, 161 U. S. 583, 40 L. ed. 816, 16 Sup. Ct. Rep. 611.

The fourth ground is that, as the crime was committed on August 4, 1901, two days before the opening of the land for settlement, the place was still under the exclusive jurisdiction of the United States, and therefore the crime was punishable under Rev. Stat. § 5339, U. S. Comp. Stat, 1901, p. 3627, alone. The order of the President with regard to the conditions of settlement and entry are referred to as confirming the argument. But those orders were intended merely to carry out the acts of Congress governing the matter. There is no doubt that Congress was exercising control so far as settlement was concerned. But there is equally little doubt that the title to the territory had passed, that it had become part of the territory of Oklahoma, and, as such, no longer under the exclusive jurisdiction of the United States within Rev. Stat. § 5339. Act of May 2, 1890, chap. 182, §§ 1, 4, 6, 26 Stat. at L. 81; act of June 6, 1900, chap. 813, 31 Stat. at L. 677; act of March 3, 1901, chap. 846, 31 Stat. at L. 1093. See Bates v. Clark, 95 U. S. 204, 24 L. ed. 471; Buster v. Wright, 68 C. C. A. 505, 135 Fed. 947, 952; Ex parte Moran, 144 Fed. 594, 602. Therefore the application of the territorial statute was not excluded and the murder was a violation of the territorial law.

Finally it is contended that the petitioner was compelled to be a witness against himself, contrary to the 5th Amendment, because he was compelled to stand up and walk before the jury, and because, during a recess, the jury was stationed so as to observe his size and walk. If this was an error, as to which we express no opinion, it did not go to the jurisdiction of the court. Felts v. Murphy, 201 U. S. 123, 50 L. ed. 689, 26 Sup. Ct. Rep. 366.

Rule discharged. Writs denied.

*NORTHERN ASSURANCE COMPANY OF [106]
LONDON, Plff. in Err.,
v.
GRAND VIEW BUILDING ASSOCIATION.

(See S. C. Reporter's ed. 106-108.)

Judgment—full faith and credit.

1. A judgment of the Supreme Court of the United States to the effect that a policy of fire insurance could not be recovered upon as it stood nor be helped out by any doctrine of the common law is not denied full faith and credit by an adjudication of a state court that such judgment is not a bar to a suit in equity to reform the policy so that it will express consent to concurrent insurance, and to recover upon such policy as reformed.

Election of remedies.

2. The prosecution of an action at law upon a policy of fire insurance to final judgment denying recovery, upon the ground that the policy could neither be recovered upon as it stood nor be helped out by any doctrine of the common law, is not an election which bars a suit in equity to reform the policy so that it will express consent to concurrent insurance, and to recover upon such policy as reformed.

[No. 40.]

Argued October 18, 19, 1906. Decided November 5, 1906.

IN ERROR to the Supreme Court of the State of Nebraska to review a decree which affirmed a decree of the District Court of Lancaster County in that state, reforming a policy of fire insurance so as to express consent to concurrent insurance, and enforcing the policy as so reformed, notwithstanding a prior judgment of the Supreme Court of the United States in an action at

NOTE.—As to full faith and credit to be given to state records and judicial proceedings—see notes to Lindley v. O'Reilly, 1 L. R.A. 79; Cummington v. Belchertown, 4 L. R.A. 131; Rand v. Hanson, 12 L.R.A. 574; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 578; Darby v. Mayer, 6 L. ed. U. S. 367; Mills v. Duryee, 3 L. ed. U. S. 411; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; and Huntington v. Attrill, 36 L. ed. U. S. 1123.

As to conclusiveness and effect of judgments as between Federal and state courts —see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; and Union & Planters' Bank v. Memphis, 49 C. C. A. 468.

As to election of remedies generally—see notes to Fowler v. Bowery Sav. Bank, 4 L.R.A. 145; Conrow v. Little, 5 L.R.A. 693; Crossman v. Universal Rubber Co. 13 L.R.A. 91; and Mills v. Parkhurst, 13 L. R.A. 472.

law denying any recovery on the policy. Affirmed.

See same case below (Neb.) 102 N. W. 246.

The facts are stated in the opinion.

Mr. Charles J. Greene argued the cause, and, with Mr. Ralph W. Breckenridge, filed a brief for plaintiff in error:

In the present proceeding, the building association seeks to establish an agreement which conflicts with the agreement expressed in the written policy, and which we submit has, by the judgment of this court, been conclusively determined to have been in force at the time of the fire.

Steinbach v. Relief F. Ins. Co. 77 N. Y. 498, 33 Am. Rep. 655.

Where a plaintiff brings an action upon a written contract in a law court, he elects to stand upon the contract as written; and if he prosecutes his action to final judgment, and is defeated, he cannot afterwards have his written contract reformed in chancery.

Black, Judgm. § 518, p. 615, §§ 632, 678, p. 816; Sanger v. Wood, 3 Johns. Ch. 416; Thomas v. Joslin, 36 Minn. 1, 1 Am. St. Rep. 624, 29 N. W. 344; Gaffney v. Megrath, 23 Wash. 476, 63 Pac. 520; Ward v. Green, 88 Tex. 177, 30 S. W. 864; Kearney Mill. & Elevator Co. v. Union P. R. Co. 97 Iowa, 719, 59 Am. St. Rep. 434, 66 N. W. 1059; Thompson v. Howard, 31 Mich. 312; Thomas v. United Firemen's Ins. Co. 108 Ill. App. 278.

Mr. Joseph R. Webster argued the cause, and, with Messrs. Halleck F. Rose and Wilmer B. Comstock, filed a brief for defendant in error:

Judgments and decrees of the circuit courts of the United States, sitting in a particular state, are to be accorded in the courts of that state such effect, only, as would be accorded, in similar circumstances, to the judgments and decrees of a state tribunal of equal authority.

Dupasseur v. Rochereau, 21 Wall. 130, 22 L. ed. 588; Crescent City L. S. L. & S. H. Co. v. Butchers' Union, S. H. & L. S. L. Co. 120 U. S. 146, 30 L. ed. 616, 7 Sup. Ct. Rep. 472; Pendleton v. Russell, 144 U. S. 644, 36 L. ed. 576, 12 Sup. Ct. Rep. 743; Metcalf v. Watertown, 153 U. S. 676, 38 L. ed. 863, 14 Sup. Ct. Rep. 947; Hancock Nat. Bank v. Farnum, 176 U. S. 645, 44 L. ed. 621, 20 Sup. Ct. Rep. 506.

The opinion below, so far from being a departure from the rules giving effect to the judgments of the courts of the state, is definitely rested upon prior authority defining the effect which, in like circumstances, is given to the judgments of the state courts.

The present record does not present a case for the application of the doctrine of election, because the plaintiff did not have a choice of remedies. There was but one remedy open, and this was misconceived.

Peters v. Bain, 133 U. S. 670–697, 33 L. ed. 696–706, 10 Sup. Ct. Rep. 354; 7 Enc. Pl. & Pr. p. 366; State v. Bank of Commerce, 61 Neb. 25, 84 N. W. 406; Omaha v. Redick, 61 Neb. 163; 85 N. W. 46; Simons v. Fagan, 62 Neb. 287, 87 N. W. 21; Gayer v. Parker, 24 Neb. 643, 8 Am. St. Rep. 227, 39 N. W. 845; Pekin Plow Co. v. Wilson, 6[illegible] Neb. 115, 92 N. W. 178; Chicago, B. & Q. R. Co. v. Bigley, 1 Neb. (Unof.) 225, 95 N. W. 344; Pinkham v. Pinkham, 60 Neb. 60[illegible], 83 N. W. 837; Lansing v. Commercial Union Assur. Co. 4 Neb. (Unof.) 140, 93 N. W. 75[illegible]

The institution or the prosecution of a suit to judgment is not an essential or decisive fact in determining the applicability of the doctrine of election, as the law is administered in the forum where this suit was tried.

Chicago, B. & Q. R. Co. v. Bigley, supra.

The judgment here assailed merely involves the exercise of one of the exclusive powers of equity, under circumstances which meet with the express sanction of the rule of this court; and the pleas of *res judicata* and election were disposed of according to time-honored doctrines, borrowed from the decisions of this court.

Parker v. Circuit Court Judges, 12 Wheat. 561, 6 L. ed. 729; Smith v. M'Iver, 9 Wheat. 532, 6 L. ed. 152; Tilton v. Cofield, 93 U. S. 167, 23 L. ed. 859; Phelps v. Harris, 101 U. S. 370–383, 25 L. ed. 855–860; McComb v. Frink, 149 U. S. 629–644, 37 L. ed. 876–883, 13 Sup. Ct. Rep. 993; Brady v. Daly, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 6[illegible]

General authority also supports the doctrines of this court and those of the judgment under review.

Commercial Union Assur. Co. v. New Jersey Rubber Co. 64 N. J. Eq. 338, 51 Atl. 451; Jenkins v. Harrison, 66 Ala. 345; Scully v. Lowenstein, 56 Miss. 652; Mosby v. Wall, 23 Miss. 81, 55 Am. Dec. 71; Hawley v. Simons, 102 Ill. 115; Schrepfer v. Rockford Ins. Co. 77 Minn. 291, 79 N. W. 1005; Conyers v. Mericles, 75 Ind. 443; Cramer v. Moore, 36 Ohio St. 347; Hill v. Combs, 8[illegible] Mo. App. 243; Re Van Norman, 41 Minn. 496, 43 N. W. 334; Bunch v. Grave, 111 Ind. 351, 12 N. E. 514; Fifield v. Edwards, 3[illegible] Mich. 266; Marsh v. Masterton, 101 N. Y. 407, 5 N. E. 59; Stowell v. Chamberlain, 6[illegible] N. Y. 272; Snow v. Alley, 156 Mass. 18[illegible] 30 N. E. 691; Kelsey v. Murphy, 26 Pa. 78; Morris v. Rexford, 18 N. Y. 557; McLaughlin v. Austin, 104 Mich. 489, 62 N. W. 719; Gould v. Blodgett, 61 N. H. 115; Smith v. Bricker, 86 Iowa, 285, 53 N. W. 250; Madden v. Louisville, N. O. & T. R. Co. 66 Miss. 258, 6 So. 181; Standard Oil Co. v. Hawkins, 33 L.R.A. 739, 20 C. C. A. 468, 46 U. S. App.

115, 74 Fed. 305; White v. Whiting, 8 Daly, 23; Bowdish v. Page, 81 Hun, 170, 30 N. Y. Supp. 691; Kittredge v. Holt, 58 N. H. 191.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill to reform a policy and to recover upon it as reformed. An action at law upon the same instrument, between the same parties, has come before this court heretofore. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133. In that case it was held that the plaintiff could not recover. The question before us at the present time is whether the supreme court of Nebraska failed to give full faith and credit to the judgment in the former case by holding that it was no bar to the relief now sought. (Neb.) 102 N. W. 246.

The policy was conditioned to be void in [107]case of other *insurance, unless otherwise provided by agreement indorsed or added; and it stated, in substance, that no officer or agent had power to waive the condition except by such indorsement or addition. There was other insurance and there was no indorsement. The plaintiff alleged a waiver and an estoppel. The jury found that the agent who issued the policy had been informed on behalf of the insured and knew of the outstanding insurance. But this court held that the attempt to establish a waiver was an attempt to contradict the very words of the written contract, which gave notice that the condition was insisted upon and could be got rid of in only one way, which no agent had power to change. The judgment based upon this decision is what is now relied upon as a bar. Metcalf v. Watertown, 153 U. S. 671, 676, 38 L. ed. 861, 863, 14 Sup. Ct. Rep. 947; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 645, 44 L. ed. 619, 621, 20 Sup. Ct. Rep. 506.

Whether sufficient grounds were shown for the relief which was granted is a matter with which we have nothing to do. But the state court was right in its answer to the question before us. The former decision, of course, is not an adjudication that the contract cannot be reformed. It was rendered in an action at law, and only decided that the contract could not be recovered upon as it stood, or be helped out by any doctrine of the common law. If it were to be a bar it would be so, not on the ground of the adjudication as such, but on the ground of election, expressed by the form in which the plaintiff saw fit to sue. As an adjudication it simply establishes one of the propositions on which the plaintiff relies,—that it cannot recover upon the contract as it stands. The supposed election is the source of the effect attributed to the judgment. If that depended on matter *in pais* it might be a question, at least, as was argued, whether such a case fell within either U. S. Const. art. 4, § 1, or Rev. Stat. § 905, U. S. Comp. Stat. 1901, p. 677. It may be doubted whether the election must not at least necessarily appear on the face of the record as matter of law in order to give the judgment a standing under Rev. Stat. § 905.

*We pass such doubts, because we are of [108] opinion that, however the election be stated, it is not made out. The plaintiff in the former action expressed on the record its reliance upon the facts upon which it now relies. It did not demand a judgment without regard to them and put them on one side, as was done in Washburn v. Great Western Ins. Co. 114 Mass. 175, where this distinction was stated by Chief Justice Gray. Its choice of law was not an election, but an hypothesis. It expressed the supposition that law was competent to give a remedy, as had been laid down by the supreme court of Nebraska and the circuit court of appeals for the circuit. Home F. Ins. Co. v. Wood, 50 Neb. 381, 386, 69 N. W. 941; Fireman's Fund Ins. Co. v. Norwood, 16 C. C. A. 136, 32 U. S. App. 490, 69 Fed. 71. So long as those decisions stood the plaintiff had no choice. It could not, or at least did not need to, demand reformation, if a court of law could effect the same result. It did demand the result, and showed by its pleadings that the path which it did choose was chosen simply because it was supposed to be an open way. Snow v. Alley, 156 Mass. 193, 195, 30 N. E. 691.

A question argued as to the obligation of the contract having been impaired by a statute as construed was not taken below, and is not open here.

Decree affirmed.

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*COVINGTON & CINCINNATI BRIDGE [109]
CO. Plff. in Err.,
v.
S. W. HAGER, Auditor of Public Accounts of the Commonwealth of Kentucky.

(See S. C. Reporter's ed. 109-111.)

Mandamus—original jurisdiction of circuit courts.

The Federal circuit courts have no jurisdiction of an original action in mandamus to compel the return of a franchise tax collected under the authority of a state statute, although the basis of the relief sought is the alleged repugnancy of the tax to the commerce clause of the Federal Constitution.

[No. 37.]

Submitted October 17, 1906. Decided November 5, 1906.

IN ERROR to the Circuit Court of the United States for the Eastern District of Kentucky to review a judgment sustaining a demurrer to, and dismissing, the petition in an original action in mandamus to compel the return of a franchise tax collected under the authority of a state statute, on the ground that such tax was a burden on interstate commerce. Modified so as to show that the case was dismissed for want of jurisdiction, and, as so modified, affirmed.

The facts are stated in the opinion.

Mr. Shelley D. Rouse submitted the cause for plaintiff in error. Mr. Charlton B. Thompson was on the brief.

Mr. N. B. Hays submitted the cause for defendant in error. Messrs. John W. Ray and C. H. Morris were on the brief.

Mr. Justice Day delivered the opinion of the court:

In this case an original action in mandamus was begun in the circuit court of the United States for the eastern district of Kentucky. It was brought by the bridge company to compel the auditor of public accounts for the state to issue his warrant on the state treasury for the amount of a franchise tax collected under authority of §§ 4079 and 4080 of the Kentucky statutes. The return of the tax was asked upon the ground that it levied a burden on the interstate commerce business of the bridge company, pertaining exclusively to commerce between Kentucky and Ohio, and was therefore repugnant to the Federal Constitution.

The auditor appeared by counsel, and, by general demurrer, raised the question of the sufficiency of the allegations of the petition, and by special demurrer challenged the jurisdiction of the court to entertain the action. The circuit court, passing the question of jurisdiction, held that levying the tax in question did not violate the commerce clause of the Federal Constitution, as it was a tax upon property, and not upon the business of the company, sustained the general demurrer, and dismissed the petition.

We are of opinion that the court below had no jurisdiction of this action. It has been too frequently decided in this court to require the citation of the cases that the circuit courts of the United States have no jurisdiction in original cases of mandamus, and have only power to issue such writs in aid of their jurisdiction in cases already pending, wherein jurisdiction has been acquired by other means and by other process.

[111] *Many of the cases are caollected in 4 Fed. Stat. Annotated, 503.

The question was before this court recently in Knapp v. Lake Shore & M. S. R. Co. 197 U. S. 536, 49 L. ed. 870, 25 Sup. Ct. Rep. 538, an action by the Interstate Commerce Commission, by petition for mandamus in the circuit court of the United States for the northern district of Ohio, against the Lake Shore & Michigan Southern Railroad Company, to compel it to file reports required by the act to regulate interstate commerce. It was argued for the government that while decisions of this court under the judiciary act of 1789 (1 Stat. at L. 73, chap. 20) and the act of 1875 (18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508) had been construed to confer no original jurisdiction in mandamus in the United States courts, yet the act of March 3, 1887 (24 Stat. at L. 552, chap. 373, U. S. Comp. Stat. 1901, p. 508), in view of the modern development in proceedings by mandamus, should be held to confer the jurisdiction upon the circuit courts to entertain original suits in mandamus. The contention was rejected and the prior cases adhered to.

We deem it settled beyond controversy, until Congress shall otherwise provide, that circuit courts of the United States have no power to issue a writ of mandamus in an original action brought for the purpose of securing relief by the writ, and this result is not changed because the relief sought concerns an alleged right secured by the Constitution of the United States.

It follows that the circuit court should have dismissed the case for want of jurisdiction instead of determining it upon the merits. The judgment dismissing the petition is therefore modified so as to show that the case was dismissed for want of jurisdiction, and, as thus modified, the judgment is affirmed.

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*COUNTY COMMISSIONERS OF WICO-[1:
MICO COUNTY
v.
SAMUEL BANCROFT, JR.

(See S. C. Reporter's ed. 112-119.)

Courts—following decisions of state courts.

1. Whether a repealable exemption from

NOTE.—As to state decisions and laws as rules of decision in Federal courts—see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553; Griffin v. Overman Wheel Co. 9 C. C. A. 548; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Mitchell v. Burlington, 18 L. ed. U. S. 351.

On repeal of statutes by implication—see notes to State v. Massey, 4 L.R.A. 369; First Nat. Bank v. Weidenbeck, 38 C. C. A. 136; and United States v. 356 Caddies of Tobacco, 20 L. ed. U. S. 235.

state taxation has been in fact repealed by a subsequent state statute is a question of state law, upon which the decisions of the highest courts of the state, in the absence of any contract rights, are binding on the Federal courts.

Taxes—exemption—repeal.

2. The withdrawal of a repealable exemption from state taxation of the property of a reorganized railway company, if any such exemption existed, was effected by Md. Acts 1896, chap. 120, which directs a new assessment for taxation of the property in the state, and expressly declares that the property of every railroad shall be assessed for county and municipal purposes, and contains a proviso that nothing therein contained shall be held to discharge, release, or impair any irrepealable contract or obligation then existing, which sufficiently evidences the legislative intent to repeal exemptions from taxation which were not protected by binding contracts beyond legislative control, and to bring all property within the taxing power of the state.

[No. 129.]

Argued and submitted October 9, 1906. Decided November 5, 1906.

ON WRIT of Certiorari to the Circuit Court of Appeals for the Fourth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Maryland, enjoining state taxation of certain railway property. Reversed and remanded to the Circuit Court with directions to dismiss the bill.

See same case below, 70 C. C. A. 287, 135 Fed. 977.

The facts are stated in the opinion.

Mr. James E. Ellegood argued the cause and filed a brief for petitioners:

Is not the rule of construction adopted by the court of appeals of Maryland the rule of construction for this court?

Commercial Bank v. Buckingham, 5 How. 342, 12 L. ed. 181; Baltimore & P. R. Co. v. Hopkins, 130 U. S. 223, 32 L. ed. 913, 9 Sup. Ct. Rep. 503; Central Land Co. v. Laidley, 159 U. S. 110, 40 L. ed. 94, 16 Sup. Ct. Rep. 80; State Railroad Tax Cases, 92 U. S. 575–617, 23 L. ed. 663–674; Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544; Wilson v. Standefer, 184 U. S. 412, 46 L. ed. 618, 22 Sup. Ct. Rep. 384; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 68, 46 L. ed. 87, 22 Sup. Ct. Rep. 26.

The repugnancy between the exemption in the statute, and the statute which was intended as a revision of the laws upon the subject of taxation, repeals the exemption.

Columbia Mfg. Co. v. Vanderpoel, 4 Cow. 556; State v. Northern C. R. Co. 90 Md. 472, 45 Atl. 465, 187 U. S. 266, 47 L. ed. 170, 23 Sup. Ct. Rep. 62.

Mr. Nicholas P. Bond submitted the cause for respondent. Messrs. Ralph Robinson and Edward Duffy were on the brief:

The organization of the Baltimore, Chesapeake, & Atlantic Railway Company and the contracts between the railway and its bondholders had been entered into, and the rights of the bondholders thereon and arising therefrom, had accrued, at a time when the decisions in question had not been made. It is, we submit, the right of a complainant, under this state of facts, to have the independent judgment of this court upon his rights. It is to that very end that the courts of the United States are given authority to administer the laws of the state in controversies between citizens of different states.

Mercantile Trust Co. v. Texas & P. R. Co. 51 Fed. 536.

We fully admit the doctrine that where a state statute has been construed, or a rule of property established, at the time a transaction is entered into, or rights accrued, such construction or rule will bind the parties as fully as though written into the transaction; but, where no such construction was then in force, we are entitled to have this statute construed by the independent judgment of this court.

Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; Carroll County v. Smith, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; Anderson v. Santa Anna Twp. 116 U. S. 356, 29 L. ed. 633, 6 Sup. Ct. Rep. 413.

This respondent is entitled to have his rights determined according to the law as it existed on September 1, 1894, at which time the rights of bondholders accrued.

Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296.

The part of § 2, chap. 120, of the Acts of 1896, relied upon by the petitioners to show a clear intention on the part of the legislature to repeal the exemption conferred by the act of 1886, chap. 133, is not sufficient for that purpose.

1st. Because this language is no broader than that to be found in § 155 of art. 81, which was in force at the time the exemption secured by chapter 133 of the Acts of 1886 was granted the Baltimore & Eastern Shore Railroad Company, and, in so far as it can be held to imply a repeal of this exemption, is copied word for word from § 155.

2d. Because this part of § 2 of chap. 120 of the Acts of 1896 is unconstitutional, being an attempt to incorporate into an amendment of § 2 a distinct section of article 81, which is not named in the title of the act.

Davis v. State, 7 Md. 151, 61 Am. Dec. 331; Stiefel v. Maryland Inst. 61 Md. 144.

When the sections to be amended are specified, matter cannot be introduced by way of amendment to such sections, which is provided elsewhere in the act.

State v. American Sugar Ref. Co. 106 La. 553, 31 So. 181; Sutherland, Stat. Constr. 2d ed. p. 239.

Every one of the sections of chapter 120 of the Acts of 1896, which are relied upon by the petitioners to show an intention on the part of the legislature to repeal by this general law the special law of chapter 133 of the acts of 1886, is merely copied without change from the law as it stood when chapter 133 of the Acts of 1886 was passed, and is not considered by the well-recognized rule of legislative construction as repealed and re-enacted, but to have been the law all along.

When there is an express repeal from an existing statute and a re-enactment of it at the same time, or a repeal or re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time.

State ex rel. Birdsey v. Baldwin, 45 Conn. 134; United Hebrew Benev. Asso. v. Benshimol, 130 Mass. 325; Middleton v. New Jersey West Line R. Co. 26 N. J. Eq. 269; Santa Cruz Rock Pavement Co. v. Lyons, 133 Cal. 114, 65 Pac. 329; Re Prime, 136 N. Y. 347, 18 L.R.A. 713, 32 N. E. 1091; State Trust Co. v. Kansas City, P. & G. R. Co. 115 Fed. 367; Ely v. Holton, 15 N. Y. 595; Fuller v. United States, 48 Fed. 654; Moore v. Kenockee Twp. 75 Mich. 335, 4 L.R.A. 555, 42 N. W. 944; Hancock v. Perry, 78 Iowa, 550, 43 N. W. 527; Sutherland, Stat. Constr. 2d ed. pp. 443–445.

This is a well-settled rule of legislative construction, and is said to be especially true if the intermediate law is special or particular and the re-enactment law is a general law on the same subject.

State ex rel. Gates v. Public Land Comrs. 106 Wis. 584, 82 N. W. 549; Olsen v. Haritwen, 6 C. C. A. 608, 15 U. S. App. 229, 57 Fed. 846; Harrison Twp. v. Schoolcraft County, 117 Mich. 215, 75 N. W. 456; Hawes v. Fliegler, 87 Minn. 319, 92 N. W. 223; Bentley v. Adams, 92 Wis. 386, 66 N W. 505; Sutherland, Stat. Constr. 2d ed. pp. 524, 525.

That a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous statute on the subject, or unless there is a necessary inconsistency in the two acts standing together, is a rule of construction recognized and applied by this court.

South Carolina v. Stoll, 17 Wall. 425, 21 L. ed. 650; Cass County v. Gillett, 100 U. S. 585, 25 L. ed. 585; Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca) 109 U. S. 556, 27 L. ed. 1034, 3 Sup. Ct. Rep. 396; Rodgers v. United States, 185 U. S. 87, 88, 46 L. ed. 818, 819, 22 Sup. Ct. Rep. 582.

Mr. Justice Day delivered the opinion of the court:

The respondent, Samuel Bancroft, Jr., began an action in the circuit court of the United States for the district of Maryland to enjoin the county commissioners of Wicomico county from levying taxes on the property of the Baltimore, Chesapeake, & Atlantic Railway Company, alleging that he was the holder of twenty bonds secured by mortgage upon the company's property, which, under the laws of the state, had been exempted from taxation. Such proceedings were had that a decree was entered enjoining taxation of certain property of the railway company. Upon appeal to the circuit court of appeals, the judgment was affirmed (70 C. C. A. 287, 135 Fed. 977), and the case was brought here by writ of certiorari.

*The case was tried upon an agreed statement of facts, from which the following, pertinent to the determination of the case, may be extracted: The Baltimore & Eastern Shore Railroad Company, organized to build a line of road from Eastern Bay, in Talbot county, to Salisbury, Wicomico county, in the same state, by act of the legislature of Maryland, was granted certain privileges (Acts of the Assembly, 1886, chap. 133), §§ 2, 4, and 5 being as follows:

"Sec. 2. And be it enacted, That said corporation shall have perpetual existence, and its franchises, property, shares of capital stocks, and bonds shall be exempt from all state, county, or municipal taxation for the term of thirty years, counting from the date of the completion of said road between the termini mentioned in its charter."

"Sec. 4. And be it enacted, That the said Baltimore & Eastern Shore Railroad Company aforesaid shall have power to unite, connect, and consolidate with any railroad company or companies, either in or out of this state, so that the capital stock of said companies so united, connected, and consolidated (respectively) may, at the pleasure of the directors, constitute a common stock, and the respective companies may thereafter constitute one company and be entitled to all the property, franchises, rights, privileges, and immunities which each of them possess, have, and enjoy under and by virtue of their respective charters.

"Sec. 5. And be it enacted, That the Baltimore & Eastern Shore Railroad Company shall have power to lease or purchase and operate any railroad or railroads, either in

or out of this state, for the purpose of carrying on their business, and any other railroad company in this state shall have the right to lease or sell its railroad or other property to the said Baltimore & Eastern Shore Railroad Company."

The Baltimore & Eastern Shore Railroad Company accepted the provisions of the act and completed the construction of its road between the termini named in August, 1891. In June, 1890, it purchased the property of [116]the *Wicomico & Pocomoke Railroad Company, extending from Salisbury to Ocean City. Afterwards, the Baltimore & Eastern Shore Railroad Company mortgaged the entire property to secure $1,600,000 of mortgage bonds. This mortgage was foreclosed in 1894, and the purchaser proceeded to organize a new corporation—the Baltimore, Chesapeake, & Atlantic Railway Company—the respondent becoming the holder of some of its mortgage bonds. This reorganization was under § 187 and 188 of art. 23, Maryland Code of 1888, which provides as follows:

Section 187, that in case of the sale of any railroad under foreclosure of mortgage, the purchaser may form a corporation for the purpose of owning, possessing, maintaining, and operating such railroad, by filing in the office of the secretary of state a certificate, of the name and style of such corporation, the number of directors, etc.

"Sec. 188. Such corporation shall possess all the powers, rights, immunities, privileges, and franchises in respect to such railroad, or the part thereof included in such certificate, and in respect to the real and personal property appertaining to the same, which were possessed or enjoyed by the corporation which owned or held such railroad previous to such sale under or by virtue of its charter, and any amendments thereto, and of [any] other laws of this state," etc.

Under authority of the Maryland statutes the Baltimore, Chesapeake, & Atlantic Railway Company issued the mortgage bonds of which respondent is the holder. The county commissioners of Wicomico county have levied and assessed taxes upon the railroad company's property, and threatened to sell the same for nonpayment thereof. The circuit court held, and the circuit court of appeals affirmed the judgment, that §§ 187 and 188 of the Maryland Code, extending immunities to the new company, had the effect to exempt from taxation certain property of the reorganized company, and that the exemption constituted a contract between the state and the company entitled to pro-[117]tection under the contract *clause of the Federal Constitution, against the subsequent attempt of the county commissioners to levy taxes upon the property.

Notwithstanding this decision of the circuit court of appeals, it is now conceded in the brief of the respondent's counsel, so far as this argument is concerned, that there was no binding contract upon the state entitled to protection under the Federal Constitution (article 1, § 10) against state impairment of the obligation of the contract. In view of the provisions of the Maryland Constitution this concession would seem in harmony with the right reserved in that instrument to amend, repeal, and alter charters. Northern C. R. Co. v. Maryland, 187 U. S. 258, 47 L. ed. 167, 23 Sup. Ct. Rep. 62. And see Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107. But it is insisted, conceding that the exemption from taxation was merely a bounty or gratuity, it extended to the reorganized company by force of the Maryland statutes above quoted, and has never been repealed nor withdrawn by the state, and, therefore, the bondholder, being directly interested in the property, has a right to be protected by injunction against the levying of such taxes so long as the act remains in force.

The questions arising in this case, as to the construction and force of the acts of the legislature of the state, have been before the supreme court of Maryland in three cases: Baltimore, C. & A. R. Co. v. Ocean City, 89 Md. 89, 42 Atl. 922; Baltimore C. & A. R. Co. v. Wicomico County, 93 Md. 113, 48 Atl. 853; and Baltimore, C. & A. R. Co. v. Wicomico County, 63 Atl. 678. In these cases it was held that the exemption from taxation provided for by the laws above quoted did not extend to the reorganized company, and in the last case, decided March 27, 1906, since the decision in the circuit court of appeals, it was held that the general assessment law of 1896 (Acts of 1896, chap. 120) declaring that the property of every railroad should be assessed for county and municipal purposes, and providing that nothing *in the act[118] should discharge or release any irrepealable contract or obligation existing at the date of the passage of the act, amounted to a recall of the immunity granted by the former law, which had at all times been subject to repeal by the state, and that, conceding the immunity extended to the reorganized company under § 187 of the statute, the repeal of the exemption did not violate any contract with the state, entitled to the protection of the Federal Constitution.

As we have said, the argument addressed to this court is rested upon the proposition that the subsequent law of 1896, imposing taxes upon the property of the railroad company in general terms, did not repeal prior legislation, which, properly construed, gives

the privilege of exemption from taxation to the property of the reorganized railroad company. We, therefore, are to consider a case wherein there is no contention that a valid and binding contract has been impaired by state action, and the questions are as to the proper construction of the statute, and whether a repealable exemption from taxation has been withdrawn by subsequent legislation of the state.

Previous decisions of this court have settled the proposition that whether such exemption has been in fact repealed by a subsequent state statute is a question of state law in which the decisions of the highest courts of the state, in the absence of a contract, are binding; and that it is only where the exemption is irrepealable, thus constituting a contract, that it becomes the duty of this court to decide for itself whether the subsequent act did or did not impair the obligation of the contract. Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66-74, 46 L. ed. 86-90, 22 Sup. Ct. Rep. 26; Northern C. R. Co. v. Maryland, 187 U. S. 258, 266, 267, 47 L. ed. 167, 170, 172, 23 Sup. Ct. Rep. 62. It is contended, however, that inasmuch as the respondent acquired his bonds in 1896, which were issued in 1894, at a time when none of the Maryland decisions above referred to had been made, the first of them being in 1899, the construction of the statutes and their continued force are questions for the Federal courts having jurisdiction of the cause and the parties. And further, [119] that while *the Federal tribunals will differ reluctantly from the state courts upon a question of the validity of state statutes, and will "lean towards an agreement of views with the state courts," nevertheless, they must in such cases exercise an independent judgment in determining the force and validity of state statutes. Burgess v. Seligman, 107 U. S. 20, 23, 27 L. ed. 359, 361, 2 Sup. Ct. Rep. 10; Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576, and cases cited in the opinion in that case.

If we could concede the soundness of this contention, we are of opinion that the court of appeals of Maryland was right in holding that the legislation of 1896 (Acts of 1896, chap. 120), directing a new assessment of the property of the state, and expressly declaring that the property of every railroad in the state should be valued and assessed for county and municipal purposes, had the effect to withdraw the prior exemption from taxation if a proper construction of the legislation of the state would extend it to the property of the reorganized company. The act contains the significant proviso that nothing therein contained shall be held to discharge, release, impair, or affect any ir pealable contract or obligation of any ki whatsoever existing at the date of the p sage of the act. This proviso evidences t legislative intent to repeal exemptions fr taxation which were not protected by bi ing contracts beyond legislative control, any such existed, and to bring all prope within the taxing power of the state. agree with the reasoning expressed by t court of appeals of Maryland upon t branch of the case. Baltimore, C. & A. Co. v. Wicomico County, 63 Atl. 683.

From this view it follows that the dec of the Circuit Court of Appeals must be versed and the cause remanded to the C cuit Court with directions to dismiss t bill.

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*CHARLES M. TAYLOR, Appt.,
v.
THOMAS BURNS, John A. Duncan, a S. R. Kauffman.

(See S. C. Reporter's ed. 120-126.)

Deeds—what constitutes.

1. No transfer of title was effected an instrument which recites that the pa of the first part "sells" certain mini claims to the party of the second part fo specified consideration, and "upon the ter and consideration following," and which, its subsequent provisions, authorizes t party of the second part to sell and nego ate the mines for any sum above $45,0 and retain out of the purchase price se eighths of the excess, the party of the fi part agreeing to execute any conveyan thereafter necessary to convey a good ti and the party of the second part assumi no obligations except a general one by wh both parties mutually agree to aid e other in the negotiation and sale; such do ment is not a deed, but simply a power attorney, and, as such, subject to revo tion.

Power of attorney—revocation.

2. An interest in the property up which the power is to operate, and merely an interest in the exercise of t power, is essential to make a power of torney one coupled with an interest, so not to be subject to revocation.

[No. 28.]

Submitted October 16, 1906. Decided N vember 12, 1906.

APPEAL from the Supreme Court of t Territory of Arizona to review a dec which affirmed a decree of the Distr Court for the County of Cochise, in th territory, in favor of defendants in a s

to quiet title to certain mining claims. Affirmed.

See same case below (Ariz.) 76 Pac. 623.

Statement by Mr. Justice Brewer:

On March 26, 1901, Thomas Burns, the owner of three mining claims, as party of the first part, and Charles M. Taylor, as party of the second part, made the following agreement:

"The said party of the first part, in consideration of the sum of $1, lawful money of the United States of America in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of money and labor heretofore expended and of labor to be hereafter expended in and upon the Magnet mining claim, the Comet mining claim, and the Victor mining claim, situate in the California mining district, in the Chiricahua mountains, Cochise county, Arizona territory, sells to the said party of the second part the said mining claims upon the terms and consideration following, to wit:

"The said party of the second part shall pay to the party of the first part, whenever he shall negotiate, sell, or place said mines to any assignee of the said party of the second part, forty-five thousand dollars 121] ($45,000), and in addition thereto *one-eighth (⅛) of whatever price the said party of the second part may be able to sell, place, or negotiate the said mines, for a consideration in excess of said $45,000; that is to say, the party of the second part is authorized to sell and negotiate the said mines for any price above the sum of $45,000, and may retain out of the said purchase price seven eighths (⅞) of said selling price above such sum of $45,000.

"The said parties hereto hereby mutually agree to aid each other in the negotiation and sale of said mining claims to the end that the same may be sold and the consideration realized as quickly as possible. And the said party of the first part hereby agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims. This contract is to take the place of and supersede any and all other contract or contracts heretofore made by said parties hereto with reference to said mining claims."

On November 9, 1901, Burns deeded a one fourth interest in the mining claims to John A. Duncan, and on March 9, 1903, Burns and Duncan conveyed the entire property to S. R. Kauffman as trustee. On February 27, 1903, Thomas Burns executed and filed for record a revocation of all authority given by the agreement to Taylor, and notified him by letter of such revocation. On April 6, 1903, Taylor filed his bill of complaint in the district court for the county of Cochise, territory of Arizona, against Burns, Duncan, and Kauffman, alleging that he was the owner of the mining claims, that defendants claimed to have some interest in them, and praying to have his title thereto quieted. The defendants answered, and also filed a cross bill, alleging in substance that plaintiff had no title whatever, and praying that their title be quieted as against him. A trial in the district court resulted in a decree in favor of the defendants, which was affirmed by the supreme court of the territory (76 Pac. 623), and thereupon the case was brought here on appeal.

Mr. Eugene S. Ives submitted the cause for appellant:

Mining claims can be transferred orally, unless statutes exist requiring them to be in writing.

Union Consol. Silver Min. Co. v. Taylor, 100 U. S. 37, 25 L. ed. 541; Lockhart v. Rollins, 2 Idaho, 540, 21 Pac. 413.

Actual possession is not necessary for the protection of title acquired by valid location; it is simply the right to possession while the paramount title remains in the United States.

Forbes v. Gracey, 94 U. S. 762, 24 L. ed. 313; Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735.

Such a right is transferred by the term "sell," without any regard to the character of the fee or of the title; and the word "sell" in a contract is a word of assignment of all the right to possession of the party who is the seller, and the ordinary words of conveyance—"grant, bargain, and sell"—are not required. The terms "grant and bargain" are not necessary, because the term "sell" implies and carries with it all right of the locator to the possession of the claims.

2 Kent, Com. 468.

Whatever the court may decree this instrument to be, it certainly did vest in Taylor a right coupled with an interest, and therefore was not revocable at the will of Burns.

Hunt v. Rousmanier, 8 Wheat. 175, 5 L. ed. 590.

That a power of attorney coupled with an interest is irrevocable, and binds the party giving it, and may be executed after his death, see the note to this case as reported in 5 L. ed. U. S. 589. Where an authorization or power of attorney is coupled with an interest, or where it is given for valuable consideration, it is, from its own nature and character, irrevocable.

Knapp v. Alvord, 10 Paige, 205, 40 Am. Dec. 241; 2 Kent, Com. 643; Bonney v. Smith, 17 Ill. 533; Raymond v. Squire, 11 Johns. 47.

Mr. William Herring and Sarah Herring Sorin submitted the cause for appellees:

The instrument under which plaintiff claims title is not a deed of conveyance. Though an instrument contains words expressing an absolute transfer, it will not be construed as a deed if, by taking the whole instrument together, it appears that such was not the intention of the parties. Particular words may not be isolatedly considered, but the instrument must be considered as a whole in order to ascertain the intention and obligation of the parties.

Jackson ex dem. Ludlow v. Myers, 3 Johns. 388, 3 Am. Dec. 504; Jackson ex dem. Shipley v. Moncrief, 5 Wend. 26; Dunaway v. Day, 163 Mo. 415, 63 S. W. 731; Stewart v. Lang, 37 Pa. 201, 78 Am. Dec. 414; Sherman v. Dill, 4 Yeates, 295, 2 Am. Dec. 408; Wallace v. Wilcox, 27 Tex. 60; Peterson v. McCauley (Tex. Civ. App.) 25 S. W. 826; Ives v. Ives, 13 Johns. 236; Jackson ex dem. Green v. Clark, 3 Johns. 424; Devlin, Deeds, 2d ed. § 7; Williams v. Paine, 169 U. S. 76, 42 L. ed. 667, 18 Sup. Ct. Rep. 279; O'Brien v. Miller, 168 U. S. 297, 42 L. ed. 473, 18 Sup. Ct. Rep. 140; Morrison v. Wilson, 30 Cal. 344.

Courts will refuse to construe an instrument as a deed where, from the instrument itself, it is manifest that further conveyances are contemplated.

Jackson ex dem. Shipley v. Moncrief, Williams v. Paine, and Peterson v. McCauley, supra; Devlin, Deeds, 2d ed. § 8.

The only one who can convey a good title is he in whom the title is vested.

To "convey" real estate is, by a proper instrument, to transfer the legal title to it from the present owner to another.

Abendroth v. Greenwich, 29 Conn. 365; Cross v. Weare Commission Co. 153 Ill. 510, 46 Am. St. Rep. 902, 38 N. E. 1038.

A mining claim is real estate, and the title thereto can only be conveyed by deed.

Hopkins v. Noyes, 4 Mont. 550, 2 Pac. 280; St. Louis Min. & Mill. Co. v. Montana Min. Co. 171 U. S. 650, 43 L. ed. 320, 19 Sup. Ct. Rep. 61; Manual v. Wulff, 152 U. S. 505, 38 L. ed. 532, 14 Sup. Ct. Rep. 651; Gillis v. Downey, 29 C. C. A. 286, 56 U. S. App. 567, 85 Fed. 483; Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735; Harris v. Equator Min. & Smelting Co. 3 McCrary, 14, 8 Fed. 863.

The authority conferred upon Taylor by the agreement of March 26, 1901, was not a power coupled with an interest. The interest is merely in that which is to be produced by the exercise of the power. Such an interest does not make the pow ocable.

Hunt v. Rousmanier, 8 Wheat. 1 ed. 589; Mansfield v. Mansfield, 6 Cc 16 Am. Dec. 76; Trickey v. Crowe 71 Pac. 965; Hall v. Gambrill, 88 F Tinsley v. Dowell, 87 Tex. 23, 26 S. Blackstone v. Buttermore, 53 Pa. 26 ley's Appeal, 53 Pa. 212, 91 Am. D Stitt v. Huidekoper, 17 Wall. 385, 1 644; Durkee v. Gunn, 41 Kan. 496, St. Rep. 300, 21 Pac. 637; Mechem, § 207.

It was merely an authorization to to negotiate a sale of the mining for any price over $45,000 and to r his commission ⅞ of such excess. being fixed for the duration of the either party was at liberty to te it at will.

Trickey v. Crowe, supra; Coffin v. 46 Pa. 426; Sibbald v. Bethlehem 83 N. Y. 378, 38 Am. Rep. 441; R Hull, 55 W. Va. 335, 104 Am. St. R 47 S. E. 92; Mechem, Agency, § 210; v. Crabtree, 186 Mass. 7, 66 L.R.A. Am. St. Rep. 543, 70 N. E. 1033; Parker, 2 Wash. 34, 25 Pac. 909.

The agent did not have the e right to negotiate a sale, and therefo was nothing to prevent the princip making a sale of his own property.

York v. Nash, 42 Or. 321, 71 I Baars v. Hyland, 65 Minn. 150, 67 1148; Golden Gate Packing Co. v. I Union, 55 Cal. 606.

The existence of a consideratio not of itself operate to transfer t from Burns to Taylor, and could n the effect of the instrument nor ai construction.

Mansfield v. Mansfield, supra.

There was, however, no considera the agreement.

An executed or past consideratio consideration for a promise unless promise which the law will imply.

1 Parsons, Contr. 5th ed. 468, 4 Comstock v. Smith, 7 Johns. 87; & Eng. Enc. Law, pp. 690, 691.

Where there is an executory consi in an agreement, until the perform the condition of the promise ther consideration and the promise is *pactum*.

Miller v. McKenzie, 95 N. Y. 575, Rep. 85.

Mr. Justice Brewer delivered the of the court:

This case turns upon the scope fect of the agreement of March 2 It is claimed by plaintiff that it is veyance, *passing title; by defendan

it is simply a power of attorney, subject to revocation. Its meaning is to be determined by a consideration of all its terms, and not by any particular phrase. The first paragraph recites a consideration, and states that for the consideration the first party "sells" the claims to the party of the second part. If this were all it would suggest a purpose to pass title, but the paragraph closes with a reference to further stipulations, its language being "sells to the said party of the second part the said mining claims upon the terms and consideration following, to wit." The next paragraph authorizes the party of the second part to "sell and negotiate" the mines for any sum above $45,000, and to retain out of this purchase price seven eighths of the excess of $45,000, while in the last paragraph the party of the first part "agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims."

Nowhere in the instrument does the party of the second part assume any obligations, except the general one in the third paragraph, by which both parties mutually agree to aid each other in the negotiation and sale of the mining claims. The instrument does not in terms grant or convey. The nearest approach to a word of conveyance is "sells." This is more apt in describing the passing of the title of personal than of real property. Not that this is decisive, for not infrequently it is held to manifest an intent to convey the title to the property named, whether real or personal. But when the purpose of the transaction is stated the word will ordinarily have no more effect upon the title than is necessary to accomplish the purpose. The purpose here named was the giving of authority to make a sale to some third party at not less than a named price, which price would belong to Burns, less the commission on the sale. For this it was not necessary to pass title with the authority. And it is not ordinarily to be expected that an owner will part with title before receipt of purchase [126] price, or security therefor. *Appellant contends that by this instrument he became owner, while Burns was only an equitable mortgagee. But no time is fixed for the sale, and therefore no time for the maturity of the supposed debt, nor is any liability cast upon Taylor for the payment of any portion thereof. Indeed, its amount is uncertain, whether $45,000, or $45,000 plus one eighth of a price which should or could be realized on a sale. If it were true that title passed, then Taylor could immediately convey to a third party, who, by payment of $45,000, would acquire the property. We need not inquire whether there was a breach of contract for which Taylor could recover damages. The question here is the effect of the contract upon the title. While it may be conceded that the meaning and scope of the instrument are not perfectly clear, yet it seems more reasonable to hold that it was simply a grant of authority to Taylor to "sell and negotiate" the mines, and not also a transfer to him of the title to the property.

As such an instrument it was subject to revocation. It was not a power of attorney coupled with an interest. By the phrase "coupled with an interest," is not meant an interest in the exercise of the power, but an interest in the property on which the power is to operate. Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589. Now, as we construe this contract, Taylor was to receive, in case he made a sale, seven eighths of the price in excess of $45,000,—that is, he was to be paid for making the sale. It was an interest in the exercise of the power, and not an interest in the property upon which the power was to operate.

We see no error in the ruling of the Supreme Court of the territory of Arizona, and its judgment is affirmed.

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*WILLIAM H. ANDREWS, Plff. in Err., [127]
v.
EASTERN OREGON LAND COMPANY.

(See S. C. Reporter's ed. 127-129.)

Error to state court—review of decree setting aside finding of fact.

A judgment of the highest court of a state, which, reversing the trial court, upholds as against a pre-emptor a patent from the United States under the Dalles military wagon road grant made by the act of February 25, 1867 (14 Stat. at L. 409, chap. 77), resting its conclusion upon the general proposition that there was no competent proof to impeach the records of the Land Department or to overthrow the presumption of validity which attends a patent from the United States, will not be reversed upon

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and Re Buchanan, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be

any presumption as to what might have been the testimony upon which the trial court made its finding that the land was situated entirely outside the limits of the grant, where such testimony, though taken and reported by a referee, is not preserved in the record.

[No. 48.]

Argued October 19, 1906. Decided November 12, 1906.

IN ERROR to the Supreme Court of the State of Oregon to review a judgment which, reversing the Circuit Court of Sherman County, in that state, upholds a patent from the United States under the Dalles military wagon road land grant as against one claiming title as a pre-emptor. Affirmed.

See same case below, 45 Or. 203, 77 Pac. 117.

The facts are stated in the opinion.

Mr. S. M. Stockslager argued the cause, and, with Messrs. James F. Moore and George C. Heard, filed a brief for plaintiff in error.

Mr. Aldis B. Browne argued the cause, and, with Mr. Alexander Britton, filed a brief for defendant in error:

The sole matter of fact here involved and clearly ruled as such in the court below cannot raise a Federal question of law reviewable here.

Bushnell v. Crooke Min. & Smelting Co. 148 U. S. 682, 688, 37 L. ed. 610, 612, 13 Sup. Ct. Rep. 771; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 507, 44 L. ed. 864, 865, 20 Sup. Ct. Rep. 726; Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222.

Mr. Justice Brewer delivered the opinion of the court:

This case brings before us a judgment of the supreme court of the state of Oregon. 45 Or. 203, 77 Pac. 117. It involves the title to lot 3 and the east ½ of the southwest ¼ of section 7, township 1 north, range 17 east of the Willamette meridian. The plaintiff in error claims title as a pre-emptor; the defendant in error under a patent from the United States. The land was patented as a part of the grant made by act of Congress, approved February 25, 1867 (14 Stat. at L. 409, chap. 77), of three alternate sections on each side of the road, to the Dalles Military Wagon Road Company, a full account of which is to be found in Wilcox v. Eastern Oregon Land Co. 176 U. S. 51, 44 L. ed. 368, 20 Sup. Ct. Rep. 269. If the patent was valid the title to the land was in the defendant, *and the[1] judgment of the supreme court of Oregon was correct. There being no conflicting land grant, the question whether the land was within the territorial limits of that to the road company is apparently one of fact only, and the decision of the Land Department on matters of fact is ordinarily conclusive in the courts.

The difficulty in the case arises from the condition of the record. This shows that by the trial court findings of fact and conclusions of law were made, one of the findings being that the land is situated entirely outside the limits of the grant, and more than 3 miles from the road as actually surveyed, platted, and constructed by the company, and certified by the governor of the state to the Land Department. No testimony is preserved, although it appears that the case was referred to a referee, who took and reported the testimony. The supreme court reversed the judgment of the trial court, and, while making no special findings, in its opinion discusses certain matters of evidence, and, after stating that the testimony tends to show that the land was in fact within the limits of the grant, rests its conclusion upon the general proposition that there is no competent proof to impeach the records of the Land Department or overthrow the presumption of validity which attends a patent of the United States. The certificate of the clerk of the supreme court states that the transcript is the full and complete record filed in that court and upon which the appeal was heard; while the certificate of the clerk of the trial court to the record sent to the supreme court is "that the same is a full, true, and correct

raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

As to what is the record for the purpose of showing the jurisdiction of the Supreme Court of the United States on a writ of error to a state court—see note to Home for Incurables v. New York, 63 L.R.A 329.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to Wedding v. Meyler, 66 L.R.A. 833.

copy of the complaint, amended answer, demurrer to the amended answer, reply, findings of fact and conclusions of law, undertaking on appeal, notice of appeal filed in my office in the above-entitled cause, and of all journal entries made in said cause, and of the whole thereof."

From this it is contended that the supreme court, without any evidence before it, set aside the findings of fact made by the trial court. But it is the judgment of [129] the supreme court *whose validity we are to consider, and while it made no special findings, its statement of what was before it for consideration and its conclusions therefrom are sufficient to sustain its judgment. True, the record fails to show how the facts were brought to its knowledge, but it is the highest court of the state, and we may not ignore its recital of what it considered, especially as it appears that testimony was taken and preserved. Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300. And when its conclusions are in harmony with the general rule of the effect to be given to a patent of the United States, we are not justified in setting aside the judgment upon any presumption of what might have been the testimony upon which the trial court made its findings.

The judgment of the Supreme Court of the state of Oregon is affirmed.

ALFRED H. BURT and Joseph J. Sindele, Plffs. in Err.,
v.
WILLIAM W. SMITH.

(See S. C. Reporter's ed. 129–135.)

Error to state court—necessity of raising Federal question.

1. A decision of a state court that there was probable cause for beginning a trademark infringement suit in the Federal courts in which a final decree was entered dismissing the bill on the merits after a temporary injunction had been dissolved is not reviewable in the Supreme Court of the United States, where the record does not show that any claim of right under the Federal Constitution or laws was made in the state court, on the theory that such court, by its reasoning, implies that it finds probable cause, in its own opinion, that the decree of the Federal court was wrong, whereas not to assume it to be correct is to fail to give it the full faith and credit which U. S. Rev. Stat. § 905, U. S. Comp. Stat. 1901, p. 677, requires.

Error to state court—Federal question.

2. Whether or not a state court exceeded its functions under the state Constitution cannot give rise to a question respecting due process of law which will sustain the appellate jurisdiction of the Supreme Court of the United States.

[No. 67.]

Argued October 29, 1906. Decided November 12, 1906.

IN ERROR to the Court of Appeals of the State of New York to review a judgment which, reversing a judgment of the Appellate Division of the Supreme Court of that state, Fourth Department, affirmed a judgment of a Trial Term of the Supreme Court held in and for the County of Erie granting a nonsuit in an action for malicious prosecution. Dismissed for want of jurisdiction.

See same case below, 181 N. Y. 1, 73 N. E. 495.

The facts are stated in the opinion.

Mr. **Norris Morey** argued the cause, and, with Mr. Joseph H. Morey, filed a brief for plaintiffs in error:

Any right, question, or fact in issue and directly adjudicated upon, or necessarily involved in the determination of a court of competent jurisdiction in which a judgment or decree is rendered upon the merits, cannot be disputed in a subsequent suit between the same parties or their privies; and the rule is the same whether the second suit is for the same or for a different cause of action.

Southern P. R. Co. v. United States, 168 U. S. 1, 49–52, 42 L. ed. 355, 377, 378, 18 Sup. Ct. Rep. 18; New Orleans v. Citizens' Bank, 167 U. S. 371, 396–401, 42 L. ed. 202, 210–212, 17 Sup. Ct. Rep. 905; Webb v. Buckelew, 82 N. Y. 555; Ex parte Watkins, 3 Pet. 193, 203, 7 L. ed. 650, 653.

NOTE.—Error to state courts in cases involving questions of due process of law.

A Federal question, *i. e.*, a controversy which will sustain the exercise by the Supreme Court of the United States of its appellate jurisdiction over a state court, is involved in the contention that the due-process-of-law clause of U. S. Const., 14th Amend., constitutes a bar to mandamus proceedings. Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617.

A claim in a state court that reputation is property, of which the owner will be deprived without due process of law, in violation of the 14th Amendment to the Federal Constitution, if a decision should be rendered against his right of action for libelous matter contained in a pleading, raises a Federal question. Abbott v. National Bank, 175 U. S. 409, 44 L. ed. 217, 20 Sup. Ct. Rep. 153.

A contention in a state court that notice of a reassessment was insufficient, and that, by reason thereof, defendant's prop-

A judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented under the pleadings.

Dowell v. Applegate, 152 U. S. 327, 339, 340, 38 L. ed. 463, 467, 468, 14 Sup. Ct. Rep. 611; National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 233–237, 46 L. ed. 157, 169, 170, 22 Sup. Ct. Rep. 111.

A dismissal of the bill absolutely, and without words of restriction, is presumed to be upon the merits, and is conclusive upon all the material issues presented by the pleadings, whether the dismissal be by default, before taking of depositions, or after a hearing on depositions.

Durant v. Essex Co. 7 Wall. 107, 19 L. ed. 154; Leary v. Long, 131 U. S. ccxviii. Appx. and 26 L. ed. 301; Lyon v. Perin & G. Mfg. Co. 125 U. S. 698, 31 L. ed. 839, 8 Sup. Ct. Rep. 1024; Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; Hubbell v. United States, 171 U. S. 203, 43 L. ed. 136, 18 Sup. Ct. Rep. 828; Baker v. Cummings, 181 U. S. 117, 125, 45 L. ed. 776, 780, 21 Sup. Ct. Rep. 578; Barber v. Kendall, 158 N. Y. 401, 53 N. E. 1; Goebel v. Iffla, 111 N. Y. 170, 18 N. E. 649; Reich v. Cochran, 151 N. Y. 127, 37 L.R.A. 805, 56 Am. St. Rep. 607, 45 N. E. 367; Dowell v. Applegate, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611.

Where there is a dismissal of the complaint it is presumed that the judgment of dismissal is upon the merits, and covers every question put in issue by the pleadings.

Hubbell v. United States, 171 U. S. 203,

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erty was sought to be taken without due process of law, and in conflict with the 14th Amendment to the Federal Constitution, raises a Federal question. Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 314, 43 L. ed. 460, 19 Sup. Ct. Rep. 205.

A claim in a state court that property is taken without due process of law when condemned under a special statute for the abolition of grade crossings, because it authorizes an increase in the number of tracks, and requires the city to pay a portion of the expense incurred for that purpose, which, it is contended, would amount to a donation to a railroad corporation, in violation of the state Constitution, raises a Federal question for the purpose of a writ of error from the Supreme Court of the United States to a state court. Wheeler v. New York, N. H. & H. R. Co. 178 U. S. 321, 44 L. ed. 1085, 20 Sup. Ct. Rep. 949.

But where a state statute providing for condemnation proceedings has been construed by the state courts as requiring notice, no Federal question with respect to due process of law can be based upon the objection that such statute allows condemnation without notice. Baltimore Traction Co. v. Baltimore Belt R. Co. 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294.

Where the Supreme Court of the United States can see that there has been no taking of property, it will dismiss a writ of error to a state court which is sought to be sustained because of a decision adverse to the contention that property has been taken without due process of law. Yesler v. Washington Harbor Line, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190; Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142.

It is rather difficult to see why the question whether there has been a taking of property within the meaning of the due-process-of-law clause is not as much a Federal question as the further question as to the constitutionality of the procedure. Perhaps the best explanation of these decisions is the one suggested in div. IV. e, 5, in the note appended to Apex Trans. Co. v. Garbade, 62 L.R.A. 513, on What adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts; *viz.*, that, as the judgment below was not to be disturbed, it was of little importance whether that result was reached by dismissal or affirmance.

The question must be a real and substantial one (see note to Offield v. New York, N. H. R. & H. R. Co. post, p. 231), and it must not be merely an abstract one. Hence the objection that persons may be deprived of their rights without due process of law, under the Massachusetts Torrens act for land registration, because it provided for adjudicating the rights of certain classes of persons who are notified only by posting notices, registered letters, or by publication, and for the registration of dealings with the land after the original registration, cannot be raised, so as to give jurisdiction on writ of error from the Supreme Court of the United States, by a person who is not affected by those provisions because he has had the requisite notice. Tyler v. Registration Ct. Judges, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206.

A taxpayer who admits that his own tax is correct cannot, on the ground that he will be deprived of his property without due process of law, and denied the equal protection of the laws, contrary to the 14th Amendment of the Constitution of the United States, have a writ of error from the United States Supreme Court to review a construction by the supreme court of the state of the statutes thereof, as exempting, in whole or in part, certain corporations from the payment of taxes. Missouri v. Dockery, 191 U. S. 165, 48 L. ed. 133, 63 L. R.A. 571, 24 Sup. Ct. Rep. 53.

A decree of the state court requiring defendants to vacate certain lands, and en-

209, 43 L. ed. 136, 138, 18 Sup. Ct. Rep. 828; Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 691, 692, 39 L. ed. 859, 863, 15 Sup. Ct. Rep. 733.

The Supreme Court must ascertain for itself what questions of law were presented by the record, and whether the court of appeals, in order to reverse the order of the appellate division, and grant final judgment, did not disregard and misinterpret the law of its own state, and also whether it did not, to reach that end, rely, in whole or in part, upon conclusions contrary to those determined by the former judgment.

Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265.

So, a question of the proper interpretation of a state ordinance was held involved in the question whether proceedings under it were in conflict with United States laws and Constitution.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

To ascertain what was really decided, resort may be had to the pleadings and to the opinion of the court.

National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 217–234, 46 L. ed. 158–169, 22 Sup. Ct. Rep. 111; Baker v. Cummings, supra.

Even though the United States circuit court had not jurisdiction of the alleged infringement of the common-law trademark, nevertheless its judgment is conclusive thereon upon the parties before it, and could not be questioned by them, or either of them, collaterally, or otherwise than on writ of error or appeal.

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joining them from further mining thereon, which was the relief prayed in a bill proceeding on the theory that the corporation holding a mining lease under which defendants justified their occupation as its agents was no longer in existence, is not reviewable in the Federal Supreme Court as involving a denial of the claim that, in proceeding to determine the case without making the corporation a party defendant, it will be deprived of its property without due process of law, since, not being a party, the rights of the corporation are not affected by such decree. Iron Cliffs Co. v. Negaunee Iron Co. 197 U. S. 463, 49 L. ed. 836, 25 Sup. Ct. Rep. 474.

The question must be adequately presented to, and be decided by, the state court, or the Federal Supreme Court will be without jurisdiction.

A judgment of a state court in condemnation proceedings is not reviewable in the Supreme Court of the United States on the theory that a question respecting due process of law was decided thereby, where there is nothing in the record which adequately shows that the state court was led to suppose that any claim was made under the Constitution of the United States, or that any ruling involved a decision against a right set up under that instrument. Hooker v. Los Angeles, 188 U. S. 314, 47 L. ed. 487, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395.

A question respecting due process of law is not specially set up or claimed in an eminent domain case, so as to give jurisdiction to the Supreme Court of the United States, by assignments of error in the state court which do not refer in any way to the Federal Constitution, but merely complain of the inadequacy of the damages. Chicago & N. W. R. Co. v. Chicago, 164 U. S. 454, 41 L. ed. 511, 17 Sup. Ct. Rep. 129.

A decision of a state court that the formalities required by the tax laws were fully observed does not present a Federal question, where the contention is not that the statutes are unconstitutional, but that the manner of their observance was a denial of due process of law. French v. Taylor, 199 U. S. 274, 50 L. ed. 189, 26 Sup. Ct. Rep. 76.

A general statement that the decision of a court was against the constitutional rights of a party or against the 14th Amendment, or that it is without due process of law, particularly when these objections appear only in specifications of error, so called, will not raise a Federal question. Clarke v. McDade, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284.

A general allegation in a suit to vacate a decree that such decree was passed against some persons who were at the time dead, and against others who were necessary parties, but had no notice of the proceedings, does not, within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, specially set up a right or immunity under the 14th Amendment of the Constitution of the United States forbidding a state to deprive any person of his property without due process of law. F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

The decision in the opinion of the highest state court, in reviewing a conviction of crime, of questions respecting due process of law, the equal protection of the laws, and cruel and unusual punishment, will not confer jurisdiction on the Supreme Court of the United States of a writ of error to the state court, in the absence of any claim to protection under the Federal Constitution made therein. Howard v. Fleming, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49.

The right to trial by jury on the question of waiver of preliminary examination is not claimed as a Federal right in a state court by a plea in abatement to an information, alleging that the prosecution is in contravention of the 14th Amendment to the Federal Constitution, where this allegation evidently referred to prior paragraphs of the plea, which dealt only with the necessity of a prosecution by indictment

Dowell v. Applegate, supra; Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; Riverdale Cotton Mills v. Alabama & G. Mfg. Co. 198 U. S. 188, 197, 198, 49 L. ed. 1008, 1015, 1016, 25 Sup. Ct. Rep. 629.

The question whether a state court has given due effect to a judgment of a court of the United States is a question arising under the Constitution and laws of the United States.

Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; Deposit Bank v. Frankfort, 191 U. S. 499-515, 520, 48 L. ed. 276-282, 284, 24 Sup. Ct. Rep. 154; National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 217, 233, 46 L. ed. 158, 169, 22 Sup. Ct. Rep. 111; Tullock v. Mulvane, 184 U. S. 497, 507, 508, 46 L. ed. 657, 664, 22 Sup. Ct. Rep. 372; Taylor, Jurisdiction, § 209.

There is a Federal question because the plaintiffs alleged and were required to prove, as an essential of their cause of action, the former judgment beween the same parties in the United States circuit court.

Commercial Pub. Co. v. Beckwith, 188 U. S. 567, 569, 47 L. ed. 598, 599, 23 Sup. Ct. Rep. 382.

All the proceedings in the United States circuit court in the injunction suit, including the judgments and orders and opinions, were pleaded and in evidence, and a part of the record. There can be no claim or argument that they were not before the court of appeals.

Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 66-68, 43 L. ed. 364, 368, 369, 19 Sup. Ct. Rep. 97; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

A failure or refusal to consider the Federal question is equivalent to a decision against the Federal right involved therein.

Des Moines Nav. & R. Co. v. Iowa Home-

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to constitute due process of law. Bolin v. Nebraska, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287.

No Federal question which will confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court is involved in a contention in the highest state court that, by the judgment of the trial court, private property is taken for public use without just compensation, in violation of the 5th Amendment of the Federal Constitution, since this Amendment operates solely as a restriction upon Federal powers, and not upon those of the several states. Winous Point Shooting Club v. Caspersen, 193 U. S. 189, 48 L. ed. 675, 24 Sup. Ct. Rep. 431.

An exception to the denial of a motion for a new trial on the ground that a state statute violates the 5th Amendment to the Federal Constitution, securing due process of law, is not the equivalent of a claim of the benefit of the due-process-of-law clause of the 14th Amendment. Chapin v. Fye, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

A Federal question, even if presented by the claim, on a motion for a new trial in a state court, that a state statute takes property without due process of law, which the highest state court expressly refrained from passing upon because it regarded the objection waived by failure to cite authorities or advance argument in support thereof, cannot be deemed necessarily to have been decided by that court, where the record does not show that the question was there raised. Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176.

A judgment of a state court dismissing a bill to enjoin municipal interference with a toll gate, which rests on the ground that the individual grantee of the franchise of the toll road corporation in a deed executed under legislative authority took only a life estate, determines no question as to the impairment of contract obligations, or the deprivation of property without due process of law. Snell v. Chicago, 152 U. S. 191, 38 L. ed. 408, 14 Sup. Ct. Rep. 489.

See also note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33, on How and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States.

The doctrine of the cases holding that it is for the state courts alone to construe their own laws (see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571, on What questions the Federal Supreme Court will consider in reviewing the judgments of state courts) does not require the Supreme Court of the United States, on writ of error to a state court, to accept that court's construction of a state statute or a statute enacted by the territory before its admission into the Union as a state, when the question is whether such statute provides for the notice required to constitute due process of law. Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108.

The Federal Supreme Court is no more bound by the state court's construction of the enactment under these conditions than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it had not been given due faith and credit in the courts of another state. Scott v. McNeal, supra.

A similar exception was recognized in Hoadley v. San Francisco (Clark v. San Francisco) 124 U. S. 639, 31 L. ed. 553, 8 Sup. Ct. Rep. 659, where one of the questions involved on a writ of error to a state

stead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 531, 46 L. ed. 673, 22 Sup. Ct. Rep. 446.

If a Federal question appears in the record and was actually decided, or was necessarily involved, in the decision as made by the state court, this court has jurisdiction.

Brown v. Atwell, 92 U. S. 327, 23 L. ed. 511; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 488, 489, 43 L. ed. 521, 525, 526, 19 Sup. Ct. Rep. 247; Wedding v. Meyler, 192 U. S. 573, 48 L. ed. 570, 66 L.R.A. 833, 24 Sup. Ct. Rep. 322; Powell v. Brunswick County, 150 U. S. 440, 37 L. ed. 1136, 14 Sup. Ct. Rep. 166; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 231, 41 L. ed. 979, 982, 17 Sup. Ct. Rep. 581; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173.

Mr. Norris Morey also filed a supplemental brief for plaintiffs in error on the question of jurisdiction.

It has been uniformly held that this court will and must ascertain for itself from the record—including the pleadings, the decree, and the opinion—what questions were, in fact, decided or involved in the decision of the court below.

Southern P. R. Co. v. United States, 168 U. S. 44, 45, 49-52, 42 L. ed. 375, 377, 378, 18 Sup. Ct. Rep. 18; Baker v. Cummings, 181 U. S. 117, 45 L. ed. 776, 21 Sup. Ct. Rep. 578; National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 217, 234, 46 L. ed. 158, 169, 22 Sup. Ct. Rep. 111.

Mr. **Milton A. Fowler** argued the cause and filed a brief for defendant in error.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action for malicious prosecution, brought by the plaintiffs in error, in

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court was whether property was taken without due process of law by certain state legislation.

Errors of state courts in respect to the details of assessments by municipal corporations for street improvements which are claimed not to furnish due process of law cannot be considered by the Supreme Court of the United States on writ of error to the state court. The only inquiry open is whether sufficient provision has been made by law for contesting the assessment by an appropriate proceeding in the ordinary courts of justice. Corry v. Campbell, 154 U. S. 629, Appx. and 24 L. ed. 926, 14 Sup. Ct. Rep. 1183.

On writ of error to a state court to review a judgment in an action in the nature of quo warranto alleged not to constitute due process of law the question before the Supreme Court of the United States is not whether the courts below, having jurisdiction of the case and of the parties, have followed the law, but whether the law, if followed, would have furnished the protection guaranteed by the Federal Constitution. Irregularities and mere errors in the proceedings must be corrected in the state court. The Supreme Court of the United States will only examine the power of the court below to proceed at all. Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478.

Proceedings had in the state court under state authority for the appropriation of private property to public purposes may be examined by the Supreme Court of the United States on writ of error to a state court so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation. But it is not every error occurring in a state court in the administration of its law concerning condemnation of private property for public purposes that may be reviewed, and the court is not called upon to search the record simply to inquire whether there may or may not be errors in the proceeding. The limit of interference is reached when it appears that no fundamental rights have been disregarded by the state tribunals. Backus v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

In Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, the question presented on a writ of error to a state court was whether due process of law, or the equal protection of the laws, was denied the Chinese by proceedings under certain municipal ordinances providing that it should be unlawful for any person to engage in the laundry business in wooden buildings within the corporate limits "without having first obtained the consent of the board of supervisors." The state court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. The Federal Supreme Court, however, held that the power conferred by these ordinances was a naked and purely arbitrary power, acknowledging neither guidance nor restraint. "The determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States," said Mr. Justice Matthews, in delivering the unanimous opinion of the court, "necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge."

which the New York court of appeals ordered judgment for the defendant in error. 181 N. Y. 1, 73 N. E. 495. The suit complained of was a bill brought by the defendant in error in the United States circuit court to restrain the infringement of a registered trademark. A preliminary injunction was granted in that suit. An appeal was taken to the circuit court of appeals where the injunction was dissolved, and, the plaintiff making default at the final hearing, a decree was entered by the circuit court, expressed to be upon the merits, and dismissing the bill. The special damage alleged in the present action is the interruption of the plaintiffs' business by the injunction while it was in force.

In the case at bar the trial court ordered a nonsuit on the ground that the granting of the injunction by the circuit court established probable cause. The principle of the decision in Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472. that a final decree of the circuit court has that effect, even if subsequently reversed, was thought to extend to a preliminary decree. See also Deposit Bank v. Frankfort, 191 U. S. 499, 511, 48 L. ed. 276, 280, 24 Sup. Ct. Rep. 154. The [134] decision of the trial court *was reversed by the appellate division. The defendant then took the case to the court of appeals, assenting, as required, that, if the order should be affirmed, judgment absolute should be rendered against him. As we have said, the order was reversed. The ground on which a review is asked here is that the court of appeals by its reasoning implies that it finds probable cause in its own opinion that the decree in the former case was wrong, whereas not to assume it to be correct is to fail to give it the faith and credit required by Rev. Stat. § 905, U. S. Comp. Stat. 1901, p. 677.

It is unnecessary to consider whether a court bound by a previous judgment would not be warranted in saying that if the question had come before it in the first instance it would have decided the case the other way, and therefore that there was probable cause for a mistake of law into which it would have fallen itself. A mistaken view of the law may constitute probable cause in some instances, as is shown by the case cited above. Probable cause does not mean sufficient cause. But this last proposition shows that the former decree could not have decided the question now before the court, and therefore that the case is not properly here. The former decree was conclusive on the merits of the suit in which it was rendered, of course (Lyon v. Perin & G. Mfg. Co. 125 U. S. 698, 31 L. ed. 839, 8 Sup. Ct. Rep. 1024), but it only decided that that suit was brought without sufficient cause. It decided nothing as to whether the plaintiff had probable cause for expecting to prevail. If the court of appeals had affirmed the judgment of the trial court for the reason that a preliminary injunction fairly obtained from any court conclusively established probable cause, or that there was no evidence of a want of it, there would have been nothing to bring here, whether that reason was right or wrong. The only ground on which our jurisdiction is maintained is that the opinion of the court of appeals shows that it gave a different and inadmissible reason for the result to which it came.

No doubt an opinion may be resorted to for the purpose of *showing that a court [1 actually dealt with a question presented by the record, or that a right asserted in general terms was maintained and dealt with on Federal grounds. Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 534, 46 L. ed. 673, 22 Sup. Ct. Rep. 446; San José Land & Water Co. v. San José Ranch Co. 189 U. S. 177, 179, 180, 47 L. ed. 765, 766, 768, 23 Sup. Ct. Rep. 487; German Sav. & L. Soc. v. Dormitzer, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221. But it would be going further than we are prepared to go if we took jurisdiction upon the ground stated in this case. Howard v. Fleming, 191 U. S. 126, 137, 48 L. ed. 121, 125, 24 Sup. Ct. Rep. 49. The record discloses no question under the Constitution or laws of the United States until we come to the assignment of errors in this court. Then it was too late. Hulbert v. Chicago, 202 U. S. 275, 280, 50 L. ed. 1026, 1028, 26 Sup. Ct. Rep. 617. It is true that the complainants allege the decree, but that was merely to show that the litigation complained of was ended, as was required by the law of New York (Marks v. Townsend, 97 N. Y. 590, 595), not to suggest a Federal question, which at that moment probably was not dreamed of. Even the opinion of the court of appeals, which is not part of the record in New York, does not disclose that there had been presented to it any argument or claim of right based upon the effect due to the previous final decree under the Revised Statutes, or indeed, in a specific way, upon the effect of the decree in any light. Furthermore, notwithstanding a few broad words relied upon by the plaintiffs in error, we doubt if the court of appeals meant to lay down the proposition which we have said that we would not discuss, or to go further than to decide that the whole evidence was not sufficient to entitle the plaintiffs to go to the jury in an action for

malicious prosecution, as that action is limited in New York.

It is argued that the court of appeals exceeded its functions under the Constitution of the state, and in that way denied the plaintiffs due process of law. We see no reason to think so, but with that question we have nothing to do. French v. Taylor, 199 U. S. 274, 50 L. ed. 189, 26 Sup. Ct. Rep. 76; Rawlins v. Georgia, 201 U. S. 638, 50 L. ed. 899, 26 Sup. Ct. Rep. 560.

Writ dismissed.

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[136] *UNITED STATES, Petitioner,
v.
GEORGE RIGGS & CO.

(See S. C. Reporter's ed. 136-141.)

Duties—on figured cotton cloth.

Figured cotton cloth valued at over 11, 12, and 12½ cents per square yard is liable, in addition to the specific duty imposed by the act of July 24, 1897 (chap. 11, 30 Stat. at L. 175, 178, U. S. Comp. Stat. 1901, pp. 1655, 1659), ¶ 313, to the ad valorem tax imposed by ¶¶ 306, 307, upon similar plain cotton cloth above those values.

[No. 167.]

Argued October 23, 1906. Decided November 12, 1906.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of New York, reversing a decision of a board of United States general appraisers as to the duty chargeable on figured cotton cloth. Reversed.

See same case below, 69 C. C. A. 357, 136 Fed. 583.

The facts are stated in the opinion.

Assistant Attorney General McReynolds argued the cause and filed a brief for petitioner.

Mr. W. Wickham Smith argued the cause, and, with Mr. John K. Maxwell, filed a brief for respondents.

[138] *Mr. Justice Holmes delivered the opinion of the court:

This case comes here on a certiorari granted to bring up a decision of the circuit court of appeals affirming the decision of the circuit court and reversing that of a board of United States general appraisers. The respondents imported "cotton cloth in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form a figure," to quote the words of paragraph 313 of the tariff act of July 24, 1897 (chap. 11, 30 Stat. at L. 175, 178, U. S. Comp. Stat. 1901, pp. 1655, 1659). The collector and board of general appraisers decided that this cloth was liable to a duty of 2 cents per square yard, under that paragraph and also, the different items being valued at over 11, 12, and 12½ cents per square yard, to the ad valorem tax imposed by paragraphs 306 and 307 upon similar plain cloth above those values. The circuit court of appeals, while admitting its belief that Congress intended to place an extra duty on figured cloth, felt bound to decide, upon the language of paragraph 313, that the tax placed by it upon figured cloth was to be added only to specific taxes imposed on less valuable cloths by paragraphs 306 and 307.

To explain: By paragraph 306 cotton cloth not bleached, etc., exceeding 100 and not exceeding 150 threads to the square inch, etc., and not exceeding 4 square yards to the pound, pays 1½ cents per square yard, with an increasing rate as the number of yards to the pound increases. But a proviso substitutes for the foregoing a different set of duties on all cotton cloth with the same count of threads, not bleached, etc., if valued above a certain sum; for instance, if over 9 cents per square yard, 30 per centum ad valorem; if over 11, 35, etc. Paragraph 307 is similar in form for cloths with between 150 and 200 threads.

By paragraph 313 figured cloth "shall pay, in addition to the duty herein provided for other cotton cloth of the same *descrip-[139] tion, or condition, weight, and count of threads to the square inch, one cent per square yard if valued at not more than seven cents per square yard, and two cents per square yard if valued at more than seven cents per square yard." In the judgment appealed from it is assumed that the cloth in question, as figured cloth, is liable to this duty, and that, in deciding what such cloth shall pay, the collector must start from this paragraph. This paragraph must decide to what other duty the one here levied shall be added. If it stopped with the words "other cotton cloth of the same description, or condition," no doubt the tax might be added to an ad valorem tax when that would be required by paragraph 306 or 307. Those words might be taken to indicate cloth of similar value in cases within the provisos as well as goods of similar weight taxed under the first part of paragraphs 306 and 307. But, as general words, they would include weight as readily as value; and the mention of weight and count shows that they are used in a narrower sense; for instance, to indicate quality,

as bleached or otherwise. Hence the criteria for the duty to which that under 313 is to be added all point to a specific duty alone; and these criteria therefore must determine for figured cloths the duty to which they are liable under paragraphs 306 and 307. You must not alter words in the interest of the imagined intent, and the importers are entitled to the benefit of even a doubt.

In spite of this reasoning, no one, we take it, has any serious doubt that paragraph 313 was not intended to affect or cut down duties already imposed in clear though general terms. The provisos of the earlier paragraphs are made applicable to "all cotton cloths" of the sorts described, in so many words. The qualified reading is due to scruples that hardly would occur except to the professional mind. As against those scruples, it is to be observed, in the first place, that the clauses to which we have referred and their neighbors, to go no further into the general scheme of the tariff act, consistently raise the amount of [140] the tax on cotton cloth *as the cloth becomes more expensive, and that it would reverse the tendency and go counter to the intent expressed everywhere else, if, in this instance, the more valuable goods were withdrawn from the general tax imposed upon their class. It is said that, in some cases, the construction contended for even would make the duty on figured cotton of a high price less than that on cheap cloth.

In the next place, if the language of paragraph 313 is not broad enough to apply to both classes of duty previously imposed, the easier contention would seem to be that the additional duty created by it was put only upon the first class, that of the cheaper goods taxed by weight, rather than that it cut down what already had been made clear. Such a notion would be disposed of by the fact that paragraph 313 applies to all cotton cloth and to all values, higher as well as lower than seven cents, and by other considerations not necessary to state. But, if anything had to yield it would be paragraph 313.

The artificial doubt is raised by assuming that the collector must start with the first part of paragraph 313 and find out what his assessments are to be from that alone. That is a mistake. He has before him the whole act. He has been told in the earlier paragraphs in unmistakable language that all cotton cloth with this number of threads and above a certain value must pay 30 or 35 cents ad valorem. Then comes this paragraph, which on its face purports to make an addition to some tax which it assumes to have been imposed by the earlier ones. It is intended to hit all cotton cloths and all values, and it is intended to be added to a tax already imposed. But this would not be the case if the presence of a figure in the cloth changed the rate established by the preceding scheme.

The truth is, as pointed out in the argument for the government, that the element of value is woven through the whole tissue of the act. The collector does not know what duty to assess, even under 313, without a valuation. It cannot *be found out what "the duty herein provided" is, or whether it is specific or ad valorem, without making a valuation under the previous paragraphs, just as if 313 did not exist. Paragraphs 306 and 307 tell the collector to make it on all cotton and to assess a duty on all cotton above a certain value after the valuation is made. Paragraph 313 assumes the duty imposed by 306 and 307 to have been assessed. As against these plain directions, coupled with the manifest intent of the act, the failure to mention value along with weight raises no serious doubt in our minds.

Decree reversed.

MARTIN CONBOY, as Trustee in Bankruptcy of the Phillip Semmer Glass Company, Limited, Bankrupt, Appt.,

v.

FIRST NATIONAL BANK OF JERSEY CITY.

(See S. C. Reporter's ed. 141-146.)

Appeal—from circuit court of appeals—in bankruptcy case.

1. The allowance of an appeal from a circuit court of appeals in a bankruptcy case on certificate of a justice of the Supreme Court cannot operate as an adjudication that such appeal is taken within the thirty days allowed by general order in bankruptcy No. 36.

Appeal—from order denying rehearing.

2. No appeal lies from an order denying a petition for rehearing.

Appeal—from circuit court of appeals—in bankruptcy case.

3. The thirty days' limitation prescribed by general order in bankruptcy No. 36 for taking an appeal from a final order of a circuit court of appeals in a bankruptcy case cannot be extended by filing a petition for rehearing after the thirty days have expired, although there may be but one term of that court, and, by its rules of prac-

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NOTE.—On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to Wedding v. Meyler, 66 L.R.A. 833.

On appeal or review in bankruptcy cases—see note to Re Eggert, 43 C. C. A. 9.

tice, petitions for rehearing may be presented at any time during the term.

[No. 54.]

Argued October 23, 1906. Decided November 19, 1906.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review an order affirming an order of the District Court for the Southern District of New York, which had affirmed an order of a referee in bankruptcy, allowing a claim against the bankrupt's estate. Dismissed because not taken in time.

See same case below, 67 C. C. A. 551, 135 Fed. 77.

The facts are stated in the opinion.

Mr. Martin Conboy argued the cause and filed a brief for appellant:

The petition for rehearing was addressed to the discretion of the court. The court duly considered it. By this the effect of the final decree was suspended. Substantially, the decree was not final until the 24th of May, 1905, within thirty days from which date the appeal was perfected.

Brockett v. Brockett, 2 How. 238, 11 L. ed. 251.

The time to appeal from the final decree did not begin to run until the petition for rehearing had been decided.

Aspen Min. & Smelting Co. v. Billings, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4; Voorhees v. John T. Noye Mfg. Co. 151 U. S. 135, 38 L. ed. 101, 14 Sup. Ct. Rep. 295; Slaughterhouse Cases, 10 Wall. 273, 19 L. ed. 915; Washington, G. & A. R. Co. v. Bradley (Washington, G. & A. R. Co. v. Washington) 7 Wall. 575, 19 L. ed. 274; Memphis v. Brown, 94 U. S. 715, 24 L. ed. 244; Texas & P. R. Co. v. Murphy, 111 U. S. 488, 28 L. ed. 492, 4 Sup. Ct. Rep. 497; Kingman & Co. v. Western Mfg. Co. 170 U. S. 675, 678, 42 L. ed. 1192, 1193, 18 Sup. Ct. Rep. 786. Of course, if the petition for a rehearing is not presented by a party who is entitled to present it, as in Sage v. Central R. Co. 93 U. S. 412, 418, 419, 23 L. ed. 933, 935, or if it is not presented at the proper term, as in Cambuston v. United States, 95 U. S. 285, 287, 24 L. ed. 448, 449, so that the court cannot entertain it, then the court's disposition of it does not affect the original judgment. But the disposition of such a motion or petition when it is presented by a party entitled to do so, within the proper time, is, in effect, a re-entry of the original judgment appealed from.

A judgment or decree must be properly entered in order to start the statute of limitation of the time to appeal.

Polleys v. Black River Improv. Co. 113 U. S. 81, 83, 28 L. ed. 938, 5 Sup. Ct. Rep. 369; Providence Rubber Co. v. Goodyear, 6 Wall. 153, 18 L. ed. 762; Yznaga del Valle v. Harrison, 93 U. S. 233, 23 L. ed. 892; United States v. Gomez, 1 Wall. 690, 17 L. ed. 677.

Mr. William G. Wilson argued the cause and filed a brief for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court:

This is an appeal from a final order of the circuit court of *appeals for the second [143] circuit affirming an order of the district court of the United States for the southern district of New York, filed June 7, 1904, affirming an order of a referee in bankruptcy, "In the matter of Phillip Semmer Glass Company, Limited, Bankrupt," dated May 7, 1904, allowing the claim of the First National Bank of Jersey City against the bankrupt's estate.

The final order of the circuit court of appeals was entered January 23, 1905. The trustee petitioned that court, April 25, to recall its mandate and vacate the order therefor, and the application was denied. On May 8 a petition for rehearing was filed, which was denied May 17, and an order to that effect entered May 24. A petition, dated the same day, was thereupon presented to a justice of this court, praying an appeal "from the whole of the said order of affirmance of the circuit court of appeals for the second circuit, dated the 23d day of January, 1905, and from the whole of the said order of the circuit court of appeals for the second circuit, dated the 25th day of April, 1905, denying the motion of your petitioner to recall the mandate of said court and cancel the order for same, and from the whole of the said order of the circuit court of appeals for the second circuit, dated the 24th day of May, 1905, denying the petition of the said trustee for a rehearing;" and for the reversal of "said orders and decrees, etc., and every part thereof."

Appeal was allowed and certificate granted under § 25b, par. 2, of the bankruptcy act [30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432], May 27, 1905. Thereafter and on June 14, 1905, findings of fact and conclusions of law were filed by the circuit court of appeals, "*nunc pro tunc*, as though the same were made and filed at the time of entry of the judgment of this court on the 23d day of January, 1905."

The following provisions of the bankruptcy act are applicable:

"Sec. 25b. From any final decision of a court of appeals, *allowing or rejecting a [144] claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of

the United States in the following cases and no other:

. . . . . .

"2. Where some justice of the Supreme Court of the United States shall certify that, in his opinion, the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

Paragraphs 2 and 3 of general orders in bankruptcy, 36, read:

"2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the supreme court of a territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

"3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

The law provides that appeals shall be taken "within such time as may be prescribed by the Supreme Court of the United States," and by general order 36 this court prescribed the time and limited it to thirty days, in harmony with the policy of the bankruptcy act, requiring prompt action and the avoidance of delay.

The limitation has the same effect as if [145] written in the statute, *and the allowance of an appeal on certificate cannot operate as an adjudication that it is taken in time.

The present appeal was allowed four months "after the judgment or decree" appealed from and three months after the time to appeal had expired.

But it is said that the limitation should be referred to the date of the order denying the petition for rehearing, and the trustee prayed an appeal from that order as well as from the judgment of January 23.

No appeal lies from orders denying petitions for rehearing, which are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors. Brockett v. Brockett, 2 How. 238, 17 L. ed. 251; Wylie v. Coxe, 14 How. 1, 14 L. ed. 301. Appellant might have made his application for rehearing and had it determined within the thirty days, and st had time to take his appeal. But he thirty days expire, as it did Febru 1905, and did not file his petition unt 8, 1905. The right of appeal had the lost and appellant could not reinves self with that right by filing a petit rehearing.

The cases cited for appellant, in w was held that an application for a reh made before the time for appeal h pired, suspended the running of the for taking an appeal, are not ap when that period had already e "When the time for taking an app expired, it cannot be arrested or calle by a simple order of court. If it co the law which limits the time within an appeal can be taken would be letter." Credit Co. v. Arkansas C. 128 U. S. 258, 261, 32 L. ed. 448, 449, Ct. Rep. 107, 108.

In the circumstances, the suggestic there is but one term of the circuit of appeals for the second circuit, an by the rules of practice of that cour tions for rehearing may be presented time during the term, and therefor this petition operated to enlarge the tion of the bankruptcy act, is v merit.

*The petition was denied. Whet could have been granted in view of th and spirit of the bankruptcy act, effect, if it had been, we are not calle to discuss.

Appeal dismissed.

JAMES GOUDY, Plff. in Err.
v.
EDWARD MEATH, Assessor of County, Washington.

(See S. C. Reporter's ed. 146-15

Taxes—exemption—Indian allotment

Land allotted under an Indian which exempts such land from levy, forfeiture until the state legislatur with the consent of Congress, remove striction, can no longer escape taxatic the Indian patentee has become a under the act of February 8, 1887 (2 at L. 388, chap. 119), which, in addi the grant of citizenship, provides th dians to whom allotments have been shall have the benefit of, and be sub the laws, both civil and criminal, state or territory in which they r side," and the ten years during whi

NOTE.—On exemption of Indian taxation—see note to Allen County mons, 13 L.R.A. 512.

gress, by the act of March 3, 1893 (27 Stat. at L. 612, 633, chap, 209), postponed the operation of the provision of Wash. Laws 1889, 1890, p. 499, granting the power of alienation "in like manner and with like effect as any other person may do under the laws of the United States and of this state," and removing all restrictions in reference thereto, have expired.

[No. 53.]

Submitted October 23, 1906. Decided November 19, 1906.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court of Pierce County, in that state, denying the claim of an Indian allottee to exemption from taxation. Affirmed.

See same case below, 38 Wash. 126, 80 Pac. 295.

Statement by Mr. Justice Brewer:

This case is before us on error to the supreme court of Washington. 38 Wash. 126, 80 Pac. 295. It was submitted to the state courts on an agreed statement of facts, and involves the question of the liability of the land of the plaintiff, now plaintiff in error, to taxation for the year 1904. He is a Puyallup Indian, and claims exemption under and by virtue of the treaty of December 26, 1854. 10 Stat. at L. 1132. That treaty provided for an allotment of land in severalty to such members of the tribe as were willing to avail themselves of the privilege, on the same terms, and subject to the same regulations, as were named in the treaty [147] with the Omahas. *The latter treaty, March 16, 1854 (10 Stat. at L. 1043), authorized the President to issue a patent for any allotted land, "conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force until a state constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the state shall remove the restrictions. . . . No state legislature shall remove the restrictions herein provided for without the consent of Congress." Under this treaty, on January 30, 1886, a patent to the plaintiff was issued. One of the facts agreed upon is the following:

"That since the issuance of said patent, and by an act of Congress passed and approved on the 8th day of February, 1887, plaintiff became and now is a citizen of the United States, and entitled to all the rights, privileges, and immunities of such citizens. Said act is found in the United States Statutes at Large, vol. 24, chapter 119, at page 388."

In 1889, Washington was admitted as a state. Its first legislature enacted:

"Section 1. That the said Indians who now hold, or who may hereafter hold, any of the lands of any reservation, in severalty, located in this state, by virtue of treaties made between them and the United States, shall have power to lease, encumber, grant, and alien the same in like manner and with like effect as any other person may do under the laws of the United States and of this state, and all restrictions in reference thereto are hereby removed." Laws 1889, 1890, p. 499.

In 1893, Congress passed an act (27 Stat. at L. 612, 633, chap. 209) authorizing the appointment of a commission with power to superintend the sale of the allotted lands, with this proviso:

"That the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said commission for a period of ten years from the date of the passage of this act."

Construing these several acts, the Secretary of the Interior, *on February 14, 1903, [148] wrote to the Commissioner of Indian Affairs, summing up his conclusions in these words:

"I am of the opinion that the requirements of the treaties with respect to these lands have been fully met, and that the provisions of the act of the legislature of the state of Washington of March 22, 1890, and the Indian appropriation act of March 3, 1893, referred to above, together operate to remove all restrictions upon the alienation or sale thereof by the allottees. I have therefore to direct that the Puyallup commissioner be instructed to continue the selection and appraisement of such portions of the Puyallup allotted lands, *but only with the consent of the Indians*, as provided in the act of March 3, 1893, until the expiration of the ten-year period mentioned, to wit, March 3, 1903, after which date, in my judgment, the Puyallup Indian allottees will 'have power to lease, encumber, grant, and alien the same in like manner and like effect as any other person may do under the laws of the United States, and of' the state of Washington.

"You are further directed to instruct the commissioner to take the necessary steps to complete and close up the business of his office as soon as practicable after March 3, next."

Mr. Walter Christian submitted the cause for plaintiff in error.

Mr. Walter M. Harvey submitted the cause for defendant in error. Mr. Charles O. Bates was on the brief.

Mr. Justice Brewer delivered the opinion of the court:

In the brief filed by the plaintiff in error no question is made of his right to sell and convey the land. The supreme court of the state, in its opinion, says: "It is conceded that the Indians may now sell their lands voluntarily and convey a title in fee, and that thereupon the lands so sold are subject to taxation in the hands of parties not Indians." [38 Wash. 129, 80 Pac. 296.] But the contention is that although he has the [149] power of voluntary sale *and conveyance, yet, until he has exercised that power, the land is not subject to taxation or forced sale. His argument rests mainly upon the contention that there is no express repeal of the exemption provided in the original treaty, "from levy, sale, or forfeiture." That Congress may grant the power of voluntary sale while withholding the land from taxation or forced alienation may be conceded. For illustration, see treaty of January 31, 1855, with the Wyandotts (10 Stat. at L. 1159, 1161). But while Congress may make such provision, its intent to do so should be clearly manifested, for the purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw this protection and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it from taxation,—in other words, that the officers of a state enforcing its laws cannot be trusted to do justice, although each and every individual acting for himself may be so trusted.

But further, by the act of February 8, 1887, plaintiff became and is a citizen of the United States. That act, in addition to the grant of citizenship, provided that "Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside." Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506.

Among the laws to which the plaintiff as a citizen became subject were those in respect to taxation. His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemption for him must be the same as for other citizens,—that is, that no exemption exists by implication, but must be clearly manifested. No exemption is clearly shown by the legislation in respect to these Indian lands. The original treaty provided that they should be exempt from levy, sale, or forfeiture the legislature of the state should, wit consent of Congress, remove the restri This, of course, *meant involuntary as as voluntary alienation. When the was admitted and its constitution fo its legislature granted the power of a tion "in like manner and with like eff any other person may do under the la the United States and of this state, a restrictions in reference thereto are h removed." What restrictions? Evid those upon alienation. The Indian ma only voluntarily convey his land (auth to do that is provided by the use o word "grant"), but he may also perm alienation by any action or omission v in due course of law, results in forced Congress postponed the operation of statute for ten years. When the ten expired (and they had expired before tax was attempted to be levied) all re tion upon alienation ceased. It requi technical and narrow construction to that involuntary alienation continues forbidden while the power of volu alienation is granted; and it is disrega the act of Congress to hold that the I having property is not subject to tax when he is subject to all the laws, civi criminal, of the state.

We see no error in the ruling of th preme Court of the state of Washin and its judgment is affirmed.

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*NATIONAL COUNCIL OF THE JU ORDER OF UNITED AMERICAN CHANICS OF THE UNITED STATE NORTH AMERICA et al., Plffs. in

v.

STATE COUNCIL OF VIRGINIA, JU ORDER OF UNITED AMERICAN CHANICS OF THE STATE OF GINIA.

(See S. C. Reporter's ed. 151-164.)

Constitutional law—impairing contrac ligations.

1. No contract obligations of a fo benevolent society are impaired by a

NOTE.—As to what laws are void a pairing obligation of contracts—see not Franklin County Grammar School v. ley, 10 L.R.A. 405; Fletcher v. Peck, 3 1 U. S. 162; McCanna & F. Co. v. Cit Trust & Surety Co. 24 C. C. A. 20; Montana Ore-Purchasing Co. v. Bost M. Consol. Copper & S. Min. Co. 35 A. 12.

On recognition or exclusion of fo corporations—see notes to Cone Expo Commission Co. v. Poole, 24 L.R.A. 289; McCanna & F. Co. v. Citizens' Trust & ty Co. 24 C. C. A. 13.

statute incorporating a local society with the same name as that of a previously existing voluntary state association whose charter from the foreign corporation had been withdrawn, and conferring upon it the exclusive right of granting subcharters in the state.

Constitutional law—due process of law—excluding foreign corporation.

2. No existing property rights are taken without due process of law by a state statute, passed in the exercise of its power over foreign corporations, incorporating a local benevolent society with the same name as that of a voluntary state association whose charter had been withdrawn by the foreign corporation that issued it, and conferring upon such society the exclusive right of granting subcharters in the state.

Constitutional law—equal protection of the laws—excluding foreign corporation.

3. The equal protection of the laws is not denied by a state statute, passed in the exercise of its power over foreign corporations, incorporating a local benevolent society with the same name as that of a voluntary state association whose charter had been withdrawn by the foreign corporation that issued it, and conferring upon such society the exclusive right of granting subcharters in the state.

[No. 89.]

Argued November 7 and 8, 1906. Decided November 19, 1906.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a decree affirming, with a slight modification, a decree of the Chancery Court of Richmond, in that state, enforcing the rights of a local benevolent society under its charter. Affirmed.

See same case below, 104 Va. 197, 51 S. E. 166.

The facts are stated in the opinion.

Messrs. C. V. Meredith and Ellis G. Kinkead argued the cause, and, with Smith W. Bennett, filed a brief for plaintiffs in error:

It cannot be successfully contended that a corporation like that of the plaintiff in error, the National Council, is of so idealistic a nature, so far removed from property interests, that the right to defend its name from wrongful use does not exist as it does in strictly business corporations.

Supreme Lodge K. of H. v. Oeters, 95 Va. 610, 29 S. E. 322; State v. Dunn, 134 N. C. 663, 46 S. E. 949; Gorman v. Russell, 14 Cal. 532; Otto v. Journeymen Tailors' Protective & Benev. Union, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217; Bauer v. Samson Lodge, K. of P. 102 Ind. 262, 1 N. E. 571; Dolan v. Court Good Samaritan, No. 5910, A. O. of. F. 128 Mass. 437; Lavalle v. Société St. Jean Baptiste, 17 R. I. 680, 16 L.R.A. 392, 24 Atl. 467; Blair v. Supreme Council A. L. of H. 208 Pa. 262, 101 Am. St. Rep. 934, 57 Atl. 564; Ludowiski v. Polish Roman Catholic St. S. K. Benev. Soc. 29 Mo. App. 337; State ex rel. Waring v. Georgia Medical Soc. 38 Ga. 608, 95 Am. Dec. 408; Dartmouth College v. Woodward, 4 Wheat. 699, 4 L. ed. 674; Great Hive, L. of M. v. Supreme Hive, L. of M. 135 Mich. 392, 97 N. W. 779, 99 N. W. 26; State v. Julow, 129 Mo. 173, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 Pac. 781.

If the alleged inability to get protection against the wrongful use of it exists, it can only be upon the ground that it is a foreign corporation; for it will not be disputed that, if the National Council were a Virginia corporation, it could undoubtedly get protection against such wrongful use by others.

International Committee, Y. W. C. A. v. Young Women's Christian Asso. 194 Ill. 194, 56 L.R.A. 888, 62 N. E. 551; Grand Lodge, A. O. U. W. v. Graham, 96 Iowa, 592, 31 L. R.A. 138, 65 N. W. 837; McFadden v. Murphy, 149 Mass. 341, 21 N. E. 868; Kane v. Shields, 167 Mass. 392, 45 N. E. 758; Altmann v. Benz, 27 N. J. Eq. 331; Gorman v. O'Connor, 155 Pa. 239, 26 Atl. 379; Niblack, Ben. Soc. § 90; Smith v. Smith, 3 Desauss. Eq. 581; Young Women's Christian Asso. v. St. Louis Y. W. C. A. 115 Mo. App. 228, 91 S. W. 171; Boston Rubber Shoe Co. v. Boston Rubber Co. 149 Mass. 436, 21 N. E. 875; Spiritual & Philosophical Temple v. Vincent, 127 Wis. 93, 105 N. W. 1026; Re First Presby. Church, 2 Grant, Cas. 240; Edison Storage Battery Co. v. Edison Automobile Co. 67 N. J. Eq. 44, 56 Atl. 861; Hendriks v. Montagu, L. R. 17 Ch. Div. 638.

A state has no right to take anyone's property without due process of law, no matter whether said property is within or without the state.

Blake v. McClung, 172 U. S. 260, 43 L. ed. 440, 19 Sup. Ct. Rep. 165.

It was beyond the lawful power of the legislature of Virginia to take away the right of the National Council, the Pennsylvania corporation, to continue to control and to use, through its subordinate body, the Virginia voluntary association, the title or name "State Council of Virginia, Junior Order United American Mechanics."

Peck Bros. & Co. v. Peck Bros. Co. 62 L. R.A. 81, 51 C. C. A. 257, 113 Fed. 291; Ottoman Cahvey Co. v. Dane, 95 Ill. 203; Investor Pub. Co. v. Dobinson, 72 Fed. 603; Goodyear Rubber Co. v. Goodyear's India Rubber Glove Mfg. Co. 22 Blatchf. 421, 21 Fed. 276.

The statute creating the defendant in error, making it an independent organization

and releasing it from all its duties and obligations to the National Council, was the authorization of a breach of contract.

Supreme Lodge K. of H. v. Oeters, supra; Kern v. Arbeiter Unterstuetzungs Verein, 139 Mich. 233, 102 N. W. 746; Kuhl v. Meyer, 42 Mo. App. 474; Supreme Lodge K. of P. v. La Malta, 95 Tenn. 157, 30 L.R.A. 838; 31 S. W. 493; Baldwin v. Hosmer, 101 Mich. 119, 25 L.R.A. 743, 59 N. W. 432; Bacon, Ben Soc. § 37; Knights of Maccabees v. Nitsch, 69 Neb. 372, 95 N. W. 626; Union Benev. Soc. No. 8 v. Martin, 113 Ky. 25, 67 S. W. 39; McGahey v. Virginia, 135 U. S. 693, 34 L. ed. 314, 10 Sup. Ct. Rep. 972.

The defendant in error is mistaken in the narrow construction it gives to the word "contract" as used in the Constitution of the United States.

Dartmouth College v. Woodward, 4 Wheat. 518, 630, 644, 645, 4 L. ed. 629, 657, 661; Bryan v. Board of Education, 151 U. S. 650, 38 L. ed. 302, 14 Sup. Ct. Rep. 465; People ex rel. Pulford v. Fire Department, 31 Mich. 458; Kern v. Arbeiter Unterstuetzungs Verein, supra; Stone v. Mississippi, 101 U. S. 820, 25 L. ed. 1080; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150–153, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; Boyd v. United States, 116 U. S. 616–635, 29 L. ed. 746–752, 6 Sup. Ct. Rep. 524; Fuller v. Academic School Trustees, 6 Conn. 532.

There are many rights of enjoyment, privileges, and personal benefits growing out of agreement or contract, which, though having "no actual market value," the courts will enforce because of the mutual obligations contained in such agreement or contract, provided they are not of a "governmental" nature, like marriage and divorce, or similar rights.

Medical & Surgical Soc. v. Weatherly, 75 Ala. 248; Com. v. St. Patrick Benev. Soc. 2 Binn. 441, 4 Am. Dec. 453; Evans v. Philadelphia Club, 50 Pa. 107; Society for Visitation of Sick v. Com. 52 Pa. 125, 91 Am. Dec. 139; People ex rel. Deverell v. Musical Mut. Protective Union, 118 N. Y. 101, 23 N. E. 129; State ex rel. Sibley v. Carteret Club, 40 N. J. L. 295; Otto v. Journeymen Tailors' Protective & Benev. Union, supra; Savannah Cotton Exchange v. State, 54 Ga. 668; Fisher v. Keane, L. R. 11 Ch. Div. 353; Lambert v. Eddison, 46 L. T. N. S. 20; Huber v. Martin, 127 Wis. 412, 3 L.R.A.(N.S.) 653, 667, 105 N. W. 1031, 1135.

The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances, and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void, as against the "law of the land."

Wally v. Kennedy, 2 Yerg. 556, 24 Am. Dec. 511; State ex rel. Stoutmeyer v. Duffy, 7 Nev. 349, 8 Am. Rep. 713; Budd v. State, 3 Humph. 483, 39 Am. Dec. 189; Millett v. People, 117 Ill. 301, 57 Am. Rep. 869, 7 N. E. 631; Holden v. James, 11 Mass. 396, 6 Am. Dec. 174; State v. Pennoyer, 65 N. H. 113, 5 L.R.A. 709, 18 Atl. 878; Cooley, Const. Lim. pp. 556, 557, 559; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255.

The law of the land and "due process of law" are virtually synonymous.

State v. Julow, 129 Mo. 174, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781.

Here, after passing a general statute inviting the plaintiffs in error by name to exist and operate in the state, along with certain other similar organizations, the legislature of Virginia undertakes to pass a law applicable solely to the plaintiffs in error, not only hampering and restricting the plaintiffs in error, but giving their rights, powers, privileges, and property interests to another organization.

Such an injustice and injury cannot be said to have been done according to the "law of the land," or under "due process of law."

Lewis v. Webb, 3 Me. 326, cited in Cooley, Const. Lim. p. 559.

The equal protection of the laws is a pledge of the protection of equal laws.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540–559, 46 L. ed. 679–689, 22 Sup. Ct. Rep. 431.

The state of Virginia invited the plaintiff in error, the National Council, to exist and continue within its limits. When it so acted, it was with knowledge as to the character of its organization. It knew that it would so exist within those limits by means of a state council and subordinate councils, composed of the citizens of that state.

State ex rel. Poulson v. Grand Lodge, I. O. O. F. 8 Mo. App. 148.

This court will look beyond the act of incorporation, and ascertain what was the object of the discrimination.

Yick Wo v. Hopkins, 118 U. S. 356–366, 30 L. ed. 220–225, 6 Sup. Ct. Rep. 1064; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 105, 43 L. ed. 913, 19 Sup. Ct. Rep. 609.

Especially is this true where the nature of the corporation brings it so clearly and forcibly within the jurisdiction of the state.

Blake v. McClung, 172 U. S. 239–261, 43 L. ed. 432–440, 19 Sup. Ct. Rep. 165.

No state need allow the corporations of other states to do business within its juris-

diction unless it chooses, but, if it does, without limitation, express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence.

Relfe v. Rundle (Life Asso. of America v. Rundle) 103 U. S. 222-225, 26 L. ed. 337-339.

Being within the jurisdiction of the state at the time of the adoption of the statute complained of, and not having been driven without its jurisdiction by said statute, as declared by the supreme court of Virginia, in construing the same, the National Council was entitled to the equal protection of the laws.

Marchant v. Pennsylvania R. Co. 153 U. S. 380, 389, 38 L. ed. 751, 756, 14 Sup. Ct. Rep. 894; Duncan v. Missouri, 152 U. S. 382, 38 L. ed. 487, 14 Sup. Ct. Rep. 570; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362-410, 38 L. ed. 1014-1027, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 105, 46 L. ed. 107, 22 Sup. Ct. Rep. 30; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 153, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; Connolly v. Union Sewer Pipe Co. 184 U. S. 540-558, 46 L. ed. 679-689, 22 Sup. Ct. Rep. 431.

The individual plaintiffs in error, for themselves, without regard to the rights of the National Council, insist that the said act is void as to them for the same reasons above given as to the National Council.

The Virginia statute deprives them of their civil and political liberties, and directly invades their vested property rights.

Vanzant v. Waddel, 2 Yerg. 260; Butcher's Union S. H. & S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 757, 28 L. ed. 591, 4 Sup. Ct. Rep. 652; State v. Julow, 129 Mo. 172, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 313; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 107, 109, 46 L. ed. 92, 107, 108, 22 Sup. Ct. Rep. 30; State v. Scougal, 3 S. D. 55, 15 L.R.A. 477, 44 Am. St. Rep. 756, 51 N. W. 858; Cummings v. Missouri, 4 Wall. 320, 18 L. ed. 362; Allgeyer v. Louisiana, 165 U. S. 587, 588, 41 L. ed. 835, 17 Sup. Ct. Rep. 427; People ex rel. Valentine v. Berrien Circuit Judge (People ex rel. Valentine v. Coolidge) 124 Mich. 664, 50 L.R.A. 493, 83 Am. St. Rep. 352, 83 N. W. 594; Eden v. People, 161 Ill 296, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; Brannon, 14th Amendment, p. 296.

Messrs. Frank W. Christian and Samuel A. Anderson argued the cause and filed a brief for defendant in error:

The provision of the Federal Constitution in respect to state legislation impairing the obligation of contracts has always been limited by the Supreme Court of the United States and applied only to cases of contracts creating some right in respect to property or subjects of pecuniary value.

Butler v. Pennsylvania, 10 How. 402, 416, 13 L. ed. 472, 478; Maryland use of Washington County v. Baltimore & O. R. Co. 3 How. 534, 11 L. ed. 714; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Maynard v. Hill, 125 U. S. 210, 31 L. ed. 658, 8 Sup. Ct. Rep. 723; Hunt v. Hunt, 131 U. S. clxv. Appx. and 24 L. ed. 1109; Black, Constitutional Prohibitions, p. 51, § 4; Bishop's Fund v. Rider, 13 Conn. 87.

Even if there were a contract of that nature, it was made subject to the inherent reserved power of the state of Virginia at any time to pass an act of the nature of that of February 17, 1900, excluding the National Council from further operation, through its agents, within the state of Virginia.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Ducat v. Chicago, 10 Wall. 410, 19 L. ed. 972; Pembina Consol. Silver Min. & Mill Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Missouri v. Dockery, 191 U. S. 165, 48 L. ed. 133, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53; Travelers Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619; Lehigh Valley Coal Co. v. Hamblen, 23 Fed. 225; Manhattan L. Ins. Co. v. Warwick, 20 Gratt. 614, 3 Am. Rep. 218; Slaughter v. Com. 13 Gratt. 767.

It was only by the comity of Virginia that the National Council had ever operated through its agencies within Virginia, and the General Assembly of Virginia had the right and power, at any time, at its mere pleasure, to withdraw these privileges, and, of course, therefore, to confer them upon some other body selected by it.

Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 1, 34 L. ed. 78, 10 Sup. Ct. Rep. 792.

Mr. Justice Holmes delivered the opinion of the court:

This is a writ of error to reverse a decree in favor of the defendant in error, the original plaintiff, and hereinafter called the plaintiff. 104 Va. 197, 51 S. E. 166. The plaintiffs in error will be called the defendants. The plaintiff is a Virginia corporation. The principal defendant is a

Pennsylvania corporation. The other defendants are alleged to be officers of a voluntary association, calling itself by the plaintiff's name, and are acting under a charter from the Pennsylvania corporation. The latter was incorporated in 1893, the articles of association reciting that the associates comprise the national council, the supreme head of the order in the United States (where it previously had existed as a voluntary association). Its objects were to promote the interests of Americans and shield them from foreign competition, to assist them in obtaining employment, to encourage them in business, to establish a sick and funeral fund, and to maintain the public school system, prevent sectarian interference with the same, and uphold the reading of the Holy Bible in the schools. As the result of internal dissensions the Virginia corporation was chartered in 1900, with closely similar objects, omitting those relating to the public schools. It seems to have consisted of the [159] dominant portion of a former *voluntary state council of the same name, from which a charter issued by the Pennsylvania corporation had been withdrawn. The act of incorporation declared that the new body "shall be the supreme head of the Junior Order of the United American Mechanics in the state of Virginia," and provides that it "shall have full and exclusive authority to grant charters to subordinate councils, Junior Order United American Mechanics, in the state of Virginia, with power to revoke the same for cause." The plaintiff and the voluntary organization of the defendants both have granted and intend to grant charters to subordinate councils in Virginia, and are obtaining members and fees which each would obtain but for the other, and are holding themselves out as the only true and lawful state council of the Virginia Junior Order of United American Mechanics.

The plaintiff sued for an injunction, and the defendants, in their answer, asked cross relief. The plaintiff obtained a decree enjoining the defendant corporation and the other defendants (declared to be shown by their answers to be its agents and representatives) as officers of the Virginia voluntary association, from continuing within the state the use of the plaintiff's name or any other name likely to be taken for it; from using the plaintiff's seal; from carrying out under such name the objects for which the plaintiff and the Virginia voluntary association were organized; from granting charters to subordinate councils in the state as the head of the order in the state; from interfering in any way with the pursuit of its objects by the plaintiff within the state; and from designating their officers within the state by applications set forth as used by the plaintiff. On appeal the decree was affirmed, a modification, merely by way of can providing that nothing therein conta should, in anywise, interfere with any sonal or property rights that might hav crued before the date of the Virginia cha The defendants had set up in their an and insisted that the charter impaired obligation of the contract existing betw the plaintiff *and the principal defend contrary to article 1, § 10, of the Cons tion, and also violated § 1 of the Amendment, and they took a writ of e from this court.

The bill and answer state the two s of the difference which led to the split length. But those details have no bea that needs to be considered here. The question before us is the constitution of the act of the Virginia legislature gr ing the charter. The elements of that q tion are the appropriation of the nam the previously existing voluntary society the exclusive right of granting subcha in Virginia conferred by the words that have quoted. Whether the persons who using that name when they got themse incorporated were using it rightly or wr ly does not matter if the legislature had right to grant the name to them in ei case. On the other hand, we do not cons the question stated to be disposed of the limitation put upon the decree by supreme court of appeals. Unless the ing of personal and property rights exis at the date of the charter be read as a struction of the charter, it does not a the scope or validity of the act. And i read, still it cannot be taken to empty specific prohibitions in the decree of all nite meaning and to leave only an indef minate injunction to obey the law at the fendants' peril. That injunction rem and imports what the words of the cha import, that the plaintiff has been gra certain defined exclusive rights which court will enforce.

The decree, however, goes beyond rights which we have mentioned as give the charter. In that respect the discus here must be limited again. Whether plaintiff is using paraphernalia, or a rit or a seal, which it should not be allowe use, is not before us here. The charter nothing about them, and its validity is affected by any abuse of rights of prop or of confidence which the plaintiff or members may have practised. This co we repeat, *cannot go beyond a decision u the constitutionality of the charter gra and we address ourselves to that.

The contract of which the obligatio alleged to have been violated is a cont between the plaintiff and the principal

fendant. What that contract is supposed to have been is not stated, but manifestly there was none. It would have had to be a contract not to come into existence, at least with the plaintiff's present functions and name. There have been cases where administration was taken out on a prematurely born child and a suit brought for causing it to be born, *per quod* it died, but they have failed. Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242. See Walker v. Great Northern R. Co. Ir. L. R. 28 Eq. 69. An antenatal contract presents greater difficulties still. Even if we should substitute an allegation of a contract with the members of the plaintiff, the contention would fail. The contract, if any there was, was not that they would not become incorporated, but must be supposed to be that they would retain their subordination to the national council, or something of that sort. It is going very far to say that they contracted not to secede, but whether they did so or not, it was a matter outside the purview of the charter. There was nothing in that to hinder their returning to their allegiance. Whether any, and if any, what, contract was made (National Council, J. O. of U. A. M. v. State Council J. O. of U. A. M. 64 N. J. Eq. 470, 473, 53 Atl. 1082, 66 N. J. Eq. 429, 57 Atl. 1132), and whether, if made, it must not be taken to have been made subject to the powers of the state, with which we are about to deal, are questions which we may pass. See Pennsylvania College Cases (Jefferson College v. Washington & J. College) 13 Wall. 190, 218, 20 L. ed. 550, 554; Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597.

The most serious aspect of the defense is presented by the matter of the plaintiff's name. If the legislation of a state undertook to appropriate to the use of its own creature a trade name of known commercial value, of course the argument would be very strong that an act of incorporation could not interfere with existing property rights. [162] And, no doubt, *within proper limits, the argument would be as good for a foreign corporation as for a foreign person. But that is not what has been done in this case.

The name in question is not the name of the principal defendant, but distinguished from that name as state and national councils no doubt generally are distinguished by members of similar institutions. It is the name of a voluntary association of which the officers are defendants. But it is not used even by that association in its own right, but only under a charter from, and in the right of, the Pennsylvania corporation. Furthermore, the name is not associated with a product of any kind. Its only value to the defendants, in a property sense, is as tending to invite membership in a club which professes to derive its existence and its powers from the Pennsylvania company. It does not seem likely that anyone would join the plaintiff, and certainly no member could be retained, in ignorance of its alienation from the national council. As the national council has its branches elsewhere, and as the plaintiff is, on its face, a state organization, competition outside the state appears improbable. So that the claim of the defendants comes down to a claim of right to compete within the state, and a right, as we have said, of or in behalf of the Pennsylvania corporation, which controls the existence of its subordinate Virginia councils. Thus the question as to the grant of the name passes over into the question as to the exclusive right of the plaintiff to issue charters, which was the other legislative grant.

The supreme court of appeals was right, therefore, in treating the constitutional question as depending on the power of the state with regard to foreign corporations. That must decide the case. Now it is true, of course, that an unconstitutional law no more binds foreign corporations than it binds others. Carroll v. Greenwich Ins. Co. 199 U. S. 401, 409, 50 L. ed. 246, 249, 26 Sup. Ct. Rep. 66. And no doubt a law specially directed against a foreign corporation might be unconstitutional, for instance, as depriving it of its property without due process of law. See Blake v. *McClung, 172 U. S. [163] 239, 260, 43 L. ed. 432, 440, 19 Sup. Ct. Rep. 165. But when the so-called property consists merely in the value that there might be in extending its business or membership into a state, that property, it hardly needs to be said, depends upon the consent of the state to let the corporation come into the state. The state of Virginia had the undoubted right to exclude the Pennsylvania corporation and to forbid its constituting branches within the Virginia boundaries. As it had that right before the corporation got in, so it had the right to turn it out after it got in. Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619. It follows that the state could impose the more limited restriction that simply forbade the granting of charters to "subordinate councils, Junior Order United American Mechanics, in the state of Virginia."

It is argued that the power of the state in this case was less than it otherwise might have been, because it did not turn the Pennsylvania corporation out. The supreme court of appeals says that the plaintiff's charter leaves the whole order of things as it existed unaffected except by the exclusive right of the plaintiff to issue subordinate charters. It is said that the general

statutes recognized the defendant and authorized such associations to continue within the state. A subordinate council of the order had been granted a special charter, which is not revoked. The conclusion is drawn that the restrictions upon the defendant which flow from the charter to the plaintiff amount to a denial of the equal protection of the laws of Virginia to a person within its jurisdiction. But the power of the state as to foreign corporations does not depend upon their being outside of its jurisdiction. Those within the jurisdiction, in such sense as they ever can be said to be within it, do not acquire a right not to be turned out except by general laws. A single foreign corporation, especially one unique in character, like the national council, might be expelled by a special act. It equally could be restricted in the more limited way.

There were many difficult questions pre-
[164] sented to the state *court which cannot be reviewed here. As to the constitutionality of the plaintiff's charter, we are of opinion that the court was right.

Decree affirmed.

CHARLES W. CLARK, Plff. in Err.,
v.
P. O. WELLS.

(See S. C. Reporter's ed. 164–173.)

Judgment—jurisdiction—service of process.

1. No valid judgment *in personam* can be rendered against a defendant without personal service upon him in a court of competent jurisdiction, or waiver of summons, and voluntary appearance therein.

Appearance—for purpose of removing cause—effect.

2. A defendant in a suit in a state court does not, by a special appearance for the sole purpose of removing the cause to a Federal circuit court, before service of summons, submit himself to the jurisdiction of the state court, nor, upon removal to the Federal court, deprive himself of the right to object to the manner of service upon him in that court.

Appearance—effect of removing cause to Federal court.

3. The exercise of the right of removing a cause from a state to a Federal circuit court before service of summons by a defendant who appeared specially for that sole purpose does not amount to a general appearance.

Writ and process—substituted service in the Federal courts.

4. Service by publication in the manner prescribed by the state statutes for nonresident defendants cannot be had in the Federal circuit court to which a suit in which an attachment has issued has been removed from a state court before service of summons.

Removal of causes—enforcing attachment—effect of lack of service of process.

5. The want of any jurisdiction over the person of defendant in a case removed to a Federal circuit court from a state court before service of summons, on a special appearance by defendant for that sole purpose, does not, in view of the provision of the removal act of March 3, 1875 (18 Stat. at L. 471, chap. 137, U. S. Comp. Stat. 1901, p. 511), § 4, preserving the lien of attachments in the state courts, prevent the Federal court from entering a judgment enforceable against the real property of defendant which had been attached before the case was removed, where the state court might, but for such removal, have rendered such a judgment on giving notice to defendant.

[No. 42.]

Submitted October 18, 1906. Decided November 19, 1906.

IN ERROR to the Circuit Court of the United States for the District of Montana to review a judgment against defendant in a cause which had been removed to that court before service of summons from the District Court of the First Judicial District in and for Lewis and Clark County, in that state. Modified by making the judgment collectible only from property which had been attached in the state court, and, as so modified, affirmed.

See same case below on motion to quash summons, 136 Fed. 462.

The facts are stated in the opinion.

Messrs. Walter M. Bickford and George F. Shelton submitted the cause for plaintiff in error. Mr. William A. Clark, Jr., was on the brief:

The attachment of his property in the state of Montana did not give the state court jurisdiction to proceed to render a judgment against the plaintiff in error without personal service of process upon him within the state of Montana.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Caledonian Coal Co. v. Baker (New Mexico ex rel. Caledonian Coal Co. v. Baker) 196 U. S. 445, 49 L. ed. 545, 25 Sup. Ct. Rep. 375; Goldey v. Morning News, 156 U. S. 518, 521, 39 L. ed. 517, 518, 15 Sup. Ct.

NOTE.—As to the validity of personal judgments rendered upon constructive service of process—see notes to Moyer v. Bucks, 16 L.R.A. 231; Hollingsworth v. Barbour, 7 L. ed. U. S. 923.

As to what service of process is sufficient to constitute due process of law—see note to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 577.

Rep. 559; Mexican C. R. Co. v. Pinkney, 149 U. S. 209, 37 L. ed. 705, 13 Sup. Ct. Rep. 859; Kendall v. United States, 12 Pet. 623, 9 L. ed. 1220; Harris v. Hardeman, 14 How. 334, 14 L. ed. 444.

Nor did the state court have jurisdiction to render a judgment collectible out of the property attached alone, without publication of summons or substituted service in the manner required by the Code of Civil Procedure of the state of Montana.

Low v. Adams, 6 Cal. 281; Barber v. Morris, 37 Minn. 194, 5 Am. St. Rep. 836, 33 N. W. 559; Heffner v. Gunz, 29 Minn. 108, 12 N. W. 342; Walker v. Cottrell, 6 Baxt. 267; Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931; Caledonian Coal Co. v. Baker (New Mexico ex rel. Caledonian Coal Co. v. Baker) 196 U. S. 432, 49 L. ed. 540, 25 Sup. Ct. Rep. 375.

The filing of the petition and bond for removal in the state court did not constitute an appearance on the part of the plaintiff in error, and he was at liberty to assert, in the circuit court of the United States, the want of jurisdiction over his person, upon the ground that process had not been served upon him at all.

Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; Wabash Western R. Co. v. Brow, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126; National Acci. Soc. v. Spiro, 164 U. S. 281, 41 L. ed. 435, 17 Sup. Ct. Rep. 996; Conley v. Mathieson Alkali Works, 190 U. S. 411, 47 L. ed. 1115, 23 Sup. Ct. Rep. 728; Courtney v. Pradt, 196 U. S. 89, 92, 49 L. ed. 398, 399, 25 Sup. Ct. Rep. 208.

The service of process must have been personal upon the defendant within the state and district of Montana in order to enforce the attachment lien.

Perkins v. Hendryx, 40 Fed. 657; Toland v. Sprague, 12 Pet. 300, 330, 9 L. ed. 1093, 1105; Levy v. Fitzpatrick, 15 Pet. 167, 171, 10 L. ed. 699, 700; Herndon v. Ridgway, 17 How. 424, 425, 15 L. ed. 100, 101; Chaffee v. Hayward, 20 How. 208, 15 L. ed. 804; Harland v. United Lines Teleg. Co. 6 L.R.A. 232, 40 Fed. 308; Nazro v. Cragin, 3 Dill. 474, Fed. Cas. No. 10,062; Chittenden v. Darden, 2 Woods, 437, Fed. Cas. No. 2,688; Central Trust Co. v. Chattanooga, R. & C. R. Co. 68 Fed. 685; Day v. Newark India Rubber Mfg. Co. 1 Blatchf. 630, Fed. Cas. No. 3,685; Atkins v. Fibre Disintegrating Co. 7 Blatchf. 566, Fed. Cas. No. 602; Saddler v. Hudson, 2 Curt. C. C. 7, Fed. Cas. No. 12,206; Anderson v. Shaffer, 10 Fed. 267; Noyes v. Canada, 30 Fed. 666; Treadwell v. Seymour, 41 Fed. 581; Ex parte Des Moines & M. R. Co. 103 U. S. 794, 796, 26 L. ed. 461, 462; Goldey v. Morning News, 156 U. S. 521, 39 L. ed. 518, 15 Sup. Ct. Rep. 559; Conley v. Mathieson Alkali Works, supra.

The state statute authorizing service of process by publication, or otherwise, upon absent and nonresident defendants, has no application to suits *in personam*.

Pennoyer v. Neff, and Goldey v. Morning News, supra; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410.

If Congress has legislated upon a given subject, and prescribed a definite rule for the government of the Federal courts, it is exclusive of any legislation of the states on the same subject.

Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; Southern P. Co. v. Denton, 146 U. S. 202, 209, 36 L. ed. 942, 945, 13 Sup. Ct. Rep. 44; Whitford v. Clark County, 119 U. S. 522, 50 L. ed. 500, 7 Sup. Ct. Rep. 306.

The appearance was special and the jurisdiction of the court was properly attacked.

Mexican C. R. Co. v. Pinkney, 149 U. S. 209, 37 L. ed. 705, 13 Sup. Ct. Rep. 859; Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237.

Mr. **N. W. McConnell** submitted the cause for defendant in error:

It is no bar to the jurisdiction of the circuit court of a case removed to it from a state court that defendant was not a resident of the district, and that the state had acquired jurisdiction by foreign attachment, without any personal service.

Crocker Nat. Bank v. Pagenstecher, 44 Fed. 705; Richmond v. Brookings, 48 Fed. 241; Purdy v. Wallace Müller & Co. 81 Fed. 513.

The case having been removed to the circuit court upon the petition of the defendant, it does not lie in its mouth to claim that such court had no jurisdiction of the case, unless the court from which it was removed had no jurisdiction.

Cowley v. Northern P. R. Co. 159 U. S. 583, 40 L. ed. 267, 16 Sup. Ct. Rep. 127.

The jurisdiction which the state court acquired by attachment carries jurisdiction into the Federal court when it is removed, for the reason that by virtue of the attachment in the state court the *res*, or the property attached, is brought into the custody of the United States circuit court; it is not, then, a question of jurisdiction in the United States circuit court, for that has been acquired by the attachment in the state court; but it is a question of practice. It involves the procedure in the United States circuit court as to how notice shall be given to the defendant so as to enable the court to proceed to render judgment and subject the property attached to the

payment of the debt so far as the proceeds realized from the sale thereof shall be sufficient to pay the same. While a judgment in form is rendered against the defendant for the amount of the debt, still it is limited, as to satisfaction, to the property attached.

Crocker Nat. Bank v. Pagenstecher, Richmond v. Brookings, Purdy v. Wallace Müller & Co., and Cowley v. Northern P. R. Co. supra.

If the suit be one rightfully brought in the state court, and which the act of Congress authorizes to be removed thence into the Federal court, the very fact of the authority to remove empowers the Federal court to take jurisdiction and proceed in the cause; the only real question in that court being, Was the suit rightfully removed? If a cause has thus come into the Federal court, then § 4 of the removal act empowers and requires that court to go on with it, and the court to render such decree against the property attached as the state court should have given if the suit had remained there.

United States v. Ottman, 1 Hughes, 313, Fed. Cas. No. 15,977; 11 Myers, Fed. Dec. §§ 1638-1643; Tootle v. Coleman, 57 L.R. A. 120, 46 C. C. A. 132, 107 Fed. 45.

After defendant had appeared in court by his petition and asked for the removal of the case into the United States circuit court, it seemed, as stated in Purdy v. Wallace Müller & Co. 81 Fed. 513, to render further notice an "idle formality."

Mr. Justice Day delivered the opinion of the court:

This case is here upon a question of jurisdiction of the circuit court, duly certified under the act of March 3, 1891. 26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488.

The action below was commenced by Wells against Clark, September 20, 1904, in the district court of the first judicial district of Montana, in and for Lewis and Clark county, to recover on a promissory note in the sum of $2,500, with interest and costs. The summons in the action was re-
[169] turned *September 22, 1904, with the indorsement by the sheriff that Clark could not be found in his county.

An attachment was sued out under the statutes of Montana (Code of Civil Procedure, §§ 890 *et seq.*), and, on September 22, 1904, was levied upon all the right, title, and interest of the defendant Clark in certain lots in Butte, Silver Bow county, Montana.

On October 18, 1904, Clark, appearing for the purpose of obtaining an order of removal, and no other, and reciting that he waived no right to object to the jurisdiction of the court over his person or property, filed his petition in the district court of Lewis and Clark county for the removal of the cause to the circuit court of the United States for the district of Montana, upon the ground that he was a resident of San Mateo, California, and a citizen of that state, plaintiff being a citizen of Montana.

Upon bond filed such proceedings were had that the cause was ordered, on October 18, 1904, to be removed to the United States circuit court for the district of Montana.

After the filing of the record in the United States court an affidavit was filed on November 3, 1904, in the office of the clerk of the United States circuit court for an order for service by publication upon Clark as a nonresident, absent from the state, who could not be found therein. An order was thereupon made by the clerk of the United States court for service upon Clark by publication in a newspaper in the city of Helena, Lewis and Clark county, and the mailing of a notice to San Mateo, California, the alleged place of residence of the defendant. This method of procedure is in conformity with the Code of Civil Procedure of Montana, §§ 637, 638. Publication was made, and a copy of the summons and complaint was served upon Clark at San Mateo, California, by the United States marshal in and for the northern district of California. Mont. Code Civ. Proc. §§ 637, 638.

On December 6, 1904, Clark, appearing solely for that purpose, *filed a motion to [21
quash the service of summons upon two grounds:

"1. That the said summons has never at all or in any manner been served upon the defendant herein personally in the state and district of Montana, nor has the defendant ever at any time waived service of summons or voluntarily entered his appearance in this cause.

"2. That the publication of service herein, wherein and whereby the said summons has been published in a newspaper, does not give the court any jurisdiction over the said defendant, nor is such service by publication permissible or in accordance with the rules of procedure in the United States court, nor is the same sanctioned or authorized by any law of the United States, and the said pretended service of summons by publication is wholly and absolutely void under the laws of the United States."

The court overruled the motion and proceeded to render a judgment *in personam* against Clark for the amount of the note and costs.

It is contended by the plaintiff in error that inasmuch as the removal was made to the Federal court before service of a summons upon the defendant, and, as there was

no personal service after the removal, there could be no valid personal judgment in that court for want of service upon the defendant. And it is insisted that the service by publication, if proper in such cases, could not be made under the state statute, but under the act of March 3, 1875 (18 Stat. at L. 472, chap. 137, U. S. Comp. Stat. 1901, p. 513), permitting the court to make an order for publication upon nonresident defendants in suits begun in the circuit court of the United States to enforce any legal or equitable lien upon a claim to real or personal property within the district where suit is brought.

It must be taken at the outset as settled that no valid judgment *in personam* can be rendered against a defendant without personal service upon him in a court of competent jurisdiction, or waiver of summons, and [171] voluntary appearance therein. *Pennoyer v. Neff, 95 U. S. 715, 25 L. ed. 565; Caledonian Coal Co. v. Baker (New Mexico ex rel. Caledonian Coal Co. v. Baker) 196 U. S. 432, 444, 49 L. ed. 540, 545, 25 Sup. Ct. Rep. 375, and cases cited.

Nor did the petition for removal in the form used in this case have the effect to submit the person of the defendant to the jurisdiction of the state court, or, upon removal to the Federal court, deprive him of the right to object to the manner of service upon him (Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559), and the exercise of the right of removal did not have the effect of entering the general appearance of the defendant, but a special appearance only for the purposes of removal Wabash Western R. Co. v. Brow, 164 U. S. 271-279, 41 L. ed. 431-434, 17 Sup. Ct. Rep. 126).

But we cannot agree with the contention of counsel for plaintiff in error, that, as a personal judgment can only be rendered upon personal service, and service by publication under the state statutes cannot be made in the Federal court, and that the United States statute (act of March, 1875, 18 Stat. at L. 472, chap. 137, U. S. Comp. Stat. 1901, p. 513) is inapplicable to the case, the effect of the removal is to render nugatory the attachment proceedings in the state court.

The purpose not to interfere with the lien of the attachment in the state court is recognized and declared in the statute (§ 4 of the removal act, 18 Stat. at L. 471, chap. 137, U. S. Comp. Stat. 1901, p. 511) providing that, when any suit is removed from a state court to the circuit court of the United States, an attachment of the goods or estate of the defendant, had in the suit in the state court, shall hold the goods or estate attached to answer the final judgment or decree in the same manner as by law it would have been held to answer the final judgment or decree had it been rendered by the court in which the suit was commenced, and preserving the validity of all bonds or security given in the state court.

The transfer of the cause to the United States court gave the latter court control of the case as it was when the state court was deprived of its jurisdiction. The lands were still held by the attachment to answer such judgment as might be rendered against the defendant.

The defendant had a right to remove to the Federal court, *but it is neither reasona- [172] ble nor consonant with the Federal statute preserving the lien of the attachment, that the effect of such removal shall simply be to dismiss the action wherein the state court had acquired jurisdiction by the lawful seizure of the defendant's property within the state.

When the jurisdiction of the state court was terminated by the removal, that court had seized upon the attached property, with the right to hold it to answer such judgment as might be rendered. In the absence of personal service the state statute provided for publication of notice of the pendency of the suit. If the defendant failed to appear the court might proceed to render a judgment, which would permit the attached property to be sold for its satisfaction. To render such a judgment in the absence of an appearance and defense the state court had only to require the statutory notice to the defendant, when its proceedings were interrupted by the removal to the Federal court on the application of the defendant.

The Federal court thus acquired jurisdiction of a cause of which the defendant had notice, as appears by his petition for removal and the action of the state court invoked by him. The defendant, it is true, had not been personally served with process or submitted his person to the jurisdiction of either the state or Federal court. But he did not attack the validity of the attachment proceedings, which appear to be regular and in conformity to the law of the state. There was no necessity of publication of notice in the Federal court in order to warn the defendant of the proceeding; he knew of it, and to a qualified extent had appeared in it.

Without further notice to him, the court had jurisdiction to enter a judgment enforcible against the attached property. The judgment purported to be rendered as upon personal service and after a finding by the court "that the so-called special appearance for the removal hereinbefore recited was an absolute and unqualified submission to the jurisdiction of this [the Federal] court."

[173] *There are expressions in the opinion of the learned judge of the circuit court to the effect that the judgment rendered was intended to be effectual only to subject the attached property (136 Fed. 462), and it seems to be in the form used in some jurisdictions, which recognize that the property attached is all that is reached by the judgment rendered. But the judgment is absolute upon its face, and entered after a finding of full jurisdiction over the person of the defendant. It is in such form as can be sued upon elsewhere and be pleaded as a final adjudication of the cause of action set forth in the petition, and be executed against other property of the defendant, whereas the court had only jurisdiction to render a judgment valid against the property seized in attachment.

We hold that, to the extent that it rendered a personal judgment absolute in terms, the court exceeded its jurisdiction in the case, not having, by service or waiver, personal jurisdiction of the defendant.

The judgment to that extent is therefore modified and made collectible only from the attached property. So modified, the judgment is affirmed.

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[174] *FRED C. FISHER and Charles C. Cohn, on Behalf of Felix Barcelon, Plffs. in Err.,

v.

COLONEL DAVID J. BAKER, JR., and Captain John Doe Thompson.

(See S. C. Reporter's ed. 174–183.)

Appeal—moot question.

1. The validity of the action of the Philippine authorities in suspending the writ of habeas corpus is a moot question, which does not call for determination by the Supreme Court of the United States on writ of error, where the suspension was revoked on the day when copy of the petition for the writ of error was served on opposing counsel, and more than two months before the writ was issued.

Appeal—distinction between appeal and writ of error.

2. Appeal, and not writ of error, is the proper method of obtaining a review in the Supreme Court of the United States of a final order of the supreme court of the Philippine Islands in a habeas corpus case, under the act of July 1, 1902 (32 Stat. at L. chap. 1369, pp. 691, 695, U. S. Comp. Stat. Supp. 1905, p. 154), § 10, providing that judgments and decrees of the latter court can only be reviewed "in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts."

[No. 214.]

Argued October 9, 10, 1906. Decided December 3, 1906.

IN ERROR to the Supreme Court of the Philippine Islands to review a denial of an application for a writ of habeas corpus. Dismissed.

The facts are stated in the opinion.

Mr. Frederic R. Coudert argued the cause, and, with Mr. Howard Thayer Kingsbury, filed briefs for plaintiffs in error.

Solicitor General Hoyt argued the cause and filed a brief for defendants in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

Application for the writ of habeas corpus was made to the supreme court of the Philippine Islands, August 2, 1905, on behalf of one Barcelon, seeking to be discharged from alleged illegal detention in the province of Batangas. An order to show cause was granted, returnable August 4, to which return was made, the cause heard, and the application denied on the ground that the writ of habeas corpus had been suspended, and *that the action of the Philippine au- [175] thorities in that regard was not open to judicial review.

Petition for the allowance of a writ of error from this court, dated October 19, and service of copy thereof acknowledged by respondents the same day, was filed January 3, 1906, and the writ of error thereupon allowed and issued on that day.

The second clause of § 9 of article 1 of the Constitution of the United States provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

The 7th paragraph of § 5 of the act of Congress of July 1, 1902 (32 Stat. at L. chap. 1369, pp. 691, 692), reads: "That the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion, insurrection, or invasion, the public safety may require it; in either of which events the same may be suspended by the President, or by the governor, with the approval of the Philippine Commission, wherever, during such period, the necessity for such suspension shall exist."

The record discloses that on January 31, 1905, the Philippine Commission adopted the following resolution:

"Whereas certain organized bands of ladrones exist in the provinces of Cavite and Batangas, who are levying forced contribu-

NOTE.—On distinction between appeal and writ of error—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

tions upon the people, who frequently require them, under compulsion, to join their bands, and who kill or maim in the most barbarous manner those who fail to respond to their unlawful demands, and are therefore terrifying the law-abiding and inoffensive people of those provinces; and

"Whereas these bands have, in several instances, attacked police and constabulary detachments, and are in open insurrection against the constituted authorities; and

"Whereas it is believed that these bands have numerous agents and confederates living within the municipalities of the said provinces; and

"Whereas, because of the foregoing conditions, there exists a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct [80] preliminary *investigations before justices of the peace and other judicial officers:

"Now, therefore, be it resolved, 'That, the public safety requiring it, the civil governor is hereby authorized and requested to suspend the writ of habeas corpus in the provinces of Cavite and Batangas."

Whereupon, on the same day, the civil governor issued the following proclamation:

"Whereas certain organized bands of ladrones exist in the provinces of Cavite and Batangas, who are levying forced contributions upon the people, who frequently require them, under compulsion, to join their bands, and who kill or maim in the most barbarous manner those who fail to respond to their unlawful demands, and are therefore terrifying the law-abiding and inoffensive people of those provinces; and

"Whereas these bands have, in several instances, attacked police and constabulary detachments, and are in open insurrection against the constituted authorities, and it is believed that the said bands have numerous agents and confederates living within the municipalities of the said provinces; and

"Whereas, because of the foregoing conditions, there exists a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct preliminary investigations before justices of the peace and other judicial officers:

"In the interest of the public safety, it is hereby ordered that the writ of habeas corpus is from this date suspended in the provinces of Cavite and Batangas."

But we must take notice of the fact that on October 19, 1905, the civil governor issued a proclamation revoking that of January 31, 1905, as follows:

"Whereas the ladrone bands which, up to a recent date, infested the provinces of Cavite and Batangas, have been practically destroyed, and the members thereof killed or captured or have surrendered, so that the necessity for the continuance of the suspension of the writ of habeas corpus in the *aforesaid provinces, which was made neces- [181] sary by the conditions therein prevailing on the 31st day of January last, no longer exists:

"Now, therefore, I, Luke E. Wright, governor general of the Philippine Islands, being duly authorized and empowered thereto by the Philippine Commission, do hereby proclaim the revocation of the suspension of the writ of habeas corpus in the provinces of Cavite and Batangas which was made by me on the 31st day of January last."

This proclamation wiped out the basis of the decision sought to be reviewed on the day when the copy of the petition for writ of error was served on opposing counsel, and more than two months before the writ of error was issued. The question ruled by the court below, and solely argued before us, became, in effect, a moot question, not calling for determination here. Mills v. Green, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132.

But the disposition of this writ of error must be rested on another ground.

The proceeding is in habeas corpus, and is a civil, and not a criminal, proceeding. Cross v. Burke, 146 U. S. 82, 88, 36 L. ed. 896, 898, 13 Sup. Ct. Rep. 22. Section 10 of the Philippine act of July 1, 1902 (32 Stat. at L. chap. 1369, pp. 691, 695, U. S. Comp. Stat. Supp. 1905, p. 154), provides:

"That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States *on [182] appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States."

Final orders of the circuit or district courts of the United States in habeas corpus can only be reviewed by appeal, and not by writ of error. Re Morrissey (Morrissey v. Perry) 137 U. S. 157, 158, 34 L. ed. 644, 645, 11 Sup. Ct. Rep. 57; Rice v. Ames, 180 U. S. 371, 373, 45 L. ed. 577, 581, 21 Sup. Ct. Rep. 406, 407. In the latter case the court said:

"Motion is made to dismiss the appeal upon the ground that there is no provision of law allowing an appeal in this class of cases. Prior to the court of appeals act of 1891, provision was made for an appeal to the circuit court in habeas corpus cases 'from the final decision of any court, justice, or judge inferior to the circuit court' (Rev. Stat. § 763, U. S. Comp. Stat. 1901, p. 594); and from the final decision of such circuit court an appeal might be taken to this court (Rev. Stat. § 764, as amended March 3, 1885, chap. 353, 23 Stat. at L. 437, U. S. Comp. Stat. 1901, p. 595).

"The law remained in this condition until the court of appeals act of March, 1891 [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549], was passed, the 5th section of which permits an appeal directly from the district court to this court 'in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.' In this connection the appellee insists that an appeal will not lie, but that a writ of error is the proper remedy. In support of this we are cited to the case of Bucklin v. United States, 159 U. S. 680, 40 L. ed. 304, 16 Sup. Ct. Rep. 182, in which the appellant was convicted of the crime of perjury, and sought a review of the judgment against him by an appeal, which we held must be dismissed, upon the ground that criminal cases were reviewable here only by writ of error. Obviously that case has no application to this, since, under the prior sections of the Revised Statutes, above cited, which are taken from the act of 1842, an *appeal* was allowed in habeas corpus cases. The observation made in the Bucklin Case that 'there was no purpose by [183] that act to *abolish the general distinction, at common law, between an appeal and a writ of error, may be supplemented by saying that it was no purpose of the act of 1891 to change the forms of remedies theretofore pursued. Re Lennon, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123; Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; Gonzales v. Cunningham, 164 U. S. 612, 41 L. ed. 572, 17 Sup. Ct. Rep. 182."

Writ of error dismissed.

ST. MARY'S FRANCO-AMERICAN PETROLEUM COMPANY, Plff. in Err.,
v.
STATE OF WEST VIRGINIA.

(See S. C. Reporter's ed. 183-192.)

Constitutional law—due process of law—appointing state auditor to accept service upon corporation.

1. A domestic corporation whose principal office and works are outside the state is not deprived of its liberty and property without due process of law by W. Va. Acts 1905, chap. 39, requiring every foreign and nonresident domestic corporation to appoint the state auditor to accept service of process, and exacting an annual fee of $10 for his services, although the prior laws left it to the corporation to appoint an attorney for that purpose.

Constitutional law—equal protection of the laws—appointing state auditor to accept service upon corporation.

2. The equal protection of the laws is not denied to a domestic corporation whose principal office and works are outside the state, by W. Va. Acts 1905, chap. 39, requiring every foreign and nonresident domestic corporation to appoint the state auditor to accept service of process, and exacting an annual fee of $10 for his services.

[No. 98.]

Submitted November 5, 1906. Decided December 3, 1906.

IN ERROR to the Supreme Court of Appeals of the State of West Virginia to review a judgment awarding a peremptory writ of mandamus to compel a nonresident domestic corporation to appoint the state auditor to accept service of process. Affirmed.

Statement by Mr. Chief Justice Fuller:

This is a writ of error to review a judgment of the supreme court of appeals of West Virginia awarding a peremptory writ of mandamus, commanding the St. Mary's Franco-American Petroleum. Company, by power of attorney, duly executed, acknowledged, and filed in the office of the auditor for the state of West Virginia, "to appoint said auditor and his successors in office, attorney in fact to accept service of process and notice in this state for said St. Mary's Franco-American Petroleum Company, and [1 by the same instrument to declare its consent that service of any process or notice in this state on said attorney in fact, or

NOTE.—As to what service of process is sufficient to constitute due process of law—see note to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 577.

his acceptance thereof indorsed thereon, shall be equivalent for all purposes to, and shall be and constitute, due and legal service upon the said St. Mary's Franco-American Petroleum Company, and that the petitioner recover from the respondent her costs about the prosecution of her petition in this court in this behalf expended."

It was agreed by the parties that no rule to show cause need be issued on the petition for mandamus, nor any alternative writ, but that the petition might stand as such writ, and the case be determined on demurrer thereto, which was filed.

The petition, among other things, averred that the St. Mary's Company was "a nonresident domestic corporation, organized, chartered, existing, and carrying on its corporate business under and by virtue of the laws of the state of West Virginia, but having its principal office and place of business and chief works in the city of Lima, in the state of Ohio;" that the corporation "was organized, and now exists by virtue of a charter issued to it by the secretary of state of the state of West Virginia on the 18th day of January, 1902;" and that "on the 17th day of February, 1902, the said defendant corporation, by power of attorney, duly and legally executed, filed, and recorded, appointed one Wm. M. O. Dawson, a resident of the county of Kanawha in the state of West Virginia, to accept service on behalf of said corporation, and as a person upon whom service may be had of any process or notice, and to make returns of its property for taxation."

At the time the company was incorporated § 8 of chapter 53 of the state Code read:

"Where the legislature has the right to alter or repeal the charter or certificate of incorporation heretofore granted to any joint stock company, or to alter or repeal any law relating to such company, nothing contained in this chapter shall be construed to surrender or impair such right. And the right is hereby reserved to the legislature to [185] alter any charter or *certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company. But in no case shall such alteration or repeal affect the right of the creditors of the company to have its assets applied to the discharge of its liabilities, or of its stockholders to have the surplus, if any, which may remain after discharging its liabilities and the expenses of winding up its affairs, distributed among themselves in proportion to their respective interests."

And § 24 of chapter 54:

"Every such corporation having its principal office or place of business in this state shall, within thirty days after organization, by power of attorney duly executed, appoint some person residing in the county in this state wherein its business is conducted, to accept service on behalf of said corporation, and upon whom service may be had of any process or notice, and to make such return for and on behalf of said corporation to the assessor of the county or district wherein its business is carried on, as is required by the 41st section of the 29th chapter of the Code. Every such corporation having its principal office or place of business outside this state shall, within thirty days after organizing, by power of attorney duly executed, appoint some person residing in this state to accept service on behalf of said corporation, and upon whom service may be had of any process or notice, and to make return of its property in this state for taxation as aforesaid. The said power of attorney shall be recorded in the office of the clerk of the county court of the county in which the attorney resides, and filed and recorded in the office of the secretary of state, and the admission to record of such power of attorney shall be deemed evidence of compliance with the requirements of this section. Corporations heretofore organized may comply with said requirements at any time within three months after the passage of this act. Any corporation failing to comply with said requirements within six months after the passage of this act shall forfeit not less than two hundred nor more *than five hun- [186] dred dollars, and shall, moreover, during the continuance of such failure, be deemed a nonresident of this state, and its property, real and personal, shall be liable to attachment in like manner as the property of nonresident defendants; any corporation failing so to comply within twelve months after the passage of this act shall, by reason of such failure, forfeit its charter to the state, and the provisions of § 8, chapter 20, Acts 1885, relative to notice and publication, shall apply thereto."

On the 22d day of February, 1905, the legislature of West Virginia passed an act —chapter 39 of the Acts of 1905—which is as follows:

"Sec. 1. The auditor of this state shall be, and he is hereby constituted, the attorney in fact for and on behalf of every foreign corporation doing business in this state, and of every nonresident domestic corporation. Every such corporation shall, by power of attorney, duly executed, acknowledged, and filed in the auditor's office of this state, appoint said auditor and his successors in office, attorney in fact to accept service of process and notice in this state for such corporations, and by the same instrument it shall declare its consent that service of any process or notice in this state on said attorney in fact, or his acceptance thereof in-

dorsed thereon, shall be equivalent for all purposes to, and shall be and constitute, due and legal service upon said corporation.

"Sec. 2. Such foreign or nonresident domestic corporation shall, at the time of taking out its charter, or procuring its authority to do business in this state, as the case may be, pay to the auditor as its said attorney $10 for his services as such for the then current year ending on the 30th day of April next ensuing; and on or before the 1st day of May, for each year, such corporation shall pay to said auditor the like sum of $10 for his services as such attorney. And all such corporations as have heretofore taken out charters, or procured authority to do business in this state, shall, for the fiscal [187] year *commencing on the 1st day of May, 1905, pay the sum of $10 to the auditor as the fee for such attorney to receive service of process, and annually thereafter a like sum, and such corporation shall not be required to pay any fee to the person who may have been heretofore appointed its attorney to receive service of process. All moneys received by the auditor under this chapter shall belong to the state, and be by him immediately paid into the state treasury. The auditor shall keep in a well bound book in his office a true and accurate account of all moneys so received and paid over to him.

"Sec. 3. The postoffice address of such corporation shall be filed with the power of attorney, and there shall be filed with the auditor, from time to time, statements of any changes of address of said corporation. Immediately after being served with, or accepting, any such process or notice, the auditor shall make and file with said power of attorney a copy of such process or notice, with a note thereon indorsed of the time of service or acceptance, as the case may be, and transmit such process or notice by registered mail to such corporation at the address last furnished as aforesaid. But no such process or notice shall be served on the auditor or accepted by him less than ten days before the return thereof.

"Sec. 4. In addition to the auditor, any such company may designate any other person in this state as its attorney in fact, upon whom service of process or notice may be made or who may accept such service. And, when such local attorney is appointed, process in any suit or proceeding may be served on him to the same effect as if the same were served on the auditor.

"Sec. 5. Failure to pay the attorney's fee as hereinbefore required shall have all the force and effect, and subject such corporation to the same penalties and forfeitures, as are or may be prescribed by law for failure to pay the license tax required to be paid by such corporation.

"Sec. 6. Any corporation failing to comply with the provisions *of this act in so far as [188] it relates to the appointment of the auditor as its statutory attorney, within ninety days from its incorporation, shall forfeit $100 as a penalty for such failure, and upon failure to pay such penalty, the charter of such corporation shall thereby be forfeited and void."

The company refused to comply with the act, and, thereupon, this proceeding was instituted.

Mr. W. E. Chilton submitted the cause for plaintiff in error. Messrs. Chilton, MacCorkle, & Chilton were on the brief:

This statute is justified by no public necessity, and is clearly that kind of legislation condemned in State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285 as sumptuary, and depriving a person of his rights and liberty of private contract.

Mugler v. Kansas, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; Williams v. Fears, 179 U. S. 274, 45 L. ed. 188, 21 Sup. Ct. Rep. 128; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343.

In discussing the constitutionality of the statute it is to be remembered that the question is to be determined, not by what has been done in any particular instance but by what may be done under and by virtue of its authority. It is for the courts to determine what is due process of law, or what is the equal protection of the laws, and not for the legislature.

People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Does not this act, then, deprive and deny to this corporation the equal protection of the laws?

Cooley, Const. Lim. 6th ed. p. 484.

Is there any limitation to the power of a state in dealing with its own corporation, if, at the time the corporation was created, there was a statute of the state reserving to the legislature the right to alter or repeal?

Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Lothrop v. Stedman, 42 Conn. 583, 13 Blatchf. 134, Fed. Cas. No. 8,519.

There is another objection to this law; that is, that the statute fixes a tax upon this corporation for a private purpose, and not for a public purpose, and in so doing deprives this corporation of its property without due process of law.

Brannon, 14th Amendment, p. 160; Cole v. La Grange, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 665, 22 L. ed. 461.

Mr. Clarke W. May submitted the cause for defendant in error:

The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discrimination and hostile legislation.

Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Brannon, 14th Amendment, 323.

It only requires that the same means and methods shall apply to all constituents of a class, so that law may operate equally on all similarly situated. With the impotency of the law, the Constitution has no concern.

Kentucky Railroad Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

The West Virginia statute is clearly not repugnant to the provisions of the 14th Amendment to the Constitution of the United States.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 43, 44 L. ed. 663, 20 Sup. Ct. Rep. 518; Hooper v. California, 155 U. S. 648, 652, 39 L. ed. 297, 298, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Allgeyer v. Louisiana, 165 U. S. 579, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Blake v. McClung, 172 U. S. 242, 43 L. ed. 433, 19 Sup. Ct. Rep. 165; Magoun v. Illinois Trust & Sav. Bank, supra; Clark v. Titusville, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; Narron v. Wilmington & W. R. Co. 122 N. C. 856, 40 L.R.A. 415, 29 S. E. 356; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 44 L. ed. 102, 21 Sup. Ct. Rep. 43; Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 Sup. Ct. Rep. 346; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Brannon, 14th Amendment, chap. 16.

The requirement that foreign and nonresident corporations pay to the auditor for the use of the state the sum of $10 does not vitiate or render the enactment unconstitutional.

Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; New York ex rel. New York Electric Lines Co. v. Squire, 145 U. S. 175, 35 L. ed. 666, 12 Sup. Ct. Rep. 880.

Mr. Chief Justice Fuller delivered the opinion of the court:

It is argued that the act of February 22, 1905, is invalid under the 14th Amendment, in that it deprives the company of liberty of contract and property without due process of law, and denies it the equal protection of the laws. But, in view of repeated decisions of this court, the contention is without merit. The state had the clear right to regulate its own creations, and *a fortiori*, foreign corporations permitted to transact business within its borders.

In this instance it put all nonresident domestic corporations, which elected to have their places of business and works outside of the state, and all foreign corporations coming into the state, on the same footing in respect of the service of process, and the law operated on all these alike.

Such a classification was reasonable, and not open to constitutional objection. Orient Ins. Co. v. Daggs, 172 U. S. 557, 563, 43 L. ed. 552, 554, 19 Sup. Ct. Rep. 281; Waters-Pierce Oil Co. v. Texas, 177 U. S. 43, 44 L. ed. 663, 20 Sup. Ct. Rep. 518; Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 Sup. Ct. Rep. 346; National Council v. State Council, 203 U. S. 151, ante, 132, 27 Sup. Ct. Rep. 46; Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 243, post, 168, 27 Sup. Ct. Rep. 126; Brannon, 14th Amendment, chap. 16.

It is true that the prior law left it to the corporation to appoint an attorney to represent it, and that the act of February, 1905, changed this so as to make the auditor such attorney, but this, at the most, was no more than an amendment as to the appointment of an agent, and when the St. Mary's Company accepted its charter it did so subject to the right of amendment. And we agree with the state court that the *require- [192] ment of the payment of $10 to the auditor for the use of the state does not amount to a taking of property without due process, or an unjust discrimination. Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; New York ex rel. New York Electric Lines Co. v. Squire,

145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880. If the act is valid, that is.

The objections going to the expediency or the hardships and injustice of the act, and its alleged inconsistency with the state Constitution and laws, are matters with which we have nothing to do on this writ of error, and the question whether the provision that the corporation shall not be required to pay any fee to anyone theretofore appointed an attorney is invalid or not requires no consideration on this record.

Judgment affirmed.

GEORGE A. PETTIBONE, Appt.,
v.
JASPER C. NICHOLS, Sheriff.

(See S. C. Reporter's ed. 192-221.)

Extradition—fugitives from justice.

1. Independent proof, apart from the requisition papers, that the accused was a fugitive from justice, need not be demanded by the governor of the surrendering state before issuing his warrant of arrest in extradition proceedings.

Extradition—right to hearing before deportation.

2. Arranging and carrying out the arrest and deportation of the accused so as to leave him no opportunity to prove before the governor of the surrendering state that he was not a fugitive from justice, or to appeal to some court of that state to prevent his illegal deportation, does not violate the provisions of U. S. Const. art. 4, § 2, or U. S. Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597, relating to extradition proceedings.

Habeas corpus—in Federal courts—review of extradition proceedings.

3. A person held in actual custody by a state for trial in one of its courts under an indictment for a crime against its laws will not be released on habeas corpus by a Federal circuit court because the methods by which his personal presence in the state was secured may have violated the provisions of U. S. Const. art. 4, § 2, or U. S. Rev. Stat. § 5278, relating to extradition proceedings.

[No. 249.]

Argued October 10, 11, 1906. Decided December 3, 1906.

APPEAL from the Circuit Court of the United States for the District of Idaho to review a judgment refusing to discharge, on habeas corpus, a person held in custody to await a trial for murder, because of the methods by which his personal presence in the state was secured. Affirmed.

The facts are stated in the opinion.

Messrs. Edmund F. Richardson and Clarence S. Darrow argued the cause, and, with Mr. John H. Murphy, filed a brief for appellant:

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.

United States v. Lee, 106 U. S. 196-220, 27 L. ed. 171-182, 1 Sup. Ct. Rep. 240; Burton v. United States, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688.

Jurisdiction of the subject-matter in a court is one thing; jurisdiction of a person in any wise related to that subject-matter is quite another.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

A conspiracy is defined to be "the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end."

2 Bishop, Crim. Law, § 171.

No provision of law exists for the extradition of one who is charged to have constructively committed an offense, in a state in which he was not present. The Constitution and the law guards even an offender in such a case as that against extradition.

State v. Hall, 115 N. C. 811, 28 L.R.A. 289, 44 Am. St. Rep. 501, 20 S. E. 729.

This arrest, and the jurisdiction over the person which attached by reason of the arrest, is in violation of the 5th Amendment to the Constitution of the United States, which provides that no person shall be deprived of liberty without due process of law.

3 Words & Phrases Judicially Defined, pp. 2227 et seq.; Davidson v. New Orleans, 96 U. S. 97, 104, 24 L. ed. 616, 619; Missouri P. R. Co. v. Humes, 115 U. S. 512-519, 29 L. ed. 463-465, 6 Sup. Ct. Rep. 110; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A.

NOTE.—As to what papers are necessary to obtain the surrender of a fugitive from another state—see note to Ex parte Hart, 28 L.R.A. 801.

As to who are fugitives from justice under extradition laws—see notes to Re Strauss, 63 C. C. A. 104; Cook v. Hart, 36 L. ed. U. S. 934, and State v. Hall, 28 L. R.A. 289.

As to abduction or wilfully bringing of criminal into jurisdiction as a defense to prosecution—see note to Kingen v. Kelley, 15 L.R.A. 177.

As to scope of review on habeas corpus to procure release of persons sought to be extradited—see notes to Bruce v. Rayner, 62 C. C. A. 506; and Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464.

265, 77 Am. St. Rep. 765, 55 S. W. 627; People v. Adirondack R. Co. 160 N. Y. 225, 54 N. E. 689; State v. Hammer, 116 Iowa, 234, 89 N. W. 1083; Jenkins v. Ballantyne, 8 Utah, 245, 16 L.R.A. 689, 30 Pac. 760.

The arrest and detention of these prisoners is in direct violation of clause 2 of § 2 of art. 4, of the Constitution of the United States, and § 5278 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3597), made in pursuance thereof.

Kentucky v. Dennison, 24 How. 66–110, 16 L. ed. 717–730; People ex rel. Corkran v. Hyatt, 172 N. Y. 176, 60 L.R.A. 774, 92 Am. St. Rep. 706, 64 N. E. 825, 188 U. S. 691–713, 47 L. ed. 657–662, 23 Sup. Ct. Rep. 456; Munsey v. Clough, 196 U. S. 364, 49 L. ed. 515, 25 Sup. Ct. Rep. 282; Tennessee v. Jackson, 1 L.R.A. 370, 36 Fed. 258.

No lawful thing founded upon a wrongful act can be supported.

Ilsley v. Nichols, 12 Pick. 270, 22 Am. Dec. 425; Luttin v. Benin, 11 Mod. 50.

The employment of any subterfuge, scheme, enterprise, pretense, or design by which defendant is brought into the state for the purpose of arresting him must fail, unless warranted by the laws of the land. This is familiar law. The question does not depend upon the honest conviction of the persons engaged in the project, but upon the legality of the act.

Smith v. Meyers, 1 Thomp. & C. 665; Re Lagrave, 45 How. Pr. 301; 2 Wharton, Confl. L. § 849 and note; Re Allen, 13 Blatchf. 271, Fed. Cas. No. 208; Hooper v. Lane, 6 H. L. Cas. 443; Hill v. Goodrich, 32 Conn. 588; Re Robinson, 29 Neb. 135, 8 L.R.A. 398, 26 Am. St. Rep. 378, 45 N. W. 267; Re Walker, 61 Neb. 803; Compton v. Wilder, 40 Ohio St. 130; Adriance v. Lagrave, 59 N. Y. 110, 17 Am. Rep. 317; Browning v. Abrams, 51 How. Pr. 173; Kendall v. Aleshire, 28 Neb. 707, 26 Am. St. Rep. 367, 45 N. W. 167.

The only lawful method by which the bodies of these defendants could have been obtained within the jurisdiction of the state of Idaho was by virtue of § 5278 of the Revised Statutes of the United States, made under and pursuant to clause 2, § 2, of art. 4 of the Constitution.

Lascelles v. Georgia, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687; Re Cook, 49 Fed. 833.

In Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148, this court held that a defendant in extradition had the right to insist upon proof that he was within the demanding state at the time he is alleged to have committed a crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process.

The 14th Amendment forbids any arbitrary deprivation of liberty.

Re Converse, 137 U. S. 624–632, 34 L. ed. 796–799, 11 Sup. Ct. Rep. 191; Hodgson v. Vermont, 168 U. S. 262–273, 42 L. ed. 461–464, 18 Sup. Ct. Rep. 80.

The question is one arising under the Constitution and laws of the United States, and the prisoners have the right to the independent judgment of the Federal courts upon the subject of their detention. The Federal courts have sometimes required the prisoner to await the action of the state courts, upon the theory that the state courts were as likely to administer the law as were the courts of the United States; and they have sometimes withheld relief on writs of habeas corpus, and required defendants, who were convicted, to sue out writs of error; but they have never denied the authority of the Federal courts in the premises.

Robb v. Connolly, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544; Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; Bruce v. Rayner, 62 C. C. A. 501, 124 Fed. 481; Ex parte Hart, 28 L.R.A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249; Re Roberts, 24 Fed. 132; Ex parte Brown, 28 Fed. 653; Ex parte Morgan, 20 Fed. 298; Ex parte Robb, 9 Sawy. 568, 19 Fed. 26; Re Doo Woon, 9 Sawy. 417, 18 Fed. 898; Ex parte McKean, 3 Hughes, 23, Fed. Cas. No. 8,848.

We are without any manner of remedy, in any way, shape, or form, except in this tribunal; and, under the circumstances of this case, the time to take jurisdiction is now. The circumstances warrant it, and the decisions of this court uphold it.

Allen v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; Whitten v. Tomlinson, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297.

We know that habeas corpus cannot usurp the functions of a writ of error, but habeas corpus is pre-eminently the writ on which to test jurisdiction, not error within jurisdiction. A fatal defect in jurisdiction itself is the question presented by this record.

Felts v. Murphy, 201 U. S. 123, 50 L. ed. 689, 26 Sup. Ct. Rep. 366; Valentina v. Mercer, 201 U. S. 131, 50 L. ed. 693, 26 Sup. Ct. Rep. 368; Whitney v. Dick, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 584; Re Wood (Wood v. Brush) 140 U. S. 278, 35 L. ed. 505, 11 Sup. Ct. Rep. 738.

Whatever the usual rule may be, it has recently been held that special circumstances authorize a departure from it.

Re Lincoln, 202 U. S. 178, 50 L. ed. 984, 26 Sup. Ct. Rep. 602.

Mr. James H. Hawley argued the cause, and, with Mr. W. E. Borah, filed a brief for appellee:

There is no right of asylum in a sister state by one who commits a crime against the laws of a state, either while personally on its soil or while in a foreign jurisdiction, and acting through some other agency or medium.

Mahon v. Justice, 127 U. S. 715, 32 L. ed. 288, 8 Sup. Ct. Rep. 1204; Lascelles v. Georgia, 148 U. S. 543, 37 L. ed. 551, 13 Sup. Ct. Rep. 687; Ker v. Illinois, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225; Re Moore, 75 Fed. 824.

This court will not interfere to relieve persons who have been arrested and taken by violence from the territory of one state to that of another, where they are held under process legally issued from the courts of the latter state. The question of the applicability of this doctrine to a particular case is as much within the province of a state court as a question of common law or of the law of nations, as it is of the courts of the United States.

Mahon v. Justice, and Ker v. Illinois, supra.

The question as to how the accused person has come within the state wherein the crime was committed cannot be inquired into by the courts of such state. It is not a cause of exemption from prosecution for a crime that the accused was illegally arrested or unlawfully brought within the jurisdiction.

13 Enc. Law & Proc. p. 99; 12 Am. & Eng. Enc. Law, p. 607; Church, Habeas Corpus, 461; Ex parte Ker, 18 Fed. 167; Ex parte Barker, 87 Ala. 4, 13 Am. St. Rep. 17, 6 So. 7; State v. Smith, 1 Bail. L. 283, 19 Am. Dec. 679; State v. Ross, 21 Iowa, 467; Dows's Case, 18 Pa. 37; Cook v. Hart, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40; Re Johnson, 167 U. S. 120, 42 L. ed. 103, 17 Sup. Ct. Rep. 735.

No case is here presented that can properly be said to come within the exception to the prohibition contained in § 753 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 592), or which will authorize the issuance of the writ by a United States court.

Ker v. Illinois, 119 U. S. 436–442, 444, 30 L. ed. 421–425, 7 Sup. Ct. Rep. 225; State v. Brewster, 7 Vt. 118; Dows's Case, supra; Re Miles, 52 Vt. 609; Mahon v. Justice, 127 U. S. 707–712, 32 L. ed. 285–287, 8 Sup. Ct. Rep. 1204; Re Mahon, 34 Fed. 525.

There is no limitation or restriction upon the crime for which a man may be extradited in interstate extradition; that duty is equally imperative as to all crimes, and no right of return is provided for or necessarily implied.

2 Moore, Extradition, §§ 643, 644; New Jersey v. Noyes, Fed. Cas. No. 10,164; Ham v. State, 4 Tex. App. 645; Harland v. Washington, 3 Wash. Terr. 153, 13 Pac. 453; Dows's Case, supra; State ex rel. Brown v. Stewart, 60 Wis. 587, 50 Am. Rep. 388, 19 N. W. 429; Ex parte Barker, supra; William v. Weber, 1 Colo. App. 191, 28 Pac. 21; State v. Brewster, 7 Vt. 120; Adriance v. Lagrave, 59 N. Y. 110, 17 Am. Rep. 317; United States v. Caldwell, 8 Blatchf. 133, Fed. Cas. No. 14,707; United States v. Lawrence, 13 Blatchf. 299, Fed. Cas. No. 15,573; People v. Rowe, 4 Park. Crim. Rep. 253; Re Miles, supra; Mahon v. Justice, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204.

The court will not inquire into the legality of arrest. That the accused is in court is sufficient to require him to answer the indictment against him.

12 Am. & Eng. Enc. Law, p. 598; Ex parte Scott, 9 Barn. & C. 446; Ker v. Illinois, 119 U. S. 436, 442, 444, 30 L. ed. 421–425, 7 Sup. Ct. Rep. 225; State v. Kealy, 89 Iowa, 94, 56 N. W. 283; State v. Patterson, 116 Mo. 505, 22 S. W. 696; Mahon v. Justice, State v. Smith, New Jersey v. Noyes, Ex parte Barker, State v. Ross, and Dows's Case, supra.

Irrespective of the methods pursued in securing the person wanted after the requisition has been honored, and the prisoner is within the jurisdiction of the demanding state, complaint comes too late when relief is asked for in the courts of the demanding state, questioning the regularity of the proceedings.

Mahon v. Justice, supra.

And, when that has happened, no Federal question remains.

Re Cook, 49 Fed. 841, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40.

The fact of the governor of either state having acted wrongfully or in collusion is not material.

People v. Pratt, 78 Cal. 349, 20 Pac. 731.

Mr. Justice Harlan delivered the opinion of the court:

This is an appeal from a judgment of the circuit court of the United States for the district of Idaho, refusing, upon habeas corpus, to discharge the appellant, who alleged that he was held in custody by the sheriff of Canyon county, in that state, in violation of the Constitution and laws of the United States.

It appears that on the 12th day of February, 1906, a criminal complaint verified by the oath of the prosecuting attorney of that county and charging Pettibone with having murdered Frank Steunenberg at Caldwell,

Idaho, on the 30th day of December, 1905, was filed in the office of the probate judge. Thereupon, a warrant of arrest based upon that complaint having been issued, application was made to the governor of Idaho for a requisition upon the governor of Colorado (in which state the accused was alleged then to be) for the arrest of Pettibone, and his delivery to the agent of Idaho, to be conveyed to the latter state and there dealt with in accordance with law. The papers on which the governor of Idaho based his requisition distinctly charged that Pettibone was in that state at the time Steunenberg was murdered and was a fugitive from its justice.

A requisition by the governor of Idaho was accordingly issued and was duly honored by the governor of Colorado, who issued a warrant commanding the arrest of Pettibone and his delivery to the authorized agent of Idaho, to be conveyed to the latter state. Pettibone was arrested under that warrant and carried to Idaho by its agent, and was there delivered by order of the probate judge into the custody of the [194]warden *of the state penitentiary, the jail of the county being deemed at that time an unfit place.

On the 23d day of February, 1906, Pettibone sued out a writ of habeas corpus from the supreme court of Idaho. The warden made a return, stating the circumstances under which the accused came into his custody, and also that the charge against Pettibone was then under investigation by the grand jury. To this return the accused made an answer embodying the same matters as were alleged in the application for the writ of habeas corpus, and charging, in substance, that his presence in Idaho had been procured by connivance, conspiracy, and fraud on the part of the executive officers of Idaho, and that his detention was in violation of the provisions of the Constitution of the United States and of the act of Congress relating to fugitives from justice.

Subsequently, March 7th, 1906, the grand jury returned an indictment against Pettibone, William D. Haywood, Charles H. Moyer, and John L. Simpkins, charging them with the murder of Steunenberg on the 30th of December, 1905, at Caldwell, Idaho. Having been arrested and being in custody under that indictment, the officer holding Pettibone made an amended return stating the fact of the above indictment, and that he was then held under a bench warrant based thereon.

At the hearing before the supreme court of the state the officers having Pettibone in custody moved to strike from the answer of the accused all allegations relating to the manner and method of obtaining his presence within the state. That motion was sustained March 12th, 1906, and the prisoner was remanded to await his trial under the above indictment. The supreme court of Idaho held the action of the governor of Colorado to be at least quasi judicial and, in effect, a determination that Pettibone was charged with the commission of a crime in the former state and was a fugitive from its justice; that, after the prisoner came within the jurisdiction of the demanding state, he could not raise in its courts the question whether he was or had been, as a matter of fact, a fugitive from *the justice[195] of that state; that the courts of Idaho had no jurisdiction to inquire into the acts or motives of the executive of the state delivering the prisoner; that "one who commits a crime against the laws of a state, whether committed by him while in person on its soil, or *absent in a foreign jurisdiction, and acting through some other agency or medium*, has no vested right of asylum in a sister state," and the fact "that a wrong is committed against him in the manner or method pursued in subjecting his person to the jurisdiction of the complaining state, and that such wrong is redressible either in the civil or criminal courts, can constitute no legal or just reason why he himself should not answer the charge against him when brought before the proper tribunal." Ex parte Moyer, 85 Pac. 897; Ex parte Pettibone, 85 Pac. 902.

From the judgment of the supreme court of Idaho a writ of error was prosecuted to this court. That case is No. 265 on the docket of the present term, but the record has not been printed. But the parties agree that the same questions are presented on this appeal as arise in that case, and as this case is one of urgency in the affairs of a state, we have acceded to the request that they may be argued and determined on this appeal.

On the 15th of March, 1906, after the final judgment in the supreme court of Idaho, Pettibone made application to the circuit court of the United States, sitting in Idaho, for a writ of habeas corpus, alleging that he was restrained of his liberty by the sheriff of Canyon county, in violation of the Constitution and laws of the United States. As was done in the supreme court of Idaho, the accused set out numerous facts and circumstances which, he contended, showed that his personal presence in Idaho was secured by fraud and connivance on the part of the executive officers and agents of both Idaho and Colorado, in violation of the constitutional and statutory provisions relating to fugitives from justice. Consequently, it was argued, the court in Idaho did not

acquire jurisdiction over his person. The [196]officer having Pettibone in *custody made return to the writ that he then held the accused under the bench warrant issued against him. It was stipulated that the application for the writ of habeas corpus might be taken as his answer to the return. Subsequently, on motion, that answer was stricken out by the circuit court as immaterial, the writ of habeas corpus was quashed, and Pettibone was remanded to the custody of the state.

As the application for the writ of habeas corpus was, by stipulation of the parties, taken as the answer of the accused to the return of the officer holding him in custody, and as that answer was stricken out by the court below as immaterial, we must, on this appeal, regard as true all the facts sufficiently alleged in the application, which, in a legal sense, bear upon the question whether the detention of the accused by the state authorities was in violation of the Constitution or laws of the United States.

That application is too lengthy to be incorporated at large in this opinion. It is sufficient to say that its allegations present the case of a conspiracy between the governors of Idaho and Colorado, and the respective officers and agents of those states, to have the accused taken from Colorado to Idaho under such circumstances and in such way as would deprive him, while in Colorado, of the privilege of invoking the jurisdiction of the courts there for his protection against wrongful deportation from the state, [201]—it being alleged that the governor *of Idaho, the prosecuting attorney of Canyon-county, and the private counsel who advised them, well knew all the time that "he was not in the state of Idaho on the 30th day of December, 1905, nor at any time near that date." The application also alleged that the accused "is not and was not a fugitive from justice; that he was not present in the state of Idaho when the alleged crime was alleged to have been committed, nor for months prior thereto, nor thereafter, until brought into the state as aforesaid."

In the forefront of this case is the fact that the appellant is held in actual custody for trial under an indictment in one of the courts of Idaho for the crime of murder, charged to have been committed in that state, against its laws, and it is the purpose of the state to try the question of his guilt or innocence of that charge.

Undoubtedly, the circuit court had jurisdiction to discharge the appellant from the custody of the state authorities if their exercise of jurisdiction over his person would be in violation of any rights secured to him by the Constitution or laws of the United States. But that court had a discretion as to the time and mode in which, by the exercise of such power, it would, by its process, obstruct or delay a criminal prosecution in the state court. The duty of a Federal court to interfere, on habeas corpus, for the protection of one alleged to be restrained of his liberty in violation of the Constitution or laws of the United States, must often be controlled by the special circumstances of the case; and unless in some emergency demanding prompt action, the party held in custody by a state, and seeking to be enlarged, will be left to stand his trial in the state court, which, it will be assumed, will enforce—as it has the power to do equally with a court of the United States (Robb v. Connolly, 111 U. S. 624, 637, 28 L. ed. 542, 546, 4 Sup. Ct. Rep. 544)—any right secured by the supreme law of the land. "When the state court," this court has said, "shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused if convicted, shall be *put to his[202] writ of error from the highest court of the state, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States." Ex parte Royall, 117 U. S. 241, 251-253, 29 L. ed. 868, 871, 872, 6 Sup. Ct. Rep. 734. To the same effect are numerous cases in this court, among which may be named Ex parte Fonda, 117 U. S. 516, 29 L. ed. 994, 6 Sup. Ct. Rep. 848; New York v. Eno, 155 U. S. 89, 93, 39 L. ed. 80, 82, 15 Sup. Ct. Rep. 30; Cook v. Hart, 146 U. S. 183, 192, 36 L. ed. 934, 939, 13 Sup. Ct. Rep. 40; Minnesota v. Brundage, 180 U. S. 499, 501, 45 L. ed. 639, 640, 21 Sup. Ct. Rep. 455; Reid v. Jones, 187 U. S. 153, 47 L. ed. 116, 23 Sup. Ct. Rep. 89; Riggins v. United States, 199 U. S. 547, 549, 50 L. ed. 303, 304, 26 Sup. Ct. Rep. 147. This rule, firmly established for the guidance of the courts of the United States, is applicable here, although it appears that the supreme court of Idaho has already decided some of the questions now raised. But the question of Pettibone's guilt of the crime of having murdered Steunenberg has not, however, been finally determined, and cannot be except by a trial under the laws and in the courts of Idaho. If he should be acquitted by the jury, then no question will remain as to a violation of the Constitution and laws of the United States by the methods adopted to secure his personal presence within the state of Idaho.

The appellant, however, contends that the principle settled in Ex parte Royall and other like cases can have application only where the state has legally acquired jurisdiction over the person of the accused, and

cannot apply when, as is alleged to be the case here, his presence in Idaho was obtained by fraud and by a violation of rights guaranteed by the Constitution and laws of the United States. Under such circumstances, it is contended, no jurisdiction could legally attach for the purpose of trying the accused under the indictment for murder.

In support of this view we have been referred to that clause of the Constitution of the United States providing that if "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having juris-
[203] diction of the crime." Art. 4, § 2; *also, to § 5278 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3597), in which it is provided that "whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand shall be paid by such state or territory."

Looking, first, at what was alleged to have occurred in the state of Colorado touching the arrest of the petitioner and his deportation from that state, we do not perceive that anything done there, however hastily or inconsiderately done, can be adjudged to be in violation of the Constitution or laws of the United States. We pass by, both as immaterial and inappropriate, any consideration of the motives that induced the action of the governor of Colorado. This court will not inquire as to the motives which guided the chief magistrate of a state when executing the functions of his office. Manifestly, whatever authority may have been conferred upon the governor of Colorado by the Constitution or laws of his state, he was not required, indeed, was not authorized, by the Constitution or laws of the United States, to have the petitioner arrested, unless, within the meaning of such Constitution *and laws, he was a fugitive from [204] the justice of Idaho. Therefore he would not have violated his duty if it had been made a condition of surrendering the petitioner that evidence be furnished that he was a fugitive from justice within the meaning of the Constitution of the United States. Upon the governor of Colorado rested the responsibility of determining, in some proper mode, what the fact was. But he was not obliged to demand proof of such fact by evidence apart from the requisition papers. As those papers showed that the accused was regularly charged by indictment with the crime of murder committed in Idaho, and was a fugitive from its justice, the governor of Colorado was entitled to accept such papers, coming, as they did, from the governor of another state, as prima facie sufficient for a warrant of arrest. His failure to require independent proof of the fact that petitioner was a fugitive from justice cannot be regarded as an infringement of any right of the petitioner under the Constitution or laws of the United States. Ex parte Reggel, 114 U. S. 642, 652, 653, 29 L. ed. 250, 253, 254, 5 Sup. Ct. Rep. 1148. In Munsey v Clough, 196 U. S. 364, 372, 49 L. ed. 515, 516, 25 Sup. Ct. Rep. 282, this court said that the issuing of a warrant of arrest by the governor of the surrendering state, "with or without a recital therein that the person demanded is a fugitive from justice, must be regarded as sufficient to justify the removal, until the presumption in favor of the legality and regularity of the warrant is overthrown by contrary proof in a legal proceeding to review the action of the governor. Roberts v. Reilly, 116 U. S. 80, 95, 29 L. ed. 544, 549, 6 Sup. Ct. Rep. 291; Hyatt v. New York, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456." See also Re Keller, 36 Fed. 681, 686.

But the petitioner contends that his arrest and deportation from Colorado was, by fraud and connivance, so arranged and carried out as to deprive him of an opportunity to prove, before the governor of that state, that he was not a fugitive from justice, as well as opportunity to appeal to some court in Colorado to prevent his illegal deportation from its territory. If we should assume, upon the present record, that the facts are as alleged, it is not perceived that they make a case of the *violation of the Constitution [205] or laws of the United States. It is true, as contended by the petitioner, that if he was not a fugitive from justice, within the meaning of the Constitution, no warrant for his

arrest could have been properly or legally issued by the governor of Colorado. It is equally true that, even after the issuing of such a warrant, before his deportation from Colorado, it was competent for a court, Federal or state, sitting in that state, to inquire whether he was, in fact, a fugitive from justice, and, if found not to be, to discharge him from the custody of the Idaho agent, and prevent his deportation from Colorado. Robb v. Connolly, 111 U. S. 624, 639, 28 L. ed. 542, 547, 4 Sup. Ct. Rep. 544; Ex parte Reggel, supra; Hyatt v. New York, 188 U. S. 691, 719, 47 L. ed. 657, 664, 23 Sup. Ct. Rep. 456; Munsey v. Clough, 196 U. S. 364, 374, 49 L. ed. 515, 517, 25 Sup. Ct. Rep. 282. But it was not shown by proof before the governor of Colorado that the petitioner, alleged in the requisition papers to be a fugitive from justice, was not one, nor was the jurisdiction of any court sitting in that state invoked to prevent his being taken out of the state and carried to Idaho. That he had no reasonable opportunity to present these facts before being taken from Colorado constitutes no legal reason why he should be discharged from the custody of the Idaho authorities. No obligation was imposed *by the Constitution or laws of the United States* upon the agent of Idaho to so time the arrest of the petitioner, and so conduct his deportation from Colorado, as to afford him a convenient opportunity, before some judicial tribunal sitting in Colorado, to test the question whether he was a fugitive from justice, and, as such, liable, under the act of Congress, to be conveyed to Idaho for trial there. In England, in the case of one arrested for the purpose of deporting him to another country, it is provided that there shall be no surrender of the accused to the demanding country until after the expiration of a specified time from the arrest, during which period the prisoner has an opportunity to institute habeas corpus proceedings. Extradition Act of 1870, 33 and 34 Vict. chap. 52, § 11; 2 Butler, Treaty-Making Power, § 433; 1 Moore, Extradition, 741, 742. There is no similar act of Congress [206] in respect of a person *arrested in one of the states of the Union as a fugitive from the justice of another state. The speediness, therefore, with which the Idaho agent removed the accused from Colorado, cannot be urged as a violation of a constitutional right, and constitutes no legal reason for discharging him from the custody of the state of Idaho.

We come now to inquire whether the petitioner was entitled to his discharge upon making proof in the circuit court of the United States, sitting in Idaho, that he was brought into that state as a fugitive from justice when he was not, in fact, such a fugitive. Of course, it cannot be conten that the circuit court, sitting in Idaho, co rightfully discharge the petitioner u proof simply that he did not commit crime of murder charged against him. guilt or innocence of that charge is wit the exclusive jurisdiction of the Idaho st court. The constitutional and statutory p visions referred to were based upon theory that, as between the states, proper place for the inquiry into the qu tion of the guilt or innocence of an alleg fugitive from justice is in the courts of state where the offense is charged to ha been committed. The question, therefore, the court below, was not whether the cused was guilty or innocent, but wheth the Idaho court could properly be prevent from proceeding in the trial of that issu upon proof being made in the circuit cou of the United States, sitting in that stat that the petitioner was not a fugitive fro justice, and not liable, in virtue of the Co stitution and laws of the United States, arrest in Colorado under the warrant of i governor, and carried into Idaho. As th petitioner is within the jurisdiction of Id ho, and is held by its authorities for tria are the particular methods by which he w brought within her limits at all material i the proceeding by habeas corpus?

It is contended by the state that th question was determined in its favor by th former decisions of this court. This is co troverted by the petitioner, and we mu therefore, and particularly because of t unusual character of this case and *the i portance of the questions involved, see wh this court has heretofore adjudged.

In Ker v. Illinois, 119 U. S. 436, 30 L. e 421, 7 Sup. Ct. Rep. 225, it appeared that the trial in an Illinois court of a pers charged with having committed a cri against the laws of that state, the accus sought, by plea in abatement, to defeat t jurisdiction of the court upon the grou that, in violation of law, he had been sei in Peru, and forcibly brought against will into the United States, and delivered the authorities of Illinois; all of which accused contended was in violation, not o of due process of law, as guaranteed by 14th Amendment, but of the treaty betw the United States and Peru, negotiated 1870, and proclaimed in 1874. One of articles of that treaty bound the contra ing countries, upon a requisition by eit country, to deliver up to justice pers who, being accused or convicted of cert named crimes committed within the ju diction of the requiring party, should s an asylum or should be found within territories of the other, the fact of the co mission being so established "as that

laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed." 18 Stat. at L. 719, 720. The plea stated, among other things, that the defendant protested against his arrest, and was refused opportunity, from the time of his being seized in Peru until he was delivered to the authorities of Illinois, of communicating with any person, or seeking any advice or assistance, in regard to procuring his release by legal process or otherwise.

The court overruled the plea of abatement, and the trial in the state court proceeded, resulting in a verdict of guilty. The judgment was affirmed by the supreme court of Illinois, and this court affirmed, upon writ of error, the judgment of the latter court. It was held by the unanimous judgment of this court that, so far as any question of Federal right was involved, no error was committed by the state court; and that, notwithstanding the illegal methods pur-[208] sued in bringing *the accused within the jurisdiction of Illinois, his trial in the state court did not involve a violation of the due process clause of the Constitution, nor any article in the treaty with Peru, although the case was a clear one "of kidnapping within the dominion of Peru, without any pretense of authority under the treaty or from the government of the United States." The principle upon which the judgment rested was that, when a criminal is brought, or is in fact within the jurisdiction and custody of a state, charged with a crime against its laws, the state may, *so far as the Constitution and laws of the United States are concerned*, proceed against him for that crime, and need not inquire as to the particular methods employed to bring him into the state. The case, the court said, "does not stand, when the party is in court, and required to plead to an indictment, as it would have stood upon a writ of habeas corpus in California, or in any state through which he was carried in the progress of this extradition, to test the authority by which he was held." In meeting the contention that the accused Ker, by virtue of the treaty with Peru, acquired by his residence a right of asylum, this court said: "There is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. . . . It is idle, therefore, to claim that, either by express terms or by implication, there is given to a fugitive from justice in one of these countries any right to remain and reside in the other; and if the right of asylum means anything, it must mean this. The right of the government of Peru voluntarily to give a party in Ker's condition an asylum in that country is quite a different thing from the right in him to demand and insist upon security in such an asylum. The treaty, so far as it regulates the right of asylum at all, is intended to limit this right in the case of one who is proved to *be a criminal fleeing from justice[209] so that, on proper demand and proceedings had therein, the government of the country of the asylum shall deliver him up to the country where the crime was committed. And to this extent, and to this alone, the treaty does regulate or impose a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom. . . . We think it very clear, therefore, that, in invoking the jurisdiction of this court upon the ground that the prisoner was denied a right conferred upon him by a treaty of the United States, he has failed to establish the existence of any such right."

If Ker, by virtue of the treaty with Peru, and because of his forcible and illegal abduction from that country, did not acquire an exemption from the criminal process of the courts of Illinois, whose laws he had violated, it is difficult to see how Pettibone acquired, by virtue of the Constitution and laws of the United States, an exemption from prosecution by the state of Idaho, which has custody of his person.

An instructive case on this subject is Mahon v. Justice, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204. The governor of Kentucky made a requisition upon the governor of West Virginia for Mahon, who was charged with the crime of murder in Kentucky, and was alleged to have fled from its jurisdiction and taken refuge in West Virginia. While the two governors were in correspondence on the subject, a body of armed men, without warrant or other legal process, arrested Mahon in West Virginia, and by force and against his will conveyed him out of West Virginia, and delivered him to the jailer of Pike county, Kentucky, in the courts of which he stood indicted for murder. Thereupon the governor of West Virginia, on behalf of that state, applied to the district court of the United States for the Kentucky district for a writ of habeas corpus and his return to the jurisdiction of West Virginia. This court, after observing that the states of the Union were not absolutely sovereign, and could not declare war or authorize reprisals on other states, and that their ability to prevent the forcible ab-

[210]duction of persons from *their territory consists solely in their power to punish all violations of their criminal laws committed within it, whether by their own citizens or by citizens of other states, said: "If such violators have escaped from the jurisdiction of the state invaded, their surrender can be secured upon proper demand on the executive of the state to which they have fled. The surrender of the fugitives in such cases to the state whose laws have been violated is the only aid provided by the laws of the United States for the punishment of depredations and violence committed in one state by intruders and lawless bands from another state. The offenses committed by such parties are against the state; and the laws of the United States merely provide the means by which their presence can be secured in case they have fled from its justice. No mode is provided by which a person unlawfully abducted from one state to another can be restored to the state from which he was taken, if held upon any process of law for offenses against the state to which he has been carried. If not thus held he can, like any other person wrongfully deprived of his liberty, obtain his release on habeas corpus. Whether Congress might not provide for the compulsory restoration to the state of parties wrongfully abducted from its territory upon application of the parties, or of the state, and whether such provision would not greatly tend to the public peace along the borders of the several states, are not matters for present consideration. It is sufficient now that no means for such redress through the courts of the United States have as yet been provided. The abduction of Mahon by Phillips and his aids was made, as appears from the return of the respondent to the writ, and from the findings of the court below, without any warrant or authority from the governor of West Virginia. It is true that Phillips was appointed by the governor of Kentucky as agent of the state to receive Mahon upon his surrender on the requisition; but no surrender having been made, the arrest of Mahon and his abduction from the state were lawless and indefensible acts, for which Phillips and his [211]aid may justly be *punished under the laws of West Virginia. The process emanating from the governor of Kentucky furnished no ground for charging any complicity on the part of that state in the wrong done to the state of West Virginia." Again: "It is true, also, that the accused had the right, while in West Virginia, of insisting that he should not be surrendered to the governor of Kentucky by the governor of West Vrginia, except in pursuance of the acts of Congress, and that he was entitled to release from any arrest in that state not made in accordance with them; but, ha been subsequently arrested in Kentucky der the writs issued on the indictm against him, the question is not as to validity of the proceeding in West Virgi but as to the legality of his detention Kentucky. There is no comity between states by which a person held upon an dictment for a criminal offense in one st can be turned over to the authorities of other, though abducted from the latter. there were any such comity, its enforcem would not be a matter within the juris tion of the courts of the United Sta By comity nothing more is meant than t courtesy on the part of one state, by wh within her territory the laws of anot state are recognized and enforced, or anot state is assisted in the execution of laws. From its nature the courts of United States cannot compel its exer when it is refused; it is admissible only on the consent of the state, and when c sistent with her own interests and pol Bank of Augusta v. Earle, 13 Pet. 519. 10 L. ed. 274, 308; Story, Confl. La § 30. The only question, therefore, sented for our determination, is whe a person indicted for a felony in state, forcibly abducted from another st and brought to the state where he indicted, by parties acting without warr or authority of law, is entitled, under t Constitution or laws of the United States, release from detention under the indictme by reason of such forcible and unlawful a duction."

After a review of the authorities, inclu ing the case of Ker v. Illinois, above cit the court concluded: "So, in this case, *it contended that, because, under the Cons tution and laws of the United States, a fu tive from justice from one state to anot can be surrendered to the state where crime was committed, upon proper proce ings taken, he has the right of asylum the state to which he has fled, unless moved in conformity with such proceedin and that this right can be enforced in courts of the United States. But the pl answer to this contention is, that the la of the United States do not recognize such right of asylum, as is here claimed the part of a fugitive from justice any state to which he has fled; have they, as already stated, made provision for the return of parties w by violence and without lawful auth ity, have been abducted from a state. Th is, therefore, no authority in the courts the United States to act upon any such leged right. In Ker v. Illinois, the court that the question of how far the forc seizure of the defendant in another count

and his conveyance by violence, force, or fraud to this country could be made available to resist trial in the state court for the offense charged upon him, was one which it did not feel called upon to decide, for in that transaction it did not see that the Constitution, or laws, or treaties of the United States guaranteed to him any protection. So in this case we say that, whatever effect may be given by the state court to the illegal mode in which the defendant was brought from another state, no right secured under the Constitution or laws of the United States was violated by his arrest in Kentucky, and imprisonment there, upon the indictments found against him for murder in that state."

These principles determine the present case and require an affirmance of the judgment of the circuit court. It is true, the decision in the Mahon Case was by a divided court, but its authority is none the less controlling. The principle upon which it rests has been several times recognized and reaffirmed by this court, and is no longer to be questioned. It was held in Cook v. Hart, 146 U. S. 183, 192, 36 L. ed. 934, 939, 13 Sup. Ct. Rep. 40, that the cases of Ker v. Illinois and Mahon v. Justice established [213] these propositions: "1. *That this court will not interfere to relieve persons who have been arrested and taken by violence from the territory of one state to that of another, where they are held under process legally issued from the courts of the latter state. 2. That the question of the applicability of this doctrine to a particular case is as much within the province of a state court, as a question of common law or of the law of nations, as it is of the courts of the United States;" in Lascelles v. Georgia, 148 U. S. 537, 543, 37 L. ed. 549, 551, 13 Sup. Ct. Rep. 687, that it was settled in the Ker and Mahon Cases that, "except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties, or laws of the United States which exempts an offender, brought before the courts of a state for an offense against its laws, from trial and punishment, even though brought from another state by unlawful violence, or by abuse of legal process;" and in Adams v. New York, 192 U. S. 585, 596, 48 L. ed. 575, 579, 24 Sup. Ct. Rep. 372 (the same cases being referred to), that "if a person is brought within the jurisdiction of one state from another, or from a foreign country, by the unlawful use of force, which would render the officer liable to a civil action, or in a criminal proceeding, because of the forcible abduction, such fact would not prevent the trial of the person thus abducted in the state wherein he had committed an offense." See also Re Johnson, 167 U. S. 120, 127, 42 L. ed. 103, 105, 17 Sup. Ct. Rep. 735, in which the court recognized the principle that when a party in a civil suit has, by some trick or device, been brought within the jurisdiction of a court, he may have the process served upon him set aside; but that a different rule prevails in criminal cases involving the public interests.

To the above citations we may add Re Moore, 75 Fed. 821, in which it appeared or was alleged that one accused of crime against the laws of a state, and in the custody of its authorities for trial, was brought back from another state as a fugitive from justice by means of an extradition warrant procured by false affidavits. In his application to the circuit court of the United States for a writ of habeas corpus the petition *stated facts and circumstances tending to [214] show that he was not a fugitive from justice. The application was dismissed. After stating that the executive warrant issued by the surrendering state had performed its office, and that the petitioner was not held in virtue of it, the court said: "His imprisonment is not illegal unless his extradition makes it so, and an illegal extradition is no greater violation of his rights of person than his forcible abduction. If a forcible abduction from another state and conveyance within the jurisdiction of the court holding him is no objection to his detention and trial for the offense charged, as held in Mahon v. Justice, 127 U. S. 712, 32 L. ed. 287, 8 Sup. Ct. Rep. 1204, and in Ker v. Illinois, 119 U. S. 437, 30 L. ed. 421, 7 Sup. Ct. Rep. 225, no more is the objection allowed if the abduction has been accomplished under the forms of law. The conclusion is the same in each case. The act complained of does not relate to the restraint from which the petititoner seeks to be relieved, but to the means by which he was brought within the jurisdiction of the court under whose process he is held. It is settled that a party is not excused from answering to the state whose laws he has violated because violence has been done him in bringing him within the state. Moreover, if any injury was done in this case in issuing the requisition upon the state of Washington without grounds therefor, the injury was not to the petitioner, but to that state whose jurisdiction was imposed upon by what was done. The United States do not recognize any right of asylum in the state where a party charged with a crime committed in another state is found, nor have they made any provision for the return of parties who, by violence and without lawful authority, have been abducted from a state, and, whatever effect may be given by a state court to the illegal mode in

which a defendant is brought from another state, no right secured under the Constitution and laws of the United States is violated by his arrest and imprisonment for crimes committed in the state into which he is brought. Mahon v. Justice, 127 U. S. 715, 32 L. ed. 288, 8 Sup. Ct. Rep. 1204."

The principle announced in the Mahon and [215] other cases above *cited was not a new one. It has been distinctly recognized in the courts of England and in many states of the Union. In Ex parte Scott (1829) 9 Barn. & C. 446, one accused of crime against the laws of England, and who was in custody for trial, sought to be discharged upon habeas corpus because she had been improperly apprehended in a foreign country. Lord Tenterden, Ch. J., said: "The question, therefore, is this: Whether, if a person charged with a crime is found in this country, it is the duty of the court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them. If the act complained of were done against the law of the foreign country, that country might have vindicated its own law. If it gave her a right of action she may sue upon it." Some of the American cases, to the same general effect, are cited in Mahon v. Justice, namely: State v. Smith, 1 Bailey, 283, 19 Am. Dec. 679; State v. Brewster, 7 Vt. 118; State v. Ross, 21 Iowa, 467. See also Dow's Case, 18 Pa. 37; State v. Kealy, 89 Iowa, 94, 97, 56 N. W. 283; Ex parte Barker, 87 Ala. 4, 8, 13 Am. St. Rep. 17, 6 So. 7; People v. Pratt, 78 Cal. 345, 349, 20 Pac. 731; Church, Habeas Corpus, § 483, and authorities cited in notes, and note to Re Fetter, 57 Am. Dec. 389, 400.

It is said that the present case is distinguishable from the Mahon Case in the fact that the illegal abduction complained of in the latter was by persons who neither acted nor assumed to act under the authority of the state into the custody of whose authorities they delivered Mahon; whereas, in this case, it is alleged that Idaho secured the presence of Pettibone within its limits through a conspiracy on the part of its governor and other officers. This difference in the cases is not, we think, of any consequence as to the principle involved; for the question now is—and such was the fundamental question in Mahon's Case—whether a circuit court of the United States when asked, upon habeas corpus, to discharge a person held in actual custody by a state for [216] trial in one of its courts *under an indictment charging a crime against its laws, can properly take into account the methods whereby the state obtained such custody. That question was determined in the negative in the Ker and Mahon Cases. It was there adjudged that in such a case neither the Constitution nor laws of the United States entitled the person so held to be discharged from custody and allowed to depart from the state. If, as suggested, the application of these principles may be attended by mischievous consequences, involving the personal safety of individuals within the limits of the respective states, the remedy is with the lawmaking department of the government. Congress has long been informed by judicial decisions as to the state of the law upon this general subject.

In this connection it may be well to say that we have not overlooked the allegation that the governor and other officers of Idaho well knew at the time the requisition was made upon the governor of Colorado, that Pettibone was not in Idaho on December 30th, 1905, nor at any time near that date, and had the purpose in all they did to evade the constitutional and statutory provisions relating to fugitives from justice. To say nothing of the impropriety of any such facts being made the subject of judicial inquiry in a Federal court, the issue thus attempted to be presented was wholly immaterial. Even were it conceded, for the purposes of this case, that the governor of Idaho wrongfully issued his requisition, and that the governor of Colorado erred in honoring it and in issuing his warrant of arrest, the vital fact remains that Pettibone is held by Idaho in actual custody for trial under an indictment charging him with crime against its laws, and he seeks the aid of the circuit court to relieve him from custody, so that he may leave that state and thereby defeat the prosecution against him without a trial. In the present case it is not necessary to go behind the indictment and inquire as to how it happened that he came within reach of the the process of the Idaho court in which the indictment is pending. And any investigation as to the motives which induced the action taken by *the governors of Idaho and Colo- [217] rado would, as already suggested, be improper as well as irrelevant to the real question to be now determined. It must be conclusively presumed that those officers proceeded throughout this affair with no evil purpose and with no other motive than to enforce the law.

We perceive no error in the action of the Circuit Court, and its final order is affirmed.

Mr. Justice McKenna, dissenting:

I am constrained to dissent from the opinion and judgment of the court. The principle announced, as I understand it, is that "a circuit court of the United States, when asked upon habeas corpus, to dis-

charge a person held in actual custody by a state for trial in one of its courts under an indictment charging a crime against its laws, cannot properly take into account the methods whereby the state obtained such custody." In other words, and to illuminate the principle by the light of the facts in this case (facts, I mean, as alleged, and which we must assume to be true for the purpose of our discussion), that the officers of one state may falsely represent that a person was personally present in the state and committed a crime there, and had fled from its justice, may arrest such person and take him from another state, the officers of the latter knowing of the false accusation, and conniving in and aiding its purpose, thereby depriving him of an opportunity to appeal to the courts, and that such person cannot invoke the rights guaranteed to him by the Constitution and statutes of the United States in the state to which he is taken. And this, it is said, is supported by the cases of Ker v. Illinois, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225, and Mahon v. Justice, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204. These cases, extreme as they are, do not justify, in my judgment, the conclusion deduced from them. In neither case was the state the actor in the wrongs that brought within its confines the accused person. In the case at bar, the states, [218] through their officers, are the *offenders. They, by an illegal exertion of power, deprived the accused of a constitutional right. The distinction is important to be observed. It finds expression in Mahon v. Justice. But it does not need emphasizing. Kidnapping is a crime, pure and simple. It is difficult to accomplish; hazardous at every step. All of the officers of the law are supposed to be on guard against it. All of the officers of the law may be invoked against it. But how is it when the law becomes the kidnapper? When the officers of the law, using its forms, and exerting its power, become abductors? This is not a distinction without a difference,—another form of the crime of kidnapping, distinguished only from that committed by an individual by circumstances. If a state may say to one within her borders and upon whom her process is served, "I will not inquire how you came here; I must execute my laws and remit you to proceedings against those who have wronged you," may she so plead against her own offenses? May she claim that by mere physical presence within her borders, an accused person is, within her jurisdiction, denuded of his constitutional rights, though he has been brought there by her violence? And constitutional rights the accused in this case certainly did have, and valuable ones. The foundation of extradition between the states is that the accused should be a fugitive from justice from the demanding state, and he may challenge the fact by habeas corpus immediately upon his arrest. If he refute the fact he cannot be removed. Hyatt v. New York, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456. And the right to resist removal is not a right of asylum. To call it so in the state where the accused is is misleading. It is the right to be free from molestation. It is the right of personal liberty in its most complete sense. And this right was vindicated in Hyatt v. New York, and the fiction of a constructive presence in a state and a constructive flight from a constructive presence, rejected. This decision illustrates at once the value of the right and the value of the means to enforce the right. It is to be hoped that our criminal jurisprudence will not need for its efficient administration the *destruction of either the [219] right or the means to enforce it. The decision in the case at bar, as I view it, brings us perilously near both results. Is this exaggeration? What are the facts in the case at bar as alleged in the petition, and which it is conceded must be assumed to be true? The complaint, which was the foundation of the extradition proceedings, charged against the accused the crime of murder on the 30th of December, 1905, at Caldwell, in the county of Canyon, state of Idaho, by killing one Frank Steunenberg, by throwing an explosive bomb at and against his person. The accused avers in his petition that he had not been "in the state of Idaho, in any way, shape, or form, for a period of more than ten years" prior to the acts of which he complained, and that the governor of Idaho knew accused had not been in the state the day the murder was committed, "nor at any time near that day." A conspiracy is alleged between the governor of the state of Idaho and his advisers, and that the governor of the state of Colorado took part in the conspiracy, the purpose of which was "to avoid the Constitution of the United States and the act of Congress made in pursuance thereof, and to prevent the accused from asserting his constitutional right under clause 2, § 2, of article 4, of the Constitution of the United States and the act made pursuant thereof." The manner in which the alleged conspiracy had been executed was set out in detail. It was in effect that the agent of the state of Idaho arrived in Denver, Thursday, February 15, 1906, but it was agreed between him and the officers of Colorado that the arrest of the accused should not be made until some time in the night of Saturday, after business hours,—after the

courts had closed and judges and lawyers had departed to their homes; that the arrest should be kept a secret, and the body of the accused should be clandestinely hurried out of the state of Colorado with all possible speed, without the knowledge of his friends or his counsel; that he was at the usual place of business during Thursday, Friday, and Saturday, but no attempt was made to arrest him until 11:30 o'clock P. M. Satur-
[220] day, *when his house was surrounded and he arrested. Moyer was arrested under the same circumstances at 8:45, and he and accused "thrown into the county jail of the city and county of Denver." It is further alleged that, in pursuance of the conspiracy, between the hours of 5 and 6 o'clock on Sunday morning, February 18, the officers of the state and "certain armed guards, being a part of the forces of the malitia of the state of Colorado," provided a special train for the purpose of forcibly removing him from the state of Colorado, and between said hours he was forcibly placed on said train and removed with all possible speed to the state of Idaho; that prior to his removal, and at all times after his incarceration in the jail at Denver, he requested to be allowed to communicate with his friends and his counsel and his family, and the privilege was absolutely denied him. The train, it is alleged, made no stop at any considerable station, but proceeded at great and unusual speed; and that he was accompanied by and surrounded with armed guards, members of the state militia of Colorado, under the orders and directions of the adjutant general of the state.

I submit that the facts in this case are different in kind and transcend in consequences those in the cases of Ker v. Illinois and Mahon v. Justice, and differ from and transcend them as the power of a state transcends the power of an individual. No individual or individuals could have accomplished what the power of the two states accomplished; no individual or individuals could have commanded the means and success; could have made two arrests of prominent citizens by invading their homes; could have commanded the resources of jails, armed guards, and special trains; could have successfully timed all acts to prevent inquiry and judicial interference.

The accused, as soon as he could have done so, submitted his rights to the consideration of the courts. He could not have done so in Colorado, he could not have done so on the way from Colorado. At the first instant that the state of Idaho relaxed its restrain-
[221] ing power, he invoked the aid of *habeas corpus successively of the supreme court of the state and of the circuit court of the United States. He should not have been dismissed from court, and the action of the circuit court in so doing should be reversed.

I also dissent in Nos. 250, 251, 265, 266, and 267.

CHARLES H. MOYER, Appt.,
v.
JASPER C. NICHOLS.

(See S. C. Reporter's ed. 221, 222.)

This case is governed by the decision in Pettibone v. Nichols, ante, 148.

[No. 250.]

Argued October 10, 11, 1906. Decided December 3, 1906.

APPEAL from the Circuit Court of the United States for the District of Idaho to review a judgment refusing to discharge, on habeas corpus, a person held in custody to await a trial for murder, because of the methods by which his personal presence in the state was secured. Affirmed.

The facts are stated in the opinion.

Messrs. Edmund F. Richardson and Clarence S. Darrow argued the cause, and, with Mr. John H. Murphy, filed a brief for appellant.

Mr. James H. Hawley argued the cause, and, with Mr. W. E. Borah, filed a brief for appellee.

For their contentions see their briefs as reported in Pettibone v. Nichols, ante, 148.

Mr. Justice Harlan delivered the opinion of the court:

This case does not differ, in principle or in its facts, from Pettibone v. Nichols, just decided. Moyer was also charged with the murder of Steunenberg, and was arrested in Colorado, upon the warrant of the governor of that state, and taken to Idaho, and delivered to its authorities. He was embraced in the same indictment with Pettibone, and was held in custody for trial under that indictment. He sued out a writ of habeas corpus from the supreme court of Idaho, but the writ was *dismissed by that court (Ex parte Moyer, 85 Pac. 897), and a writ of error has been prosecuted to this court. That is case No. 266 on our present docket. He then sued out a writ of habeas corpus from the circuit court of the United States, and his discharge being refused by the court, he prosecuted the present appeal.

For the reason stated in Pettibone's Case, the final order is affirmed.

The final order of the circuit court of the

tates for Idaho, in Haywood v. o. 251, on appeal, is affirmed on the of Pettibone v. Nichols, 203 U. S. 148, 27 Sup. Ct. Rep. 111, from to the facts or the questions it does not differ. The orders in v. Whitney, No. 265, Morey v. No. 266, and Haywood v. Whitney, each of which cases is here upon ror to the supreme court of Idaho, the same question as those deter- Pettibone v. Nichols, and by agree- depend upon the judgment in that ist also be affirmed.
ordered.

HUR E. APPLEYARD, Appt.,
v.
ONWEALTH OF MASSACHU-SETTS.

S. C. Reporter's ed. 222-232.)

on—fugitives from justice.
e belief of the accused, when leav- demanding state, that he had not d any crime against the laws of e, does not prevent his being a fu- m justice within the meaning of sion of U. S. Const. art. 4, § 2, and v. Stat. § 5278 (U. S. Comp. Stat. 3597), relating to extradition pro-

on—fugitives from justice.
be a fugitive from justice within ning of the provisions of U. S. t. 4, § 2, and U. S. Rev. Stat. § ting to extradition proceedings, it ecessary that the accused, having he demanding state when the crime mitted, thereafter leave that state ound within the territory of an-

[No. 115.]

d November 16, 1906. Decided December 3, 1906.

L from the Circuit Court of the d States for the District of Mas- s to review a judgment discharging habeas corpus to inquire into a de- nder an order of arrest in extradi- eedings. Affirmed.
cts are stated in the opinion.
njamin S. Minor submitted the appellant. Mr. Fred H. Williams the brief:
ppellant was not a fugitive from

Hyatt v. New York, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456; United States v. O'Brian, 3 Dill. 381, Fed. Cas. No. 15,908; 24 Am. Jur. 226; 6 Pa. L. J. 418; Re Tod, 12 S. Dak. 386, 47 L.R.A. 566, 76 Am. St. Rep. 616, 81 N. W. 637.

Mr. Dana Malone submitted the cause for appellee. Mr. Frederic B. Greenhalge was on the brief:

Whether or not Appleyard was a fugitive from justice is a pure question of fact.

Roberts v. Reilly, 116 U. S. 80, 95, 29 L. ed. 544, 549, 6 Sup. Ct. Rep. 291; Ex parte Reggel, 114 U. S. 642, 651, 29 L. ed. 250, 253, 5 Sup. Ct. Rep. 1148. See also Hyatt v. Cockran, 188 U. S. 691, 709, 47 L. ed. 657, 660, 23 Sup. Ct. Rep. 456.

This court will not revise the findings of fact of the trial court if there is evidence adequate to justify them.

Zeckendorf v. Johnson, 123 U. S. 617, 31 L. ed. 277, 8 Sup. Ct. Rep. 261; Hewitt v. Campbell, 109 U. S. 103, 27 L. ed. 871, 3 Sup. Ct. Rep. 68; Jeffries v. Mutual L. Ins. Co. 110 U. S. 305, 28 L. ed. 156, 4 Sup. Ct. Rep. 8; Central P. R. Co. v. California, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766.

Conscious guilt, or an intent to avoid the consequences of a known crime or a certain prosecution, is not an element which is essential to constitute a flight from justice within the meaning of the Constitution and statutes of the United States.

Roberts v. Reilly, 116 U. S. 80, 97, 29 L. ed. 544, 549, 6 Sup. Ct. Rep. 291; Re White, 5 C. C. A. 29, 14 U. S. App. 87, 55 Fed. 54; Re Bloch, 87 Fed. 981.

Mr. Justice Harlan delivered the opinion of the court:

The appellant was indicted in the supreme court of New York, county of Erie, for the crime of grand larceny, first degree, alleged to have been committed in that county on the 18th day of May, 1904.

Upon that indictment a warrant of arrest was issued, but the accused was not arrested, for the reason that he was not found within the state.

Then the district attorney of Erie county applied to the governor of New York for a requisition upon the governor of Massachusetts for Appleyard as a fugitive from justice. The application was based upon the above indictment and numerous accompanying affidavits, stating, among other things, that the accused was then in Massachusetts. A requisition was accordingly made upon the governor of that commonwealth for the apprehension of Appleyard, and his delivery to a named agent of New York, who was authorized to receive and convey him to the

-As to who are fugitives from jus- er extradition laws—see notes to ss, 63 C. C. A. 104; Cook v. Hart, U. S. 934; and State v. Hall, 28 9.

latter state, to be there dealt with according to law. With that requisition went properly authenticated copies of all the papers which had been submitted to the governor of New York by the district attorney of Erie county.

The governor of Massachusetts received the requisition, and, pursuant to the statutes of that commonwealth, referred it to the attorney general for examination and report. Giving the accused full opportunity [224]to be heard and to introduce *evidence, of which he availed himself, that officer examined the case and reported that the requisition was in regular and proper form and that there was no sufficient reason why it should not be honored. The governor thereupon issued a warrant for the arrest of Appleyard and his delivery to the agent of New York, to be taken to that state, the officer who should execute the warrant being required to give the accused such opportunity to sue out a writ of habeas corpus as was prescribed by the laws of Massachusetts in such cases. Appleyard, having been arrested, applied for a writ of habeas corpus to the supreme judicial court of Massachusetts. This fact is stated in the return of the officer holding the accused, and is not denied. That court, after hearing an argument, denied the application, and remanded the petitioner to the custody of the agent of New York, to be held in accordance with the warrant issued by the governor of Massachusetts.

The accused then applied to the circuit court of the United States for a writ of habeas corpus, alleging that the warrant of the governor of Massachusetts and the order for his delivery to the agent of New York were issued without authority of law, and contrary to the Constitution and laws, as well of the United States as of Massachusetts, and "especially contrary to § 2, article 4, of the Constitution of the United States, and of § 5278 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3597), in that your petitioner is not a fugitive from justice." The writ was issued and a return was made of the above facts.

At the hearing in the circuit court the accused requested a ruling that, on the evidence, it did not appear that, within the meaning of the Constitution and laws of the United States, he was a fugitive from justice, and, also, that he should be discharged from custody unless it appeared positively, by a preponderance of proof, that he "consciously fled from justice when he left the state of New York." Those requests were denied. But the court granted a request that the finding by the governor of Massachusetts as a fact that the accused was a fugitive from justice was not conclusive. The court refused *to find, as facts, that the [225] acts of Appleyard did not constitute a crime under the laws of New York; that no crime was committed by him in that state; and that Appleyard was not in New York on May 18th, 1904, the date of the alleged crime. It consequently discharged the writ of habeas corpus. From that order the present appeal was prosecuted.

It cannot be said that the appellant has not had ample opportunity to test the question whether his detention was in violation of the Constitution and laws of the United States. He has had three hearings upon that question; first, before the executive authorities of Massachusetts, then before the supreme judicial court of that commonwealth, and finally before the circuit court of the United States. Upon each occasion he insisted that, within the meaning of the Constitution and laws of the United States, he could not be regarded as a fugitive from justice. The decision at each hearing was adverse to that contention, and, unless this court reverses the judgment of the circuit court, he must stand his trial upon the charge that he committed a crime against the laws of New York. In view of the history of this case from the time of the demand upon the governor of Massachusetts for the surrender of the appellant, this court should hesitate, by disturbing the ruling below, to further delay the administration by New York of its criminal laws through its own judicial tribunals. Regularly, the accused should have prosecuted a writ of error to the supreme judicial court of Massachusetts before *invoking the jurisdiction of [226] the circuit court of the United States upon habeas corpus. Ex parte Royall, 117 U. S. 241, 251-253, 29 L. ed. 868, 871, 872, 6 Sup. Ct. Rep. 734; Markuson v. Boucher, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76; Minnesota v. Brundage, 180 U. S. 499, 502, 45 L. ed. 639, 640, 21 Sup. Ct. Rep. 455; Reid v. Jones, 187 U. S. 153, 47 L. ed. 116, 23 Sup. Ct. Rep. 89. But, in view of the long time which has elapsed since the governor of New York made his requisition for the surrender of the accused, and as the case is one which the public interests demand should be speedily determined, we think the ends of justice will be promoted if we proceed to a final judgment on this appeal.

Upon a careful scrutiny of the record we discover no ground for the assertion that the detention of the appellant is in violation of the Constitution or laws of the United States. The crime with which he is charged is alleged in the indictment to have been committed at Buffalo, New York, on May 18th, 1904. It is, we think, abundantly established by the evidence that he was per-

present in that city on that day, and
ereafter he left New York, although
as some evidence to the effect that
particular day named he was not in
e. In his own affidavit, submitted
epted as evidence, the accused speci-
eral days when he was in Buffalo,
and subsequent to May 18th, 1904,
stated by the attorney general of
usetts in his report to the governor
commonwealth, there was in that
no statement directly denying that
in New York at the time and place
l in the indictment.

he appellant contended below, as he
e, that he had no *belief* when leav-
York at any time that he had vio-
criminal laws, and therefore, within
ning of the Constitution and laws
nited States, he could not be deemed
e from its justice. This contention
e sustained; indeed, it could not be
l without materially impairing the
of the constitutional and statutory
s relating to fugitives from justice.
ed fugitive may believe that he has
mitted any crime against the laws of
e in which he is indicted, *and yet,
to the laws of such state, as ad-
d by its judicial tribunals, he may
e so, and his belief or want of be-
be without foundation in law.
province of the courts of New York
e what its laws are, and to deter-
ether particular acts on the part of
d offender constitute a crime under
vs. The constitutional provision
erson charged with crime against
of a state, and who flees from its
must be delivered up on proper de-
sufficiently comprehensive to em-
offense, whatever its nature, which
, consistently with the Constitution
s of the United States, may have
crime against its laws. Kentucky
son, 24 How. 66, 69, 16 L. ed. 717;
Reggel, 114 U. S. 642, 650, 29 L. ed
5 Sup. Ct. Rep. 1148. So that the
quiry must be whether the person
rrender is demanded is in fact a
from justice, not whether he *con-*
fled from justice in order to avoid
on for the crime with which he is
by the demanding state. A person
y indictment or by affidavit before
rate with the commission within a
a crime covered by its laws, and
er the date of the commission of
e, leaves the state,—no matter for
pose or with what motive, nor un-
belief,—becomes, from the time of
ing, and within the meaning of the
ion and the laws of the United
fugitive from justice, and if found
s.

in another state must be delivered up by the governor of such state to the state whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the governor of the state from which the accused departed. Such is the command of the supreme law of the land, which may not be disregarded by any state. The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several states,—an object of the first concern to the people of the entire country, *and which each state is bound, in fidelity to [228] the Constitution, to recognize. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the states. And while a state should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state.

In Roberts v. Reilly, 116 U. S. 80, 95, 97, 29 L. ed. 544, 549, 6 Sup. Ct. Rep. 291, this court said that the act of Congress, § 5278 of the Revised Statutes, made it the duty of the executive authority of the state in which is found a person charged with crime against the laws of another state, and who has fled from its justice, "to cause the arrest of the alleged fugitive from justice whenever the executive authority of any state demands such person as a fugitive from justice, and produces a copy of an indictment found, or affidavit made before a magistrate of any state, charging the person demanded with having committed a crime therein, certified as authentic by the governor or chief magistrate of the state from whence the person so charged has fled. It must appear, therefore, to the governor of the state to whom such a demand is presented, before he can lawfully comply with it, first, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the governor of the state making the demand; and, second, that the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand. The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of habeas corpus. The second is a question of fact,

which the governor of the state upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. How [229]far his decision may be *reviewed judicially in proceedings in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court. It is conceded that the determination of the fact by the executive of the state in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof. Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148."

Replying to the suggestion, in that case, that the fugitive was not within the demanding state subsequent to the finding of the indictment, the court further said: "The appellant in his affidavit does not deny that he was in the state of New York about the date of the day laid in the indictment when the offense is alleged to have been committed, and states, by way of inference only, that he was not in that state on that very day; and the fact that he has not been within the state since the finding of the indictment is irrelevant and immaterial. To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another." To the same effect are Ex parte Brown, 28 Fed. 653, 655; Re White, 5 C. C. A. 29, 14 U. S. App. 87, 55 Fed. 54, 57; Re Bloch, 87 Fed. 981, 983. It is suggested that Roberts v. Reilly was substantially modified in Streep v. United States, 160 U. S. 128, 134, 40 L. ed. 365, 369, 16 Sup. Ct. Rep. 244, in which the court had occasion to construe § 1045 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 726). But this is an error. Interpreting the words "fleeing from justice" as found in that section, the court expressly held that these words must receive [230]*the same construction as was given in Roberts v. Reilly to like words in § 5278 of the Revised Statutes, the inquiry in that case being whether the accused was a fugitive from justice.

In support of his contention, the appellant refers to Hyatt v. New York, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456. That was the case of an arrest in New York, under the warrant of the governor of that state, of an alleged fugitive from the justice of Tennessee, in which state he stood charged by indictment with crime committed in that state. This court said (p. 718, L. ed. p. 664, Sup. Ct. Rep. p. 462) that as the alleged fugitive "showed, without contradiction, and upon conceded facts, that he was not within the state of Tennessee at the times stated in the indictments found in the Tennessee court, nor at any time when the acts were, if ever, committed, he was not a fugitive from justice within the meaning of the Federal statute upon that subject, and upon these facts the warrant of the governor of the state of New York was improperly issued, and the judgment of the court of appeals of the state of New York, discharging the relator from imprisonment by reason of such warrant, must be affirmed." The present case is a wholly different one; for here the presumption arising from the recitals in the warrant of arrest in favor of its validity was not overthrown by the proof; on the contrary, it appeared, by a preponderance of evidence, that the accused was in the state of New York when the alleged crime was committed.

Similar views to those expressed in Roberts v. Reilly have been expressed by state courts. In Kingsbury's Case, 106 Mass. 223, 227, 228, the contention of the fugitive from justice was that, as she went into the demanding state and returned to her home in the other state before the alleged crime was known, she could not be deemed to have fled from justice. But the court said: "The material facts are, that the prisoner is charged with a crime in the manner prescribed, and has gone beyond the jurisdiction of the state, so that there has been no reasonable opportunity to prosecute him after the facts were known. The fact in this case, that she returned to her permanent home, cannot be material. . . . It is sufficient *that the [231] crime of larceny has been properly charged, and that the prisoner is a fugitive, and a requisition has been properly made." In State ex rel. Burner v. Richter, 37 Minn. 436, 438, 35 N. W. 9, the contention was that to constitute a fugitive from justice a person must have left the state where the crime was committed for the purpose of escaping the legal consequences of his crime. Referring to Roberts v. Reilly, above cited, as authoritative and binding, and as in accordance with its own views, the supreme court of Minnesota well said: "The sole purpose of this statute, and of the constitutional provision which it was designed to carry into effect, was to secure the return of persons who had committed crime within one state,

l left it before answering the de- of justice. The important thing is r purpose in leaving, but the fact y had left, and hence were beyond h of the process of the state where ne was committed. Whether the for leaving was to escape prosecution thing else, their return to answer ges against them is equally within t and purpose of the statute; and le fact that they are not within the answer its criminal process, when renders them, in legal intendment, from justice, regardless of their in leaving." In Re Voorhees, 32 N. , 150, the court said: "A person who a crime within a state, and with- mself from such jurisdiction with- ng to abide the consequences of such t be regarded as a fugitive from ce of the state whose laws he has . Any other construction would not inconsistent with good sense and obvious import of the word to be ed in the context in which it ut would likewise destroy, for most purposes, the efficacy of the entire ional provision." In Ex parte en, 13 S. C. 74, 80, the court held terms "fugitive from justice" "were to embrace not only a case where after committing a crime, actually the literal sense of that term, from where such crime was committed, a case where *a citizen of one state, hin the territorial limits of another mmits a crime, and then simply re- his own home. The object of the tion was to enable a state whose been violated, to secure the arrest erson charged with such violation, ugh such person might be beyond h of the ordinary process of such In Re Mohr, 73 Ala. 503, 512, 49 Am. the court, referring to the words in titution, "who shall flee from justice und in another state," said: "There rence of opinion as to what must xact nature of this flight on the the criminal, but the better view, is that any person is a fugitive he purview of the Constitution, s into a state, commits a crime, and urns home.' " In Hibler v. State, 97, 201, the court said: "The words from justice' as used in this con- must not be understood in a literal t in reference to the subject-matter, ng the general object of the Con- and laws of the United States in thereto. A person who commits a one state, for which he is indicted, rts therefrom, and is found in an- te, may well be regarded as a fugi- S.

tive from justice in the sense in which it is here used."

Referring to the opinion in Pettibone v. Nichols (just decided) 203 U. S. 192 ante, 148, 27 Sup. Ct. Rep. 111, for a further discussion of the general subject, and perceiving no error in the action of the Circuit Court, its final order is affirmed.

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*ANN FRANCIS, Plff. in Err., [233]

v.

PETER J. FRANCIS, William Francis, and Frank Francis.

(See S. C. Reporter's ed. 233-242.)

Indians—treaty as grant.

1. A title in fee may pass under a treaty with the Indians without the aid of an act of Congress, and without any patent from the United States.

Courts—following decisions of state courts.

2. Decisions of the courts of a state respecting the title acquired by individual Indians under the treaty of September 24, 1819, with the Chippewa Nation, to the lands therein reserved for their use, will not be disturbed by the Supreme Court of the United States, where they have become a rule of property, and do not clearly involve a misinterpretation of the words of the treaty.

Indians—treaty as grant.

3. An alienable title in fee simple which could not be affected by restrictions, in a subsequent patent, upon the power of alienation, passed under the reservation of 640 acres of land for the use of the children of Bokowtonden and their heirs, made by the treaty of September 24, 1819, with the Chippewa Nation, for the cession of Indian lands to the United States.

[No. 8.]

Submitted October 10, 1906. Decided December 3, 1906.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which affirmed a judgment of the Circuit Court of Bay County, in that state, in favor of defendants in an action of ejectment. Affirmed.

NOTE.—As to state decisions and laws as rules of decision in Federal courts—see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553; Griffin v. Overman Wheel Co. 9 C. C. A. 548; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex. dem. St. John v. Chew, 6 L. ed. U. S. 583; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Mitchell v. Burlington, 18 L. ed. U. S. 351.

See same case below, 136 Mich. 288, 99 N. W. 14.

The facts are stated in the opinion.

Messrs. Henry M. Duffield and James Van Kleeck submitted the cause for plaintiff in error. Mr. Thomas E. Webster was on the brief.

Mr. Nathaniel T. Crutchfield also submitted the cause for plaintiff in error. Mr. James Van Kleeck was on the brief.

Mr. Chester L. Collins submitted the cause for defendants in error.

Mr. Justice Harlan delivered the opinion of the court:

This action of ejectment was brought to recover the possession of certain lands in Bay county, Michigan, which the plaintiff, Ann Francis, claims as tenant for her own life, and which are thus described in the declaration: "The east half, the Bokowtonden reserve, excepting land heretofore owned and occupied by F. A. Kaiser, and 10 acres heretofore owned and occupied by Edward McGuiness, being in Township Fourteen, north range four east, and being a part of the Bokowtonden reserve, conveyed by the United States to the children of Bokowtonden and their heirs, by patent, dated November 6th, A. D. 1827."

The defendants pleaded the general issue, giving notice that they would show that for more than twenty years next preceding the commencement of this action they and their grantors had been in open, notorious, exclu-
[237] sive, and adverse possession *and occupancy of the lands in question under claim and color of title.

At the conclusion of the evidence the jury, by direction of the court, returned a verdict for the defendants, upon which judgment was rendered. That judgment was affirmed, upon writ of error, by the supreme court of Michigan.

By the treaty of September 24th, 1819, made at Saginaw in the territory of Michigan, and proclaimed March 25th, 1820, between the United States and the Chippewa Nation of Indians, the lands comprehended within certain boundaries were forever ceded to the United States. But from that cession certain tracts were reserved for the use of the Chippewa Nation of Indians. And by article 3 of the treaty it was provided that "there shall be reserved, for the use of each of the persons hereinafter mentioned and their heirs, which persons are all Indians by descent, the following tracts of land: . . . For the use of the children of Bokowtonden, six hundred and forty acres, on the Kawkawling river." 7 Stat. at L. 203.

Subsequently, November 6th, 1827, a patent was signed by President Adams. It purported to have been issued pursuant to that treaty, for a tract of 640 acres on Kawkawling river, described by metes and bounds, "unto the said children of Bokowtonden, and their heirs forever," the patent containing these words: "But never to be conveyed by them or their heirs without the consent and permission of the President of the United States."

The particular land here in question is a part of the 640 acres reserved by the above treaty for the use of the children of Bokowtonden and their heirs, and embraced by the patent of 1827. What rights were acquired, under and by virtue of the treaty, by those children? In Jones v. Meehan, 175 U. S. 1, 8, 21, 44 L. ed. 49, 52, 57, 20 Sup. Ct. Rep. 1, 4, 9, where one of the questions was as to the nature of the title that passed under an Indian treaty ceding lands to the United States, and which required a certain number of acres to be set apart from the ceded lands *for a named Indian chief, this court said: [E
"Was it a mere right of occupancy, with no power to convey the land except to the United States or by their consent? Or was it substantially a title in fee simple, with full power of alienation? Undoubtedly, the right of the Indian nations or tribes to their lands within the United States was a right of possession or occupancy only; the ultimate title in fee in those lands was in the United States; and the Indian title could not be conveyed by the Indians to anyone but the United States, without the consent of the United States."—citing Johnson v. M'Intosh, 8 Wheat. 543, 5 L. ed. 681; Cherokee Nation v. Georgia, 5 Pet. 1, 17, 8 L. ed. 25, 31; Worcester v. Georgia, 6 Pet. 515, 544, 8 L. ed. 483, 495; Doe ex dem. Mann v. Wilson, 23 How. 457, 463, 16 L. ed. 584, 586; United States v. Cook, 19 Wall. 591, 22 L. ed. 210; United States v. Kagama, 118 U. S. 375, 381, 30 L. ed. 228, 230, 6 Sup. Ct. Rep. 1109; Buttz v. Northern P. R. Co. 119 U. S. 55, 67, 30 L. ed. 330, 335, 7 Sup. Ct. Rep. 100. But in that case, after an extended review of previous decisions, this court further said: "The clear result of this series of decisions is that when the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United

States, by a provision of the treaty, or of an act of Congress, have expressly or impliedly prohibited or restricted its alienation."

Did an alienable title in fee simple pass to the children of Bokowtonden by virtue of the treaty of 1819, 1820? That question was under consideration in the courts of Michigan a long while ago and was answered in the affirmative; and it would seem that their construction of the provisions in question has become a rule of property in that state. In Stockton v. Williams, Walk. Ch. (Mich.) 120, 129, decided in 1843, *the question was elaborately discussed and fully considered. The treaty in that case—the same one involved here—contained these words: "There shall be reserved for the use of each of the persons hereinafter mentioned and their heirs, which persons are all Indians by descent, the following tracts of land. . . . For the use . . . of Mokitchenoqua . . . each, six hundred and forty acres of land, to be located at and near the Grand Traverse of the Flint river in such manner as the President of the United States may direct." 7 Stat. at L. 204. The chancellor said: "It makes no mention of a patent, nor does it require the President or other officer of the government, after the lands have been located, to do any act whatever recognizing the right of the several reservees to the different sections. All it required of the President was to have the lands located, at and near a particular place pointed out by the treaty. To locate does not mean to patent, but to have the several sections surveyed and marked out, and a map made of them, showing the particular section belonging to each of the reservees. This was done; and, when it was done, this part of the treaty was fully executed on the part of the government. Nothing further was required to carry it into effect, and the title then vested in the respective reservees, unless we hold the treaty itself to be clearly defective in not providing for the execution of its several stipulations. A patent, although the usual, is by no means the only, mode in which the title to the public domain can pass from the government to an individual. It may pass by an act of Congress, or by a treaty stipulation, as well as by a patent. The Indian title to the land reserved did not pass to the United States by the treaty, which operated as a release, by both the Indians and government, of all interest either had in the lands reserved to the respective reservees, in fee simple; and it would be a violation of the treaty for the government to claim the land in question." Upon appeal the supreme court of Michigan, 1 Dougl. 546, 558, 564, said: "The first question to be determined is, What estate passed to the reservee *under the treaty? The 3d [240] article is in the following words: 'There shall be reserved for the use of each of the persons hereinafter mentioned, and their heirs, which persons are all Indians by descent, the following tracts of land,' etc. 'For the use of Mokitchenoqua, six hundred and forty acres of land, to be located at and near the Grand Traverse of the Flint river, in such manner as the President of the United States may direct.' It is very clear that, if a fee-simple estate was intended to be granted, the parties to the treaty were unfortunate in the choice of terms by which to give effect to that intention; and yet it is difficult to conceive that any other estate was in the contemplation of the parties at the time of its existence. Will, then, the 3d article warrant such a construction? It will be observed that the reservation is to the use of Mokitchenoqua and *her heirs*. No limitation as to the time of holding, or restriction upon the right of alienation, is contained in the grant. The use of the word *heirs* clearly implies that such an estate was granted as would, upon her death, descend to her legal representatives. Here, then, are all the essential elements of a fee-simple estate. This construction, we think, is justified by the words of the 3d article, and is strengthened by the fact that it corresponds not only with an opinion given by the Attorney General of the United States to the Secretary of War (Land Laws, pt. 2, pp. 96, 97), but with the opinion of the Senate,—a branch of the treaty-making power,—which is certainly entitled to great consideration. 3 Senate Doc. 1836, No. 197." Again, in the same case, the court said: "The location of the lands became a duty devolving on the President by the treaty. This duty he could execute without an act of Congress; the treaty, when ratified, being the supreme law of the land, which the President was bound to see executed. It was impossible to describe the tract granted to any of the reservees in the treaty, as it is matter of history that none of the lands ceded had ever been surveyed. But locality is given to the grant by the terms of the treaty, with an authority to locate afterwards by a survey *making it definite. Smith v. United [241] States, 10 Pet. 331, 9 L. ed. 444. This authority being executed, the grant then became as valid to the particular section designated by the President as though the description had been incorporated in the treaty itself. We are, therefore, of opinion that a fee simple passed to the reservee, Mokitchenoqua, by force of the treaty itself, and that the rights of the parties could in no wise be affected by the subsequent act of the President directing a patent to be issued."

In Dewey v. Campau, 4 Mich. 565, 566, the court, interpreting the same treaty, said: "A title in fee, under this clause of the treaty, passed, by this language, to the reservee. The term 'reservation' was equivalent to an absolute grant. The title passed as effectually as if the grant had been executed. The title was conferred by the treaty; it was not, however, perfect until the location was made; the location was necesary to give it identity. The location was duly made, and thus the title to the land in controversy was consummated by giving identity to that which was before unlocated." In Campau v. Dewey, 9 Mich. 381, 433, reference was made to Stockton v. Williams, 1 Dougl. (Mich.) 546, above cited, the court saying: "This decision has, for sixteen years, been recognized as the law governing the titles under this treaty, at least, and these must be quite numerous, many of which have doubtless been bought and sold on the faith of this decision. We are therefore compelled to recognize it as a rule of property which we are not at liberty to disturb." These cases were not, in any sense, modified by Auditor General v. Williams, 94 Mich. 180, 53 N. W. 1097, which was the case of an Indian treaty which expressly provided that the land there in question should never be sold or alienated to any person or persons whomsoever, without the consent of the Secretary of the Interior for the time,—manifestly a different case from the present one, in which the treaty contained no restriction upon alienation.

The result of the cases cited is: 1. That this court and the highest court of Michigan concur in holding that a title in fee may pass by a treaty without the aid of an act [242] of Congress, *and without a patent. 2. That the construction of the treaty here involved, whereby the respective Indians named in its 3d article are held to have acquired by the treaty a title in fee to the land reserved for the use of themselves, has become a rule of property in the state where the land is situated. That rule of property should not be disturbed, unless it clearly involves a misinterpretation of the words of the treaty of 1819. We agree with the state court in holding that a title in fee passed by the treaty to the children of Bokowtonden, and that the patent issued in 1827 only located or made definite the boundaries of the tract reserved to them by the treaty. It follows that the words in the patent of 1827, "but never to be conveyed by them or their heirs without the consent and permission of the President of the United States," were ineffectual as a restriction upon the power of alienation. The President had no authority, in virtue of his office, to impose any such restriction; certainly not, without the authority of an act of Congress, and no such act was ever passed. The children of Bokowtonden having, then, obtained by the treaty the right to convey, there is no reason to doubt that title could be acquired by prescription. The evidence shows that the defendants and those through whom they claim have had peaceable, adverse possession of the premises in question continuously for more than half a century prior to the commencement of this action.

Without assigning other grounds in support of the ruling below, the judgment of the Supreme Court is affirmed.

Mr. Justice White did not participate in the decision of this case.

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*NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, Plff. in Err.,

v.

PAUL RIGGS and Eugene De Hart, Executors of the Estate of Eber B. Roloson Deceased.

(See S. C. Reporter's ed. 243-255.)

Constitutional law—due process of law—equal protection of the laws—state regulation of insurance.

A foreign life insurance company doing business in Missouri is neither deprived of its liberty or property without due process of law nor denied the equal protection of the laws by Mo. Rev. Stat. § 7890, which cuts off any defense by a life insurance company, domestic or foreign, based upon the false and fraudulent statements in the application, unless the matter misrepresented in the judgment of the jury, actually contributed to the death of the insured.

[No. 34.]

Argued October 18, 1906. Decided December 3, 1906.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri to review a judgment in favor of plaintiffs in an action on two policies of life insurance. Affirmed.

The facts are stated in the opinion.

Mr. Stephen S. Brown argued the cause and, with Messrs. W. A. Kerr and John Dolman, filed a brief for plaintiff in error.

The right to make contracts is an indi

NOTE.—On the incontestability of life insurance under provisions of the policy or a statute—see note to Clement v. New York L. Ins. Co. 42 L.R.A. 247.

As to restrictions on business of foreign insurance companies—see note to State ex rel. Richards v. Ackerman, 24 L.R.A. 2

pensable incident to property, without which it cannot be lawfully acquired as between living persons, nor effectively preserved or used.

Allgeyer v. Louisiana, 165 U. S. 578, 591, 41 L. ed. 832, 836, 17 Sup. Ct. Rep. 427; Holden v. Hardy, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Yick Wo. v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 559, 46 L. ed. 679, 685, 22 Sup. Ct. Rep. 431; Shaver v. Pennsylvania Co. 71 Fed. 931; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781.

"Due process of law" and "law of the land," which are synonymous, necessarily refer to a pre-existing rule of conduct, and are intended to secure the individual from the arbitrary exercise of the powers of the government, unrestrained by the established principles of private rights and distributive justice. These terms were intended to perpetuate old and well-established principles of right and justice by securing them from abrogation or violation.

Weimer v. Bunbury, 30 Mich. 201; Cooley, Const. Lim. 6th ed. 443; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624; Cooley, Const. Lim. 1st ed. 208; People v. Budd, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Sedgw. Stat. & Const. Law, p. 149; McKinster v. Sager, 163 Ind. 671, 68 L.R.A. 273, 106 Am. St. Rep. 268, 72 N. E. 854.

Having these principles in mind it becomes a necessary "conclusion of reason" that a statute that has the effect to enable one to obtain the property of another by fraud, which "is even more odious than force" (1 Story, Eq. Jur. 15th ed. 200), and, when the fraud shall have been accomplished, vests the title in the wrongdoer, is obnoxious to that provision of the Constitution which forbids the state to deprive one of his property without due process of law.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

A contract may be avoided for fraud without reference to whom the fraud may be directed against,—whether it be one of the parties, a stranger to the agreement, or the public.

1 Bouvier, Law Dict. 690; Broom, Legal Maxims, 3d ed. 463, *572; Merritt v. Robinson, 35 Ark. 483; Riggs v. Palmer, 115 N. Y. 506, 5 L.R.A. 340, 12 Am. St. Rep. 819, 22 N. E. 188; United States v. The Amistad, 15 Pet. 518, 594, 10 L. ed. 826, 854; Catts v. Phalen, 2 How. 376, 381, 11 L. ed. 306, 307; Cochran v. Cummings, 4 Dall. 250, 1 L. ed. 820; Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. 52 C. C. A. 671, 115 Fed. 77; Livingston v. Maryland Ins. Co. 7 Cranch, 506, 3 L. ed. 421; Hubbard v. Mutual Reserve Fund Life Asso. 40 C. C. A. 665, 100 Fed. 719; Mattson v. Modern Samaritans, 91 Minn. 434, 98 N. W. 330; Koerts v. Grand Lodge, O. of H. S. 119 Wis. 525, 97 N. W. 163; Rupert v. Supreme Court U. O. of F. 94 Minn. 293, 102 N. W. 715; Royal Neighbors of A. v. Wallace (Neb.) 102 N. W. 1020; Speiser v. Phœnix Mut. L. Ins. Co. 119 Wis. 530, 97 N. W. 207; Hanf v. Northwestern Masonic Aid Asso. 76 Wis. 450, 45 N. W. 315; Ketcham v. American Mut. Acci. Asso. 117 Mich. 521, 76 N. W. 5; New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837.

It is a matter affecting the public morals and the policy of the state, and one may not even make a valid contract that he will stand bound by fraud.

Bridger v. Goldsmith, 143 N. Y. 424, 38 N. E. 458; Hofflin v. Moss, 14 C. C. A. 459, 32 U. S. App. 200, 67 Fed. 440; Wilcox v. Howell, 44 N. Y. 398; Columbia Ins. Co. v. Lawrence, 10 Pet. 507, 9 L. ed. 512.

The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole.

Boyd v. United States, 116 U. S. 616, 627, 29 L. ed. 746, 749, 6 Sup. Ct. Rep. 524.

The question whether one is sick or well at the time insurance is effected on his life is material to the risk, and a rule is at least reasonable which provides against the insurance of the lives of sick men.

Aloe v. Mutual Reserve Life Asso. 147 Mo. 561, 49 S. W. 553; McCollum v. Mutual Life Ins. Co. 55 Hun, 103, 8 N. Y. Supp. 249, 124 N. Y. 642, 27 N. E. 412; Metropolitan L. Ins. Co. v. McTague, 49 N. J. L. 587, 60 Am. Rep. 661, 9 Atl. 766; United Brethren Mut. Aid Soc. v. O'Hara, 120 Pa. 256, 13 Atl. 932.

The police power of the state does not justify this statute.

Com. v. Alger, 7 Cush. 53; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 297, 43 L. ed. 702, 706, 19 Sup. Ct. Rep. 465; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 689, 43 L. ed. 858, 861, 19 Sup. Ct. Rep. 565; Cooley, Const. Lim. 4th ed. p. 459; Pom. Eq. Jur. § 431.

Messrs. Robert A. Hewitt, Jr., and W. H. Haynes argued the cause, and, with Messrs. Kendall B. Randolph and W. M. Fitch, filed a brief for defendants in error:

A foreign corporation is not a citizen within the meaning of U. S. Const., 14th Amend., and the states have a right to impose whatever conditions they see fit to impose upon foreign corporations doing business in the state.

Cable v. United States L. Ins. Co. 191 U. S. 288, 48 L. ed. 188, 24 Sup. Ct. Rep. 74; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; John Hancock Mut. L. Ins. Co. v. Warren, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535.

Were the application of the law as to foreign insurance companies otherwise than as stated above, even then the plaintiff in error would not be entitled to the relief asked, for the reason that Mo. Rev. Stat. 1899, § 7890, applies to all persons in like circumstances and conditions, and all insurance companies, whether foreign or domestic.

Hibben v. Smith, 191 U. S. 310, 325, 48 L. ed. 195, 201, 24 Sup. Ct. Rep. 88; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625. See also Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176.

The courts of the United States are controlled as to the interpretation of state statutes by the decision of the court of last resort of the state, and will form an independent judgment as to their meaning only when no such construction has been had.

Enfield v. Jordan, 119 U. S. 680, 30 L. ed. 523, 7 Sup. Ct. Rep. 358; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; McCain v. Des Moines, 174 U. S. 177, 43 L. ed. 939, 19 Sup. Ct. Rep. 644; Orr v. Gilman, 183 U. S. 283, 46 L. ed. 200, 22 Sup. Ct. Rep. 213; Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. 173 U. S. 107, 43 L. ed. 628, 19 Sup. Ct. Rep. 341.

A foreign insurance company doing business in Missouri is governed by the laws of Missouri as to the interpretation of its contract. The laws of Missouri become a part of the contract.

Fletcher v. New York L. Ins. Co. 4 McCrary, 440, 13 Fed. 526; New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; John Hancock Mut. L. Ins. Co. v. Warren, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535; Equitable Life Assur. Soc. v. Clements (Equitable Life Assur. Soc. v. Pettus) 140 U. S. 233, 234, 35 L. ed. 500, 501, 11 Sup. Ct. Rep. 822; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281.

Mr. Justice Harlan delivered the opinion of the court:

This was an action upon two policies of insurance issued by the Northwestern National Life Insurance Company, a Minnesota corporation doing business in Missouri, upon the life of Eber B. Roloson; one, dated November 21st, 1901, the other, May 14th, 1902; each for the sum of $5,000, payable to the estate of the insured within ninety days after the acceptance by the company of satisfactory evidence of his death while the policy was in full force.

Each policy contained these provisions: "This policy shall not be in force until the first premium is paid, and the policy delivered to and accepted by the insured while in good health. At any time when this policy has been two years continuously in force it will be incontestable, except for fraud and nonpayment of premiums as provided herein, if the age of the insured has been correctly stated in the application."

The application for insurance was made by reference a part of the policy, the latter providing that the statements and answers therein every person accepting or acquiring an interest in the policy "adopts as his own, and warrants to be full, complete, and true, and agrees to be material." The application provides: "No obligation shall arise under this application until the usual policy of insurance shall be issued and delivered to me, I being at that time in good health, and the first premium paid by me," also, "I warrant the statements and answers as written or printed herein, or in part two of this application, to be full, complete, and true, whether written *by my own hand or not, and[9] agree that every such statement and answer is material to the risk;" also, "That I am not afflicted with any disease or disorder: nor have I had any illness, local disease, or personal injury not herein set forth."

Among the questions propounded to the insured and his answers—embodied in the application—were the following: "Q. Has any

or association ever postponed or to grant insurance on your life? Q. If so, for what reason and by npany or association. A. No. Q. physician ever given an unfavor- ion upon your life with reference surance or otherwise? A. No. Q. ever had any illness, local disease, ental or nervous disease or infirm- er had any disease, weakness, or f the head, throat, lungs, heart, intestines, liver, kidneys, bladder isease or infirmity whatever? A. ive name and address of each phy- o has prescribed for or attended n the past ten years, and for what d ailments? Name, Dr. C. O. Pat- all, Missouri. (b.) For what dis- ailment? A. Bilious attack. Q. husband or wife or any other im- member of your family any tuber- sease? A. Only sister had, as stat-

admitted at the trial that the in- d February 28th, 1903, having paid ums due upon his policies, and fs of his death were made, such ating that he died of progressive

mpany denied all liability on its upon the ground that each of the to the above questions was un- known to be so by the applicant made them. And at the trial it was be proved (and the offer was re- e company duly excepting) that ers were not true, and when made wn to be untrue.

was a verdict for the plaintiffs, the of the insured, for the amount due wo policies, namely, $11,050, *for dgment was rendered against the

se was brought here under the act 3d, 1891, chap. 517, which author- ppeal or writ of error directly to t from a circuit or district court nited States, in any case in which itution or law of a state is claimed contravention of the Constitution nited States. 26 Stat. at L. 826, Comp. Stat. 1901, pp. 488, 549.

the policies in question were issued ovided by the statutes of Missouri, hat: "No misrepresentation made ing or securing a policy of insur- the life or lives of any person or citizens of this state, shall be naterial, or render the policy void, e matter misrepresented shall have contributed to the contingency or which the policy is to become due ble, and whether it so contributed se shall be a question for the jury;" and by § 7891, that "in suits brought upon life policies, heretofore or hereafter issued, no defense based upon misrepresentation in obtaining or securing the same shall be valid unless the defendant shall, at or before the trial, deposit in court for the benefit of the plaintiffs, the premiums received on such policies."

These provisions were first enacted in 1874, appearing in the Revision of 1879 as §§ 5976 and 5977, in the Revision of 1889 as §§ 5849 and 7891, and in the present revision as §§ 7890 and 7891.

At the trial in the circuit court the insurance company made several requests for instructions. They embodied these propositions: That the statute of Missouri, § 7890, was not applicable to this case, and could not be applied to it consistently with the 14th Amendment of the Constitution of the United States; that the plaintiff could not recover on either policy if it appeared that it was not delivered to and accepted by him while he was in good health; that if the insured, at the time of making his application for a policy of insurance, knowingly, falsely, and fraudulently, with the purpose *to mis- [250] lead and deceive the company, misrepresented in the application any matter concerning his health, life, or physical condition, which would reasonably affect the action of the company, then the Missouri statute was not applicable to the case; that if, with the intention to deceive and mislead the company, the insured made in his application an untrue warranty or misrepresentation concerning anything material to the risk, or if, at the time of the application, he was in bad health, and knew such to be his condition, but fraudulently and falsely, with the intent to deceive, stated that he was then, and had been for twelve months, in good health, free from all ailments, diseases, weaknesses and infirmities, whereby the company was deceived into issuing the policy, when it would not otherwise have done so, he could not recover in this action.

The trial court refused each request of the company and an exception to its action was duly taken; and it charged the jury (the company excepting) that the Missouri statute was applicable to this case, and not unconstitutional, and that the defendant company could not avoid liability on its policy by reason of any representations by the insured in his application, unless the jury found that the matters to which such representations had reference *actually contributed to the contingency or event on which the policy, by its terms, was to become due and payable.*

Although the assignments of error are numerous, we do not deem it necessary to notice any questions except those growing

out of the application of the Missouri statute to this case.

As to the purpose and scope of that statute, we need only refer to the decisions of the highest court of Missouri, whose province it is to declare its meaning and effect, while it is the province of this court to adjudge whether the statute, as interpreted, is in conflict with the Constitution of the United States. We do not stop to inquire whether, having due regard to its words, the statute might not have been differently construed by the state court, but accept its judgment as indicating what it is to be tak-
[251] en to mean. In Schuerman v. *Union Cent. L. Ins. Co. 165 Mo. 641, 653, 65 S. W. 723, reference was made to the history of business of life insurance in Missouri, the court saying: "While equality of rights and privileges should be the general aim of all laws, and special restrictions and burdens imposed its strict exception, yet laws have ever been enacted by the state, and sustained, since the adoption of our present Constitution, as before its adoption, which were made to operate against certain classes of the community only, when that class has occupied some peculiar position, or when it has been clothed with some peculiar opportunities not enjoyed by the remainder of the community. As said before, life insurance companies in this state, prior to the adoption of § 7890, could, and by a practice, almost universal, did, insert in their policies a stipulation to the effect that any untrue statement or answer made by the applicant for insurance (regardless of its materiality or regardless of the intent of the applicant in making same) should avoid the policy, and too frequently when demands were made upon them for the obligations of the policies the companies availed themselves of these harsh provisions without a return by them of the money which they had obtained from the insured in his lifetime, and when the untrue statements made had little, if any, effect upon the risk undertaken by the insurer. This doctrine of warranties, in the extent to which it had grown and was applied, was something peculiar to insurance companies, and was therefore thought the subject of special legislation, in a law which properly undertook to affect insurance companies alone in that particular. By a long and hurtful practice of a given policy peculiarly their own, insurance companies had stamped themselves as a class, to which alone legislation might properly address itself, in that regard."

In the subsequent case of Kern v. Supreme Lodge, A. L. of H. 167 Mo. 471, 487, 67 S. W. 252, the court, referring to the statute, said that it "was enacted to correct the evil that had grown up, of permitting insurance companies to make every statement or answer a warranty, and if any one, however trivial or however *foreign to the risk[254] or loss, turned out to be untrue, to avoid the policy without refunding the benefits the company had received. The statute draws no distinction between innocent and fraudulent misrepresentations, and the courts have no right to draw any such distinction. The test applied by the statute is whether 'the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable,' and the power to determine that question is vested by the statute in the jury, and not in the court." The case of Christian v. Connecticut Mut. L. Ins. Co. 143 Mo. 460, 45 S. W. 268, being called to the attention of the state court, it further said: "In that case no distinction was drawn, or intended to be permitted, between innocent and wilfully fraudulent misrepresentations. The purpose was to give full force and effect to the statute, and to hold that no misrepresentation, whether innocent or fraudulent, when based upon a warranty of truth by the terms of the policy or not, shall be a defense, 'unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable.'" See also Jenkins v. Covenant Mut. L. Ins. Co. 171 Mo. 375, 383, 71 S. W. 688.

We take it, then, that the statute, if enforced, cuts off any defense by a life insurance company, based upon false and fraudulent statements in the application, unless the matter misrepresented actually contributed to the death of the insured. Is the statute, therefore, to be held repugnant to the 14th Amendment? Does it, in such case, deprive the insurance company of its "liberty" or property without due process of law, or deny to it the equal protection of the laws? Although the statute in some degree restricts the company's power of contracting, and is so worded that the beneficiaries of its policy may sometimes reap the fruits of fraud practised upon it by the insured, we cannot, for that reason, hold that the state may not, so far as the Constitution of the United States is concerned, regulate the business of life insurance to the extent indicated. It is true that this court has said that the liberty *guaranteed by the 14th[255] Amendment against deprivation otherwise than by due process of law embraces the right to pursue a lawful calling and enter into all contracts proper, necessary, and essential to the carrying out of the purposes of such calling. Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427. It is true, also, that a corporation of one state, doing business in an-

other state, under such circumstances as to be directly subject to its process at the instance of suitors, may invoke the protection of that clause of the 14th Amendment which declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Blake v. McClung, 172 U. S. 239, 260, 261, 43 L. ed. 432, 440, 19 Sup. Ct. Rep. 165. But it is equally the doctrine of this court that the power, whether called police, governmental, or legislative, exists in each state, by appropriate legislation, not forbidden by its own Constitution or by the Constitution of the United States, to determine for its people all questions or matters relating to its purely domestic or internal affairs, and, "to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and, therefore, to provide for the public convenience and the public good." Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 297, 43 L. ed. 702, 706, 19 Sup. Ct. Rep. 465, and authorities there cited.

We are informed by the decisions of the supreme court of Missouri that life insurance companies doing business in that state often secured contracts under which they could defeat all recovery upon a policy, and retain all premiums paid by the insured, if it appeared in proof that the application for insurance contained an inaccurate or untrue statement, however innocently made, as to matters having no real or substantial connection whatever with the death of the insured, and which were in no sense material to the risk. This was deemed an evil practice, to be remedied by legislation. Of course, the state, if it had seen proper, might have excepted from the operation of the statute cases in which the insured, by his representations when obtaining a policy, perpetrated a fraud upon the company, or made [254] untrue statements in his application *as to matters material to the risk. But that remedy was deemed inadequate to prevent wrong and injustice. The state decided to go to the root of the evil, and therefore, in substance, it established, as a rule of conduct for all life insurance companies, domestic and foreign, doing business in the state, that representations, of whatever nature, made to the company by the insured, should not defeat recovery upon a policy unless such representations, in the judgment of a jury, actually contributed to the contingency or event on which it was to become due and payable. Surely the state could make such a regulation in relation to its own corporations; for a corporation cannot exert any power, nor make any contract, forbidden by the law of its being. Such a restriction as that founded in the Missouri statute, if embodied in the original charter of a life insurance corporation, would, of course, be binding upon it in the state granting such charter, and could not be disregarded. If, however, no such restriction was imposed by its charter, it could yet be imposed by subsequent legislation, unless the state had precluded itself from so doing by some contract (if a binding one could be made) which, as to its obligation, was protected by the Federal Constitution. The business of life insurance is of such a peculiar character, affects so many people, and is so intimately connected with the common good, that the state creating the insurance corporations and giving them authority to engage in that business may, without transcending the limits of legislative power, regulate their affairs, so far, at least, as to prevent them from committing wrong or injustice in the exercise of their corporate functions. The state may well say to its own corporate creatures engaged in the business of life insurance that they shall not refuse to pay what they agreed to pay simply because of some representation made by the insured which did not actually contribute to the contingency or event on which the agreement to pay depended. If a life insurance corporation does not approve such a restriction upon the conduct of its affairs it is its privilege to cease doing business. *Now, if the statute in question is not in- [255] valid as to life insurance corporations of Missouri, it is not perceived that the state may not make its provisions applicable to corporations of other states doing business in its territory with its sanction or under its license. That Missouri could forbid life insurance companies of other states from doing any business whatever within its limits, except upon the terms prescribed by the statute in question, cannot be doubted, in view of the decisions of this court. If it could go that far, why may it not declare, as it has in effect done, by this statute, that its provisions shall apply to foreign life insurance companies doing business in Missouri under its license? It would, indeed, be extraordinary if the state could compel its own life insurance companies to respect this statute, but could not enforce its provisions against a foreign corporation doing business within its limits, with its consent, express or implied—especially against one which, as is the case here, came into the state for purposes of business after such statutory provisions were enacted. As the present statute is applicable alike to all life insurance companies doing business in Missouri, after its enactment, there is no reason for saying that it denies the equal protection of the laws. Equally without foundation is the contention that the statute, if enforced, will be inconsistent with the

liberty guaranteed by the 14th Amendment. The liberty referred to in that Amendment is the liberty of natural, not artificial, persons. Nor, in any true, constitutional sense, does the Missouri statute deprive life insurance companies doing business in that state of a right of property. This is too plain for discussion.

What has been said disposes of the only questions we need to determine, and the judgment is affirmed.

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[256]*ATLANTIC COAST LINE RAILROAD COMPANY, Plff. in Err.,

v.

STATE OF FLORIDA upon the Relation of W. H. ELLIS, as Attorney General of Said State, and J. M. Barrs, as Special Counsel for Jefferson B. Browne et al., Railroad Commissioners of Said State.

(See S. C. Reporter's ed. 256-260.)

Evidence — sufficiency — reasonableness of state regulation of railroad rates.

The evidence is insufficient to justify a refusal to enforce an order of a state railroad commission fixing local rates of carrying phosphates on any objection based on the due process of law and equal protection of the laws clauses of the 14th Amendment to the Federal Constitution, where there is no evidence from which a reasonable deduction can be made as to the cost of transportation, the amount of phosphates transported, or the effect which the rate established by the commission will have upon the income of the carrier.

[No. 9.]

Argued March 2, 5, 1906. Decided December 3, 1906.

IN ERROR to the Supreme Court of the State of Florida to review a judgment awarding a peremptory writ of mandamus to enforce an order of the state railroad commission, fixing the local rates for carrying phosphates. Affirmed.

See same case below, 48 Fla. 146, 37 So. 657.

Statement by Mr. Justice Brewer:

On December 17, 1903, the railroad commission of the state of Florida, after notice and a hearing, made an order:

"That the rate to be charged by all the railroads and common carriers doing business wholly or in part within the state of Florida, for the transportation of phosphate from points in the state to points within the state, shall not exceed 1 cent per ton per mile.

"Provided, however, that where the rate of 1 cent per ton per mile will raise any rate now in operation, that said rate of 1 cent per ton per mile shall not be effective, but the rate as now charged by the railroad companies is hereby adopted by the railroad commissioners as their rate between such points.

"It is therefore ordered, that where a shipment of phosphate shall pass over two or more railroads in reaching its destination within the state of Florida, the initial line may charge 1½ cents per ton per mile for the first ten miles which said phosphate shall be hauled."

The railroad company, plaintiff in error, which was a party to the *proceedings before[257] the commission, not complying with this order, application was made on March 7, 1904, to the supreme court of the state for a writ of mandamus to compel compliance, and on October 19, 1904, the peremptory writ was ordered by that court, as prayed for. 48 Fla. 146, 37 So. 657. Thereupon the railroad company sued out this writ of error.

No special findings of fact were made by the supreme court, but in its opinion it said:

"There is a total lack of positive proof that the commission rate is materially less than that now charged. The company proves merely that its books do not show that any local phosphate has been carried by it, but does not show what rate it charges on the interstate shipments of phosphate. There is some showing of the expensiveness of handling phosphate for foreign shipment, much of which would not enter into the local or intrastate business, should such be carried, but nothing is shown from which this court can say that the rate fixed by the commission is unreasonable. The evidence offered might tend to show that the rate is unnecessary or that it is speculative, but such questions the court is not called upon to decide.

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"Taking the figures from the brief filed by the respondent, we find that the local business alone produces a net earning of at least 3 per cent on the total value of the

NOTE.—On legislative power to fix tolls, rates, or prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

As to reasonableness of state limitation of railroad rates—see note to Chicago, M. & St. P. R. Co. v. Tompkins, 44 L. ed. U. S. 417.

On unconstitutional inequality or discrimination in state regulation of tolls or rates—see note to Cotting v. Godard, 46 L. ed. U. S. 92.

road in Florida, charging against such income the whole of the taxes. While a state is not permitted to offset local business against interstate business, and to justify low local rates by reason of the profitableness of the latter, yet the interstate and foreign business may and should be considered in determining the proportion of the value of the property of the company assignable to local business. There is no proper showing of the interstate and foreign business, so that we may determine on what fraction of the whole value of the property in Florida the company might be entitled to earn an income from local business; there is, however, a showing that the interstate and foreign business is large and, on a proper [260] showing and a proper proportioning *of the service between domestic and foreign business, this percentage of net income would be largely increased.

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"Under the burden of proof cast by the law upon the respondent, we find that the rate in question is not unreasonable."

Mr. John E. Hartridge argued the cause and filed a brief for plaintiff in error.

Mr. J. M. Barrs argued the cause, and, with Mr. W. H. Ellis, filed a brief for defendant in error.

Mr. Justice Brewer delivered the opinion of the court:

Passing all matters of a local nature, in respect to which the decision of the state court is final, the Federal question is whether the order of the railroad commission, sustained by the supreme court of the state, deprived the company of its property without due process of law, or denied to it the equal protection of the law. The testimony taken before the commission was not preserved, but, by the law of the state, the rates established by such commission are to be taken in all courts as prima facie just and reasonable. Florida Laws 1899, chap. 4700, § 8, pp. 76, 82. We start, therefore, with the presumption in favor of the order.

The testimony on the hearing of the application in the supreme court is, however, in the record. That court, in the exercise of its original jurisdiction of mandamus cases, determines questions of fact as well as of law. State ex rel. Columbia County [260] v. Suwannee County, 21 Fla. 1. *While it did not make any distinct findings of fact, yet its deductions from the testimony are clearly indicated by the quotations from its opinion. If it be said that, in the absence of special findings of fact, it is the duty of this court to examine the testimony upon which the judgment was entered, it is very clear that there was no sufficient evidence presented to that court to justify a refusal to enforce the order of the railroad commission.

And here we face this situation: The order of the commission was not operative upon all local rates, but only fixed the rate on a single article; to wit, phosphate. There is no evidence of the amount of phosphates carried locally; neither is it shown how much a change in the rate of carrying them will affect the income, nor how much the rate fixed by the railroads for carrying phosphate has been changed by the order of the commission. There is testimony tending to show the gross income from all local freights and the value of the railroad property, and also certain difficulties in the way of transporting phosphates, owing to the lack of facilities at the terminals. But there is nothing from which we can determine the cost of such transportation. We are aware of the difficulty which attends proof of the cost of transporting a single article, and, in order to determine the reasonableness of a rate prescribed, it may sometimes be necessary to accept as a basis the average rate of all transportation per ton per mile. We shall not attempt to indicate to what extent or in what cases the inquiry must be special and limited. It is enough for the present to hold that there is in the record nothing from which a reasonable deduction can be made as to the cost of transportation, the amount of phosphates transported, or the effect which the rate established by the commission will have upon the income. Under these circumstances it is impossible to hold that there was error in the conclusions reached by the Supreme Court of the State of Florida, and its judgment is affirmed.

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*SEABOARD AIR LINE RAILWAY, Plff. in Err., [261]

v.

STATE OF FLORIDA upon the Relation of W. H. ELLIS, as Attorney General of Said State, et al.

(See S. C. Reporter's ed. 261-270.)

Constitutional law—due process of law—state regulation of railroad rates.

1. State regulation of local freight rates for shipments to and from the Florida West Shore Railway and over the Seaboard Air Line Railway does not deprive the latter road of its property without due process of law, even if its total receipts from local freight rates are insufficient to meet what

NOTE.—On legislative power to fix tolls, rates, or prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

can properly be cast as a burden upon that business, where, so far as appears, such regulation may have no other effect than to make the rates on the Florida West Shore Railway the same as those obtaining generally in the state.

Constitutional law—due process of law—state regulation of railroad rates.

2. Carriers may be forbidden by the state railroad commission to make their local freight rate for phosphates more than 1 cent per ton per mile without denying due process of law to a railway company whose transportation of phosphates constitutes about one sixth of its local freight business, where the rate so authorized is nearly 2 mills per ton larger than that company's average local freight rate.

[Nos. 10, 11.]

Argued March 2, 5, 1906. Decided December 3, 1906.

IN ERROR to the Supreme Court of the State of Florida to review two judgments awarding peremptory writs of mandamus to enforce orders of the state railroad commission which respectively prescribe the local freight rates for a specified road and fix a local freight rate for phosphates. Affirmed.

See same case below, No. 10, 48 Fla. 129, 152, 37 So. 314, 658; No. 11, 48 Fla. 150, 37 So. 658.

Statement by Mr. Justice Brewer:

These cases resemble the one immediately preceding, in this: that review is sought in each of an award of a peremptory writ of mandamus by the supreme court of Florida to compel compliance with an order of the state railroad commission. In the first, the court sustained an order of the commission, made June 25, 1903, and to go into effect July 1, 1903, prescribing rates on the Florida West Shore Railway, charged to be under the control and management of the plaintiff in error (48 Fla. 129–152, 37 So. 314, 657, 658), the order being in these words: "It is hereby ordered and adjudged by the railroad commission of the state of Florida that the following schedule of freight tariffs shall be allowed and adopted [262] for freight shipments over the *Seaboard Air Line Railway, to apply only to shipments from or destined to points on the Florida West Shore Railway, and from points on the Florida West Shore Railway to points on the Florida West Shore Railway, and the same shall be put into operation and be effective on the 1st day of July, A. D. 1903," and followed by the schedule; and in the second, it enforced the order of the commission in respect to phosphates (which was noticed by us in the opinion in the preceding case). 48 Fla. 150, 37 So. 658.

The proceedings before the commission are not disclosed, nor is there anything to show upon what the orders were based. There was notice and a hearing. And in the pleadings in the first case appear the contracts between the plaintiff in error and the Florida West Shore Railway.

In the supreme court the relator presented no testimony, relying upon the statutory presumption which attends an order of the commission. The defendant introduced the report which it had made to the railroad commission for the year ending June 30, 1904, and the report of the railroad commission to the governor of the state for the year ending March 1, 1904, and upon these two reports the cases were considered by the supreme court.

Messrs. Hilary A. Herbert and George P. Raney argued the cause, and, with Mr. Benjamin Micou, filed a brief for plaintiff in error:

The order of the Florida commission in relation to phosphates is discriminatory, exceptional, and partial as to the particular subject-matter. On its face it is an irregular, unjust, and intolerable method of rate fixing.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 695, 696, 43 L. ed. 863, 864, 19 Sup. Ct. Rep. 565; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Ames v. Union P. R. Co. 64 Fed. 188; Western U. Teleg. Co. v. Mississippi Railroad Commission, 74 Miss. 80, 21 So. 15.

The Seaboard Air Line Railway is not over-capitalized.

Metropolitan Trust Co. v. Houston & T. C. R. Co. 90 Fed. 683.

In estimating the value of the property on which a railroad company is entitled to earn a return from tariff rates, the following authorities show that the cost of bare physical reproduction is too narrow a basis.

Milwaukee Electric R. & Light Co. v. Milwaukee, 87 Fed. 585; Ames v. Union P. R. Co. 64 Fed. 165; Smyth v. Ames, 169 U. S. 547, 42 L. ed. 849, 18 Sup. Ct. Rep. 418; Chicago, B. & Q. R. Co. v. Dey, 38 Fed. 656.

Railway companies should be allowed to earn something by way of dividends in ad-

As to reasonableness of state limitation of railroad rates—see note to Chicago, M. & St. P. R. Co. v. Tompkins, 44 L. ed. U. S. 417.

On unconstitutional inequality or discrimination in state regulation of tolls or rates—see note to Cotting v. Godard, 46 L. ed. U. S. 92.

dition to paying operating and maintaining expenses, interest on outstanding bonds, and taxes.

Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Reagan v. Farmers' Loan & T. Co. supra; Milwaukee Electric R. & Light Co. v. Milwaukee, 87 Fed. 577; Louisville & N. R. Co. v. Brown, 123 Fed. 951; Ames v. Union P. R. Co. and Smyth v. Ames, supra; Southern P. Co. v. Railroad Comrs. 78 Fed. 236.

Interest on bonded debt is held by all authorities to be a proper charge upon income.

Southern P. Co. v. Railroad Comrs. 78 Fed. 263.

An ordinance requiring a street railroad charging 5 cent fares to sell six tickets for 25 cents, or 25 tickets for $1, is unreasonable, when the road is only making yearly net earnings of 3.3 per cent to 4.5 per cent on its bona fide investment, and paying 5 per cent interest on its bonds in a city where the current rate of interest on first-mortgage real estate security is 6 per cent.

Milwaukee Electric R. & Light Co. v. Milwaukee, supra.

The presumption which, according to the statutes of Florida, and, perhaps, according to common usage, generally arises in favor of the reasonableness of rates fixed by commissioners, is always rebuttable, and never conclusive.

Southern P. Co. v. Railroad Comrs. supra. Lawson, Presumptive Ev. rule 120; Graves v. Colwell, 90 Ill. 615.

It is not always easy to determine the value of railroad property, and if there is no other testimony in respect thereto than the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or other of these represents it, and computation as to the compensatory quality of rates may be based upon such amounts.

Ames v. Union P. R. Co. 64 Fed. 177.

Mr. J. M. Barrs argued the cause, and, with Mr. W. H. Ellis, filed a brief for defendant in error:

The plaintiff in error has not shown sufficient facts to reverse the judgment of the supreme court of Florida, if the court should decide contrary to our contention, and that the points raised in the case are questions of mixed law and fact, and properly reviewable by this court.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571.

Mr. Justice Brewer delivered the opinion of the court:

There are no special findings of facts in these cases, and only from an examination of the opinions filed by the supreme court can we ascertain what its conclusions were or upon what its judgments were based. It may well be doubted whether a railroad company can rely, as evidence in its own behalf, upon a report made and filed by it, and while a report of the railroad commission to the governor may undoubtedly be used against it in an application made at its instance to secure compliance with one of its orders, yet there is little in its report which throws light upon the questions in these cases.

Referring to the first case, in which is presented the reasonableness of an order made by the commission respecting local rates for business on, to, or from the Florida West Shore Railway, we find it stated in the brief of the plaintiff in error that the railroad commission on December 22. 1903, made an order, to go into effect July 1, 1904, reducing local freight rates generally; that from this order no appeal was taken; that in November, 1903, an order was made reducing by 10 per cent rates on certain freights going over two or more roads, and that from such order no appeal was taken. These are the *orders referred to in the re- [269] port of the commission to the governor. But the order in controversy was made on June 25, 1903, to go into effect July 1, 1903, and is applicable solely to the Florida West Shore road. Now, whether this order of June 25, 1903, was simply operative to make the rates on the Florida West Shore road the same as those then obtaining generally in the state, or whether it made them higher or lower than such rates, does not appear. For some reason, not disclosed, the order touched only the local freight rates to and from the Florida West Shore Railway and over the Seaboard Air Line Railway. Even if the total receipts by the latter company from local freight rates were insufficient to meet what could properly be cast as a burden upon that business, such insufficiency would not justify it in an inequality of rates between different parts of the state, in one part too high and in the other too low. The state might properly insist that there should be equality in the rates,—the condi-

tions being the same,—and, if nothing more was accomplished by the order of the commission than to establish such equality, we cannot hold that the judgment of the supreme court was erroneous.

With reference to the second of these cases, the order made by the railroad commission is said by the plaintiff in error to be an "irregular, unjust, and unreliable method of rate fixing;" and this upon the theory that the order makes the rate per mile the same for any distance, whether one mile or a hundred miles. It appears that 16.43 per cent of all the local freight business of the company in Florida comes from the carrying of phosphates, and reference is made to several cases in which the courts have noticed the fact that the cost of moving local freight is greater than that of moving through freight, and the reasons for the difference. But evidently counsel misinterpret the order of the railroad commission. It does not fix the rate at 1 cent per ton per mile. It simply provides that it shall not exceed 1 cent per ton per mile,—prescribes a maximum which may be reduced by the railway company, and, if dis-[270]tance *demands a reduction, the company may and doubtless will make it. In addition it must be borne in mind that it is to be presumed that the railroad commission acted with full knowledge of the situation; that phosphates were in Florida possibly carried a long distance, the place of mining being far from the place of actual use or preparation for use. Further, when we turn to the report of the railroad company (which, of course, is evidence against it), we find that the company's average freight receipt per ton per mile in the state of Florida was $8^{15}/_{100}$ mills; so that the rate authorized for phosphates was nearly 2 mills per ton larger than such average. Under these circumstances it is impossible to say that there was error in the conclusions of the Supreme Court of the state, and its judgments are affirmed.

PAUL HEYMANN, Plff. in Err.,
v.
SOUTHERN RAILWAY COMPANY.

(See S. C. Reporter's ed. 270-278.)

Commerce—in intoxicating liquors—state regulation—Wilson act.

1. Delivery of an interstate shipment of intoxicating liquors to the consignees is essential to constitute their arrival in the state within the meaning of the Wilson act of August 8, 1890 (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), subjecting all intoxicating liquors arriving in the state to the laws of such state enacted in the exercise of its police power.

Commerce—intoxicating liquors—state regulation—Wilson act.

2. The mere placing of an interstate shipment of intoxicating liquors in the carrier's warehouse to await delivery to the consignees does not constitute their arrival in the state within the meaning of the Wilson act of August 8, 1890, subjecting all intoxicating liquors arriving in the state to the laws of such state enacted in the exercise of its police power.

[No. 32.]

Submitted October 17, 1906. Decided December 3, 1906.

IN ERROR to the Supreme Court of the State of Georgia to review a judgment which, on second appeal, affirmed a judgment of the Superior Court of Richmond County, in that state, on appeal from a justice's court, in favor of defendant in an action to recover damages from a railroad company for failing to make the deliveries of shipments of intoxicating liquors as agreed in the bills of lading. Reversed and remanded for further proceedings.

See same case below, 122 Ga. 608, 50 S. E. 342; on first writ of error, 118 Ga. 616, 45 S. E. 491.

The facts are stated in the opinion.

Messrs. Milton Strasburger and Samuel H. Myers submitted the cause for plaintiff in error.

Mr. Joseph B. Cumming submitted the cause for defendant in error.

Mr. Justice White delivered the opinion of the court:

In March, 1902, P. B. Wise and H. D.

NOTE.—On state regulation of interstate or foreign commerce— see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

State licenses or taxes as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 306; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; and Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On commerce in intoxicating liquors—see notes to State v. Creeden, 7 L.R.A. 296; State ex rel. Cochran v. Winters, 10 L.R.A. 616; and Rhodes v. Iowa, 42 L. ed. U. S. 1089.

Harkins, residents of Charleston, South Carolina, each ordered a cask of whisky from Paul Heymann, a wholesale liquor dealer in Augusta, Georgia. The price of the whisky acompanied the orders, which were given upon the understanding that if, for any cause, delivery was not made to the consignees, the purchase price would be refunded.

The two casks of whisky, consigned to the respective purchasers at Charleston, were delivered to the Southern Railway Company at Augusta. In due course the packages of liquor reached Charleston, and were by the railroad company at once unloaded into its warehouse, ready for delivery. The record does not show that the consignees were notified of the arrival of the goods. Shortly after the goods were so placed in the warehouse of the railroad company they were seized and taken from its possession. The seizures were made without any warrant or other process, by constables asserting their right to do so under the authority of what is known as the dispensary law of South Carolina, which law was considered in Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674. The agent of the railroad company did not resist the seizure.

Thereafter, Heymann, the consignor, sued the railroad company for failing to make the deliveries as contracted in the bills of lading, and in the superior court of Richmond county, on appeal from a justice's court, obtained a verdict and judgment. The cause was appealed to the supreme court of Georgia, and by that court the judgment was reversed and the case remanded. 118 Ga. 616, 45 S. E. 491. On the second trial the defendant had a verdict and judgment; [272] and on appeal the *judgment was affirmed by the supreme court of Georgia upon the authority of its previous opinion. The case was then brought here.

The act of Congress of August 8, 1890 [26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177], commonly known as the Wilson act, provides that all intoxicating liquors "transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The supreme court of Georgia held—although the goods had not been delivered to the consignees, and although there was no showing of notice to them from the carrier, or even if notice by the local law was unnecessary, of the lapse of a reasonable time for the consignees to call for and accept delivery—that the interstate transportation of the goods ended when they were placed in the warehouse, and the carrier was thenceforward liable only as a warehouseman, and that the goods ceased to be under the shelter of the interstate commerce clause of the Constitution. This was based upon the conclusion that goods warehoused under the circumstances stated must be considered as having arrived, within the meaning of the Wilson act, and therefore the packages of liquor in question were lawfully seized because subject to the police authority of the state of South Carolina. The meaning thus affixed to the word "arrival," as employed in the Wilson act, was adopted after consideration of the opinion in Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664. While it was conceded by the learned court that language contained in the opinion in that case indicated that this court deemed delivery essential to constitute "arrival" within the Wilson act, yet, the expressions in the opinion to that effect were not binding, as they were merely *obiter*, since the *Rhodes Case was only concerned [273] with whether goods had come under the state authority on reaching their place of destination and before they had been warehoused by the carrier.

We cannot concur in the view taken by the learned court of the decision in the Rhodes Case. In that case a railroad employee at a town in Iowa was indicted under the law of that state because, after an interstate shipment of liquors had reached the depot of the final carrier, at the point of destination, he moved the package from the platform, where it had been placed on being unloaded, to a freight warehouse belonging to the railroad company, a few feet away. It was insisted on behalf of the state of Iowa that the effect of the Wilson act was to confer upon that state the power to subject to state regulations merchandise shipped from another state the moment it reached the boundary line of the state of Iowa. On the other hand, it was contended that an interstate shipment of liquor did not arrive within that state within the meaning of the Wilson act until the consummation of the shipment by delivery at its destination to the consignee. The case, therefore, necessarily involved deciding the meaning of the word "arrival" in the Wilson act, and this required an ascertainment of when goods shipped from one state to another, generally speaking, ceased to be con-

trolled by the interstate commerce clause of the Constitution, and how far the general rule resulting from the power of Congress to regulate commerce had been limited, if at all, by the provisions of the Wilson act. Considering the first question, the elementary and long-settled doctrine was reiterated that delivery and sale in the original package was necessary to terminate interstate commerce, so far as the police regulations of the states were concerned. In passing upon the second question the court, referring to a previous case involving the Wilson law (Re Rahrer [Wilkerson v. Rahrer] 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865), pointed out that the contention which was made in that case, that the Wilson act was repugnant to the Constitution of the United States because it was an abdication by Congress of its power to [274] regulate commerce, *was held to be untenable, because the Wilson act was simply legislation by Congress creating a uniform rule applicable to all the states, by which liquor, when the subject of interstate commerce, could come under the power of a state at an earlier date than it otherwise would have done. Contemplating the grounds of the previous ruling upholding the constitutionality of the Wilson act, and coming to precisely determine the meaning of the word "arrival" as used in that act, it was said in the Rhodes Case (p. 426, L. ed. p. 1096, Sup. Ct. Rep. p. 669):

"Interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the state to attach to an interstate commerce shipment whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination, and delivery there to the consignee."

And as a result of this ascertainment of the meaning of the Wilson act it was held that, as the act of moving the goods preceded the period affixed by the Wilson act at which the state power could attach, the conviction was erroneous.

The Rhodes Case involved, of necessity, a construction of the import of the Wilson act, and the mere fact that the particular conduct which happened in that case to be the subject of complaint occurred prior to the delivery did not operate to cause the affirmative construction which was given to the Wilson act, and which it was necessary to give, to be *obiter*, and therefore subject to be disregarded. And a case decided by this court on the same day as the Rhodes Case leaves no room for controversy concerning the affirmative construction given to the Wilson act in the Rhodes Case. The case referred to is Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674. The court said (p. 451, L. ed. p. 1105, Sup. Ct. Rep. p. 679):

"The interstate commerce clause of the Constitution guarantees the right to ship merchandise from one state into another, and protects it until the termination of the shipment by delivery at the place of consignment, and this right is wholly unaffected by the act of Congress which allows state *authority to attach to the original package before sale, but only after delivery. Scott v. Donald, 165 U. S. 58, 107, 41 L. ed. 632, 648, 17 Sup. Ct. Rep. 265, 262, and Rhodes v. Iowa, supra. It follows that under the Constitution of the United States every resident of South Carolina is free to receive for his own use liquor from other states, and that the inhibitions of a state statute do not operate to prevent liquors from other states from being shipped into such state, on the order of a resident, for his use."

And in subsequent cases the construction adopted in the previous cases of the word "arrival" as employed in the Wilson act has been reaffirmed and applied. Thus, in American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182, in reviewing the Rhodes Case, the meaning of the Wilson act was again reiterated, the court saying (p. 142, L. ed. p. 421, Sup. Ct. Rep. p. 184):

"The contention was that, as by the Wilson act the power of the state operated upon the property the moment it passed the state boundary line, therefore the state of Iowa had the right to forbid the transportation of the merchandise within the state, and to punish those carrying it therein. This was not sustained. The court declined to express an opinion as to the authority of Congress, under its power to regulate commerce, to delegate to the states the right to forbid the transportation of merchandise from one state to another. It was, however, decided that the Wilson act manifested no attempt on the part of Congress to exert such power, but was only a regulation of commerce, since it merely provided, in the case of intoxicating liquors, that such merchandise, when transported from one state to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original packages."

Again, in Foppiano v. Speed, 199 U. S. 501, 50 L. ed. 288, 26 Sup. Ct. Rep. 138, referring to the Wilson act and its previous construction, it was declared (p. 517, L. ed. p. 291, Sup. Ct. Rep. 140):

"This act was held to be constitutional in the case of Re Rahrer, supra, and that by virtue of said act state *statutes might operate upon the original packages of intoxicating liquors before sale in the state. Rhodes v.

Iowa and Vance v. W. A. Vandercook Co. *supra*, held that the state statute must permit the delivery of the liquors to the party to whom they were consigned within the state, but that, after such delivery, the state had power to prevent the sale of the liquors, even in the original package."

As the general principle is that goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package, and as the settled rule is that the Wilson law was not an abdication of the power of Congress to regulate interstate commerce, since that law simply affects an incident of such commerce by allowing the state power to attach after delivery, and before sale, we are not concerned with whether, under the law of any particular state, the liability of a railroad company as carrier ceases and becomes that of a warehouseman on the goods reaching their ultimate destination, before notice and before the expiration of a reasonable time for the consignee to receive the goods from the carrier. For, whatever may be the divergent legal rules in the several states concerning the precise time when the liability of a carrier, as such, in respect to the carriage of goods, ends, they cannot affect the general principle as to when an interstate shipment ceases to be under the protection of the commerce clause of the Constitution, and thereby comes under the control of the state authority.

Of course, we are not called upon in this case, and do not decide, if goods of the character referred to in the Wilson act, moving in interstate commerce, arrive at the point of destination, and, after notice and full opportunity to receive them, are designedly left in the hands of the carrier for an unreasonable time, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, the holding that goods so dealt with have come under the operation of the Wilson act, because constructively delivered. We say we [277] *are not called upon to consider this question, for the reason that no facts are shown by the record justifying passing on such a proposition. And as in this case we deal only with the power of the state to enforce its police regulations against goods of the character of those enumerated in the Wilson act, the subject of interstate commerce, before delivery, we must not be understood as in any way limiting or restricting the ruling made in Vance v. W. A. Vandercook Co., *supra*, upholding the right of a citizen of one state to bring from another state into the state of his residence, and keep therein, for his personal use, the merchandise referred to in the Wilson act. In other words, as in the case at bar, delivery had not taken place when the seizures were made, and the control of the state over the goods had not attached, we are not called upon to consider whether, if the power of the state had attached by delivery, the state might not have levied upon the goods on the charge that they had not been bona fide brought into the state, and were not held by the consignees for their personal use, and, therefore, were not within the ruling in Vance v. W. A. Vandercook Co. supra.

The conclusion that the court below erred in declining to follow the prior rulings of this court construing the Wilson act disposes of the entire controversy arising on the record before us, for the following reasons: In its answer filed in the trial court the railroad company substantially defended alone upon the ground that the seizure was rightful. And the supreme court of Georgia treated the liability of the defendant as depending solely upon the validity of the seizure. The court said:

"If [the goods] . . . were still in the course of interstate transportation, the seizure by the constable was not even prima facie legal, for the very law under which the seizure was made had, prior to such seizure, been declared by the Supreme Court of the United States to be unconstitutional in so far as it interfered with interstate commerce. Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265. It therefore follows that if the shipment had not *been [278] completed at the time the goods were seized, the railroad company would have no right to defend on the ground that it submitted to the superior authority, granting that such a defense, if established, would relieve it from liability." [118 Ga. 618, 45 S. E. 492.]

Moreover, in this court, counsel, in their brief on behalf of the defendant in error, rely exclusively upon the correctness of the construction given to the Wilson act by the court below, and do not urge, in the event such construction be not sustained, that it was exempt for any reason whatever from liability.

The judgment of the Supreme Court of Georgia is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

C. H. NICHOLS LUMBER COMPANY, Plff. in Err.,
v.
CHARLES FRANSON.

(See S. C. Reporter's ed. 278-283.)

Error to circuit court—certificate—jurisdiction below.

1. The certificate of a Federal circuit

court may be considered by the Supreme Court on the direct review authorized by the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), for the purpose of supplying the failure of the record to show when and how the question of jurisdiction was raised, if the elements necessary to decide the question are in the record, although it is the better practice to make apparent on the record, by a bill of exceptions or other appropriate mode, the fact that the question of jurisdiction was raised and passed upon, and the elements upon which the decision of the question was based.

Error to circuit court—certificate—jurisdiction below.

2. In deciding the question of the jurisdiction below which is shown by the certificate of the Federal circuit court to have been raised, the Supreme Court cannot resort to the statements in the certificate for the purpose of supplying elements of decision which it could not properly consider in an action at law without a bill of exceptions.

Courts—jurisdiction of Federal circuit court—sufficiency of allegation to show alienage.

3. The alienage of the plaintiff is sufficiently alleged to sustain the jurisdiction of a Federal circuit court by an averment in the complaint that "the plaintiff now is, and for more than one year last past has been, a resident of Washington and a citizen of Sweden," although, at the time the action was brought, Sweden was under a monarchical form of government, since the designation "citizen of Sweden" could only have been intended as a statement of the nationality of the plaintiff,—*viz.*, the country to which he bore allegiance.

[No. 30.]

Argued and submitted October 17, 1906. Decided December 3, 1906.

IN ERROR to the Circuit Court of the United States for the Western District of Washington to review a judgment for plaintiff in an action for personal injuries. Affirmed.

The facts are stated in the opinion.

Mr. Carroll T. Bond argued the cause, and, with Mr. William L. Marbury, filed a brief for plaintiff in error:

The allegation in the complaint, that plaintiff was a "citizen of Sweden," is not a sufficient averment to confer jurisdiction on the ground of diversity of citizenship of parties.

Jones v. United States, 137 U. S. 202, 212 214, 34 L. ed. 691, 695, 696, 11 Sup. Ct. Rep 80; Stuart v. Easton, 156 U. S. 46, 39 L. ed 341, 15 Sup. Ct. Rep. 268; Hennessy v Richardson Drug Co. 189 U. S. 34, 47 L. ed 698, 23 Sup. Ct. Rep. 532; Bishop v. Averill 76 Fed. 386; Rondot v. Rogers Twp. 25 C C. A. 145, 47 U. S. App. 290, 79 Fed. 676.

The statements of defendant in error in his testimony are equally insufficient for the purpose of conferring jurisdiction.

Thomas v. Ohio State University, 195 U S. 218, 49 L. ed. 167, 25 Sup. Ct. Rep. 24 Sun Printing & Pub. Asso. v. Edwards, 19 U. S. 377, 48 L. ed. 1027, 24 Sup. Ct. Rep 696; Grace v. American Cent. Ins. Co. 10 U. S. 278, 285, 27 L. ed. 932, 935, 3 Sup. Ct Rep. 207; Horne v. George H. Hammond Co 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep 167.

The motion of defendant in error to dismiss the writ of error should be denied.

Mansfield, C. & L. M. R. Co. v. Swan, 11 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct Rep. 510; Wetmore v. Rymer, 169 U. S 115, 120, 42 L. ed. 682, 684, 18 Sup. Ct. Rep 293.

Mr. Walter S. Fulton submitted the cause for defendant in error. Mr. Martin J. Lund was on the brief:

It is no longer necessary to describe a party as an alien.

Hennessy v. Richardson Drug Co. 189 U. S. 25, 47 L. ed. 697, 23 Sup. Ct. Rep. 532.

Sweden is a foreign state, and a citizen of Sweden is a foreign citizen. The court takes judicial notice of the existence of a foreign country.

12 Am. & Eng. Enc. Law, p. 152; 9 Century Dict. p. 969.

While the term "citizen" is used to designate a member of a republic, it is not exclusively so, but is also appropriately used to designate a member of a monarchy, provided he is a freeman.

2 Johnson, Universal Enc. 581; Webster International Dict. "Citizen;" 3 Am. & Eng Enc. Law, p. 242; 2 Bouvier, Law Dict. P 551; Robertson v. Scottish Union & Nat Ins. Co. 68 Fed. 176; Jennes v. Landes, 8 Fed. 74.

A certificate of questions upon jurisdiction cannot take the place of a bill of exceptions.

Felix v. Scharnweber, 125 U. S. 54, 3 L. ed. 687, 8 Sup. Ct. Rep. 759.

NOTE.—On direct review in the Federal Supreme Court of judgments of circuit or district courts—see note to Gwin v. United States, 46 L. ed. U. S. 741.

As to diverse citizenship as ground of Federal jurisdiction—see notes to Shipp v. Williams, 10 C. C. A. 247; Mason v. Dullagham, 27 C. C. A. 296; Seddon v. Virginia, T & C. Steel & I. Co. 1 L.R.A. 108; Myers v Murray, N. & Co. 11 L.R.A. 216; Robert v. Lewis, 36 L. ed. U. S. 579; Emory v Greenough, 1 L. ed. U. S. 640; Strawbridg v. Curtiss, 2 L. ed. U. S. 435; and M'Donal v. Smalley, 7 L. ed. U. S. 287.

[280] *Mr. Justice White delivered the opinion of the court:

A motion has been made to dismiss the writ of error, among others, on the ground of the absence of a bill of exceptions, and the character of the order appealed from. We pass to the merits of the case without stopping to review the grounds of the motion, as we think they will be substantially disposed of by the views which we shall hereafter express.

By this writ of error the C. H. Nichols Lumber Company seeks the reversal of a judgment obtained by Charles Franson in the circuit court of the United States for the western district of Washington. Considering the record alone, and putting out of view for the moment the effect of statements contained in a certificate made by the court below on the allowance of the writ of error, the case is this: The action was brought to recover for personal injuries alleged to have been sustained while in the employ of the defendant. The jurisdiction of the court below was invoked solely upon the ground of diversity of citizenship, it being alleged in the first paragraph of the complaint that the defendant was a corporation organized under the laws of the state of Washington, and doing business in the state of Washington, and that the plaintiff was, at the time of the filing of the complaint, and had been for more than a year prior thereto, "a resident of Washington and a citizen of Sweden." Admitting its incorporation, and that it was doing business in the state of Washington, the defendant, by its answer, specifically denied each and every other allegation of the first as well as other specified paragraphs of the complaint.

The cause was tried to a jury, and, after verdict and remittitur of a portion thereof, a judgment was entered in favor of plaintiff. The record does not contain a bill of exceptions, and in the brief of counsel for plaintiff in error it is stated that none was prepared.

This writ of error, upon the ground solely of a want of jurisdiction in the trial court, [281] was prayed and allowed, and a *formal certificate was made by the judge, reciting to the time when and how the question of jurisdiction was raised and decided, accompanied with a statement of the pleadings and of the court's impression of certain testimony given at the trial by the plaintiff, deemed by the court pertinent to the elucidation of the question of jurisdiction. The certificate concludes with the statement of enumerated "questions of jurisdiction," which the court was of opinion arose for decision, all of them being based upon the overruling by the court of a motion to dismiss the action for want of jurisdiction, which motion, it is recited in the certificate, was made between verdict and judgment. And the only ground here assigned as error is predicated upon the action of the court in denying such motion to dismiss.

As the circuit court was without power to make a certificate containing a statement of facts as the basis for legal propositions upon which it desired the guidance of this court (Mexican C. R. Co. v. Eckman, 187 U. S. 432, 47 L. ed. 246, 23 Sup. Ct. Rep. 211; United States v. Rider, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983), it follows, speaking in a general sense, that our right to review on a direct proceeding concerning the jurisdiction of that court must depend upon the record, and not upon the mere statement of facts made in the certificate prepared by the trial court. Applying this general rule, as it nowhere appears from the record that the issue as to jurisdiction presented by the motion to dismiss, the overruling of which is the sole ground for reversal relied upon in the assignment of error, was made or passed upon by the court, we should be constrained to dismiss this writ of error on the ground that the record did not disclose the presence in the case of the question of jurisdiction which is made the basis of the assignment of error. As, however, under the judiciary act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488], on a direct review of a question of jurisdiction, the trial judge is authorized to certify as to the existence of such question, we think we may look at his certificate for the purpose of ascertaining when and how the question of jurisdiction was raised, although, for the purpose of deciding the question *shown to have been thus [282] raised, we may not resort to the statements in the certificate for the purpose of supplying elements of decision which we could not properly consider in an action at law without a bill of exceptions. We have said that we may resort to the certificate, in the absence of a proper showing on the record as to when and how the question of jurisdiction was raised and decided, for the limited purpose stated, because the power to do so is implied in a previous decision of the court (North American Transp. & T. Co. v. Morrison, 178 U. S. 262, 44 L. ed. 1061, 20 Sup. Ct. Rep. 869), and because of the general rule that it would be our duty, without action of the trial court or of the parties, to look at the record to determine whether or not the court below had jurisdiction of the action (Thomas v. Ohio State University, 195 U. S. 211, 49 L. ed. 164, 25 Sup. Ct. Rep. 24). It is apparent, under the rule we have stated, that, whilst we must consider the record for the purpose of determining the question of jurisdiction which

the certificate shows adequately to have been raised, we may not consider, in passing upon that question, in the absence of a bill of exceptions, the extraneous matter, such as the testimony of the plaintiff, etc., which forms no part of the record. The question, therefore, for decision under these circumstances is merely this: Does the record show jurisdiction in the court below? This solely depends upon the contention that the allegation in the complaint of the alienage of the plaintiff was insufficient.

The allegation was as follows: "That the plaintiff now is, and for more than one year last past has been, a resident of Washington and a citizen of Sweden." In brief, the argument is that at the time the action was brought Sweden was under a monarchical form of government, being, jointly with Norway, under the rule of the King of Sweden and Norway, and if the plaintiff owed allegiance to the government of Sweden he was not a "citizen" but a "subject" of that country. It is not, however, disputed that, although at the time of the bringing of this action Sweden, a limited monarchy, was united to Norway under the same king, and [283] the two countries were *bound to assist each other in the event of war, they were otherwise free and independent. 9 Century Dictionary and Encyclopedia, 969. The allegation that the plaintiff was a resident of the state of Washington clearly shows that the designation "citizen of Sweden" was not employed to indicate mere residence, and could only have been intended as a statement of the nationality of the plaintiff,—the country to which he bore allegiance. Whether, as contended for the defendant in error, the plaintiff, if he owed allegiance to the ruler of the Kingdom of Sweden, was properly described, in the strictest technical sense, as a citizen instead of as a subject of Sweden, we need not consider. The meaning of the pleader being evident, the objection is without merit. Hennessy v. Richardson Drug Co. 189 U. S. 25, 47 L. ed. 697, 23 Sup. Ct. Rep. 532.

Whilst we hold that in a case of direct review under the judiciary act of 1891, when the record does not otherwise show when and how the question of jurisdiction was raised, the certificate of the circuit court may be considered for the purpose of supplying such deficiency when the elements necessary to decide the question are in the record, we deem it the better practice in every case of direct review on a question of jurisdiction to make apparent on the record, by a bill of exceptions or other appropriate mode, the fact that the question of jurisdiction was raised and passed upon, and the elements upon which the decision of the question was based.

Judgment affirmed.

*REUBEN L. MARTIN, Plff. in Err.,

v.

PITTSBURG & LAKE ERIE RAILROA COMPANY.

(See S. C. Reporter's ed. 284-296.)

Postoffice—congressional power over po roads—state regulation.

1. The power of Congress to establis postoffices and post roads is not infringe by Pa. act of April 4, 1868, under which railway postal clerk, injured in the cour of his employment, can have no greate rights against the railway company than he were an employee.

Commerce—state regulation.

2. Applying to interstate transport tion the provisions of Pa. act of April 1868, restricting, as against a railway com pany, the rights of persons injured in th course of their employment in or about th railroad to those which an employee of th railway company would have under lik circumstances, does not make such statut repugnant to the commerce clause of th Federal Constitution.

Constitutional law—due process of law.

3. Due process of law is not denied person injured in the course of his emplo ment in or about a railroad by Pa. act April 4, 1868, restricting his rights as again the railway company to those which an em ployee of such company would have und like circumstances.

Constitutional law—privileges and immun ties.

4. Privileges and immunities of citize of the United States are not denied by ap plying to interstate transportation the pro visions of Pa. act of April 4, 1868, restrict ing, as against a railroad company, th rights of persons injured in the course of their employment in or about the railroad to those which an employee of the railway

NOTE.—On the liability of railroad com panies for injuries received by postal clerk on their trains—see note to Cleveland, C. C & St. L. R. Co. v. Ketcham, 19 L.R.A. 339

On state regulation of interstate or for eign commerce—see notes to Norfolk & W R. Co. v. Com. 13 L.R.A. 107; McCanna F. Co. v. Citizens' Trust & Surety Co. 9 C. C. A. 13; and Gloucester Ferry Co. v Pennsylvania, 29 L. ed. U. S. 158.

As to what constitutes due process of la —see notes to People v. O'Brien, 2 L.R.A 255; Kuntz v. Sumption, 2 L.R.A. 655; R Gannon, 5 L.R.A. 359; Ulman v. Baltimor 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A 304; Pearson v. Yewdall, 24 L. ed. U. S. 436 and Wilson v. North Carolina, 42 L. ed. U S. 865.

As to the validity of class legislation—se notes to State v. Goodwill, 6 L.R.A. 621 and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privilege immunities, and protection—see note t Louisville Safety Vault & T. Co. v. Louis ville & N. R. Co. 14 L.R.A. 579.

company would have under like circumstances.

Constitutional law—equal protection of the laws—classification.

5. Restricting railway mail clerks and others whose employment in and about a railroad subjects them to greater peril than passengers in the strict sense to such right of action against the railway company for injuries received in the course of their employment as a railway employee would have under like circumstances is a reasonable classification, which sustains the provision of Pa. act of April 4, 1868, making it, as against the objection that such statute denies the equal protection of the laws.

[No. 66.]

Argued October 26, 29, 1906. Decided December 3, 1906.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Circuit Court of Mahoning County, in that state, which had in turn affirmed a judgment of the Court of Common Pleas of that county, in favor of defendant, in an action by a railway postal clerk to recover from a railway company for personal injuries alleged to have been sustained by reason of its negligence. Affirmed.

See same case below, 72 Ohio St. 659, 76 N. E. 1129.

Statement by Mr. Justice White:

Reuben L. Martin brought this action to recover compensation for personal injuries. At the time Martin was injured he was on a train of the railroad company, in the employ of the United States as a railway postal clerk on a route extending from Cleveland, 285 Ohio, to Pittsburg, Pennsylvania. The *injuries arose from the derailing in Pennsylvania of the train, by the negligence of the crew of a work train, in permitting a switch leading to a side track to be open. Among other defenses the company pleaded a law of Pennsylvania passed April 4, 1868 (P. L. 58), which, it alleged, was applicable, and relieved from responsibility. In reply the plaintiff denied the existence and applicability of the statute, moreover, and defended on the ground that the statute, if existing and applicable, was void, first, because contrary to the power delegated to Congress to establish postoffices and post roads; second, because repugnant to the commerce clause of the Constitution; and, third, because in conflict with the equal protection and due process clauses of the 14th Amendment, and also the clause prohibiting a state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States.

On trial before a jury the court held the statute in question to be applicable and valid, and hence operative to defeat a recovery. A verdict and judgment in favor of the railroad company was severally affirmed by the circuit court and by the supreme court of the state of Ohio.

Mr. Charles Koonce, Jr., argued the cause, and, with Messrs. Robert B. Murray and William S. Anderson, filed a brief for plaintiff in error:

Prior to the enactment of this statute everyone lawfully on a train who was not in fact an employee of the company was, and had the rights of, a passenger in the state of Pennsylvania.

Lockhart v. Lichtenthaler, 46 Pa. 151; Pennsylvania R. Co. v. Henderson, 51 Pa. 315; Creed v. Pennsylvania R. Co. 86 Pa. 139, 27 Am. Rep. 693; Cumberland Valley R. Co. v. Myers, 55 Pa. 288; Philadelphia & R. R. Co. v. Derby, 14 How. 468, 14 L. ed. 502; Gleeson v. Virginia Midland R. Co. 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; Yarrington v. Delaware & H. Co. 143 Fed. 565.

The same rule has been announced without exception in every other jurisdiction.

Cavin v. Southern P. Co. 69 C. C. A. 366, 136 Fed. 592; Southern P. Co. v. Schuyler, 68 C. C. A. 409, 135 Fed. 1015; Arrowsmith v. Nashville & D. R. Co. 57 Fed. 165; Collett v. London & N. W. R. Co. 15 Jur. 1053, 16 Q. B. 984; Mellor v. Missouri P. R. Co. 105 Mo. 460, 10 L.R.A. 36, 16 S. W. 849; Magoffin v. Missouri P. R. Co. 102 Mo. 540, 22 Am. St. Rep. 798, 15 S. W. 76; Seybolt v. New York, L. E. & W. R. Co. 95 N. Y. 562, 47 Am. Rep. 75; Blair v. Erie R. Co. 66 N. Y. 313, 23 Am. Rep. 55; Yeomans v. Contra Costa Steam Nav. Co. 44 Cal. 71; Hammond v. North Eastern R. Co. 6 S. C. N. S. 130, 24 Am. Rep. 467; Baltimore & O. R. Co. v. State, 72 Md. 36, 6 L.R.A. 706, 20 Am. St. Rep. 454, 18 Atl. 1107; Louisville & N. R. Co. v. Kingman, 18 Ky. L. Rep. 82, 35 S. W. 264; Illinois C. R. Co. v. Crudup, 63 Miss. 291; Cleveland, C. C. & St. L. R. Co. v. Ketcham, 133 Ind. 346, 19 L.R.A. 339, 36 Am. St. Rep. 550, 33 N. E. 116; Norfolk & W. R. Co. v. Shott, 92 Va. 34, 22 S. E. 811.

It was also the established law of the state of Pennsylvania that a common carrier could not, by contractual stipulation, relieve itself of liability for the negligence of itself or its servants, whereby those carried by it were injured.

New York C. R. Co. v. Lockwood, 17 Wall. 357-368, 21 L. ed. 627-636; Laing v. Colder, 8 Pa. 479, 49 Am. Dec. 533; Camden & A. R. Co. v. Baldauf, 16 Pa. 67, 55

Am. Dec. 481; Goldey v. Pennsylvania R. Co. 30 Pa. 242, 72 Am. Dec. 703; Powell v. Pennsylvania R. Co. 32 Pa. 414, 75 Am. Dec. 564; Pennsylvania R. Co. v. Henderson, supra; Farnham v. Camden & A. R. Co. 55 Pa. 53; American Exp. Co. v. Sands, 55 Pa. 140; Empire Transp. Co. v. Wamsutta Oil Ref. & Min. Co. 63 Pa. 14, 3 Am. Rep. 515; Grogan v. Adams Exp. Co. 114 Pa. 523, 60 Am. Rep. 360, 7 Atl. 134; Pennsylvania R. Co. v. McCloskey, 23 Pa. 526; Phœnix Pot Works v. Pittsburgh & L. E. R. Co. 139 Pa. 284, 20 Atl. 1058; Pennsylvania R. Co. v. Raiordon, 119 Pa. 577, 4 Am. St. Rep. 670, 13 Atl. 324; The Kensington, 183 U. S. 263-268, 46 L. ed. 190-193, 22 Sup. Ct. Rep. 102.

If this limitation of liability cannot be effected by contract, wherein there is a voluntary waiver on the part of the one carried, to recover damages against the carrier for negligence of itself or its servants, how can it be compelled by legislative enactment?

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684-693, 43 L. ed. 858-862, 19 Sup. Ct. Rep. 565.

The authority of Congress to legislate with reference to the establishment of post-offices and post roads, and all matters of an executive and administrative character pertaining thereto, is exclusive.

Re Debs, 158 U. S. 564-583-593, 39 L. ed. 1092-1102-1105, 15 Sup. Ct. Rep. 900; Gilman v. Philadelphia, 3 Wall. 713-725, 18 L. ed. 96-99; Searight v. Stokes, 3 How. 151, 11 L. ed. 537; Ex parte Jackson, 96 U. S. 727-732, 24 L. ed. 877-879; Robbins v. Taxing District, 120 U. S. 489-493, 30 L. ed. 694-696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Cooley v. Port Wardens, 12 How. 299-319, 13 L. ed. 996-1004; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Passenger Cases, 7 How. 283-462, 12 L. ed. 702-777; Crandall v. Nevada, 6 Wall. 35-42, 18 L. ed. 745, 746; Ward v. Maryland, 12 Wall. 418-430, 20 L. ed. 449-452; State Freight Tax Case, 15 Wall. 232-279, 21 L. ed. 146-162; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465-469, 24 L. ed. 527-529; Mobile County v. Kimball, 102 U. S. 691-697, 26 L. ed. 238, 239; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196-203, 29 L. ed. 158-161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Gibbons v. Ogden, 9 Wheat. 1-222, 6 L. ed. 23-76; Welton v. Missouri, 91 U. S. 275-282, 23 L. ed. 347-350; Brown v. Houston, 114 U. S. 622-631, 29 L. ed. 257-260, 5 Sup. Ct. Rep. 1091; Walling v. Michigan, 116 U. S. 446-455, 29 L. ed. 691-694, 6 Sup. Ct. Rep. 454; Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204-212, 38 L. ed. 962-966, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 48 L. ed. 518, 24 Sup. Ct. Rep. 300; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160-162, 47 L. ed. 995-999, 23 Sup. Ct. Rep. 817; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181-190, 31 L. ed. 650-654, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

But even if the right of Congress to legislate with reference to the rights and liabilities of the plaintiff were not exclusive, the state statute is in conflict with the interstate commerce clause of the Federal Constitution.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Kelley v. Rhoads and Wabash, St. L. & P. R. Co. v. Illinois, supra; Hall v. DeCuir, 95 U. S. 485-489, 24 L. ed. 547, 548; State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146.

The interstate passenger is comprehended by the constitutional provision as well as the interstate carrier.

Central R. Co. v. Murphy, 196 U. S. 194-206, 49 L. ed. 444-449, 25 Sup. Ct. Rep. 218; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101; Hart v. State, 100 Md. 595, 60 Atl. 457.

The statute denies the plaintiff the right of due process of law in that it abridges his liberty of contract.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Lochner v. New York, 198 U. S. 45-53, 49 L. ed. 937-

940, 25 Sup. Ct. Rep. 539; Cleveland v. Clements Bros. Constr. Co. 67 Ohio St. 197, 59 L.R.A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 313; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; Com. v. Perry, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; People v. Hawkins, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Lawton v. Steele, 152 U. S. 136, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; Long v. State, 74 Md. 565, 12 L.R.A. 425, 28 Am. St. Rep. 268, 22 Atl. 4; Luman v. Hitchens Bros. 90 Md. 25, 46 L.R.A. 393, 44 Atl. 1051; Ex parte Sing Lee, 96 Cal. 354, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; Bailey v. People, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; Re Hong Wah, 82 Fed. 623; Tiedeman, State & Federal Control of Persons & Property, §§ 120–147; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; Seybolt v. New York, L. E. & W. R. Co. 95 N. Y. 562, 47 Am. Rep. 75.

The statute denies the plaintiff the right of due process of law in that it deprives him of his right of remedy for negligent injury.

Hanson v. Krehbiel, 68 Kan. 670, 64 L. R.A. 790, 104 Am. St. Rep. 422, 75 Pac. 1041; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Park v. Detroit Free Press. Co. 72 Mich. 560, 1 L.R.A. 599, 16 Am. St. Rep. 544, 40 N. W. 731; McGee v. Baumgartner, 121 Mich. 287, 80 N. W. 21; Osborn v. Leach, 135 N. C. 628, 66 L.R.A. 648, 47 S. E. 811.

It abridges plaintiff's privileges and immunities as a citizen of the United States.

Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394.

It denies to him as a railway postal clerk within the jurisdiction of that state the equal protection of the laws.

Brannon, 14th Amendment, 322; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 188, 31 L. ed. 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Railroad Tax Case, 8 Sawy. 238, 13 Fed. 722, 9 Sawy. 165, 18 Fed. 385; Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Luman v. Hitchens Bros. Co. supra; State v. Walsh, 136 Mo. 400, 35 L.R.A. 231, 37 S. W. 1112; Ex parte Jentzsch, 112 Cal. 468, 32 L.R.A. 664, 44 Pac. 803; Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 497, 12 L.R.A. 70, 15 S. W. 87; Dixon v. Poe, 159 Ind. 492, 60 L.R.A. 308, 95 Am. St. Rep. 309, 65 N. E. 518; Sutton v. State, 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 168; Cooley, Const. Lim. 393.

Is the classification, and discrimination against the same, made by act of 1868, arbitrary, as relating to postal clerks?

State v. Haun, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard), 183 U. S. 107, 108, 46 L. ed. 107, 108, 22 Sup. Ct. Rep. 30.

The police power must be exercised subject to the provisions of the Constitution of the United States.

Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Lochner v. New York, 198 U. S. 45–64, 49 L. ed. 937–944, 25 Sup. Ct. Rep. 539; Jacobson v. Massachusetts, 197 U. S. 11–25, 49 L. ed. 643–649, 25 Sup. Ct. Rep. 358; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465–473, 24 L. ed. 527–531; Henderson v. New York (Henderson v. Wickham), 92 U. S. 259, 23 L. ed. 543; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Minnesota v. Barber, 136 U. S. 313–319, 34 L. ed. 455–457, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; New York v. Compagnie Générale Transatlantique, 107 U. S. 59–63, 27 L. ed. 383–385, 2 Sup. Ct. Rep. 87; Walling v. Michigan, 116 U. S. 446–460, 29 L. ed. 691–695, 6 Sup. Ct. Rep. 454; People v. Hawkins, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354; Block v. Schwartz, 27 Utah, 387, 65 L.R.A. 308, 101 Am. St. Rep. 971, 76 Pac. 22; State v. Missouri Tie & Timber Co. 181 Mo. 536, 65 L.R.A. 588, 103 Am. St. Rep. 614, 80 S. W. 933; State v. Walsh, supra; State v. Gardner, 58 Ohio St. 610, 41 L.R.A. 689, 65 Am. St. Rep. 785, 51 N. E. 136; Hocking Valley Coal Co. v. Rosser, 53 Ohio St. 23, 29 L.R.A. 386, 53 Am. St. Rep. 622, 41 N. E. 263; Re Preston, 63 Ohio St. 428, 52 L.R.A. 523, 81 Am. St. Rep. 642, 59 N. E. 101; Miller v. Crawford, 70 Ohio St. 207, 71 N. E

631; Yick Wo v. Hopkins, 118 U. S. 372, 30 L. ed. 227, 6 Sup. Ct. Rep. 1064; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Mugler v. Kansas, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; Re Jacobs, supra; Scott v. McNeal, 154 U. S. 45, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18.

Limitation of the liability of a carrier for the negligence of itself or its servants is contrary to public policy.

Pennsylvania R. Co. v. Raiordan, 119 Pa. 577, 4 Am. St. Rep. 670, 13 Atl. 324; Philadelphia & R. R. Co. v. Derby, 14 How. 486, 14 L. ed. 509; The New World v. King, 16 How. 469–474, 14 L. ed. 1019–1021; New York C. R. Co. v. Lockwood, 17 Wall. 357, 378, 381, 384, 21 L. ed. 627, 639–641; The Kensington, 183 U. S. 263–268, 46 L. ed. 190–193, 22 Sup. Ct. Rep. 102; Cleveland, P. & A. R. Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 362.

If an attempt at limitation of liability by contractual stipulation cannot be permitted, on the ground that it contravenes public policy, a limitation by legislative enactment, whereby constitutional rights are infringed, for the same and more potent reasons, cannot be permitted; for persons may voluntarily contract to do what no legislature would have the right to compel them to do.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684–697, 43 L. ed. 858–864, 19 Sup. Ct. Rep. 565.

How this statute—even though it be held to have been enacted to protect the public health, the public morals, or the public safety—has any real or substantial relation to those objects, requires a power of discernment which is not given to mortals making their examination through the medium of fairness.

Lochner v. New York, supra.

Mr. James P. Wilson argued the cause, and, with Messrs. Arrel, Wilson, & Harrington, filed a brief for defendant in error:

Under the law of the state of Pennsylvania, the plaintiff did not sustain the relation of passenger to the defendant, either prior to or subsequent to the passage of the statute.

Pennsylvania R. Co. v. Price, 96 Pa. 256.

It may be conceded that the carrying of the United States mails is a matter relating to interstate commerce, and that the regulation of it rests with Congress. It is conceded that the plaintiff was in charge of the mails at the time of his injury. These admitted facts in no manner affect the question.

Price v. Pennsylvania R. Co. 113 U. S. 218–222, 28 L. ed. 980, 981, 5 Sup. Ct. Rep. 427; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

Congress not having legislated on the particular subject until long subsequent to the trial of this cause, the Pennsylvania statute under consideration in no manner violates the commercial clause of the Federal Constitution, or the clause relating to the establishment of post roads.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 700, 40 L. ed. 859, 16 Sup. Ct. Rep. 714; Peirce v. Van Dusen, 69 L.R.A. 70[illegible], 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693; Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 4[illegible]; Boering v. Chesapeake Beach R. Co. 1[illegible] U. S. 442, 48 L. ed. 742, 24 Sup. Ct. Rep. 515; Duncan v. Maine C. R. Co. 113 Fed. 508; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; 17 Am. & Eng. Enc. Law, 2d ed. pp. 75, 95; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 8[illegible], 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1[illegible]; Chicago & N. W. R. Co. v. Fuller, 17 Wall. 560, 21 L. ed. 710; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Willson v. Omaha & St. L. R. Co. 116 Iowa, 548, 9[illegible] N. W. 358; Illinois C. R. Co. v. People, 1[illegible] Ill. 434, 19 L.R.A. 119, 33 N. E. 173; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627.

Long aquiescence by a state in the enforcement of a statute, and the repeated enforcement of it by the courts of the state, is a strong argument against the unconstitutionality of it when attempted to be raised.

8 Cyc. Law & Proc. p. 737; 17 Am. & Eng. Enc. Law, 2d ed. pp. 77, 738 note.

An act of the legislature supported by a long line of adjudication, and treated by the government as constitutional, will not be inquired into.

Ferris v. Coover, 11 Cal. 175.

This statute has been upheld by the Pennsylvania courts.

Kirby v. Pennsylvania R. Co. 76 Pa. 8[illegible]; Pennsylvania R. Co. v. Price, 96 Pa. 2[illegible]

Miller v. Cornwall R. Co. 154 Pa. 473, 26 Atl. 779.

A statute which is not violative of the Pennsylvania Constitution does not violate the germane provision of the 14th Amendment to the Federal Constitution.

State ex rel. Schwartz v. Ferris, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579.

State statutes can make the peculiar circumstances which surround particular persons the ground for the imposition of certain liabilities or the relief from certain liabilities.

7 Cyc. Law & Proc. title "Const. Law," p. 1032.

A state may enlarge the liability of a master for the negligence of a servant without depriving him of property without due process of law.

8 Cyc. Law & Proc. p. 1098; Levick v. Norton, 51 Conn. 461; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

This statute is clearly within the constitutional rights of the legislature of Pennsylvania or of any other state to enact laws which operate equally upon all of a certain class, and which affect all persons pursuing the same business under the same conditions, alike.

State v. Schlemmer, 42 La. Ann. 1166, 10 L.R.A. 135, 8 So. 307; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Missouri P. R. Co. v. Mackey, 127 U. S. 208, 209, 32 L. ed. 108, 109, 8 Sup. Ct. Rep. 1161; 6 Am. & Eng. Enc. Law, 2d ed. p. 970; Sinking Fund Cases, 99 U. S. 718, 25 L. ed. 496; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Cleveland, C. C. & St. L. R. Co. v. Backus, 133 Ind. 513, 18 L.R.A. 729, 33 N. E. 421; Sutton v. State, 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697; Lehman v. McBride, 15 Ohio St. 573; State v. Hogan, 63 Ohio St. 202, 57 L.R.A. 863, 81 Am. St. Rep. 626, 58 N. E. 572.

The very large discretion accorded to the state legislatures and recognized by the Federal courts may be evidenced by a quotation from a few of the adjudicated cases.

Gundling v. Chicago, 177 U. S. 188, 44 L. ed. 728, 20 Sup. Ct. Rep. 633; Louisville & N. R. Co. v. Kentucky, 161 U. S. 701, 40 L. ed. 859, 16 Sup. Ct. Rep. 714; Holden v. Hardy, 169 U. S. 381, 388, 392, 42 L. ed. 787, 789, 791, 18 Sup. Ct. Rep. 383.

It is not against public policy to permit an express messenger expressly to waive all right of compensation arising from the negligence of the railroad company's employees.

Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385.

It is not contrary to public policy for a person riding upon a gratuitous pass to waive negligence of the company.

Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; Boering v. Chesapeake Beach R. Co. 193 U. S. 442, 48 L. ed. 742, 24 Sup. Ct. Rep. 515.

The policy of including those workmen who voluntary subject themselves to similar risks, in the same rule of liability as the company's employees themselves, and of according to them similar rights, is entirely consistent with the settled policy of the state of Pennsylvania in nearly a century of judicial history,—to wit, a recognition of the soundness of the policy which prevents a recovery by one servant for the personal negligence of another, even though that other be in control and direction over the injured servant.

New York, L. E. & W. R. Co. v. Bell, 112 Pa. 400, 4 Atl. 50; Duffy v. Oliver Bros. 131 Pa. 203, 18 Atl. 872.

If we seek for the reason of the rule it will be found deep in the common law.

Priestly v. Fowler, 3 Mees. & W. 1; Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 339.

It is no new thing in our common law to extend the principle of fellow servant to include employees of third persons, who, by their work, are in contact with the servants of the master, who is made defendant, and to deny liability to the servants of such third persons upon the principle, not that they assume the risk of the service, but that the public policy of the state is best subserved by a rule denying liability in such cases, and that its tendency is to induce a greater degree of vigilance upon the part of all operatives engaged in a common work.

Harkins v. Standard Sugar Refinery, 122 Mass. 400; Johnson v. Boston, 118 Mass. 114.

This statute is not invalid because it applies only to railroad companies, and is not applicable to other carriers of freight and passengers, such as steamship companies, stage coaches, and carriers of marine freight.

State v. Hogan, 63 Ohio St. 210, 52 L.R.A. 863, 81 Am. St. Rep. 626, 58 N. E. 572; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

There has been no hesitation by the Supreme Court of the United States in upholding legislation increasing the liability of railroad companies, and the fact that such legislation abrogates the common law has never been considered to deny to railroad companies the equal protection of the law. The whole matter has been deemed to come under the head of police regulations com-

mitted wholly to the discretion of the state legislature.

8 Cyc. Law & Proc. pp. 1078, 1079; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 210, 32 L. ed. 107, 109, 8 Sup. Ct. Rep. 1161; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585.

If the statutes wiping out the common law and increasing the liability of railroad corporations to the exclusion of others did not contravene this fundamental law of the land, we suppose that laws upon the same subject, which, in the opinion of the highest state courts, fairly tend to accomplish the same result, to wit, an increased public safety, cannot be attacked upon any such ground, even though the common-law liability of such corporation be thereby diminished.

Cooley, Const. Lim. 5th ed. 716, note.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

We quote the Pennsylvania statute of April 4, 1868, upon which the case turns:

[202] *"Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met: It is hereby enacted by the authority of the same that when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee, provided that this section shall not apply to passengers."

As the application of the statute, if valid, presents no Federal question, we are unconcerned with that matter, although it may be observed in passing that it is conceded in the argument at bar that under the settled construction given to the statute by the supreme court of Pennsylvania the plaintiff, as a railway postal clerk, was not a passenger, and had no greater rights in the event of being injured in the course of his employment than would have had an employee of the railroad company.

Was the application of the statute thus construed to a railway postal clerk of the United States in conflict with the power of Congress to establish postoffices and post roads?

In Price v. Pennsylvania R. Co. 113 U. S. 221, 28 L. ed. 981, 5 Sup. Ct. Rep. 427, this question was in effect foreclosed against the plaintiff in error. That case was brought to this court from a judgment of the supreme court of Pennsylvania (96 Pa. 258), holding that a railway postal clerk was not a passenger within the meaning of the Pennsylvania act, and hence had no right to recover for injuries suffered by him in consequence of the negligence of an employee of the company. The Federal ground there relied upon was substantially the one here asserted; that is, the power of the government of the United States to establish postoffices and post roads, and the effect of the legislation of Congress and the act of the Postmaster General in appointing mail clerks thereunder. After fully considering the subject the case *was dismissed because no substantial Federal ground was involved, the court saying (113 U. S. 221, 28 L. ed. 981, 5 Sup. Ct. Rep. 428): [203]

"The person thus to be carried with the mail matter, without extra charge, is no more a passenger because he is in charge of the mail, nor because no other compensation is made for his transportation, than if he had no such charge; nor does the fact that he is in the employment of the United States, and that defendant is bound, by contract with the government, to carry him, affect the question. It would be just the same if the company had contracted with any other person who had charge of freight on the train to carry him without additional compensation. The statutes of the United States which authorize this employment and direct this service do not, therefore, make the person so engaged a passenger, or deprive him of that character, in construing the Pennsylvania statute. Nor does it give to persons so employed any *right*, as against the railroad company, which would not belong to any other person in a similar employment, by others than the United States."

This brings us to the second contention,—the repugnancy of the Pennsylvania statute to the commerce clause of the Constitution. It is apparent from the decision in the Price Case, just previously referred to, that in deciding that question we must determine the application of the statute to the plaintiff in error, wholly irrespective of the fact that at the time he was injured he was a railway postal clerk. In other words, the validity or invalidity of the statute is to be adjudged precisely as if the plaintiff was, at the time of the injury, serving for hire in the employment of a private individual or corporation.

Under the circumstances we have stated, the case of Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132, clearly establishes the unsoundness of the contention that the Pennsylvania statute in question was void because in conflict with the commerce clause. In that case a

horse was shipped from a point in the state of New York to a point in the state of Pennsylvania under a bill of lading which [294] limited the right of *recovery to not exceeding $100 for any injury which might be occasioned to the animal during the transit. The horse was hurt within the state of Pennsylvania through the negligence of a connecting carrier. In the courts of Pennsylvania, applying the Pennsylvania doctrine which denies the right of a common carrier to limit its liability for injuries resulting from negligence, a recovery was had in the sum of $10,000, the value of the animal. On writ of error from this court the judgment of the supreme court of Pennsylvania was affirmed, it being held that, at least, in the absence of legislation by Congress on the subject, the effect of the commerce clause of the Constitution was not to deprive the state of Pennsylvania of authority to legislate as to those within its jurisdiction concerning the liability of common carriers, although such legislation might, to some extent, indirectly affect interstate commerce. The ruling in the Hughes Case in effect but reiterated the principle adopted and applied in Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289, where an Iowa statute forbidding a common carrier from contracting to exempt itself from liability was sustained as to a person who was injured during an interstate transportation.

The contention that because, in the cases referred to, the operation of the state laws which were sustained was to augment the liability of a carrier, therefore the rulings are inapposite here, where the consequence of the application of the state statute may be to lessen the carrier's liability, rests upon a distinction without a difference. The result of the previous rulings was to recognize, in the absence of action by Congress, the power of the states to legislate, and of course this power involved the authority to regulate as the state might deem best for the public good, without reference to whether the effect of the legislation might be to limit or broaden the responsibility of the carrier. In other words, the assertion of Federal right is disposed of when we determine the question of power, and doing so does not involve considering the wisdom [295] *with which the lawful power may have been under stated conditions, exerted.

And the views previously stated are adequate to dispose of the assertion that the Pennsylvania statute is void for repugnancy to the 14th Amendment. If it be conceded, as contended, that the plaintiff in error could have recovered but for the statute, it does not follow that the legislature of Pennsylvania, in preventing a recovery, took away a vested right or a right of property. As the accident from which the cause of action is asserted to have arisen occurred long after the passage of the statute, it is difficult to grasp the contention that the statute deprived the plaintiff in error of the rights just stated. Such a contention, in reason, must rest upon the proposition that the state of Pennsylvania was without power to legislate on the subject,—a proposition which we have adversely disposed of. This must be, since it would clearly follow, if the argument relied upon were maintained, that the state would be without power on the subject. For it cannot be said that the state had authority in the premises if that authority did not even extend to prescribing a rule which would be applicable to conditions wholly arising in the future.

The contention that because plaintiff in error, as a citizen of the United States, had a constitutional right to travel from one state to another, he was entitled, as the result of an accident happening in Pennsylvania, to a cause of action not allowed by the laws of that state, is in a different form to reiterate that the Pennsylvania statute was repugnant to the commerce clause of the Constitution of the United States. Conceding, if the accident had happened in Ohio, there would have been a right to recover, that fact did not deprive the state of Pennsylvania of its authority to legislate so as to affect persons and things within its borders. The commerce clause not being controlling in the absence of legislation by Congress, it follows, of necessity, that the plaintiff in error, as an incident of his right to travel from state to state, did not possess the privilege, as to an accident happening in Pennsylvania, to exert a cause *of ac- [296] tion not given by the laws of that state, and had no immunity exempting him from the control of the state legislation.

The proposition that the statute denied to the plaintiff in error the equal protection of the laws because it "capriciously, arbitrarily, and unnaturally," by the classification made, deprived railway mail clerks of the rights of passengers, which they might have enjoyed if the statute had not been enacted, is without merit. The classification made by the statute does not alone embrace railway mail clerks, but places in a class by themselves such clerks and others whose employment in and about a railroad subjects them to greater peril than passengers in the strictest sense. This general difference renders it imposible in reason to say, within the meaning of the 14th Amendment, that the legislature of Pennsylvania, in classifying passengers in the strict sense in one class and those who are subject to greater risks, including railway mail clerks, in an-

other, acted so arbitrarily as to violate the equal protection clause of the 14th Amendment.

Judgment affirmed.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plff. in Err.,
v.
FIRST NATIONAL BANK OF GENESEO, ILLINOIS.

(See S. C. Reporter's ed. 296-310.)

Appeal—distinction between appeal and writ of error.

1. Writ of error is the proper method of reviewing a judgment of the supreme court of the territory of Oklahoma, affirming a judgment of the court below in an action of replevin tried by the court upon waiver of a jury.

Error—to territorial supreme court—statement of facts.

2. There is a finding of facts upon which a review can be had in the Supreme Court of the United States by writ of error to the Oklahoma supreme court, where the latter court states in its opinion that on a prior appeal it had made "a full statement and findings of facts," and had enunciated the law as applied thereto, and that finding the record the same as stated in its former opinion, and being satisfied with the law as therein declared, no new question being raised, the judgment of the trial court is affirmed.

Chattel mortgage—assignment—record.

3. The provision for recording the satisfaction of a chattel mortgage by the mortgagee, his assigns or personal representative, which is made by Kan. Gen. Stat. 1901, § 4251, ¶ 36, does not make it necessary to record or file the assignment of a chattel mortgage in order to protect the assignee.

Chattel mortgage—assignment—record.

4. The failure of the Kansas laws to prohibit the recording of the assignment of a chattel mortgage given to secure a negotiable note does not make such action necessary in order to protect the assignee, but, in order to compel such action, there must be a law which provides for such record, either in express terms or by plain and necessary implication.

[No. 33.]

Argued October 17, 18, 1906. Decided December 3, 1906.

NOTE.—On distinction between appeal and writ of error—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

As to review by the United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

IN ERROR to the Supreme Court of the Territory of Oklahoma to review a judgment which, on a second appeal, affirmed a judgment of the District Court of Woodward County, in that territory, in favor of defendant in an action of replevin. Affirmed.

See same case below, 15 Okla. 194, 79 Pac. 1134, on former appeal, 13 Okla. 719, 76 Pac. 130.

Statement by Mr. Justice Peckham:

This is an action of replevin, brought by the plaintiff in error against the defendant in error, in the district court of Woodward county, in the then territory of Oklahoma, to recover possession of certain cattle, once belonging to one W. B. Grimes, and by him mortgaged. The trial resulted in a judgment for the defendant, which was affirmed by the supreme court of the territory, and the plaintiff has brought the case here by writ of error.

The action has been twice tried. The first trial ended in a judgment for the plaintiff. Upon appeal to the supreme court of the territory it was reversed and the case remanded, and a second trial had, resulting in the judgment for defendant now under review. Upon the second appeal to the supreme court of the territory a brief opinion was given, in which it was stated that upon appeal from the first judgment the court had "promulgated an opinion, in which it made a full statement and findings of facts and enunciated the law as applied thereto, reversed the judgment of the lower court, and remanded the case, directing a new trial. 13 Okla. 719, 76 Pac. 130." The court also stated in its opinion on the second appeal that it had been agreed upon between the parties in the trial court that a jury should be waived and the case submitted on the record as made on the first trial, and that [201] "no new question is raised on this appeal. The record is the same as stated in our former opinion, and we are fully satisfied with the law as therein declared. The judgment of the lower court is hereby affirmed at the cost of the appellant." [(Okla.) 79 Pac. 1134.]

The following facts were found by the supreme court on the first appeal, and were adopted by it as the facts for review on the second appeal:

One W. B. Grimes, who at the time was a resident of Clark county, in Kansas, executed at that place, on the 27th day of June, 1900, and delivered to Siegel-Sanders Live Stock Commission Company, his negotiable promissory note for $11,111.23, due November 1, 1900, with interest from maturity at the rate of 8 per cent per annum. To secure the payment of this note he executed and delivered a chattel mortgage to the

ee of the note on 526 cattle then in the nty, and the mortgage was duly filed in office of the register of deeds of Clark nty on July 12, 1900. The note was indorsed and delivered by the payee to Geneseo Bank, the defendant in error. oes not appear that there was any sep- e assignment of the mortgage. No rec- of any assignment was ever made in register's office of Clark county, Kan-

On the 24th day of November, 1900, al- gh the Siegel-Sanders Company had al- ly sold and delivered the note for $11,- 23 to the Geneseo Bank, the defendant in r, yet, notwithstanding such sale, the sident of that company, Frank Siegel, hout any authority, filed in the office of register of deeds a pretended release of mortgage, in which payment of the ve debt was acknowledged.

In the 25th day of February, 1901, the cago Cattle Loan Company caused its nt to examine the records of Clark coun- as to chattel mortgages against Grimes, upon this examination he found the ord clear, except as to a mortgage exe- ed by Grimes to the Siegel-Sanders Live ck Company, October 24, 1900, and by assigned to the *Chicago Cattle Loan Com- ny, and True so reported to the last- med company.

On April 17, 1901, Grimes executed two er notes to the Siegel-Sanders Company $7,694.70 each, due October 27, 1901. ese notes were probably renewals of notes eviously given. To secure the payment of ese two notes Grimes at the same time ecuted and delivered a chattel mortgage the Siegel-Sanders Company on the cat- in question and other cattle. The two tes thus given were then sold by that mpany to the plaintiff in error for the nount named in the notes, and the plain- ff believed at the time it bought these tes that the mortgage securing them was e first lien on the cattle, and it secured is information through its agent, who rsonally examined the record.

It is further stated in the finding that ere was practically no dispute as to the cts, and that the trial court expressly und that both parties to this action acted good faith.

The release of the first mortgage, signed y the president of the Live Stock Com- ission Company and filed in the office of e register of deeds, as above stated, on ovember 24, 1900, was not acknowledged. After the execution of these various in- ruments, and between the 25th of April d the 1st of May, 1901, without the owledge or consent of either of the banks, rties to this suit, Grimes, the original ner of the cattle, moved them from the state of Kansas to the county of Woodward, in the territory of Oklahoma, at which latter place, between the 19th and 20th of May, 1901, they were seized and taken possession of by the Geneseo Bank, the defendant. The plaintiff, within one year from the filing of the first mortgage, dated June, 27, 1900, in the office of the register of deeds of Clark county, Kansas, commenced this suit in replevin in the district court of Woodward county, Oklahoma, to recover possession of the cattle, claiming under the mortgage which was executed and delivered to the Siegel-Sanders Company on April 17, 1901, and by it sold to plaintiff; while the *defendant claimed under the mortgage dated [300] June 27, 1900, a pretended release of which had been filed as already stated, but after the assignment to defendant.

Upon these facts, as found by the supreme court of Oklahoma, judgment was rendered for the defendant in error.

Mr. **Silas H. Strawn** argued the cause, and, with Messrs. Frederick S. Winston, John Barton Payne, Ralph M. Shaw, Blackburn Esterline, and Earle W. Evans, filed a brief for plaintiff in error:

The failure of the Geneseo bank to take and record an assignment of the chattel mortgage left it within the power of the commission company to release the same of record. The Geneseo bank should abide by the consequences of its negligence, and sustain the loss; as it is the law that when one of two innocent parties must suffer, the loss should be borne by him through whose negligence it was brought about.

Lewis v. Kirk, 28 Kan. 497, 42 Am. Rep. 173; Thomas v. Reynolds, 29 Kan. 304; Parkhurst v. First Nat. Bank, 53 Kan. 136, 35 Pac. 1116; Williams v. Jackson, 107 U. S. 478, 27 L. ed. 529, 2 Sup. Ct. Rep. 814; Swasey v. Emerson, 168 Mass. 118, 60 Am. St. Rep. 368, 46 N. E. 426; Ogle v. Turpin, 102 Ill. 148; Mann v. Jummel, 183 Ill. 523, 56 N. E. 16; Lennartz v. Quilty, 191 Ill. 174 85 Am. St. Rep. 260, 60 N. E. 913; Bowling v. Cook, 39 Iowa, 200; Rand v. Barrett, 66 Iowa, 731, 24 N. W. 530; Jenks v. Shaw, 99 Iowa, 604, 61 Am. St. Rep. 256, 68 N. W. 900; Purdy v. Huntington, 42 N. Y. 339, 1 Am. Rep. 532; Van Keuren v. Corkins, 66 N. Y. 79; Clark v. Mackin, 95 N. Y. 345; Porter v. Ourada, 51 Neb. 510, 71 N. W. 52; Connecticut Mut. L. Ins. Co. v. Talbot, 113 Ind. 373, 3 Am. St. Rep. 655, 14 N. E. 588; Baugher v. Woollen, 147 Ind. 308, 45 N. E. 94; Ayers v. Hays, 60 Ind. 455; Morris v. Beecher, 1 N. D. 130, 45 N. W. 696; Pickford v. Peebles, 7 S. D. 166, 63 N. W. 779; Trenton Bkg. Co. v. Woodruff, 2 N. J. Eq. 117; Ferguson v. Glassford, 68 Mich. 36, 35 N. W. 820; Jones, Mortg. §§ 481, 791,

820; Cobbey, Chat. Mortg. § 648; Townsend v. Little, 109 U. S. 504, 27 L. ed. 1012, 3 Sup. Ct. Rep. 357.

The execution, filing, and recording of the release of the chattel mortgage by the commission company, in whom the record title to the cattle stood, was a notice to all the world that the debt secured by the mortgage had been paid, and that the cattle were cleared of the lien.

Carpenter v. Longan, 16 Wall. 271, 21 L. ed. 313; Pierce v. Faunce, 47 Me. 513; Drumm-Flato Commission Co. v. Barnard, 66 Kan. 568, 72 Pac. 257.

The case is properly here by writ of error.

Comstock v. Eagleton, 196 U. S. 99, 49 L. ed. 402, 25 Sup. Ct. Rep. 210; Oklahoma City v. McMaster, 196 U. S. 529, 49 L. ed. 587, 25 Sup. Ct. Rep. 324; Guss v. Nelson, 200 U. S. 298, 50 L. ed. 489, 26 Sup. Ct. Rep. 260.

Agreed facts have the same force and effect as a special finding of facts.

Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 44, 19 L. ed. 65; Wayne County v. Kennicott, 103 U. S. 554, 26 L. ed. 486; Lehnen v. Dickson, 148 U. S. 71, 37 L. ed. 373, 13 Sup. Ct. Rep. 481; Wilson v. Merchants' Loan & T. Co. 183 U. S. 121, 46 L. ed. 113, 22 Sup. Ct. Rep. 55; Guss v. Nelson, supra.

Mr. James S. Botsford argued the cause, and, with Messrs. B. F. Deatherage and Odus G. Young, filed briefs for defendant in error:

This case should have been brought to this court by appeal, and not by writ of error, and the writ of error should be dismissed.

Stringfellow v. Cain, 99 U. S. 610, 612–614, 25 L. ed. 421–423; Davis v. Fredericks, 104 U. S. 618, 619, 26 L. ed. 849; Neslin v. Wells, F. & Co. 104 U. S. 428, 26 L. ed. 802; Hecht v. Boughton, 105 U. S. 235, 26 L. ed. 1018; United States v. Union P. R. Co. 105 U. S. 263, 26 L. ed. 1021; Gray v. Howe, 108 U. S. 12, 27 L. ed. 634, 1 Sup. Ct. Rep. 136; Story v. Black, 119 U. S. 235, 30 L. ed. 341, 7 Sup. Ct. Rep. 176; Idaho & O. Land Improv. Co. v. Bradbury, 132 U. S. 509, 513, 33 L. ed. 433, 436, 10 Sup. Ct. Rep. 177; Gregory Consol. Min. Co. v. Starr, 141 U. S. 222, 35 L. ed. 715, 11 Sup. Ct. Rep. 914; San Pedro & C. D. A. Co. v. United States, 146 U. S. 130, 36 L. ed. 914, 13 Sup. Ct. Rep. 94; Mammoth Min. Co. v. Salt Lake Foundry & Mach. Co. 151 U. S. 447, 38 L. ed. 229, 14 Sup. Ct. Rep. 384; Bonnineld v. Price, 154 U. S. 672, Appx. and 26 L. ed. 1022, 14 Sup. Ct. Rep. 1194; Haws v. Victoria Copper Min. Co. 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282; Grayson v. Lynch, 163 U. S. 468, 41 L. ed. 230, 16 Sup. Ct. Rep. 1064; Young v. Amy, 171 U. S. 179, 43 L. ed. 127, 18 Sup. Ct. Rep. 802; Marshall v. Burtis, 172 U. S. 630, 43 ed. 579, 19 Sup. Ct. Rep. 290; Cohn v. Dal 174 U. S. 539, 43 L. ed. 1077, 19 Sup. Rep. 802.

Even if this case were here on appeal stead of by writ of error, this court is wit out jurisdiction to consider the case, becau there is no finding of facts in the nature a special verdict by either the supreme co of Oklahoma or the district court of Wo ward county, Oklahoma. This is necess to give this court jurisdiction. The sta ment of facts in the opinion of the Ok homa supreme court on the first heari does not constitute a finding of facts in t nature of a special verdict.

Dickinson v. Planters' Bank, 16 Wall. 2 252–256, 21 L. ed. 278, 279; Lehnen v. Di son, 148 U. S. 78, 37 L. ed. 375, 13 Sup. Rep. 481; Saltonstall v. Birtwell, 150 U. 417, 37 L. ed. 1128, 14 Sup. Ct. Rep. 1 Stone v. United States, 164 U. S. 380, 41 ed. 477, 17 Sup. Ct. Rep. 71; Kentuc Life & Acci. Ins. Co. v. Hamilton, 11 C. A. 42, 22 U. S. App. 386, 548, 63 Fed. 9 Minchen v. Hart, 18 C. C. A. 570, 36 U. App. 534, 72 Fed. 294; National Mason Acci. Asso. v. Sparks, 28 C. C. A. 399, 49 U S. App. 681, 83 Fed. 225; Mutual Reserv Fund Life Asso. v. DuBois, 29 C. C. A. 35 56 U. S. App. 586, 85 Fed. 586.

On the facts shown by the record in thi case and recited in our statement of facts the Chicago bank was not a subsequent pur chaser bona fide, for value, without notic of its notes and mortgages.

1 Enc. Pl. & Pr. p. 880; Boone v. Chile 10 Pet. 177, 211, 9 L. ed. 388, 400; 2 Pom Eq. Jur. 2d ed. §§ 784, 785; Holdsworth v. Shannon, 113 Mo. 508, 35 Am. St. Re 719, 21 S. W. 85; Connecticut Mut. L. In Co. v. Smith, 117 Mo. 261, 38 Am. St. Re 656, 22 S. W. 623.

It is conceded that the Geneseo bank ha no actual knowledge of the filing of th release or of the filing of the mortgage und which the Chicago bank claims. That re lease and the mortgage of the Chicago ban were filed and recorded months after th filing and recording of the mortgage of th Geneseo bank. It is well settled that prior mortgagee is not affected with co structive notice of any instrument made a filed by his mortgagor subsequent to the f ing of his mortgage.

Tydings v. Pitcher, 82 Mo. 379; Meier Meier, 105 Mo. 433, 16 S. W. 223; Sense derfer v. Kemp, 83 Mo. 582; Ford v. Uni Church Soc. 120 Mo. 516, 23 L.R.A. 5 41 Am. St. Rep. 711, 25 S. W. 394; 2 Jon Mortg. § 1624.

The general principle applicable to t registry laws of the different states up the point of notice is that the registeri

of instruments is notice to subsequent purchasers and encumbrancers only. The filing for record of the unauthorized and void release of the mortgage held by the Geneseo bank, and the filing for record of the mortgage held by the Chicago bank, were, therefore, not notice to the Geneseo bank, which held under a prior recorded mortgage.

Ackerman v. Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621; Rowan v. Sharps' Rifle Mfg. Co. 29 Conn. 282; Schmidt v. Zahrndt, 148 Ind. 447, 47 N. E. 335; Tapia v. Demartini, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641; Nelson v. Boyce, 7 J. J. Marsh. 401, 23 Am. Dec. 411; Ward v. Cooke, 17 N. J. Eq. 93; Shirras v. Caig, 7 Cranch, 34, 51, 3 L. ed. 260, 265; Central Trust Co. v. Continental Iron Works, 51 N. J. Eq. 605, 40 Am. St. Rep. 539, 28 Atl. 595; Summers v. Roos, 42 Miss. 778, 2 Am. Rep. 653; Witcziaski v. Eberman, 51 Miss. 841; George v. Wood, 9 Allen, 80, 85 Am. Dec. 741; McDaniels v. Colvin, 16 Vt. 300, 42 Am. Dec. 512; Seymour v. Darrow, 31 Vt. 122.

Where there is no law authorizing the holder of a negotiable note secured by a mortgage to put on the record an assignment of the mortgage, the subsequent release of that mortgage by the original mortgagee and the subsequent conveyance or mortgage by the mortgagor to a third party are unavailing as against the holder of the first-mortgage note.

Carpenter v. Longan, 16 Wall. 271, 21 L. ed. 314; Burhans v. Hutcheson, 25 Kan. 625, 37 Am. Rep. 274; Mutual Ben. L. Ins. Co. v. Huntington, 57 Kan. 744, 48 Pac. 19; Bronson v. Ashlock, 2 Kan. App. 255, 41 Pac. 1068; Swift v. Smith, 102 U. S. 442, 26 L. ed. 193; Chicago Ry. Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 283, 34 L. ed. 353, 10 Sup. Ct. Rep. 999; Jones, Chat. Mortg. § 662(a)-633; Biggerstaff v. Marston, 161 Mass. 101, 36 N. E. 785; Watson v. Wyman, 161 Mass. 96, 36 N. E. 692; Mulcahy v. Fenwick, 161 Mass. 164, 36 N. E. 689; Hefferman v. Boteler, 87 Mo. App. 316; Brooke v. Struthers, 110 Mich. 562, 35 L.R.A. 536, 68 N. W. 272; Lee v. Clark, 89 Mo. 553, 1 S. W. 142; Hagerman v. Sutton, 91 Mo. 519, 4 S. W. 73; Swift v. Bank of Washington, 52 C. C. A. 339, 114 Fed. 643; Cummings v. Hurd, 49 Mo. App. 139; Walter v. Logan, 63 Kan. 193, 65 Pac. 225; 20 Am. & Eng. Enc. Law, 2d ed. pp. 1045, 1046; Robinson Female Seminary v. Campbell, 60 Kan. 60, 55 Pac. 276; De Laureal v. Kemper, 9 Mo. App. 77; Lakeman v. Robards, 9 Mo. App. 179; Passumpsic Sav. Bank v. Buck, 71 Vt. 190, 44 Atl. 93; Parker v. Randolph, 5 S. D. 549, 29 L. R.A. 33, 59 N. W. 722; Williams v. Paysinger, 15 S. C. 171; Black v. Reno, 59 Fed. 917; Brewer v. Atkeison, 121 Ala. 410, 77 Am. St. Rep. 64, 25 So. 992; Roberts v. Halstead, 9 Pa. 32, 49 Am. Dec. 541; Anderson v. Kreidler, 56 Neb. 171, 76 N. W. 581; Keohane v. Smith, 97 Ill. 156; Stiger v. Bent, 111 Ill. 329; Preston v. Morris, 42 Iowa, 549; Martindale v. Burch, 57 Iowa, 291, 10 N. W. 670; Vandercook v. Baker, 48 Iowa, 199; Gordon v. Mulhare, 13 Wis. 22; Demuth v. Old Town Bank, 85 Md. 315, 60 Am. St. Rep. 322, 37 Atl. 266; Lapping v. Duffy, 47 Ind. 51; Dixon v. Hunter, 57 Ind. 278; Reeves v. Hayes, 95 Ind. 521.

Section 4246 of the chattel mortgage law of Kansas (Dassler's Statutes of 1901, p. 896) provides that every holder of a mortgage may keep his mortgage alive by filing an affidavit during the last thirty days of the year following the recording of his mortgage; and since the Chicago bank took its mortgage within the year, and before the time had arrived when the Geneseo bank could file the affidavit contemplated by that provision, it follows that the Chicago Bank, in view of that statute, is not a subsequent purchaser or mortgagee in good faith.

Meech v. Patchin, 14 N. Y. 71; Howard v. First Nat. Bank, 44 Kan. 549, 10 L.R.A. 537, 24 Pac. 983; Farmers' & M. Bank v. Bank of Glen Elder, 46 Kan. 376, 26 Pac. 680.

The original mortgagee in a chattel mortgage, after he indorses and transfers the negotiable note secured by the mortgage, has no beneficial interest in the mortgage, and cannot maintain an action of replevin or trover in his own name, but such action must be brought by the transferee of the negotiable promissory note as the real holder and owner of the note and mortgage, and therefore as being the "assignee" within the meaning of the Kansas chattel mortgage statute.

Wiscomb v. Cubberly, 51 Kan. 580, 33 Pac. 320; J. C. Bohart Commission Co. v. Buckingham, 62 Kan. 658, 64 Pac. 627.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The defendant in error, at the outset, objects to the jurisdiction of this court on the ground that the plaintiff should have brought the case here by appeal instead of by writ of error, because the case was tried without a jury, and therefore the writ of error was improper. There is nothing in this objection, as in actions at law coming from the territory of Oklahoma it has been held that the proper way to review the judgments of the supreme court of that terri-

tory was by writ of error. Comstock v. Eagleton, 196 U. S. 99, 49 L. ed. 402, 25 Sup. Ct. Rep. 210; Oklahoma City v. McMaster, 196 U. S. 529, 49 L. ed. 587, 25 Sup. Ct. Rep. 324; Guss v. Nelson, 200 U. S. 298, 50 L. ed. 489, 26 Sup. Ct. Rep. 260.

Further objection is made that the court below found no facts upon which a review can be had in this court. The foregoing statement disposes of this objection also, and shows it to be untenable.

On the merits, the question arises which of these two parties shall sustain the loss occasioned by the improper act of the president of the Live Stock Commission Company in signing this pretended release, and acknowledging the payment of the $11,000 note, as above stated? The plaintiff in error contends that the defendant bank should bear the loss because of its failure to record or file the assignment to it of the first mortgage, securing the $11,000 note. The defendant opposes this view and insists that, being the holder and the owner of the $11,000 note, secured by a first mortgage duly executed on the 27th of June, 1900, and duly filed in the register's office, it has the prior right to the cattle, and that the statutes of Kansas do not require that it should file or record the assignment to it of the note and mortgage, and its claim should not therefore be postponed.

[306] *The note executed by Grimes for eleven thousand and some odd dollars was negotiable, and the chattel mortgage was given at that time to secure the payment of the note. The indorsement of the note and its delivery before maturity to the defendant by the payee of the note transferred its ownership to the defendant bank. This transfer also transferred, by operation of law, the ownership of the mortgage, which was collateral to the note. Such a mortgage has no separate existence, and when the note is paid the mortgage expires, as it cannot survive the debt which the note represents. Carpenter v. Longan, 16 Wall. 271, 21 L. ed. 313; Burhans v. Hutcheson, 25 Kan. 625, 37 Am. Rep. 274; Mutual Ben. L. Ins. Co. v. Huntington, 57 Kan. 744, 48 Pac. 19; Swift v. Bank of Washington, 52 C. C. A. 339, 114 Fed. 643.

The mortgage, therefore, is a prior lien upon the cattle, as security for the payment of the note, unless defendant has lost it by its failure to record an assignment of the mortgage. Whether it has or not is to be determined by the law of Kansas.

There is no express provision in the statutes of Kansas for the filing or recording of assignments of chattel mortgages. Paragraph 36, § 4251, General Statutes of Kansas for 1901, by Dassler, may be found in the margin.† It is said this statute by implication provides for the recording of an assignment of a chattel mortgage.

Assuming that the statute makes provision for such recording, it is then argued that it is the duty of the assignee to do *so, and his failure takes away a right of priority of lien which he might otherwise have. This reasoning is not satisfactory. We cannot make the assumption that the statute cited does make provision for the recording of the assignment, and we fail, therefore, to find its necessity. That necessity depends upon statute, and without some statutory provision therefor the necessity does not exist. Uncertain and doubtful implications arising from portions of a statute not requiring the recording of an instrument are not to be regarded as furnishing a rule upon the subject. There are statutory provisions for recording assignments of real estate mortgages to be found in the Kansas statutes. See paragraph 19, § 4234, and paragraph 26, § 4241, General Statutes of Kansas for 1901, by Dassler. Paragraph 19, above, provides for the acknowledgment of assignments of real estate mortgages by the assignor, and paragraph 26 provides that, on presentation of such assignment for record, it shall be entered upon the margin of the record of the mortgage by the register of deeds, who is to attest the same, as therein provided. Now, in relation to chattel mortgages and the assignment thereof, there is no such provision or anything similar to it. Provision is made for the satisfaction of a chattel mortgage when paid by the mortgagee, assignee, etc., but that does not make it necessary to record or file the assignment of a chattel mortgage in order to protect the assignee.

The supreme court of Kansas has held that there is no statute making it necessary to record an assignment of a chattel mort-

†Paragraph 36, § 4251, General Statutes of Kansas for 1901, by Dassler, provides as follows:

"When any mortgage of personal property shall have been fully paid or satisfied, it shall be the duty of the mortgagee, his assignee or personal representative, to enter satisfaction or cause satisfaction thereof to be entered of record in the same manner as near as may be, and under the same penalty for a neglect or refusal, as provided in case of the satisfaction of mortgages of real estate. The entry of satisfaction shall be made in the book in which the mortgage is entered, as hereinbefore provided; and any instrument acknowledging satisfaction shall not be recorded at length, but shall be referred to under the head of 'Remarks', and filed with the mortgage or copy thereof, and preserved therewith in the office of the register."

gage, in order to protect the rights of such assignee, and that it need not be recorded or filed. Burhans v. Hutcheson, supra; Wiscomb v. Cubberly, 51 Kan. 580, 33 Pac. 320; Mutual Ben. L. Ins. Co. v. Huntington, supra. It is true that these cases refer to real estate mortgages, but the reasoning sustains the statement as to chattel mortgages.

The first of the above cases (Burhans v. Hutcheson) holds that where a mortgage upon real estate is given to secure payment of a negotiable note, and before its ma-[308]turity the note *and mortgage are transferred by indorsement of the note to a bona fide holder, the assignment, if there be a written one, need not be recorded. This is held even where there was an express statute as to the record of such an assignment. The statute was held not to apply to the case of a mortgage given as collateral to a negotiable note.

The second case (Wiscomb v. Cubberly) has reference also to a mortgage on real estate, and involves much the same principle.

In the third case (Mutual Ben. L. Ins. Co. v. Huntington) it was again held that after the assignment and delivery by the payee of a negotiable promissory note, before maturity, together with the mortgage on real estate, given as collateral security for its payment, the original mortgagee had no power to release or discharge the lien of the mortgage, and a release made by him without authority, even though the assignment was not recorded, would not affect the rights of the assignee.

These cases would seem to establish the rule in Kansas that it is not necessary to record the assignment of a mortgage even upon real estate, when given to secure payment of negotiable notes, although there is a statute which, in general terms, provides for the recording of assignments of real estate mortgages. Still stronger, if possible, is the case of a chattel mortgage given to secure the payment of negotiable notes, when there is no statutory provision for the recording of the assignment of such mortgage. It is probable that in the large majority of cases the only evidence of an assignment of a negotiable note and a chattel mortgage given to secure its payment is the indorsement of the note, and delivery thereof to the purchaser. In such a case there would be no assignment to record, and there is no provision in the statute for filing a copy of the note with its indorsement, together with a statement that it had been delivered to a third party, as the purchaser or assignee thereof.

The policy of the state of Kansas seems [309]to be not alone to *give to a negotiable promissory note all the qualities that pertain to commercial paper, but also to clothe mortgages given as collateral security for the payment of such notes with the same facility of transfer as the note itself, to which it is only an incident.

The plaintiff, however, contends for the opposite doctrine, and cites, among others, Lewis v. Kirk, 28 Kan. 497, 42 Am. Rep. 173, as its authority. In that case the question was which should suffer, a bona fide purchaser of the real estate which had been mortgaged, or the bona fide purchaser of the mortgage, who had failed to have his assignment recorded. The court held in favor of the purchaser of the real estate, and distinguished Burhans v. Hutcheson, supra, though not assuming to overrule it. The mortgage in the Lewis Case was upon real estate, and would not, therefore, necessarily affect the case of a chattel mortgage, where there is no statute for recording an assignment of the mortgage.

But in Mutual Ben. L. Ins. Co. v. Huntington, supra, the case of Burhans v. Hutcheson, supra, was cited, and the doctrine that a bona fide holder of negotiable paper, transferred by him by indorsement thereon before maturity, and secured by a real estate mortgage, need not record the assignment of mortgage, was again approved.

In Thomas v. Reynolds, 29 Kan. 304, cited by plaintiff, it was held that an action to recover the penalty provided for by the statute for refusal to enter satisfaction of a chattel mortgage when it had been paid could not be sustained against the assignee of the mortgage without proof of the assignment of record, as the purpose of the statute was to clear the record, and therefore the defaulting party must have record title or his satisfaction would apparently be an impertinent interference by a stranger. That action did not raise the question herein presented, and the court made no reference to the case of Burhans v. Hutcheson, supra. It is quite clear that it did not intend to overrule that case. In any event, as already mentioned, the Burhans Case has been approved in 57 Kan. 744, 48 Pac. 19, *above cited. We cannot treat the rule[310] which we have stated above as having been at all shaken by the two cases from 28 and 29 Kansas (supra.)

The counsel for plaintiff contends that, assuming there was no statute providing for the recording of an assignment of a chattel mortgage in the state of Kansas, yet there was no law of that state which prohibited the Geneseo Bank from recording its assignment. It is not necessary that there should be a law to prohibit the recording of such assignments. There must be a law which provides for their record, either in express terms or by plain and necessary im-

plication from the words stated. Where the statute does not so provide, it is not necessary nor is it the duty of the assignee to record or file his assignment. There must be some legal duty imposed upon the assignee before the necessity arises for the recording of the assignment.

Counsel have cited many cases from states other than Kansas, in which the rights of assignees of mortgagees as against subsequent mortgages or conveyances have been discussed and decided. In many cases the question has arisen in regard to the recording of assignments of mortgages upon real estate, where the states had provided for the recording of such assignments, and where, in the absence of such recording, the assignee has failed in obtaining priority of rights under his mortgage, which he would have had if the assignment had been recorded. But, as the owner of the cattle mentioned herein resided in Kansas at the time the mortgages were given, and the cattle were then in that state, and the mortgages were filed there, the transactions are to be judged of with reference to the law of that state, and we decide this question with reference to such law. Under that law the assignee of the first mortgage of June, 1900, has a superior lien to the assignee of the second mortgage of April, 1901, although such assignee of the first mortgage did not have his assignment recorded.

Judgment is affirmed.

311]*MERCANTILE TRUST & DEPOSIT COMPANY OF BALTIMORE, Appt.,
v.
CITY OF COLUMBUS, L. H. Chappell, Mayor, et al.

(See S. C. Reporter's ed. 311-323.)

Courts—jurisdiction of Federal circuit court—case arising under Federal Constitution.

A controversy arising under the Federal Constitution, of which a Federal circuit court has original jurisdiction without regard to the citizenship of the parties, is presented by a bill which asserts that the obligation of a contract for the exclusive privilege of supplying water to a city and its inhabitants is impaired by a subsequent municipal ordinance and a legislative enactment under which the municipality is proceeding to issue and market its bonds for the purpose of constructing its own waterworks system.

[No. 50.]

Argued October 22, 23, 1906. Decided December 3, 1906.

APPEAL from the Circuit Court of the United States for the Northern District of Georgia to review a decree dismissing, for the alleged want of jurisdiction, a bill to enjoin a municipality from constructing its own system of waterworks. Reversed and remanded for further proceedings.

See same case below on motion for temporary injunction, 130 Fed. 180.

Statement by Mr. Justice **Peckham**:

The appellant filed its bill in this case in the United States circuit court for the northern district of Georgia to obtain an injunction restraining the city of Columbus, in the state of Georgia (one of above defendants) from the construction of waterworks for the supplying of water to the defendant city and its inhabitants. Judgment was entered by the circuit court dismissing the bill for the want of jurisdiction, and the question of jurisdiction alone was certified to this court under § 5, chapter 517, of the Acts of Congress of 1891. [26 Stat. at L. 827, U. S. Comp. Stat. 1901, p. 549.]

The complainant based the jurisdiction of the circuit court on the ground of diverse citizenship, and also upon the existence of a Federal question. An amended bill was filed and a motion made for an injunction *pendente lite*, enjoining the city from issuing bonds or doing any work towards the construction of the waterworks. The motion was granted, and a demurrer to the amended bill having been overruled, and issue having been joined by the service of an answer and replication, the *case was re-[3] ferred to a master. Evidence was taken before him, and a report thereafter filed, to which exceptions were duly taken by both parties and an argument had thereon before the court. The judge certifies that, before a decision had been made by the court on the questions of law raised by the exceptions, the defendant filed a motion to dismiss the bill, on the ground that, if the parties to the suit were properly placed, there was no such diversity of citizenship as was required to sustain the jurisdiction of the court, and also on the ground that there was no Federal question involved. The court granted the motion on those grounds and made its certificate, as stated.

The suit was brought by the appellant, a citizen of Maryland, against the city of Co-

NOTE.—As to Federal questions as conferring jurisdiction on United States courts—see notes to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7; and Bailey v. Mosher, 11 C. C. A. 308.

lumbus, a municipal corporation created by the state of Georgia, and its mayor and aldermen, all of them citizens of the state of Georgia, and against the Columbus Waterworks Company, a corporation also created by the state of Georgia.

It appears from the averments contained in the bill that the complainant is trustee for the bondholders in a certain mortgage executed by the waterworks company, in January, 1891, to complainant, as trustee, to secure the payment of certain bonds, and to raise money for the purpose of making improvements and additions to the waterworks which were to supply the city of Columbus with water, and for providing for future extensions and improvements thereof. The mortgage is upon all of the company's property, and also upon all contracts made, or thereafter to be made, between the waterworks company and the city of Columbus for the supplying of water by the company to the city, or any public institution or public office. The mortgage also included all the water rents, etc., and all the income whatsoever of the mortgagor, due or to grow due, arising from its business of supplying water within the city, or within its vicinity or elsewhere, during the continuance of the lien under the mortgage.

It also included therein a contract, which [313] had been entered *into in October, 1881, between one Thomas R. White, of the city of Philadelphia, and the mayor and council of the city of Columbus (defendant herein) for the construction and operation of an effective system of waterworks for the supplying of the city with water for the various uses required. This is the contract in question in this suit. Provision for a corporation was made in the contract, to which it was to be assigned; the corporation was subsequently created, and such contract was assigned by White to the water company, and the assignment was assented to by the city. The contract provided in great detail for the erection of a water system for the city and for private consumers, and it contained all the usual provisions for that kind of a contract.

It was, among other things, provided in the contract that the city should grant a franchise to the other party named therein, for the exclusive privilege of maintaining and operating the waterworks for a period of thirty years, or until they might be purchased by the city, as provided in the contract.

The work under the contract was completed and accepted by the city November 6, 1882, and the company then commenced to, and did, for some years, furnish water, under its provisions, to the city and its inhabitants.

Thereafter disputes and differences arose between the parties, regarding the sufficient supply of water for the city and its inhabitants, the city contending that the water company had entirely failed to satisfactorily fulfil the contract in that respect. The company contended, on the other hand, that it had done all that possibly could be done, under the circumstances of an extraordinary and unprecedented drought, and was willing to spend more money for the purpose of enlarging its field of supply, if the city would not, by its proposed action, defeat such purpose. The differences continued until finally, on the 14th day of September, 1902, the city passed an ordinance for submitting to the voters of the city the question of issuing $250,000 of bonds of the city, to be used for the purpose of building and operating and owning a system of *water- [314] works by the city. A special election was called for the 4th day of December, 1902. The ordinance opened with the statement that the water company had totally failed to supply the city of Columbus and its inhabitants with a sufficient quantity of pure and wholesome water, and that the public health of the city was of paramount importance to every other consideration, and the city, therefore, proposed an ordinance (which it set forth for the approval of the electors) for the issuing of bonds for the building of a separate system of works to be owned and operated by the city. It was provided in the proposed ordinance that if the electors assented to the issue and sale of the bonds to be used for the purpose of building and operating the waterworks, that thereafter bonds of the city should be issued upon certain conditions, and an annual tax should be levied for the payment of the interest on the bonds and a certain proportion of the principal every year. The proposed ordinance also provided that in the event of the assent of the voters at the election, and the issuing of the bonds when the same should have been validated, as by law required, thereafter the waterworks were to be considered a separate and distinct department of the city government, and a water commission was to be created for the government and control and operation of the waterworks. Other provisions were contained in the proposed ordinance, regulating the doing of the work and the operation of the constructed work.

On the 3d day of December, 1902 (the day before the election under the city ordinance), the legislature, at the request, as it may be presumed, of the city, passed an act to amend its charter, so as to confer power and authority upon the city to construct, maintain, and operate a system of waterworks of its own. The act gave power

to the city to appropriate private property, and to lay its pipes through its streets, either within or without the corporate limits of the city, and the city was given power and authority generally to do and perform all things necessary to carry the object and purposes of the act into effect. Section 7 [315] of the act expressly conferred *upon the city the right to issue and sell its bonds, for the purposes of building and operating the waterworks. Provision was also made in the act for the appointment of a board of water commissioners, who should have the supervision and control of the construction, operation, and management of the waterworks. This board was to regulate the distribution and use of water in all places, it was to fix the price for the use thereof, and terms of payment therefor. The moneys coming into the hands of the board for water rents and the sale of any apparatus or other property, or from any other source connected with the waterworks, were to be paid to the treasurer of the city, and were to be used by him only for the purpose of paying any principal and interest becoming due on the bonds issued by the city. The board was to be regarded as a subordinate branch of the city government.

The ordinance above mentioned and this act of the legislature of Georgia having been passed subsequently to the execution of the contract, are asserted by the complainant to be acts which impair the obligation of such contract.

Proceedings were taken under the ordinance, and the election was held pursuant to its provisions on the 4th of December, 1902, and resulted in the assent of the requisite number of electors to the issuing of the bonds and the use of the proceeds in the erection of a water system, to be owned and controlled by the city.

A board of water commissioners was thereupon appointed, under the provisions of the ordinance and the act of the legislature, and on the 6th of May, 1903, the common council received a communication from the board, through its secretary, wherein the board requested the common council to invite bids for the bonds of the city for the purpose of constructing the system of waterworks, which bids were to be opened on the 1st of August, 1903. Thereupon the common council, on the same day, complied with the request, and directed the publication of a notice for receiving bids for the bonds up to August 1, 1903.

[316] *On the 30th of July, 1903, the complainant filed this bill against the parties named. It is contended in the bill that, as trustee for the bondholders, the complainant can maintain this action, on the ground of an impairment of the obligation of the contract already mentioned, and that, as the wate company has mortgaged to the complainan the benefits of its contract with the cit together with the other property of the wa ter company, as security for the paymen of its bonds, any such action as propose by the city will destroy the value of th bonds of the water company, and wi amount to the taking of complainan trustee's property without due process o law, and will deprive it of the equal pro tection of the laws. The water company i made a defendant for the purpose of bindin it, as averred in the bill, by the judgmen and decree that may be rendered in th cause, so that the right and equity of sul rogation, or other rights and equities set up may be enforced and decreed against th water company, and that the water com pany may be held and decreed, on its part to specifically perform all the obligations o such contract. An injunction was asked for and granted, as stated, *pendente lite*. It was also asked that the defendant city might be enjoined from refusing to carry out the contract with the waterworks company, and from placing any obstacle in the way of the due performance thereof, according to its terms.

Messrs. Joseph Packard and Olin J. Wim berly argued the cause, and, with Messrs Louis F. Garrard and John I. Hall, filed a brief for appellant:

The legislation set forth in this case a impairing the obligation of the contract i clearly distinguishable from the legislatio which, in St. Paul Gaslight Co. v. St. Paul 181 U. S. 142, 45 L. ed. 788, 21 Sup. C Rep. 575, this court held not to be suc legislation as impaired the obligation o the contract in that case.

The ordinances of the city of Columbu and the acts of the general assembly o Georgia, set forth in the bill, under au by virtue of which the action of the cit of Columbus in proceeding to issue bonds fo the construction of its own system of wate works was taken, clearly constituted legisla tion impairing the contract between the cit and the water works company, and th contract the appellant, as trustee of th bondholders, was in duty bound to seek t uphold. This case is closely analogous i this respect to Walla Walla v. Walla Wall Water Co. 172 U. S. 17, 43 L. ed. 348, 19 Su Ct. Rep. 77.

Even if, as in the case of Vicksburg Wate works Co. v. Vicksburg, 185 U. S. 81, 46 L ed. 815, 22 Sup. Ct. Rep. 585, we lay asid the act of the legislature of Georgia, passe on December 3d, 1902, the ordinance of th city of Columbus passed on September 14t 1902, and the subsequent ordinances civin

effect thereto, disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract,—to use the language of this court in the Vicksburg Case.

See also New Orleans Waterworks Co. v. Rivers, 115 U. S. 680, 29 L. ed. 527, 6 Sup. Ct. Rep. 273.

Such an ordinance may properly be considered a law within the meaning of the article of the Constitution of the United States.

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 31, 31 L. ed. 612, 8 Sup. Ct. Rep. 741; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 148, 45 L. ed. 791, 21 Sup. Ct. Rep. 575.

Even in the case of an appeal from the highest state court, this court will determine for itself as to the existence and meaning of the alleged contract, in order to determine the question whether subsequent legislation has impaired the obligation thereof.

Capital City Light & Fuel Co. v. Tallahassee, 186 U. S. 406, 46 L. ed. 1223, 22 Sup. Ct. Rep. 866.

The Federal court had jurisdiction based upon the allegations of the bill, even though it be held that the Columbus Waterworks Company should have been aligned as plaintiff. It would have had such jurisdiction, even though all the parties had been citizens of Georgia.

City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Walla Walla v. Walla Walla Water Co. 172 U. S. 7, 43 L. ed. 344, 19 Sup. Ct. Rep. 77; New Orleans Waterworks Co. v. Rivers, supra.

Where the bill properly sets forth a contract granting exclusive rights to furnish water, and that the action of the city tends to impair the obligation of such contract, the case is one where the Federal courts have jurisdiction without regard to the citizenship of the parties.

Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585.

Messrs. Joseph Packard and Olin J. Wimberly also filed a supplemental brief for appellant:

The jurisdiction of the circuit court is established when it is shown that the company had, or claimed to have, a contract with a state or municipality which the latter had attempted to impair; and, so long as the claim is apparently made in good faith and is not frivolous, the case can be heard and decided on the merits.

Pacific Electric R. Co. v. Los Angeles, 194 U. S. 112, 48 L. ed. 896, 24 Sup. Ct. Rep. 586; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Illinois C. R. Co. v. Adams, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251.

A municipal ordinance is legislation within the meaning of the impairment-of-contract clause of the Constitution

Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 216, 217, 47 L. ed. 778, 780, 23 Sup. Ct. Rep. 498; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 148, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 10, 43 L. ed. 341, 345, 19 Sup. Ct. Rep. 77.

Messrs. William A. Wimbish and J. H. Martin argued the cause, and, with Messrs. T. T. Miller and Ellis, Wimbish, & Ellis, filed a brief for appellees:

A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this, of course, is the obligation of his contract.

Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529.

The obligation of the contract is the chain of the law giving legal efficacy to the undertaking.

Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606.

Since the law creates the obligation, only the law can impair or destroy it. It cannot be affected by an act or default of either contracting party. The constitutional provision is intended to protect the obligation of contracts against impairment by the laws of a state. The subsequent law must have the effect of loosening the chain of the obligation by changing the rights or the essential remedies of the parties as they existed when the contract was entered into.

Ogden v. Saunders, 12 Wheat. 214, 327, 6 L. ed. 606, 645; Bronson v. Kinzie, 1 How. 312, 11 L. ed. 143; McCracken v. Hayward, 2 How. 608, 11 L. ed. 397; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793.

A municipal ordinance, if authorized by the legislature, may have the force and effect of a law of the state; and, if obnoxious to the Constitution, be held to impair the obligation of a contract. The ordinance must have been passed in pursuance of state legislation passed subsequent to the contract.

McCracken v. Hayward, supra; Lehigh Water Co. v. Easton, 121 U. S. 392, 30 L. ed. 1060, 7 Sup. Ct. Rep. 916.

The mere fact, however, that a party repudiating a contract is a municipal corporation, does not give to its refusal to per-

form the character of a law impairing the obligation of the contract, or constitute the taking of private property without due process of law.

Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90.

Whether the contract granted an exclusive privilege such as to prevent the city from constructing its own system, and, if so, whether the city had power to grant such an exclusive right, are questions to be determined by the laws of the state, in no wise involving the construction or application of the Constitution of the United States.

Fergus Falls v. Fergus Falls Water Co. 19 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 873.

The refusal of the city to pay an instalment of water rental claimed to be due is alleged to have been unlawful, and is so plainly a mere breach of the contract as not to require argument.

Raton Waterworks Co. v. Raton, 174 U. S. 360, 43 L. ed. 1005, 19 Sup. Ct. Rep. 719; St. Paul Gaslight Co. v. St. Paul, supra.

In the case of Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. supra, the city of Dawson entered into a contract by its terms granting an exclusive franchise, in pursuance of the same general authority of law as did the city of Columbus in the present case.

In Georgia, a city, in the exercise of its police power and in order to promote the general welfare, may contract for, or itself provide, a supply of water for domestic use and fire protection.

Frederick v. Augusta, 5 Ga. 561; Rome v. Cabot, 28 Ga. 50; Wells v. Atlanta, 43 Ga. 67; Dawson v. Dawson Waterworks Co. 106 Ga. 709, 32 S. E. 907.

The court will look beyond the allegations of the bill to the facts properly pleaded in order to determine whether a real and substantial Federal question is presented.

Millingar v. Hartupee, 6 Wall. 258, 18 L. ed. 829; Wilson v. North Carolina, 169 U. S. 586, 595, 42 L. ed. 865, 871, 18 Sup. Ct. Rep. 435; McCain v. Des Moines, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 344, 46 L. ed. 936, 941, 22 Sup. Ct. Rep. 691; Sawyer v. Piper, 189 U. S. 154, 47 L. ed. 757, 23 Sup. Ct. Rep. 633; Newburyport Water Co. v. Newburyport, 193 U. S. 561, 576, 48 L. ed. 795, 799, 24 Sup. Ct. Rep. 553; Harris v. Rosenberger, 76 C. C. A. 225, 145 Fed. 449.

In the case at bar the court will look to the facts properly and also to the contract, attached as an exhibit to the original bill, to see if any valid grant of an exclusive privilege has been made.

Fergus Falls v. Fergus Falls Water Co. 19 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 876.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The sole question arising herein is whether the Federal circuit court had the jurisdiction to determine the issue involved. That question alone has been certified to this court by the circuit court, under the provisions of the 5th section of the act of Congress of 1891. [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549.] The grounds of the dismissal of the bill are set forth in the foregoing statement of facts.

Whether this case comes within the principle laid down by this court in Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420, upon the question of diversity of citizenship, it is unnecessary to determine, because there is, in our *opinion, a Federal[3 question involved, which gave the circuit court jurisdiction to determine the case without reference to citizenship. It is averred in the bill that by reason of the passage of the ordinance of the common council of the city and the act of the legislature of Georgia, passed December 3, 1902, the obligation of the contract set forth in the bill was impaired. It is part of the duty of the Federal courts, under the impairment of the obligation of contract clause in the Constitution, to decide whether there be a valid contract and what its construction is, and whether, as construed, there is any subsequent legislation, by municipality or by the state legislature, which impairs its obligation. That the ordinance of the common council of a municipal corporation may constitute a law within the meaning of this constitutional clause is too well settled to admit of doubt. St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 148, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207-216, 47 L. ed. 778-780, 23 Sup. Ct. Rep. 498. The contract in this case provided in terms for the exclusive privilege of supplying water to the city and its inhabitants for thirty years from the date of its completion. By the ordinance of the city of 1902 the city insisted that the water company had totally failed to fulfil its contract to supply water to the city and its inhabitants. Such ordinance then went on and proposed to the electors an ordinance, the material portions

of which have been set forth in the foregoing statement.

The act of the legislature, passed the day before the day of the election, is also referred to in the statement and some of its material provisions are mentioned.

The ordinance and the act should properly be considered together, and they evidently contemplate an immediate execution of the work in case the electors assented to the issuing of the bonds. If the provisions of the ordinance and act were carried out, the effect, of course, could be none other than disastrous to the water company, as the obligations of the contract (if any) would thereby be so far impaired as to render the contract of no value. The source of the liability of *the water company to pay the interest on its bonds, and the principal thereof, as they became due, was, by this ordinance and act, entirely cut off.

Was not this legislation, and legislation of a kind materially to impair the obligation of the contract then existing, and not only to impair, but to wholly destroy its value? We are not called upon now to say whether the exclusive right for thirty years, granted to the water company by the contract to supply the city with water, was legal and valid, because that is a part of the question whether the obligation of the contract has been impaired by the subsequent ordinances of the city and the laws of the state. It cannot be determined that there is an impairment of the obligation of a contract until it is determined what the contract is, and whether it is a valid contract. If it be valid, it still remains to be determined whether the subsequent proceedings of the city council and legislature impaired its obligation. The ordinance and act were not mere statements of an intention on the part of one of the parties to a contract not to be bound by its obligations. Such a denial on the part, even of a municipal corporation, contained in an ordinance to that effect, is not legislation impairing the obligation of a contract. St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575. It was stated in that case that the ordinance in question "created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. . . . When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted, on the one hand, that a municipality is bound by a contract to perform a particular act, and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises, *in violation of the Constitution of [322] the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus, to reduce the proposition to its ultimate conception is to demonstrate its error."

In the case at bar the conditions are entirely different. There was not merely a denial by the city of its obligation under the contract, but the question is whether there were not new and substantial duties in positive opposition to those contained in the contract created and their performance provided for by the ordinances and act. The act of the legislature aided the city by granting it power to itself erect waterworks and to issue bonds in payment of the cost thereof, and the city was proceeding to avail itself of the power thus granted, when its progress was arrested by the filing of the bill in this case and the issuing of a temporary injunction. It would seem as if the case were really within the principle decided in Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585, 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224. In the last-cited case the water company contended that the agreement mentioned in that case constituted a contract, for which it acquired for a given period the exclusive right to supply water to the city and its inhabitants, and it insisted that the obligation of this contract would be impaired if the city, acting under the acts of the legislature and under the ordinance mentioned, established and maintained an independent and separate system of waterworks in competition with those of the water company. It was held that such a question was one arising under the Constitution of the United States, and that the Federal circuit court had jurisdiction thereof without regard to the citizenship of the parties. It must be remembered that in the case before us the sole question is whether the Federal circuit court had jurisdiction to determine the *case, and we are [323] not now concerned with the question as to how the matter should be determined, but only whether the circuit court had jurisdic-

tion to determine it. As stated in Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, at page 82, 46 L. ed. 808, at page 815, 22 Sup. Ct. Rep. 585, at page 592, in speaking of the question of jurisdiction: "We do not wish to be understood as now determining such questions in the present case, for we are only considering whether or not the circuit court had jurisdiction to consider them."

Concluding that the court below had such jurisdiction, because it presents a controversy arising under the Constitution of the United States, the judgment of the Circuit Court is reversed, and the case remanded to that court to take proceedings therein according to law.

Reversed.

SECURITY TRUST & SAFETY VAULT COMPANY, of Lexington, Kentucky, Trustee of Clara D. Bell, Plff. in Err.,

v.

CITY OF LEXINGTON, Kentucky, and E. T. Gross, Delinquent Tax Collector for Said City, Defts. in Err.

(See S. C. Reporter's ed. 323-335.)

Constitutional law—due process of law—notice and hearing.

The failure of the Kentucky statutes to require notice to be given of a special assessment for back taxes on omitted property, made by the regular assessor under Ky. Stat. § 3179, after the time provided by law for the making of the general assessment, does not deprive the taxpayer of his property without due process of law, where the state court has afforded him full opportunity to be heard on the question of the validity and the amount of the tax, and, on such hearing, has reduced the tax.

[No. 55.]

Argued October 23, 24, 1906. Decided December 3, 1906.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Fayette County Circuit Court reducing a tax and enforcing it as reduced. Affirmed.

See same case below, 27 Ky. L. Rep. 591, 85 S. W. 1081.

Statement by Mr. Justice **Peckham**:

The plaintiff in error, which was plaintiff [324] below, filed its *petition in the Fayette county circuit court, state of Kentucky, in equity, on February 3, 1899, for the purpose of obtaining an injunction restraining the defendants in error from the collection of certain back taxes accruing during the years 1894 to 1898, both inclusive, imposed in favor of the city of Lexington, and which the plaintiff asserted were illegally assessed. A temporary injunction was prayed for and granted, restraining the collection of the tax, and upon the trial the amount of the taxes was reduced, and, as so reduced, declared to be a lien on the property of the plaintiff in error as trustee, and judgment accordingly was entered, which judgment was, upon appeal to the court of appeals of the state, affirmed, and the plaintiff brings the case here by writ of error.

In the amended petition it is averred that the plaintiff, as trustee, owned certain real estate in the city of Lexington, and that the tax collector of the city, asserting a claim for back taxes from 1894 to 1898, both inclusive, in favor of the city, against the trust estate in the plaintiff's hands, for $13,964.96, had, to satisfy the claim, levied on the real property held by it as trustee and described in the petition, and had advertised the same to be sold, and would sell the same, unless restrained by order of the court. It was averred that the claim for back taxes was for alleged omissions of personal property owned by the plaintiff as trustee, which had not been assessed for city taxation for the years stated, and that the tax was based on alleged assessments imposed in December, 1898, for these years, made by the city assessor of Lexington. The plaintiff denied that the pretended assessments made in 1898 for those years were any assessments at all, and alleged that there had been no assessment for the back taxes of those years or for any of them. It was averred that certain entries which had been made in the assessor's books for the years mentioned, purporting to assess the property for these back taxes, were interpolated among the assessments for those years, but were not legally made; that such entries were not assessments, nor any step in the valid assessment of back taxes in those years, and *were made by the city assessor without any notice to, or conference with, the plaintiff of his intention to make the same, or any assessment, and the plaintiff at no time, either before or since said pretended assessment, had been given or allowed any opportunity or privilege to make any complaint or show cause against the assessment before any competent officer or tribunal whatever. It was also averred that all the property of plaintiff as trustee, during each of the years covered by the claim for back taxes, had been duly assessed, and, if

NOTE.—On notice and hearing required to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

had been given the opportunity, plaintiff uld have established the fact of such as- sment, and that it had been fully and ally paid.

The plaintiff averred that collection of es based on assessments made as above ted would be in violation of the Constitu- n of the United States and of the state Kentucky, forbidding that a citizen should deprived of his property without due cess of law.

The defendants in their answer averred t all of the property (with an exception t material) on which the defendants were iming taxes as upon omitted property, l in fact been omitted by the plaintiff m its assessment lists during the years ntioned, and that the lists made out by plaintiff for those years had been im- fect and improper lists, and that there s omitted therefrom a large part of the sonalty owned by the plaintiff as trus- . The defendants averred that all the itted property was properly assessable for respective years, and that there was due reon, in 1898, as the back taxes on the d omitted property, the sum named, to , $13,964.96; and the defendants denied t the valuation of the property, as fixed the assessment, was any larger in propor- n than the value of the assessment gener- y placed on similar property in the city of ington. After the assessment was made, was averred that the delinquent tax col- tor demanded payment of the same, which s refused and thereupon he levied upon property on the 31st of December, 1898. e answer then set up the making of the essment *on the property omitted, and wed that it was made substantially as erred in the amended petition, by insert- in each of the books for the various ars an additional assessment on account omitted property, and that, after each the entries of assessment in the various oks had been made by the assessor, he ned his name after the words, "Assessed me;" and it is averred that the assess- nt was also recorded by the assessor in the ck-tax assessment book kept by the city Lexington, and was by him reported to e auditor of the city of Lexington on the y that the assessment was made, Decem- r 31, 1898. The defendants also averred at, more than thirty days prior to the ne the assessment was made, the city, rough its duly authorized officers and ents, had notified the plaintiff that it d omitted from its assessments for the ars 1894 to 1898, both inclusive, a large rtion of the estate held by it as trustee, d, at the time of giving such notice, the cers of the city had furnished and deliv- d, as a part of such notice, an itemized statement of the securities and other personal property belonging to the estate, and held by the plaintiff, on the respective dates for taxation for the respective years, and that payment of the taxes upon this omitted property was repeatedly demanded of the plaintiff by the city during a period of more than thirty days prior to the assessment, and the plaintiff refused to pay any additional taxes or to list the omitted property, and that ample time and opportunity were afforded plaintiff to show that the property had not been omitted from the yearly assessments, and the plaintiff failed to do so.

A reply and rejoinder were filed, and, upon the pleadings, the parties went to trial.

Judgment was given for the defendants, refusing the injunction, and providing for the sale of the real estate to satisfy the amount due for back taxes, as stated in the judgment. The total amount of back taxes due on the omitted property was, by such judgment, reduced from $13,964.96, the amount claimed by the defendants, to the sum of $8,626.63.

Messrs. **John T. Shelby** and **George R. Hunt** argued the cause, and, with Messrs. Joseph D. Hunt and John R. Allen, filed a brief for plaintiff in error:

The right to be heard in tax cases is a constitutional right, and indefeasible.

Cooley, Taxn. 2d ed. pp. 362, 363, 3d ed. pp. 626–629; McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 709, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; Spencer v. Merchant, 125 U. S. 345, 355, 31 L. ed. 763, 767, 8 Sup. Ct. Rep. 921; Palmer v. McMahon, 133 U. S. 660, 669, 33 L. ed. 772, 776, 10 Sup. Ct. Rep. 324; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 426, 38 L. ed. 1031, 1036, 14 Sup. Ct. Rep. 1114; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 537, 40 L. ed. 251, 16 Sup. Ct. Rep. 83.

The action of the assessing officers, whatever the form of the assessment, when completed, if it be of any force at all, becomes conclusive as to the value of the property embraced in the assessment; and that matter is not open to further inquiry in any court; and if, in these proceedings, the requisite notice and opportunity for hearing be not allowed, then the so-called assessment is void for want of due process of law. No other hearing can be the legal equivalent or substitute for the hearing the party to be affected is entitled to before the assessing officers, whose authority to value and

give relief against errors of valuation is full and exclusive.

Stanley v. Albany County, 121 U. S. 550, 30 L. ed. 1003, 7 Sup. Ct. Rep. 1234; Cooley, Taxn. 2d. ed. p. 730, 3d ed. p. 1353; Odd Fellows' Hall Asso. v. Dayton, 25 Ky. L. Rep. 665, 76 S. W. 181; Ward v. Beale, 91 Ky. 65, 14 S. W. 967; Henderson Bridge Co. v. Com. 99 Ky. 623, 29 L.R.A. 73, 31 S. W. 486; Royer Wheel Co. v. Taylor County, 104 Ky. 741, 47 S. W. 876; Coulter v. Louisville Bridge Co. 114 Ky. 42, 70 S. W. 29; Albin Co. v. Louisville, 117 Ky. 895, 79 S. W. 274; Citizens' Nat. Bank v. Com. 118 Ky. 60, 80 S. W. 479, 81 S. W. 686; Slaughter v. Louisville, 89 Ky. 112, 8 S. W. 917; Turner v. Pewee Valley, 100 Ky. 288, 38 S. W. 143, 688.

The fact that persons may have violated the law, either neglecting or wilfully refusing to return their property for taxation, is no reason why constitutional safeguards provided for the protection of all classes should be destroyed or ignored. The question is not one of policy, but of power; and if it is competent for a legislature to dispense with an assessment of property as to one class, it would be equally within its power to dispense with it for any or all other classes.

State Revenue Agent v. Tonella (Adams v. Tonella) 70 Miss. 701, 22 L.R.A. 346, 14 So. 17.

Messrs. George C. Webb and George S. Shanklin argued the cause, and, with Messrs. J. R. Morton and E. P. Farrell, filed a brief for defendants in error:

When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of property without due process of law within the 14th Amendment of the Constitution of the United States.

Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

A person who seeks the aid of a court of equity against the payment of a tax must come with not only clean but open hands, and if he owes any tax the court will compel him to pay it.

Clark v. Louisville Water Co. 90 Ky. 524, 14 S. W. 502; Reynolds v. Bowen, 138 Ind. 434, 36 N. E. 756.

Publication of notice, as is provided in the statute, is ample and sufficient to meet the requirements of due process of law, and the sittings of the officer at stated times and places takes taxation out of the inhibition of the 14th Amendment.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Kentucky Railroad Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; I Cooley, Taxn. 3d ed. p. 61.

The return made by the corporation through its officers is the statement of its own case in all the particulars that enter into the question of the value of its taxable property.

Kentucky Railroad Tax Cases, supra.

Since assessments for taxation do not constitute judicial judgments such as can be set aside only upon notice and after opportunity to be heard, a reassessment of grossly undervalued property so as to make such property bear the same burden it would have borne if the true assessment had been made in the first instance does not violate the constitutional requirement of due process of law.

1 Cooley, Taxn. 3d ed. p. 65; Weyerhaueser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485.

The actual notice given to plaintiff in error meets every requirement of due process of law.

Davidson v. New Orleans, supra; Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; Hagar v. Reclamation Dist. No. 108, and Kentucky Railroad Tax Cases, supra; Sturges v. Carter, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014.

A hearing of the taxpayer's complaint by a court of competent jurisdiction meets the requirements of due process of law under the 14th Amendment, whether there be any other notice or not, and whether the taxpayer may have had any other hearing or not.

Kentucky Railroad Tax Cases, supra; McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335; Hagar v. Reclamation Dist. No. 108, supra.

Under the jurisprudence of Kentucky, there can be no question but that a court of equity can enjoin the collection of taxes.

Baldwin v. Shine, 84 Ky. 502, 2 S. W. 166; Gates v. Barrett, 79 Ky. 295; Allison v. Louisville, H. C. & W. R. Co. 9 Bush, 249; Louisville & N. R. Co. v. Warren County Court, 5 Bush, 243; Louisville v. Board of Trade, 90 Ky. 409, 9 L.R.A. 629, 14 S. W. 468.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

There are in the state of Kentucky two distinct methods by which an assessment for so-called back taxes can be made. One method is an assessment by a special back-tax assessor, elected as provided for by an ordinance of the city of Lexington. This ordinance the court of appeals of the state of Kentucky has held, contrary to the contention of the plaintiff in this case, did not displace the regular assessor, or affect his

right to make an assessment for back taxes. The other method provides for an assessment by the regular assessor, under § 3179 of the laws relating to the city of Lexington, which section, among other things therein contained, provides that: "Whenever the assessor shall ascertain that there has, in any former year or years, been any property omitted which should have been taxed, he shall assess the same against the person who should have been assessed with it, if living; if not, against his representative."

In this case the assessment for back taxes was made by the regular assessor, but not until December 31, 1898, under the above-quoted provision in § 3179. It was, however, a special assessment, made after the regular assessment in the assessor's books of 1898, and after such books had been transmitted within the time prescribed by law (§ 3180), December 1, 1898, to the auditor, subject to the inspection of the public. In regard to the regular assessment, the statutes of Kentucky provide (§ 3181) for a board of equalization, which sits on the first Monday of January, and continues in session not longer than four weeks. The auditor must deliver to the board the assessment books filed with him by the assessor, and it is to hear all complaints against the assessments made by the assessor, and may determine the same, but it cannot increase the assessment without notice to the party whose property is to be increased. The section is part of the general statutes as to assessments for the annual taxes, and it refers evidently to the assessments made by the assessor up to the 1st of December preceding, and which appear in the book which the law directs to be sent to the auditor and by him transmitted to the board of equalization. It does not refer to an extraordinary assessment made by the assessor for back taxes subsequently to the [331] time provided for by law for *the making of the general assessment. The assessor must return the general assessment which he makes in his book under § 3179 to the auditor on or before December 1 in each year. Section 3180. This book remains in the auditor's office subject to the inspection of the public until transmitted, in the January following, to the board of equalization under § 3181. In the case before us the assessment for the back tax was made December 31, 1898, by entering a separate assessment for each year in the assessor's book for that year, and therefore these various assessments were not contained in the books of the assessor as they were sent to the auditor on December 1 of each year, respectively. The assessor's books for the years prior to 1898 were obtained in some way, and the entries of the assessments were therein made, because, as stated, there were no other books provided. We find no provision of the statute as to assessments for back taxes, which requires notice of such assessment if made at any time other than in the regular course for the general assessment as provided for in the general statute. If the assessment happens to be made in the assessor's book prior to December 1 in any year, it, of course, goes with the book to the auditor, and remains there for inspection by the public until taken before the board of equalization. Such an assessment would carry with it the provision of the law of the state applicable to the city on the subject of assessments, including the general notice under the law providing for such assessment. But that, of course cannot apply where the assessment is not made on or before December 1 in the regular assessment book. That book the taxpayer must omit to examine at his peril, when filed with the auditor, or when before the board of equalization. As sent to the auditor December 1, 1898, the book did not contain the assessment in question. And as to the books of the former years, they had passed out of the legal custody of the assessor, and he could not take any such books, and, without notice, impose a conclusive assessment for back taxes for the particular year the book had been made *use [332] of as an assessment book. Such assessment could not be enforced unless the taxpayer could thereafter at some time, and as a matter of right, be heard upon the question of the validity and the amount of such tax. The general statutory notice as to the regular assessment proceedings cannot be regarded as notice of this special assessment, made years after the completion of the old assessments.

In regard to the question of notice, the court of appeals held that the burden of proof in such a proceeding as this was upon the plaintiff to establish that there was no notice of the assessment given it; but it also held that the defendant had, in fact, proved that there was notice given to the plaintiff in error before the assessment was made. This applies to a notice in fact, but the court of appeals did not hold that there was any notice made necessary by the statute in regard to such a special assessment as above described. An assessment made on December 31, 1898, in the manner set forth, although imposed before the meeting of the board of equalization in January following, was not imposed at a time which made the general statutes as to assessments applicable, and therefore the taxpayer had no statutory notice or opportunity furnished him to appear and be heard before the board.

He may have examined the assessor's books for the various years 1894–1898, when filed in the auditor's office on the 1st of December, by the assessor, and prior to December 31, when this assessment was made, and found that there was no assessment made against him for any back taxes. There was no statutory obligation imposed on him to again examine the books, lest perchance they may have had an interlined assessment made in them, for the making of which the law provided no notice. It follows that the subsequent assessments placed in such books, and not appearing on any book when sent to the auditor by the assessor, would not be made under any statutory provision for notice, and would not afford the taxpayer an opportunity to be heard before the board of equalization in regard to the illegality of such tax.

[*333] *If the statute did not provide for a notice in any form, it is not material that, as a matter of grace or favor, notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case, that is material, but the question is whether any notice is provided for by the statute. Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289. Before this special assessment could be actually enforced or during the process of enforcement the taxpayer must have an opportunity to be heard as to its validity and extent. In Weyerhaueser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485, it was held that the taxpayer was entitled to an opportunity to be heard before the tax could be enforced (see page 556, L. ed. page 586, Sup. Ct. Rep. page 488), that the filing of the tax list therein spoken of was, in effect, as held by the court, the institution of an action against each tract of land described in it, and the taxpayer thereafter had opportunity to make any defense he might have. This the court held was sufficient. The proceedings leading up to that assessment originated in a complaint, in writing, to the governor, who thereupon appointed a commission to hear the matter, and if proper, impose the tax, but before it could be enforced or during the process of collection the landowner had a right to be heard. The statute now before us does not provide for a notice of the special assessment, nor did the plaintiff have an opportunity to be heard as to the assessment before the board of equalization.

But in this case the state court has afforded to the taxpayer full opportunity to be heard on the question of the validity and amount of the tax, and, after such opportunity, has rendered a judgment which provides for the enforcement of the tax as it has been reduced by the court, the reduction amounting to over $5,000. The plaintiff has, therefore, been heard, and on the hearing has succeeded in reducing the assessment. What more ought to be given? Whether the opportunity to be heard which has been afforded to the plaintiff has been pursuant to the provisions of some statute, as in McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335, and Hagar v. *Reclamation Dist. No. 108, 111 U. [*334] S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663, or by the holding of the court that the plaintiff has such right in the trial of a suit to enjoin the collection of the tax, is not material. The state court in this case has held the taxpayer entitled to a hearing, and has granted and enforced such right, and upon the trial has reduced the tax. In so doing the court below has not assumed the legislative function of making an assessment. It has merely reduced, after a full hearing, the amount of an assessment made by the assessor under color, at least, of legislative authority.

The court of appeals has held that the power of the trial court in giving the hearing has been properly exercised.

It is urged that the court below has not in fact decided that the assessment against plaintiff as reduced was legal, but only that plaintiff will not be heard upon the question of enjoining the collection of the tax until plaintiff tenders the amount of tax equitably due. The plaintiff denies that there is any amount equitably due, and it contends that it has not had an opportunity to show the invalidity of the assessment. We think the contention not well founded. The court has held that the burden rested upon the plaintiff to show the invalidity of the tax. Even if erroneous, the decision is not of a Federal nature. It had the chance, at all events, to show the invalidity of the tax in whole or in part. Upon the evidence given on the trial the tax was reduced, and the court of appeals has said:

"The claim of appellant to escape a retrospective assessment of the property of its *cestui que trust* in this case is wholly technical. That it owes the tax it seeks to evade is made apparent by an examination of this record. Although it had in its hands the means of instantly and most conclusively showing either that the trust estate did not own the property with which it was assessed, or that the values were too high, it introduced no evidence whatever on this subject. While it was not incumbent upon the appellees to introduce any evidence, being authorized under the principles herein enunciated to *await the evidence of appel- [*335] lant showing the invalidity of the assessment complained of, yet they did introduce

vidence which we think clearly establishes hat appellant justly owes the amount of he tax which has been adjudged against he estate of its *cestui que trust*." [27 Ky. L. Rep. 595, 85 S. W. 1083.]

We think it sufficiently appears that the laintiff had an opportunity to be heard pon the question of the validity of the tax, oth for want of notice in fact, and whether e property assessed for back taxes had ally been omitted from the original list r the years in question, and was therefore operly taxable under the assessment for ck taxes. Even if the assessment had en made by the assessor without notice, t if, upon the hearing in this cause, the aintiff had the right and an opportunity be heard, and the assessment was thereon duced, it has obtained all the hearing it as entitled to. We think the plaintiff d have such a hearing, and the judgment correct, so far, at least, as this court is uthorized to review it. It is therefore affrmed.

MISSISSIPPI RAILROAD COMMISSION, R. L. Bradley, S. D. McNair, and J. C. Kincannon, Members of Said Commission, and T. R. Maxwell, Clerk Thereof, Appts.,

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

(See S. C. Reporter's ed. 335-347.)

State—immunity from suit.

1. A suit to enjoin the enforcement of an order of the Mississippi railroad commission compelling a railroad company to stop its trains at a specified station is not a suit against the state.

Federal courts—enjoining proceedings in state courts.

2. The Mississippi railroad commission is not a court within the meaning of U. S. Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581, forbidding the Federal courts to enjoin proceedings in a state court.

Federal courts—enjoining proceedings in state courts.

3. A proceeding before the Mississippi railroad commission does not become a proceeding in a state court, within the meaning of U. S. Rev. Stat. § 720, so as to prevent a Federal court from enjoining the enforcement of an order of such commission which is claimed to violate the Federal Constitution, because the commission would have to resort to a state court to aid it in the enforcement of its order.

Appeal—jurisdiction of circuit court of appeals.

4. An appeal lies to the appropriate circuit court of appeals in a case where the jurisdiction of the circuit court attached both on the ground of diverse citizenship and on a separate and independent constitutional ground.

Commerce—state regulation—requiring train to stop at county seat.

5. Interstate commerce is unconstitutionally interfered with by an order of the Mississippi railroad commission, made in the exercise of its discretionary authority, under Miss. Code 1892, §§ 3550, 4302, requiring a railway company to stop its interstate mail trains at a specified county seat, where proper and adequate railway passenger facilities are otherwise afforded that station.

[No. 64.]

Argued October 26, 1906. Decided December 3, 1906.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which reversed a judgment of the Circuit Court for the Southern District of Mississippi, in favor of defendants in a suit to enjoin the enforcement of an order of the Mississippi railroad commission requiring a railway company to stop its interstate mail trains at a specified county seat, and remanded the case, with directions to enter a decree enjoining the enforcement of such order. Affirmed.

See same case below, 70 C. C. A. 617, 138 Fed. 327.

Statement by Mr. Justice Peckham:

The railroad commission of the state of Mississippi, and its members and clerk, as appellants, bring to this court by appeal the judgment of the circuit court of appeals for the fifth circuit, which court reversed the

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NOTE.—On suits against a state—see notes to Murdock Parlor Grate Co. v. Com. 1 L.R.A. 399; Carr v. State, 11 L.R.A. 370; Beers v. Arkansas, 15 L. ed. U. S. 991; Hans v. Louisiana, 33 L. ed. U. S. 842; and Kendall v. Wesley, 13 C. C. A. 165.

On enjoining proceedings in state courts see notes to Garner v. Second Nat. Bank, 6 C. C. A. 90; Central Trust Co. v. Grant-a, 27 C. C. A. 575; Copeland v. Bruning, 6 C. C. A. 437; and Tefft, W. & Co. v. Arnberg, 5 L.R.A. 224.

On the jurisdiction of the circuit court of appeals—see notes to Lau Ow Bew v. United States, 1 C. C. A. 6; Salmon v. Mills, 13 C. C. A. 374; and United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On the duty of a carrier to stop trains at passenger station—see note to Atchison, T. & S. F. R. Co. v. Cameron, 14 C. C. A. 362.

judgment of the United States circuit court for the southern district of Mississippi, in favor of the appellants, and remanded the case, with directions to enter a decree for the complainant, the railroad company.

The case, as it appears in the record, shows the following facts:

The citizens of the town of Magnolia, which has about 1,200 inhabitants, and is situated in the state of Mississippi, on the line of the railroad of the appellee, and about 98 miles north of New Orleans, in April, 1903, presented a petition to the Mississippi railroad commission, asking that commission to order the railroad company to stop its passenger trains numbers 1, 3, and 4 at the Magnolia station, the ground of the request being, as stated in the petition, that Magnolia was one of the most progressive towns in the state and the county site of the county, and the petitioners be-
[337] lieved *that they were entitled to have these trains make regular stops at that point, and they stated their belief that it was for the best interest of the public, as well as the town, to have the passenger trains named make regular stops at the town.

Trains numbers 1 and 3 were south-bound trains from Chicago, passing Magnolia on their way to New Orleans, while train number 4 was a train on its way north to Chicago from New Orleans.

After a hearing before the railroad commission, on notice to the railroad company, the commission made an order granting the application as to trains 1 and 3, and denying it as to number 4.

Before obeying the order the company brought this suit to enjoin its enforcement. Upon the filing of the bill a temporary injunction was issued and a subsequent motion to dissolve it was denied. The defendant in the suit, the railroad commission, answered the bill, and denied that the railroad company furnished the town of Magnolia with adequate accommodations for the south, and put in issue the allegations of the bill that the order made by the commission was unreasonable or an illegal interference with the interstate commerce of the railroad company. The case came on for hearing before the circuit court, at the end of which a decree was made denying the relief asked for by the complainant, the court holding that the order of the commission was not unreasonable, and that therefore the temporary injunction should be, and it was, dissolved. An appeal to the circuit court of appeals was prayed for by the railroad company and granted.

The bill stated, amongst other things, that the corporation was created under the laws of the state of Illinois, and that the complainant was a resident of that state, and domiciled in the city of Chicago; and that the railroad commission was created by the state of Mississippi, and its individual members were citizens and residents of the state. The complainant further showed that it was operating an interstate line of railroad, extending from the city of New Orleans, in Louisiana, *north through that state and the states of Mississippi, Kentucky, Indiana, and Illinois to the Great Lakes of the Northwest, connecting at various points with other lines of interstate railroads. It is also averred that the Congress of the United States had established the line of railroad operated by the complainant as a national highway, for the accommodation of interstate commerce and the carriage of the mails of the United States, and had been so recognized and promoted as such by various acts of Congress; that owing to the exigencies of its interstate business and the requirements of modern commerce and passenger transportation, as well as the transportation of freight and the United States mails, the complainant had been, from time to time, required to shorten its schedule, and to maintain and operate certain fast through trains, intended primarily and chiefly for interstate transportation and interstate commerce; that the two trains numbered 1 and 3—one being known as the fast mail and the other as the New Orleans & Chicago Limited—were run expressly for the purpose of carrying the interstate business and for the transportation of the United States mail, and that they were run on special schedules for that purpose, and of necessity had to make close connections with other through trunk lines of railroad doing an interstate business, and, in order to maintain the necessary schedule of time for the operation of these interstate trains, it was impossible and wholly impracticable to stop at all stations; and, further, that these trains, being south-bound trains, only stop regularly at junction points and all such points of importance in the state of Mississippi which are necessary and which justify such stops. The bill showed the accommodations which were afforded the town of Magnolia by the other trains provided by the company, and which it alleged sufficiently accommodated the traveling public at that point; that a compliance with the order of the commission, by stopping the trains named, would imperil the ability of the complainant to comply with its contract with the United States for the carriage of the mails, and *would embarass its interstate traffic, and that it would be impossible, under the present condition of the roadbed and equipment of the complainant to increase the speed of the trains so as to allow for the stoppage of the trains

by the commission; that the com- protested before the commission the issuing of the order, and it al- hat it showed that it was then ng the town of Magnolia all reason- l necessary railroad facilities, and effect of the order would be to give wn greater railroad facilities than orded by complainant to any other the state of Mississippi, including of Jackson, the capital of the state, g only the town of McComb City, being a relay station on complain- ad, it is necessary for all trains to ere to change the engine, and for ter, etc.; that the effect of the order uld be to give to the town five daily o the city of New Orleans, running hort intervals of each other. It was alleged that by the statutory law of e of Mississippi the complainant was to a penalty of $50 for each time it o stop its trains on the order of the sion, and that the complainant would e be compelled to comply with the be subject to a multiplicity of suits alties arising from each and every n of the order, and that defendants n by suit to enforce the order. It n averred that the order of the com- was a direct burden upon interstate ce, and also a direct and unnecessary ence with the speedy carriage of the f the United States.

mendment to the bill was subse- filed, showing that Congress had a right of way and sections of land state of Illinois to aid in the con- n of a railroad from the southern tion of the Illinois & Michigan o a point at or near the junction of ississippi and Ohio rivers, with s, etc., which should remain a public y for the use of the government of ited States, free from toll or other upon the transportation of any rty or troops of the United States, and ch mails of the United States should imes be transported, and the Congress de like grants to the states of Ala- nd Mississippi, respectively, for the of aiding in the construction of a l from the city of Mobile to a point e mouth of the Ohio river; and it o averred that the state of Illinois rtered the complainant in 1850, and o it rights and lands granted to that y the act of Congress.

Defendant commission answered and the averments in the bill, as already

Marcellus Green argued the cause, th Messrs. Garner Wynn Green, Wil- liam Williams, and J. N. Flowers, filed a brief for appellants:

The circuit court of appeals, under its opinion, was without jurisdiction of the appeal.

Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784.

The circuit court, as a Federal court, was without jurisdiction of this suit.

It is a suit against the state of Mississippi, contrary to the 11th Amendment.

Fitts v. McGhee, 172 U. S. 527, 528, 43 L. ed. 540, 541, 19 Sup. Ct. Rep. 269; Re Ayers, 123 U. S. 497, 31 L. ed. 226, 8 Sup. Ct. Rep. 164; Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919.

If the state statutes were unconstitutional, the Federal court could not restrain the suit.

Harkrader v. Wadley, 172 U. S. 169, 43 L. ed. 406, 19 Sup. Ct. Rep. 119; McWhorter v. Pensacola & A. R. Co. 24 Fla. 417, 2 L.R.A. 504, 12 Am. St. Rep. 220, 5 So. 129.

There is no complaint in the bill that the state statutes are unconstitutional; the complaint is that the order violates the Constitution. The assignment of error in the court of appeals only complains of the order.

A suit against an officer of a state to enjoin him from instituting suits to enforce the police power under a state statute, which, if properly construed, is conceded to be valid, and with the enforcement of which he is charged by law, on the ground that he is proceeding under an erroneous interpretation of the law, and in violation of the Federal Constitution, is a suit, in effect, against the state, and of which the Federal court is denied jurisdiction by the 11th Amendment.

Arbuckle v. Blackburn, 65 L.R.A. 864, 51 C. C. A. 122, 113 Fed. 616, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148.

The court, as a Federal court, was prohibited from issuing this injunction by U. S. Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581.

The "proceedings" in the state court were commenced before the commission by petition by citizens of Magnolia, and, after hearing before the commission, and its order made to stop, the next step for the commission to compel obedience (it having no power to issue final process) would be to petition the proper state court, under § 4286, Miss. Code, 1892, by proper proceeding, for aid in the enforcement of obedience to its process, and to compel compliance with its lawful orders, and such courts shall have jurisdiction to grant aid and relief in such cases. The application to the proper court by the commission for mandamus or man-

datory injunction constitutes the final process of the proceedings.

2 Elliott, Railroads, § 698.

This § 4286 does not create a new jurisdiction in equity, but is directory to the commission to make effective its orders.

Mississippi R. Commission v. Gulf & S. I. R. Co. 78 Miss. 760, 29 So. 789.

The jurisdiction to make the order continues until it is enforced by performance or by final process.

Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253; Leathe v. Thomas, 38 C. C. A. 75, 97 L. ed. 138.

Mandamus to compel performance is predicable upon and referable to the jurisdiction to render the judgment; and under § 720 that jurisdiction controls as having already attached.

Riggs v. Johnson County (United States ex rel. Riggs v. Johnson County) 6 Wall. 166, 18 L. ed. 768.

The opinion below cites Western U. Teleg. Co. v. Mississippi R. Commission, 74 Miss. 80, 21 So. 15, correctly as holding that the commission is an administrative agency of the state, with quasi judicial powers, and that its findings are, by virtue of § 4284, only prima facie evidence. But the exercise of this judicial power results in a judgment which is prima facie valid, and is enforceable by the aid of the courts only by suit; and, after the rendition, and before the state, through this agency, can act to make effective this judgment, it is not competent for the Federal jurisdiction to intervene, and to enjoin the enforcement of the judgment by the only means provided by law for final process.

County seats as places requiring stops occupy peculiarly a class to themselves.

Illinois C. R. Co. v. People, 143 Ill. 434, 19 L.R.A. 125, 33 N. E. 173.

If the railroad company had provided, by less than all of its trains, primarily and adequately for the accommodation of those to whom they are directly tributary (Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 521, 44 L. ed. 868, 871, 20 Sup. Ct. Rep. 722), then, in the exercise of this legal discretion, the commission would not be presumed to have authority to interfere with special through trains devoted exclusively to interstate commerce. The legislative intent would not extend to a violation of the Federal Constitution by thus having the application of the statute to depend upon a legal discretion, to be exercised in discerning the course prescribed by law.

Tripp v. Cook, 26 Wend. 143.

Every reasonable presumption must be indulged in interpretation to avoid imputing to the legislature an intent to violate the Constitution.

Cooley, Const. Lim. 7th ed. 255.

Section 3550 is fully within the rules laid down in Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627.

It was a proper exercise of the police power to require railroads to establish and maintain "such depots as shall be reasonably necessary for the public convenience," and such duty would be imposed by its charter as a part of its construction as a railroad.

3 Elliott, Railroads, § 1056.

Here, the requirement is legislative; and it is not that passenger and freight trains shall all stop at all depots; but only that they shall stop "at any depot, as the business and public convenience shall require." This only declares that "all local conditions" must "have been adequately met."

Cleveland, C. C. & St. L. R. Co. v. Illinois, supra.

The finding of the commission and of the circuit court, undisturbed by the court of appeals, that the facilities were inadequate, is conclusive.

Schwartz v. Duss, 187 U. S. 10, 47 L. ed. 53, 23 Sup. Ct. Rep. 4, 43 C. C. A. 323, 103 Fed. 561; Murphy v. Southern R. Co. 53 C. C. A. 477, 115 Fed. 257.

The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce.

Pullman Co. v. Adams, 189 U. S. 422, 47 L. ed. 878, 23 Sup. Ct. Rep. 494.

The sole ground for the reversal of the decree by the court below being that the statutes are unconstitutional, if such was not the case, no reason exists why a Federal court, as a court of equity, should enjoin these regular proceedings in another tribunal of competent jurisdiction.

Defiance Water Co. v. Defiance, 191 U. S. 184, 193, 48 L. ed. 140, 144, 24 Sup. Ct. Rep. 63; United States v. Parkhurst-Davis Mercantile Co. 176 U. S. 320, 44 L. ed. 485, 20 Sup. Ct. Rep. 423.

Mr. Edward Mayes argued the cause, and, with Mr. J. M. Dickinson, filed a brief for appellee:

The Mississippi railroad commission is without many of the most necessary powers of a court. It can neither summon a witness nor swear one; it cannot certify a bill of exceptions, nor enforce its orders by any process. The supreme court of Mississippi has expressly decided that it is no

n an administrative agency, which quasi judicial powers, and that its are only prima facie evidence that ons are right. To give its orders t value, the findings must be set writing.

n U. Teleg. Co. v. Mississippi R. on, 74 Miss. 80, 21 So. 15.

ginal bill by the railroad company e original jurisdiction of the cir- t on the two distinct grounds of sity of citizenship, and (2) an in- with interstate commerce and the ion of the mails, and the conse- onstitutionality of the order of the commission by which the trains ired to stop at Magnolia. In such court of appeals may take juris-

an Sugar Ref. Co. v. New Orleans, 277, 45 L. ed. 859, 21 Sup. Ct. Rep. uley Mfg. Co. v. Galeton Cotton U. S. 290, 46 L. ed. 546, 22 Sup. 452; Spreckels Sugar Ref. Co. v. 192 U. S. 397, 48 L. ed. 496, 24 Sup. 376.

not a suit against the state.

r, 149 U. S. 167, 37 L. ed. 690, 13 tep. 785; Reagan v. Farmers' Loan 154 U. S. 362, 388, 38 L. ed. 1014, iters. Com. Rep. 560, 14 Sup. Ct. ; Scott v. Donald, 165 U. S. 58, ed. 632, 633, 17 Sup. Ct. Rep. 265; cp. Co. v. Ohio State Auditor, 165 , 41 L. ed. 683, 17 Sup. Ct. Rep. th v. Ames, 169 U. S. 466, 518, 819, 839, 18 Sup. Ct. Rep. 418; Starr, 188 U. S. 537, 47 L. ed. 584, t. Rep. 398; People's Nat. Bank 191 U. S. 272, 48 L. ed. 180, 24 tep. 68; Fargo v. Hart, 193 U. S. ed. 761, 24 Sup. Ct. Rep. 498.

road commission is not, in any of ns, a court; it is a mere adminis- ency; and although it has some icial power, its essential func- legislative.

U. Teleg. Co. v. Mississippi R. n, supra; Yazoo & M. Valley R. ms, 81 Miss. 90, 32 So. 937.

trolling law is found in the fol- isions of this court:

C. R. Co. v. Illinois, 163 U. S. 142, 107, 16 Sup. Ct. Rep. 1096; Glad- nesota, 166 U. S. 427, 41 L. ed. up. Ct. Rep. 627; Lake Shore & o. v. Ohio, 173 U. S. 285, 43 L. ed. p. Ct. Rep. 465; Cleveland, C. C. & Co. v. Illinois, 177 U. S. 514, 44 20 Sup. Ct. Rep. 722.

tice Peckham, after making the tatement, delivered the opinion of

The decision in this case by the circuit court of appeals is reported in 70 C. C. A. 617, 138 Fed. 327, in which will be found a statement of the material portions of the evidence taken at the hearing before the trial court. It is unnecessary to repeat it.

The first objection raised by the appellant is, that this suit is, in substance, one against a state. The commission was created by the state of Mississippi, under the authority of its Constitution and laws, for the purpose of supervising, and, to some extent, controlling, the acts of the railroads operating within the state. Such a commission is subject to a suit by a citizen. Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398. We do not see that Arbuckle v. Blackburn, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148, is at all in point.

*It is also objected that an injunction will [341] not lie from a United States court to stay proceedings in a state court, because of the provisions of § 720, United States Revised Statutes (U. S. Comp. Stat. 1901, p. 581). The commission is, however, not a court, and is a mere administrative agency of the state, as held by the Mississippi court. Western U. Teleg. Co. v. Mississippi Railroad Commission, 74 Miss. 80, 21 So. 15.

It is urged, however, that proceedings in a state court were commenced by the presentation of the petition of the citizens of Magnolia to the railroad commission, and because the commission, having made an order to stop the trains, would have to resort to the proper state court to aid it in the enforcement of its order, therefore the whole proceeding must be regarded as in a state court from the commencement. Whatever may be the provision in the state statute in regard to the enforcement solely by the state court of the order of the railroad commission, the proceeding while before the commission never thereby became a proceeding in a state court, and the jurisdiction of the Federal court to enjoin the commission from the enforcement of its order, because such order was a violation of the Federal Constitution, was not in the least affected.

The appellants also object that the circuit court of appeals had no jurisdiction to review the judgment of the circuit court in this case, because, as is stated, the jurisdiction was predicated upon diversity of citizenship, and also upon the claim that the state statutes requiring the stoppage of trains, when applied to the trains under discussion, violated the commerce clause of the Federal Constitution, and, therefore, the

case should have come directly here from the circuit court, and Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784, is cited as authority. The complainant in this case, by a proper pleading, set up not only the diversity of citizenship, but also a constitutional question, and the complainant had the right to appeal from the judgment of the circuit court to the circuit court of appeals, and from its decision in such a case an appeal or writ of error may be taken to this [342] court. American Sugar *Ref. Co. v. New Orleans, 181 U. S. 277, 281, 45 L. ed. 859, 861, 21 Sup. Ct. Rep. 646; Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 295, 46 L. ed. 546, 548, 22 Sup. Ct. Rep. 452. The case of Field v. Barber Asphalt Paving Co. supra, does not hold otherwise. It simply holds that where the jurisdiction of the circuit court attaches on the ground of diverse citizenship, and also upon a separate and independent constitutional ground, the party may take a direct appeal to this court; but it does not hold that the defeated party must do so, and that he cannot go to the circuit court of appeals.

The main question is, as stated in the court below, whether the order of the commission is valid with reference to the Federal Constitution. That depends upon the question whether it is only an incidental interference with interstate commerce, based upon a legal exercise of the police powers of the state for the purpose of securing proper and sufficient accommodation from the railroad company for railroad facilities for the residents of the state. The authority of the commission to interfere with a railroad is based on the statutes of Mississippi. Section 3550 (chapter 112, Code of Mississippi, 1892, relating to railroads) reads as follows:

"3550. To stop all passenger trains, if, etc., at county seats.—Every railroad shall cause each and all of its passenger trains to stop for passengers at all county seats at which it has a depot, at the discretion of the railroad commission."

Chapter 134 of the same Code relates to the supervision of common carriers. Section 4302 thereof reads as follows:

"Necessary depots to be maintained.—Every railroad shall establish and maintain such depots as shall be reasonably necessary for the public convenience, and shall stop such of the passenger and freight trains at any depot as the business and public convenience shall require; and the commission may cause all passenger trains to permit passengers to get on and off in a city at any place other than at the depot, where it is for the convenience of the traveling public. And it shall be unlawful for any railroad to abolish or disuse any depot when once established, or to fail to keep up the same and to regularly *stop the trains thereat, without the consent of the commission."

Under these statutes the commission has power (a) to stop, in its discretion, all passenger trains at all county seats at which the company has a depot; (b) to stop such of the passenger and freight trains at any depot as the business and public convenience may require. The order in question was made with regard to a place which is both a county seat and also one where the railroad has a depot. It is not plain under which section the commission acted. Its order simply states that the petition of the citizens of Magnolia is granted as to trains 1 and 3, and denied as to train 4. The petition throws no light upon the subject. We may assume, however, that the commission acted under all the authority it had from the above quoted sections of the statute. It is fair to assume that it had exercised its discretion in causing the trains to stop at a county seat, and that it did so because, in its judgment, it was reasonable and necessary for the public convenience. The question is whether, having regard to the facts, the order is valid.

The matter of the validity of statutes directing railroad companies to stop certain of their trains at stations named has been before this court several times, and the result of its holdings is: That a statute of Illinois, which required the Illinois Central Railroad to stop its fast mail train from Chicago to New Orleans at Cairo, in the state of Illinois, which was a county seat, was unconstitutional if the company had made adequate accommodation by other trains for interstate passengers to and from Cairo. That a statute which required every railroad corporation to stop all regular passenger trains running wholly within the state at its stations at all county seats was a reasonable exercise of the police power of the state, where the statute did not apply to railroad trains entering the state from any other state, or transcontinental trains of any railroad. A statute relating to railroad companies which provided that a company should cause three of its trains each *way, if so many were run daily, Sundays [343] excepted, to stop at a station containing over 3,000 inhabitants, was valid in the absence of legislation by Congress on the subject; and also a state statute which required all regular passenger trains to stop at county seats was invalid when applied to an interstate train, intended only for through passengers from St. Louis to New York, when it appeared that the railroad company furnished sufficient trains to accommodate all the local through business in the state, and where such trains stopped at

county seats. These principles have been decided in Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Cleveland C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722. Upon the principles decided in these cases, a state railroad commission has the right, under a state statute, so far as railroads are concerned, to compel a company to stop its trains under the circumstances already referred to, and it may order the stoppage of such trains if the company does not otherwise furnish proper and adequate accommodation to a particular locality, and in such cases the order may embrace a through interstate train actually running, and compel it to stop at a locality named. In such case, in the absence of congressional legislation covering the subject, there is no illegal or improper interference with the interstate commerce right; but if the company has furnished all such proper and reasonable accommodation to the locality as fairly may be demanded, taking into consideration the fact, if it be one, that the locality is a county seat, and the amount and character of the business done, then any interference with the company (either directly, by statute, or by a railroad commission acting under authority of a statute) by causing its interstate trains to stop at a particular locality in the state is an improper and illegal interference with the rights of the railroad company, and a violation of the commerce clause of the Constitution.

In reviewing statutes of this nature, and also orders made by a state railroad commission, it frequently becomes necessary *to examine the facts upon which they rest, and to determine from such examination whether there has been an unconstitutional exercise of power and an illegal interference by the state or its commission with the interstate commerce of the railroad. Whether there has or has not been such an interference is a question of law arising from the facts. In this case there was no important conflict of evidence on the material points, and so the circuit court of appeals has stated and these facts are clearly and sufficiently set forth in 138 Fed. supra. The fact that the company has contracts to transport the mails of the United States within a time which requires great speed for the trains carrying them, while not conclusive, may still be considered upon the general question of the propriety of stopping such trains at certain stations within the boundaries of a state. The railroad has been recognized by Congress, and is the recipient of large land grants, and the carrying of the mails is a most important function of such a road. We think that the railroad company has fully performed its duty towards the town in the way of furnishing it proper and adequate and reasonable accommodation, without stopping these interstate trains as ordered, and, therefore, the order of the commission was improper and illegal, and not merely an incidental interference with the interstate commerce of the company. The circuit court of appeals has, in effect, so held, although it did say that the commission and the circuit court had made an order that indicated that the trains which already stopped at Magnolia were not sufficient, and that the town should have five daily trains going south, and therefore the court said it thought it well to examine other questions, which it did. A reading of the whole opinion of the circuit court of appeals shows that the court did not concede, in any degree, that the passenger facilities afforded were inadequate, but that the remedy was to compel the company to run more trains, and not stop the ones in question. The opinion simply suggests that even if the facilities were inadequate, the appropriate course was to order more trains *instead of [346] stopping those mentioned. In any event, the question is before us upon uncontradicted evidence as to whether there were or were not proper facilities, and we hold there were.

The order cannot be viewed alone in the light of ordering a stop at one place only, which might require not more than three minutes, as asserted. It is the question whether these trains can be stopped at all at any particular station when proper and adequate facilities are otherwise afforded such station. If the commission can order such a train to be stopped at a particular locality under such circumstances, then it could do so as to other localities, and in that way the usefulness of a through train would be ruined and the train turned from a through to a local one in Mississippi. The legislature of a state could not itself make such an order, and it cannot delegate the power to a commission to do so, in its discretion, when adequate facilities are otherwise furnished.

The transportation of passengers on interstate trains as rapidly as can with safety be done is the inexorable demand of the public who use such trains. Competition between great trunk lines is fierce and at times bitter. Each line must do its best even to obtain its fair share of the transportation between states, both of passengers and freight. A wholly unnecessary, even though a small, obstacle, ought not, in fairness, to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals. We by no means

intend to impair the strength of the previous decisions of this court on the subject, nor to assume that the interstate transportation, either of passengers or freight, is to be regarded as overshadowing the rights of the residents of the state through which the railroad passes to adequate railroad facilities. Both claims are to be considered, and after the wants of the residents within a state or locality through which the road passes have been adequately supplied, regard being had to all the facts bearing upon the subject, they ought not to be permitted to demand more, at the cost of the ability [347] of *the road to successfully compete with its rivals in the transportation of interstate passengers and freight.

We are of opinion that the judgment of the Circuit Court of Appeals was right, and it is affirmed.

E. L. ALLEN, and Wallace B. Allen, Administrator of the Estate of Erasmus W. Allen, Deceased, Plffs. in Err.,

v.

FRANCES J. RILEY.

(See S. C. Reporter's ed. 347-358.)

Patents—state regulation of sale.

The regulation of the sale of patent rights made by Kan. Laws 1889, chap. 182, which compels one selling a patent right in any county in the state to file with the clerk of such county an authenticated copy of the letters patent, together with an affidavit of the genuineness of the letters patent and as to other matters, and provides that any written obligation given for the purchase price of a patent right shall contain the words "given for a patent right," does not violate U. S. Const. art. 1, § 8, granting to Congress the right to secure to inventors the exclusive right to their discovery, nor U. S. Rev. Stat. § 4898, U. S. Comp. Stat. 1901, p. 3387, authorizing written assignments of patents or interests therein, which shall be void as against subsequent purchasers unless recorded in the Patent Office.

[No. 99.]

Submitted November 5, 6, 1906. Decided December 3, 1906.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Brown County, in that state, f the recovery of the value of real proper transferred in part payment for the sale a patent right, because of the failure of t vendors to comply with the state legisl tion governing the sale of patent right Affirmed.

See same case below, 71 Kan. 378, 80 Pa 952.

Statement by Mr. Justice Peckham:

Frances J. Riley, the defendant in erro who was plaintiff below, recovered a judg ment against plaintiffs in error, defendant below, for $1,250, in the district court Brown county, in the state of Kansas, whic judgment was affirmed by the supreme cou of the state, and the defendants below hav brought the case here by writ of error.

The suit was commenced by the filing o a petition by defendant in error, plaintif below, in a district court of Kansas, Mare 17, 1902, to recover the value of certai lands alleged to have been transferred b the plaintiff to the defendant Erasmus W Allen, in part payment for the transfer t plaintiff of rights for the state of Kentuck under a patent dated January 30, 1901, fo a washing machine. The right to recover i based upon the failure of the defendants t comply with the Kansas statute, which fail ure defendants do not *deny, but they insis that the statute is void as being in viola tion of the Constitution of the United State and the act of Congress referred to in th opinion. The Kansas statute is chapte 182 of the Laws of 1889. A copy of the ac is set out in the margin.†

Mr. N. H. Loomis submitted the cause fo plaintiffs in error. Messrs R. W. Blair an H. A. Scandrett were on the brief.

Messrs. A. E. Crane and T. T. Woodbur submitted the cause for defendant in error

Mr. Justice Peckham, after making th foregoing statement, delivered the opinio of the court:

The sole question for our determinatio in this case is concerning *the constitution

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NOTE.—On the power of a state to restrict and regulate the sale and enjoyment of patent rights—see note to Com. v. Petty, 29 L.R.A. 786.

As to the validity of notes given for patent rights—see notes to First Nat. Bank v. Stockell, 20 L.R.A. 605; and Mandeville v. Welch, 5 L. ed. U. S. 88.

†Chapter 182, Laws of 1889 (paragraph 4356, 4357, and 4358, General Statutes o Kansas, 1901), reads as follows:

"Sec. 1. It shall be unlawful for any pe son to sell or barter, or offer to sell or ba ter, any patent right, or any right whic such person shall allege to be a paten right, in any county within this state, wit out first filing with the clerk of the distri court of such county copies of the letter patent, duly authenticated, and at the sam time swearing or affirming to an affidav before such clerk that such letters paten are genuine, and have not been revoked

the Kansas act. The opinion of the court of the state of Kansas is in 71 Kan. 378, 80 Pac. 952.

dgment herein is founded upon Ma-eLeod, 57 Kan. 105, 41 L.R.A. 548, t. Rep. 327, 45 Pac. 76; which case followed by that of Pinney v. t. Bank, 68 Kan. 223, 75 Pac. 119.

efendants insist that the act in violates article 1, § 8, of the Con- of the United States, and the Fed- ute passed in pursuance thereof, v. Stat. § 4898, U. S. Comp. Stat. 3387. The Constitution grants to the right "to promote the prog- cience and useful arts by securing, d times, to authors and inventors, sive right to their respective writ- discoveries;" and § 4898 of the Re- atutes provides that every patent st therein shall be assignable in n instrument in writing, which as- is made void against any subse- rchaser or mortgagee, for a valu- ideration, without notice, unless it d in the Patent Office within three rom the date thereof.

sserted by the plaintiffs in error subject of the sale or assignment hole or any part of an interest in a derived from the laws of Congress ith reference to the constitutional quoted above, and that any regu- whatever, by any state authority, to such assignment or sale, and rovision in respect to them, are il-

preme court of Kansas has main- nd upheld the Kansas act on the hat the statute is simply a reason- proper exercise of the police power ate in regard to the subject of the son v. McLeod, supra. That court opinion that the provisions of the statute did not trench upon the ower nor interfere with the rights o patentees by Federal law. The opinion does not assert that a state statute can interfere with the right of a patentee to sell or assign his patent, nor that it can take away any essential feature of his exclusive right, but, *as is stated,] 353] the provisions in the act have no such purpose or effect; that "they are in the nature of police regulations designed for the protection of the people against imposition and fraud. There is great opportunity for imposition and fraud in the transfer of intangible property, such as exists in a patent right, and many states have prescribed regulations for the transfer of such property differing essentially from those which control the transfer of other property." Many authorities are cited, and the opinion then continues: "The doctrine of these cases is that the patent laws do not prevent the state from enacting police regulations for the protection and security of its citizens, and that regulations like ours, which are mainly designed to protect the people from imposition by those who have actually no authority to sell patent rights or own patent rights to sell, should be upheld. We think the statute is valid."

In Indiana a statute which is like that in Kansas has been upheld by the supreme court of that state. Brechbill v. Randall, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362. That case has, since that time, been followed in Indiana. New v. Walker, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386. In Ohio a statute somewhat similar to the one in question has been upheld. Tod v. Wick Bros. 36 Ohio St. 370. And the same result has been reached in Pennsylvania. Haskell v. Jones, 86 Pa. 173. In Herdic v. Roessler, 109 N. Y. 127, 16 N. E. 198, the validity of the same kind of a statute has been upheld. See also Wyatt v. Wallace, 67 Ark. 575, 55 S. W. 1105; State v. Cook, 107 Tenn. 499, 62 L.R.A. 174, 64 S. W. 720. The statutes in the different states are not all precisely like the Kansas law, but they make provisions in regard to the sale or assignment of rights un-

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and that he has full authority to arter the right so patented; which shall also set forth his name, age, n, and residence; and if an agent, , occupation, and residence of his

A copy of this affidavit shall be e office of said clerk, and said clerk a copy of said affidavit to the ap- who shall exhibit the same to any demand.

. Any person who may take any n in writing for which any patent right claimed by him or her to be right, shall form a whole or any he consideration, shall, before it is the maker or makers, insert in the said written obligation, above the of said maker or makers, in legible writing or print, the words, 'Given for a patent right.'

"Sec. 3. Any person who shall sell or barter, or offer to sell or barter, within this state, or shall take any obligation or promise in writing for a patent right, or for what he may call a patent right, without complying with the requirements of this act, or shall refuse to exhibit the certificate when demanded, shall be deemed guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction shall be fined in any sum not exceeding $1,000, or be imprisoned in the jail of the proper county not more than six months, at the discretion of the court or jury trying the same, and shall be liable to the party injured in a civil action for any damages sustained."

der a patent, and sometimes in regard to notes given for their purchase, which cannot be upheld under the contention of plaintiffs in error herein, that all such provisions are in violation of, or inconsistent with, the laws of Congress on the subject. The courts of some other states, having like questions before them, have held their statutes void. Hollida v. Hunt, 70 Ill. 109, 22 Am. Rep. 63; Cranson v. Smith, 37 Mich. 309, 26 Am. Rep. 514; Wilch v. Phelps, 14 Neb. 134, 15 N. W. [354]361; *State v. Lockwood, 43 Wis. 405, and some others.

The circuit court of appeals of the eighth circuit, in Ozan Lumber Co. v. Union County Nat. Bank, 145 Fed. 344, has held a statute of Arkansas upon this same subject void because of its discrimination between articles of property of the same class or character, based only on the fact that the property discriminated against was protected by a patent granted by the United States. In the opinion in the case, authorities upon the subject are cited and commented upon. Among the cases cited are Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115, and Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565.

In Patterson v. Kentucky, supra, the owner of a patent right for an improved burning oil was convicted of the violation of a Kentucky statute by the sale of the oil covered by the patent. The owner claimed the right to sell such oil notwithstanding the statute, which provided a standard below which oil was regarded as dangerous for illuminating purposes, and the sale of which was prohibited. It was admitted the patented oil did not come up to the state standard. This court held the conviction was right, and that the owner of the patent was not protected, by reason of his ownership, from liability under the state statute. That statute was held to be one passed in the legitimate exercise of the powers of the state over its purely domestic affairs, and it was said that it did not violate either the Constitution or laws of the United States, as, when property protected by patent once comes into existence, its use is subject to the control of the several states to the same extent as any other species of property.

Webber v. Virginia, supra, relates also to tangible property covered by a patent, and it was held that the patent did not exclude from the operation of the taxing or licensing law of the state the tangible property manufactured under a patent. It was said in that case that "Congress never intended that the patent laws should displace the police powers of the states, meaning by that term those powers by which the health, good [355]*order, peace, and general welfare of the community are promoted. Whatever rights are secured to the inventors must be enjoyed in subordination to this general authority of the state over all property within its limits."

While these two cases do not cover the one now before us, because they refer to tangible property which has been manufactured and come into existence under a patent, and the case before us relates to provisions which are to accompany an assignment of intangible rights, growing out of a patent, yet the general power of the states to legislate in order to protect their citizens in their lives and property from fraud and deceit is recognized, not as being without limit, of course, but as being properly exercised in the cases named.

We think the state has the power (certainly until Congress legislates upon the subject) with regard to the provision which shall accompany the sale or assignment of rights arising under a patent, to make reasonable regulations concerning the subject, calculated to protect its citizens from fraud. And we think Congress has not so legislated by the provisions regarding an assignment contained in the act referred to.

In some of the cases holding such statutes void it is said that it is unfortunately true that many frauds are committed under color of patent rights, and that the patent laws are not so framed as to secure the public from being cheated by worthless inventions; but, notwithstanding that, they hold statutes of the nature of the one under consideration to be void, as trenching upon the rights of the owner of a patent secured by the Constitution and laws of the United States.

To uphold this kind of a statute is by no means to authorize any state to impose terms which, possibly, in the language of Mr. Justice Davis, in Ex parte Robinson, 2 Biss. 309, Fed. Cas. No. 11,932, "would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of Congress which regulate its transfer, and destroy the power conferred upon Congress by the Constitution." Such a statute would not be a reasonable exercise of the powers of the state.

*In Michigan, the court, speaking through Mr. Justice Campbell, while holding the act under review in that case upon the subject invalid (Cranson v. Smith, 37 Mich. 309, 26 Am. Rep. 514), said: "While we cannot but recognize the magnitude of an evil which has brought patents into popular discredit and has provoked legislation in several states similar to that of Michigan, we can not, on the other hand, fail to see in the laws a plain and clear purpose to check the evil by hindering parties owning patents

from dealing with them as they may deal with their other possessions." If there is a special evil, unusually frequent and easily perpetrated when parties are dealing in the sale of rights existing or claimed to exist under a patent, we do not see why a state may not, in the bona fide exercise of its powers, enact some special statutory provision which may tend to arrest such evil, and may omit to enact the same provision concerning the disposal of other property. There is no discrimination which can be properly so called against property in patent rights, exercised in such legislation. It is simply an attempt to protect the citizen against frauds and impositions which can be more readily perpetrated in such cases than in cases of the sale or assignment of ordinary property.

The act must be a reasonable and fair exercise of the power of the state for the purpose of checking a well-known evil, and to prevent, so far as possible, fraud and imposition in regard to the sales of rights under patents. Possibly Congress might enact a statute which would take away from the states any power to legislate upon the subject, but it has not as yet done so. It has simply provided that every patent, or interest therein, shall be assignable in writing, leaving to the various states the power to provide for the safeguarding of the interests of those dealing with the assumed owner of a patent, or his assignee. To deal with that subject has been the purpose of the acts passed by the various states, among them that of the state of Kansas, and we think that it was within the powers of the state to enact such statute. The expense of [357] *filing copies of the patent and the making of affidavits in the various counties of the state in which the owner of the rights desired to deal with them is not so great, in our judgment, as to be regarded as oppressive or unreasonable, and we fail to find any other part of the act which may be so regarded. Some fair latitude must be allowed the states in the exercise of their powers on this subject. It will not do to tie them up so carefully that they cannot move, unless the idea is that the states have positively no power whatever on the subject. This we do not believe; at any rate, in the absence of congressional legislation. The mere provision in the Federal statute for an assignment and its record as against subsequent purchasers, etc., is not such legislation as takes away the rights of the states to legislate on the subject themselves in a manner neither inconsistent with, nor opposed to, the Federal statute. We think the judgment is right, and it is affirmed.

Mr. Justice White, with whom concurs Mr. Justice Day, dissenting:

My brother Day and myself dissent. The reasons, however, which impel him are broader than those influencing me. In general terms, the Kansas statute which the court now upholds compels one selling a patent right in any county of the state of Kansas to file with the clerk of such county an authenticated copy of the patent, together with an affidavit as to the genuineness of the patent, and as to other matters. The statute, moreover, exacts that where a note is given for the purchase price of a patent right, there shall be inserted in the note a statement that it is given for a patent right, presumably to deprive the note of the attributes of commercial paper. We both think that the requirements as to recording the patent and affidavit are void, because repugnant to the power delegated to Congress by the Constitution on the subject of patents, and because in conflict with the legislation of Congress on the *same subject. [358] And, for like reasons, my brother Day is also of the opinion that the provision is void which exacts an insertion in a note given for the sale of a patent right of the fact that it was given for such sale. This latter provision, in my opinion, the state had the power to make as a reasonable police regulation, not repugnant to the authority as to patents delegated to Congress by the Constitution, or the legislation which Congress has enacted in furtherance thereof.

JOHN WOODS & SONS, Plffs. in Err.,
v.
FRANK CARL.

(See S. C. Reporter's ed. 358, 359.)

Patents—state regulation of sale.

The requirement that a negotiable instrument taken on a sale of rights under a patent shall show on its face for what it was given, or be void, which is made by Kirby's (Ark.) Dig. § 513, does not violate U. S. Const. art. 1, § 8, granting to Congress the right to secure to inventors the exclusive right to their discovery, nor U. S. Rev. Stat. § 4898, U. S. Comp. Stat. 1901, p. 3387, authorizing written assignments of patents or interests therein, which shall be

NOTE.—As to the validity of notes given for patent rights—see notes to First Nat. Bank v. Stockell, 20 L.R.A. 605; and Mandeville v. Welch, 5 L. ed. U. S. 88.

On the power of a state to restrict and regulate the sale and enjoyment of patent rights—see note to Com. v. Petty, 29 L.R.A. 786.

void as against subsequent purchasers unless recorded in the Patent Office.

[No. 102.]

Submitted November 7, 1906. Decided December 3, 1906.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a judgment of the Circuit Court of Pulaski County, in that state, in favor of defendant in an action on a promissory note given for the sale of a patent right, which was not executed as required by the statutes of that state governing the sale of patent rights. Affirmed.

See same case below, 75 Ark. 328, 87 S. W. 621.

The facts are stated in the opinion.

Mr. Charles F. Wilson submitted the cause in behalf of Homer C. Mechem for plaintiffs in error. Mr. Edwin Mechem was on the brief.

Mr. John Fletcher submitted the cause for defendant in error. Mr. W. C. Ratcliffe was on the brief.

Mr. Justice Peckham delivered the opinion of the court:

This action was brought in the proper court of the state of Arkansas by the plaintiffs in error to recover the amount of a promissory note which was given by the defendant in error on the sale to him of a patented machine and of the right to the patent in the state of Arkansas. Before the [359] *maturity of the note it was indorsed by the payee and transferred to plaintiffs in error. The note was not executed as provided for by the statute of that state relating to the sale of rights under a patent. Act of April 23, 1891, Kirby's Dig. § 513. The section reads as follows:

"Sec. 513. Any vendor of any patented machine, implement, substance, or instrument of any kind or character whatsoever, when the said vendor of the same effects the sale of the same to any citizen of this state on a credit, and takes any character of negotiable instrument in payment of the same, the said negotiable instrument shall be executed on a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance, or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be ly void."

The defendant set up the violati statute as a defense. The verdict the defendant, and the judgment thereon having been affirmed by the court, the plaintiffs have brought here by writ of error.

The sole question involved is the of the statute. The opinion of the court of Arkansas is reported in 75 87 S. W. 621. See also Wyatt v. 67 Ark. 575, 55 S. W. 1105; State 107 Tenn. 499, 62 L.R.A. 174, 64 S This case is governed by the im preceding one, although the statu kansas renders the note void if gi patent right if the note does not its face for what it was given. T ence is not so material as to call f ferent decision. The judgment is a

Mr. Justice Day dissents.

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*CITY OF MONTEREY, Plff. in
v.
DAVID JACKS.

(See S. C. Reporter's ed. 360-3

Private land claims—state cont pueblo lands.

1. The California legislature act the act of April 2, 1866, ratif veyances made by the corporate ties of the city of Monterey of pue confirmed to that city by the Unit and afterwards patented to it, it sors and assigns.

Error to state court—Federal que

2. The question whether the C legislature could enact the act 2, 1866, ratifying conveyances mad corporate authorities of the city o rey of pueblo lands confirmed to by the United States, and afterw ented to it, its successors and a not so far unsubstantial as to ju missal of a writ of error to a sta

[No. 27.]

Argued and submitted October Decided December 3, 1906.

IN ERROR to the Supreme Cou State of California to review ment which affirmed a judgment o perior Court of the County of Mo

NOTE.—As to the necessity of merit in Federal question to sustai error to state court—see note to New York, N. H. & H. R. Co. post,

that state, in favor of defendant in an action to quiet title to pueblo lands. Affirmed.

See same case below, 139 Cal. 542, 73 Pac. 136.

The facts are stated in the opinion.

Mr. Hamilton Gay Howard submitted the cause for plaintiff in error:

This court has jurisdiction.

Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; Pittsburg, C. C. & St. L. R. Co. v. Long Island Loan & T. Co. 172 U. S. 507, 43 L. ed. 532, 19 Sup. Ct. Rep. 238; Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; Romie v. Casanova, 91 U. S. 379, 23 L. ed. 374; McKay v. Friedman, 92 U. S. 723, 23 L. ed. 667; Little York Gold-Washing & Water Co v. Keyes, 96 U. S. 199, 24 L. ed. 656; Bushnell v. Crooke Min. & Smelting Co. 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; Gillis v. Stinchfield, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; Borgmeyer v. Idler, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; Delamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715.

Where did the sovereign state of California get its title to, or jurisdiction over, the pueblo lands of the city of Monterey?

Meader v. Norton, 11 Wall. 455, 20 L. ed. 186; Teschemacher v. Thompson, 18 Cal. 26, 79 Am. Dec. 151; Leese v. Clark, 18 Cal. 571; Baker v. Brickell, 87 Cal. 333, 25 Pac. 480, 1067; United States v. Sutherland, 19 How. 365, 15 L. ed. 667; Fenn v. Holme, 21 How. 488, 16 L. ed. 200; Scull v. United States, 98 U. S. 410, 25 L. ed. 164; Fremont v. United States, 17 How. 542, 557, 15 L. ed. 241, 245; Trenier v. Stewart, 101 U. S. 797, 25 L. ed. 1021; McCabe v. Worthington, 16 How. 86, 14 L. ed. 856; United States v. Clamorgan, 101 U. S. 831, 25 L. ed. 838; Hoadley v. San Francisco (Clark v. San Francisco) 124 U. S. 644, 31 L. ed. 556, 8 Sup. Ct. Rep. 659; Grisar v. McDowell, 6 Wall. 378, 379, 18 L. ed. 867, 868; Townsend v. Greeley, 5 Wall. 334, 18 L. ed. 548; Palmer v. Low, 98 U. S. 16, 25 L. ed. 64; Woodworth v. Fulton, 1 Cal. 307.

A patent for a Mexican land grant is a deed from the United States.

Teschemacher v. Thompson, Leese v. Clark, and Baker v. Brickell, supra; Beard v. Federy, 3 Wall. 491, 18 L. ed. 92.

Mr. W. I. Brobeck argued the cause, and, with Messrs. John Garber and Frederic D. McKenney, filed a brief for defendant in error:

The assignment of a Federal question comes too late unless the question has been presented for decision in the state courts, or unless a right, title, immunity, or privilege claimed under the Constitution or laws of the United States has been specially set up or claimed in the state courts.

Caro v. Davidson, 197 U. S. 197, 49 L. ed. 723, 25 Sup. Ct. Rep. 428; Bolln v. Nebraska, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287; Levy v. Superior Court, 167 U. S. 175, 42 L. ed. 126, 17 Sup. Ct. Rep. 769; Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 182, 50 L. ed. 143, 26 Sup. Ct. Rep. 41; Scudder v. Comptroller (Scudder v. Coler) 175 U. S. 32, 36, 44 L. ed. 62, 63, 20 Sup. Ct. Rep. 26.

The Federal question must be unmistakably and specifically drawn in question.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Maxwell v. Newbold, 18 How. 511, 15 L. ed. 506; Crowell v. Randell, 10 Pet. 368, 9 L. ed. 458; Hoyt v. Shelden (Hoyt v. Thompson) 1 Black, 518, 17 L. ed. 65; Sayward v. Denny, 158 U. S. 180, 183, 184, 186, 39 L. ed. 941–943, 15 Sup. Ct. Rep. 777.

And even in those instances in which a Federal question is drawn in question, and it appears that the decision below was adverse to the plaintiff in error upon two independent grounds, one of which is not a Federal question, the judgment of the state court will be affirmed.

Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Adams County v. Burlington & M. River R. Co. 112 U. S. 123, 28 L. ed. 678, 5 Sup. Ct. Rep. 77; De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; Hopkins v. McLure, 133 U. S. 380, 33 L. ed. 660, 10 Sup. Ct. Rep. 407; Hammond v. Johnston, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141.

And where a defense is distinctly made, resting on local statutes, this court will not, in order to reach a Federal question, resort to critical conjecture as to the action of the state court in the disposition of such defense.

Johnson v. Risk, 137 U. S. 300, 307, 34 L. ed. 683, 686, 11 Sup. Ct. Rep. 111; Corkran Oil & Development Co. v. Arnaudet, supra; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577.

It is apparent that the validity of the treaty and of the act could scarcely have been contested by either party to the action, as they formed the basis of the rights of each. As it is well known, by that treaty the territory of which California now forms a part was ceded to the United States, and the act of Congress was intended to carry out the obligation imposed by the treaty upon the Federal government to protect the

rights of private land claimants under the Mexican or Spanish laws. That no Federal question was here involved is absolutely foreclosed by the repeated decisions of this court, some of them in reference to this same act and treaty.

Blackburn v. Portland Gold Min. Co. 175 U. S. 571-579, 44 L. ed. 276-280, 20 Sup. Ct. Rep. 222; Kennard v. Nebraska, 186 U. S. 304, 46 L. ed. 1175, 22 Sup. Ct. Rep. 879; California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; California ex rel. Hastings v. Jackson, 112 U. S. 237, 28 L. ed. 714, 5 Sup. Ct. Rep. 113; De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715.

A general reference to the Federal Constitution is not sufficient (Corkran Oil & Development Co. v. Arnaudet, supra), but the provisions specially relied upon must be specifically pointed out.

It is apparent from the court's opinion that it decided the case quite without thought that any Federal question was, or could be, involved in its determination.

See Scudder v. Comptroller, supra.

No right or title claimed by the city to have been acquired by it under United States patent was ever specially set up or claimed in the courts of the state of California. This objection is fatal to the jurisdiction of this court.

Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Morrison v. Watson, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; Miller v. Texas, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; F. G. Oxley Stave Co. v. Butler County, supra; Chicago & N. W. R. Co. v. Chicago, 164 U. S. 454, 41 L. ed. 511, 17 Sup. Ct. Rep. 129; Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; Roby v. Colehour, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; Spies v. Illinois (Ex parte Spies) 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84.

The conflicting rights of persons, each admittedly claiming under a patent of the United States, do not present a Federal question.

Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; Kennard v. Nebraska, supra.

Counsel for plaintiff in error are mistaken as to the effect of the patent, as to which there can no longer be any room for controversy in this court.

United States v. Conway, 175 U. S. 70, 44 L. ed. 76, 20 Sup. Ct. Rep. 13; Langdeau v. Hanes, 21 Wall. 521, 22 L. ed. 606; Beard v. Federy, 3 Wall. 478, 491, 18 L. ed. 88, 92; Landes v. Brant, 10 How. 373, 13 L. ed. 460.

The Federal questions set up are manifestly frivolous and without merit.

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 344, 46 L. ed. 936, 941, 22 Sup. Ct. Rep. 691; Sawyer v. Piper, 189 U. S. 154, 47 L. ed. 757, 23 Sup. Ct. Rep. 633; St. Louis, G. & Ft. S. R. Co. v. Missouri, 156 U. S. 478, 484, 39 L. ed. 502, 504, 15 Sup. Ct. Rep. 443; McCain v. Des Moines, 174 U. S. 171, 43 L. ed. 937, 19 Sup. Ct. Rep. 644; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Wabash R. Co. v. Flannigan, 192 U. S. 29, 48 L. ed. 328, 24 Sup. Ct. Rep. 224; Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435.

Mr. Justice McKenna delivered the opinion of the court:

Action to quiet title, brought by plaintiff in error (and, being plaintiff in the court below, we will so designate it) in the superior court of the county of Monterey to 1,635.03 acres of land, situate in Monterey county, state of California. Plaintiff alleged title in fee simple, and contends that such title has come to it as successor of the pueblo of Monterey of Upper California. There is no dispute that the land was part of the pueblo of Monterey, and that, after proper proceedings had in pursuance of acts of Congress, the title of the city of Monterey was confirmed by a decree of the board of land commissioners, and a patent issued to the city November 19, 1891.

*The defendant gets his title through one [36
D. R. Ashley, who was the attorney for the city, to present and prosecute its claim to the land before the board of land commissioners. To pay the indebtedness incurred for his services the land was sold under the authority of certain acts of the legislature of the state, and purchased by him. The validity of the title so derived, as against the title of the city as successor of the pueblo of Monterey, free from the control of the legislature, makes the question in the case. Judgment passed for the defendant in the trial court and was affirmed by the supreme court. 139 Cal. 542, 73 Pac. 436. This writ of error was then allowed.

The city of Monterey was incorporated by an act of the legislature of the state of

California, March 30, 1850, and became thereby successor of the former pueblo to its pueblo lands. In 1857 the charter of the city was amended, and by § 7 thereof the trustees were empowered to pay off the expenses of prosecuting the title of the city before the United States land commissioners and before the United States courts, and for that purpose sell and transfer any property, right, or franchise upon such terms and for such price as might by them be deemed reasonable. It was found by the lower courts (and we quote from the opinion of the supreme court) that—

"On January 24, 1859, said Ashley presented to the trustees of the city of Monterey a claim amounting to $991.50 for services as its attorney in presenting such pueblo claim to the commissioners. The claim was approved and allowed, and there being no funds in the treasury to pay it, the board of trustees passed a resolution directing that a sale of all the pueblo lands of the city, or so much of them as might be necessary to pay the claim of said Ashley, be made at public auction on the 9th day of February, 1859. Due notice of the time for holding said sale was given, and the same was held at the time and in accordance with the notice, at which sale the entire pueblo tract was bid in by the said D. R. Ashley and the defendant, David Jacks, for the sum of [362] $1,002.50, being *the amount of the indebtedness and the necessary expenses of sale; no one offering to purchase less than the whole, or bid a higher amount. Thereafter said trustees made, executed, and delivered a conveyance of said lands, dated February 9, 1859, but acknowledged February 12, 1859, in favor of said D. R. Ashley and the defendant, David Jacks, and in the conveyance the proceedings taken by the trustees in the matter of such sale were recited. This conveyance was recorded in the county recorder's office of the county of Monterey on June 11, 1859. On April 2, 1866, the act to incorporate the city of Monterey was amended to read as follows: 'Sec. 2. All sales and conveyances made by the corporate authorities of said city since the 8th day of February, 1859, and which conveyances purport to have been recorded in the county recorder's office of Monterey county, purporting to convey public lands, or lands confirmed to said city of Monterey, in pursuance of the act of Congress of March 3, 1851 (9 Stat. at L. 631, chap. 41), and entitled "An Act to Ascertain and Settle the Private Land Claims in the State of California," are hereby ratified and confirmed.' . . . On September 4, 1869, Ashley conveyed all his interest in the land in controversy to the defendant."

The contentions of the parties are in part made to turn upon the kind of right the city of Monterey derived as the successor of the pueblo of Monterey, whether proprietary or in trust, and, because in trust, subject to the disposition of the legislature of the state. This distinction was expressed by the supreme court and the case determined by it, and the court supported its action by a citation of prior decisions. It was said: "There is a marked difference, however, between lands which are held by a municipality in trust for public, municipal purposes, such as pueblo lands, and lands acquired by a municipality through purchase or special grant, and held in proprietary right." Of the latter class it was said: "That it is beyond the power of the state to control its disposition without the consent of the municipality." In the other case, "the lands, being simply ancillary to the execution of the public trust,—lands in which *the pueblo never had an indefeasible [363] proprietary interest, and which were subject to the supreme political dominion of the former Mexican government,—became equally subject to the sovereignty of the state of California through its legislature upon the change of government."

Plaintiff attacks this conclusion, and contends that the title to the lands vested, not in the state of California as succeeding sovereign, but in the United States, and the United States, having the title, passed it by the patent of November 19, 1891, to the plaintiff. And this contention, plaintiff asserts, presents the Federal question to be decided. At one time this might have been regarded as a serious question, but it is no longer so. Whatever of legal power the state of California may exercise over its municipalities has received decisive definition in many decisions. The cases are quoted by the supreme court in the case at bar. Whatever power the United States may exercise, or, by refraining from exercising, yield to the state of California to exercise, has long been decisively settled. We need not review the cases. An exposition of them can be found in United States v. Santa Fe, 165 U. S. 675, 41 L. ed. 874, 17 Sup. Ct. Rep. 472.

If the United States was, as contended, a paramount sovereign, and, as such, possessed the power to direct the trust to which pueblo lands were subject, it did not do so, but conveyed land to the "city of Monterey, its successors and assigns." In other words, the conveyance was made to a municipality of the state of California,—a creature of the laws of the state and subject to the state. Payne v. Treadwell, 16 Cal. 220; San Francisco v. Canavan, 42 Cal. 541. See also Atty. Gen. ex rel. Kies v. Lowrey, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep.

27. And we may observe that the United States, by an act passed June 15, 1906, has designated the city of Monterey as trustee of the original grant, and confirmed the land to the city as patented. 34 Stat. at L. 267.

We do not think, however, that the Federal question presented is so far unsubstantial as to justify a dismissal of the writ of error, and the motion to dismiss is denied.

Judgment affirmed.

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[364]*INTERNATIONAL TRUST COMPANY, Plff. in Err.,
v.
JOHN W. WEEKS, Agent of the Shareholders of the Broadway National Bank.

(See S. C. Reporter's ed. 364–368.)

Courts—jurisdiction of circuit court—action to wind up affairs of national bank.

1. An action for rent, brought against the agent for the shareholders of an insolvent national bank to whom the Comptroller of the Currency has released the estate of the bank, is one to wind up the affairs of the bank, and, as such, is within the jurisdiction of a Federal circuit court.

Landlord and tenant—rent after re-entry—effort to relet.

2. Rent after re-entry cannot be recovered by the lessors unless a reasonable effort has been made to relet the premises, where the lease provides that after re-entry for breach of any covenant the lessors "may, at their discretion, relet the premises, at the risk of the lessee, who shall remain, for the residue of said term, responsible for the rent herein reserved, and shall be credited with such amounts only as shall be, by the lessors, actually realized."

[No. 31.]

Argued October 17, 1906. Decided December 3, 1906.

IN ERROR to the United States Circuit Court of Appeals for the First Circuit to review a judgment which affirmed, on a second writ of error, a judgment of the Circuit Court for the District of Massachusetts in favor of defendant in an action for rent. Affirmed.

See same case below, 71 C. C. A. 417, 139 Fed. 5.

The facts are stated in the opinion.

Mr. Robert M. Morse argued the cause, and, with Mr. William M. Richardson, filed a brief for plaintiff in error:

A receiver of a national bank may be sued in the circuit court irrespective of citizenship.

Auten v. United States Nat. Bank, 174 U. S. 125, 43 L. ed. 920, 19 Sup. Ct. Rep. 623.

The stockholders' agent may likewise be sued in the circuit court.

NOTE.—On actions by and against receivers and agents of national banks—see note to McCartney v. Earle, 53 C. C. A. 398.

As to the liability for rent of premises occupied by receiver or assignee for creditors—see note to Link Belt Mach. Co. v. Hughes, 59 L.R.A. 673.

Landlord's duty to relet on defaulting tenant's account.

There is scarcely any dissent from the general proposition that the landlord is under no obligation to relet abandoned premises for the benefit of the tenant, but may, if he choose, decline to meddle with the property, and hold the tenant liable for the rent for the whole term. The following cases recognize this principle: Respini v. Porta, 89 Cal. 464, 23 Am. St. Rep. 488, 26 Pac. 967; Aberdeen Coal & Min. Co. v. Evansville, 14 Ind. App. 621, 43 N. E. 316; Patterson v. Emerich, 21 Ind. App. 614, 52 N. E. 1012; Merrill v. Willis, 51 Neb. 162, 70 N. W. 914; Re Hevenor, 144 N. Y. 271, 39 N. E. 393; Underhill v. Collins, 132 N. Y. 269, 30 N. E. 576; Clendinning v. Lindner, 9 Misc. 682, 30 N. Y. Supp. 543; Reich v. McCrea, 37 N. Y. S. R. 620, 13 N. Y. Supp. 650; Milling v. Becker, 96 Pa. 182; Lipper v. Bouvé, C. & Co. 6 Pa. Super. Ct. 452; Randall v. Thompson Bros. 1 Tex. App. Civ. Cas. (White & W.) § 1102; Alsup v. Banks, 68 Miss. 664, 13 L.R.A. 598, 24 Am. St. Rep. 294, 9 So. 895.

In answer to the objection that a contrary doctrine was laid down in Allen v. Saunders, 6 Neb. 436, where, in an action for rent, brought against a tenant who had abandoned the property, a charge was approved to the effect that while it was the duty of the landlord to relet to as good an advantage and in as profitable a way as would be done by an ordinarily careful and prudent man, he was not obliged to let to tenants whose business was of such a character as would be of permanent injury to the property in a greater degree than ordinary business, the court, in Merrill v. Willis, supra, said that the turning point of that case was not the duty of the lessor to relet, but the qualification of an instruction otherwise satisfactory to both parties, to the effect that the landlord was not required to relet to a tenant whose business would permanently injure the property, and that what was said respecting the entry of the lessor to relet for the protection of the lessee must be regarded as *obiter*.

But where, as in INTERNATIONAL TRUST Co. v. WEEKS, the lease expressly empowers the landlord to re-enter and relet on the defaulting tenant's account without losing his rights under the lease, what little authority exists is to the effect that, if the landlord elects to take advantage of the

Re Chetwood, 165 U. S. 443, 459, 41 L. ed. 782, 787, 17 Sup. Ct. Rep. 385; Guarantee Co. v. Hanway, 44 C. C. A. 312, 104 Fed. 389.

It may be that the terms of this lease were onerous upon the lessee. But the original lessors had the right to make them, and the plaintiff, in purchasing the property of the original lessors, was necessarily influenced by the terms of this lease and had the right to the benefit of them. They had the right to limit the use of their property in such way as should, in their judgment, secure their interests, and the lessees are bound by the stipulations in the lease.

Minot v. Joy, 118 Mass. 308; Wilkinson v. Libbey, 1 Allen, 375; Amory v. Melvin, 112 Mass. 83; Hunnewell v. Bangs, 161 Mass. 132, 36 N. E. 751.

That a lessee may, under a clause in a lease substantially like that in the present lease, be held liable for the amount of the rent, less such amounts as may be actually collected, is well established.

Way v. Reed, 6 Allen, 364; Edmands v. Rust & R. Drug Co. 191 Mass. 123, 77 N. E. 713; Ex parte Lake, 2 Low. Dec. 544, Fed. Cas. No. 7,991; Grommes v. St. Paul Trust Co. 147 Ill. 634, 37 Am. St. Rep. 248, 35 N. E. 820, 47 Ill. App. 568; Hall v. Gould, 13 N. Y. 127.

The plain and natural construction of the lease, especially in view of the clause that the use of the premises was limited to the business offices of the bank, is that the lessee was to be held for the entire rent less such amounts as might be collected, and that any reletting was to be at the lessor's discretion.

Weeks v. International Trust Co. 60 C. C. A. 236, 125 Fed. 370; Ex parte Lake and Grommes v. St. Paul Trust Co. supra; Woodbury v. Sparrell Print, 187 Mass. 426, 73 N. E. 547.

It is well settled that where a tenant abandons the possession of the premises during the continuance of the tenancy, the landlord is not bound to re-enter and attempt to relet them for his benefit.

18 Am. & Eng. Enc. Law, 2d ed. p. 303; Clendinning v. Lindner, 9 Misc. 682, 30 N. Y. Supp. 543.

Mr. G. Philip Wardner argued the cause, and, with Mr. Edward E. Blodgett, filed a brief for defendant in error:

No liability rests or can rest upon the lessee under such a clause as the one presented in the case at bar, in the absence of a reasonable attempt to relet the premises after the termination of the lease.

Way v. Reed, 6 Allen, 364; Bowditch v. Raymond, 146 Mass. 109, 15 N. E. 285; Re Ells, 98 Fed. 967; Woodbury v. Sparrell Print, 187 Mass. 426, 73 N. E. 547; Edmands v. Rust & R. Drug Co. 191 Mass. 123, 77 N. E. 713.

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clause, he must make a reasonable effort to relet the premises, and must not arbitrarily refuse prospective tenants.

In exercising his rights under such a lease the landlord has the right to select a good and proper tenant. Nathan v. Gendron Iron Wheel Co. 18 Misc. 374, 41 N. Y. Supp. 661.

And he is not required to accept a prospective tenant merely because the defaulting lessees are satisfied as to his financial responsibility. Edmands v. Rust & R. Drug Co. 191 Mass. 123, 77 N. E. 713.

But he is bound to use due diligence in renting. Fitch v. Armour, 27 Jones & S. 413, 14 N. Y. Supp. 319.

And an unreasonable refusal to accept a suitable tenant may be deemed an abandonment of the election to relet at the risk of the lessee. Edmands v. Rust & R. Drug Co. supra.

The belief of the landlord that an actress might keep late hours and thus disturb his other tenants is not sufficient reason for rejecting her application to rent the premises, and entitles the defaulting tenant, in an action for the rent, to be credited with the amount of rent that would have been payable under such reletting. Fitch v. Armour, supra.

But the question as to whether the landlord used due diligence to relet the premises is immaterial where the lease provides that the landlord may, at his option, relet the premises on the tenant's account on such terms as he may deem expedient or proper, and that such reletting shall not operate as a termination of the lease or the waiver of any right to hold the tenant for the rent reserved, since the landlord could hold the tenant for the entire rent if there had been no reletting. Lehman v. Henry Sears Co. 30 Chicago Legal News, 309, 16 Nat. Corp. Rep. 487.

Of course, the landlord need not avail himself of his privilege. He may still abstain from renting, and hold the tenant liable for the rent. Weeks v. Internationl Trust Co. 60 C. C. A. 236, 125 Fed. 370.

Or he may, in his discretion, elect not to relet, but to resume possession on his own account. Bowditch v. Raymond, 146 Mass. 109, 15 N. E. 285.

Where a party breaks his executory contract to take a lease of certain premises before the time for performance arrives, the owner, if he does not vest the lessee with the right of possession so as to enable him to collect the stipulated rent, must keep the possession and use reasonable endeavors to make the property as productive or profitable to himself as possible, and if he does not do so he can only recover such legitimate damages as he has sustained over and above what he ought to have realized from the property. Kirland v. Wolf, 7 Ohio Dec. Reprint, 436.

This being a matter of the construction of a lease of real estate, the decision of the supreme judicial court of Massachusetts will be followed by this court.

Jackson ex dem. St. John v. Chew, 12 Wheat. 153, 167, 5 L. ed. 583, 588; Henderson v. Griffin, 5 Pet. 151, 155, 8 L. ed. 79, 80; Beauregard v. New Orleans, 18 How. 497, 15 L. ed. 469; Suydam v. Williamson, 24 How. 427, 16 L. ed. 742; Burgess v. Seligman, 107 U. S. 20, 33, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; Barber v. Pittsburgh, Ft. W. & C. R. Co. 166 U. S. 83, 99, 41 L. ed. 925, 933, 17 Sup. Ct. Rep. 488; Warburton v. White, 176 U. S. 484, 496, 44 L. ed. 555, 559, 20 Sup. Ct. Rep. 404; Freeport Water Co. v. Freeport, 180 U. S. 587, 595, 45 L. ed. 679, 687, 21 Sup. Ct. Rep. 493.

This was not a suit for winding up the affairs of the Broadway bank.

Snohomish County v. Puget Sound Nat. Bank, 81 Fed. 518; Armstrong v. Trautman, 36 Fed. 275; Guarantee Co. v. Hanway, 44 C. C. A. 312, 104 Fed. 369; Brown v. Smith, 88 Fed. 565; Stephens v. Bernays, 44 Fed. 642; Speckart v. German Nat. Bank, 85 Fed. 12; George v. Wallace, 68 C. C. A. 40, 135 Fed. 286.

No one is an officer of the United States who is not appointed by the President, the courts of law, or the head of a department.

Thompson v. Pool, 70 Fed. 725.

The stockholders' agent of a national bank is not appointed by the President, or by the courts of law, or by the head of a department. He is not, therefore, an officer of the United States, and the cases of McConville v. Gilmour, 1 L.R.A. 498, 36 Fed. 277, and Guarantee Co. v. Hanway, supra, must be held to have been erroneously decided.

Mr. Justice McKenna delivered the opinion of the court:

This is an action on contract brought in the circuit court of the United States for the district of Massachusetts, for rent alleged to be due under the terms of a lease made by Henry Parkman and others to the Broadway National Bank.

The original lessors sold the land and building leased to the International Trust [365] Company, plaintiff in error. Defendant *in error is agent of the shareholders of the Broadway National Bank.

The premises leased were the first floor of the building and the basement under the same, "to be used as the business offices of said corporation and for no other purpose." The lease contained a provision for re-entry upon breach of any covenant. "And thereupon the lessors may, at their discretion, relet the premises, at the risk of the lessee, who shall remain for the residue of said term responsible for the rent herein reserved, and shall be credited with such amounts only as shall be by the lessors actually realized."

On December 16, 1899, the bank became insolvent, and the Comptroller of the Currency appointed a receiver. On February 15, 1900, the Comptroller released the estate of the bank to defendant in error as the stockholders' agent. Between December 16, 1899, and January 5, 1900, the trust company entered upon the premises and repossessed itself of the same as of its former estate. The receiver occupied the premises for a while, but it was stipulated that such occupation was not to affect the rights of the parties. Defendant in error occupied the premises until May 19, 1900. He contended in defense of the action that upon the termination of the lease it was the duty of the trust company to use all reasonable effort to relet the premises, so as to minimize the damages, and that the company had not done so. And further, that suitable and responsible parties were willing at various times to hire the premises at a rent as great or greater than the rent reserved in the lease.

At the first trial of the case the circuit court took the opposite of defendant in error's contention, and held that, by force of the lease, the trust company did not assume any risk, and was only required to use its discretion "with some degree of reasonableness and with some degree of justice, and have some regard to the rights of the position of the other parties concerned." The court further held that the evidence did not show that the company had abused its discretion, and *directed a verdict for it, less [366] certain payments made by the occupant of the basement, formerly the bank's tenant. This was reversed by the circuit court of appeals. 60 C. C. A. 236, 125 Fed. 371. The latter court held that a lessor had the right to re-enter and might exercise his discretion to relet the premises at the risk of the lessee. The lessor, it was said, need not go through the form of reletting, but an honest and reasonable attempt to relet should be made, and whether so made was a question for the jury.

Upon the second trial of the case in the circuit court the trust company expressed its contentions in requests for instructions to the jury as follows: (1) That it was entitled to rent the premises and relet them at the risk of the bank; (2) that there was no obligation upon it to notify the bank of its election so to do, or to relet the premises or attempt to relet them. The court declined to give the instructions, but instructed the jury in accordance with the principle expressed by the circuit court of appeals. The jury returned a verdict for

at in error, upon which judgment y entered. It was affirmed by the court of appeals.

is objected by defendant in error circuit court had no jurisdiction of ion. We think otherwise. The ac- clearly one to wind up the affairs bank. Re Chetwood, 165 U. S. 443, L. ed. 782, 787, 17 Sup. Ct. Rep. 385; ee Co. v. Hanway, 44 C. C. A. 312, . 369.

he fact that the trust company make a reasonable effort to relet mises was settled by the verdict jury against it, and the case is re- o the simple question whether the y can recover by virtue of the pro- of the lease without any attempt ver to relet the premises.

aid in argument that the provision oversy has been found in the usual lease in Massachusetts for a gen- and yet its meaning, as now in dispute, has not come up for or explicit decision. To this absence ntion and decision both parties re- *equal confidence to establish that spective constructions have been so able as never to have been ques- However, there are some indica- a judgment between the two con- ns in the case of Edmands v. Rust Drug Co. 191 Mass. 123, 77 N. E. ich may be turned to in passing on ion so essentially local.

lease passed on contained a provi- an entry by the lessors to termi- e lease for the breach of covenants, l by this language: "But the les- mants to be responsible for any loss nution of rent sustained by the les- consequence till the end of the The defendant in the case requested ions, expressing it to be the duty of or to accept any tenant that was tory financially to defendant. His ions were refused, and the court in- l the jury, among other things, as "In general, the effort must be ich a reasonable landholder would nder the circumstances. Not every l tenant need be accepted, but an nable refusal to accept a suitable will be deemed an abandonment of tion to relet at the risk of the les- Commenting on the instructions the judicial court said that "the jury t to decide between the parties, in of which the defendant has no rea- complain."

nanifest from this decision that the fter entry, has not the absolute dis- o relet or not to relet the premises, it is his duty to "prevent unneces- sary loss or diminution of rent in consequence of the termination of the lease."

In Bowditch v. Raymond, 146 Mass. 109, 15 N. E. 285, the liability of the lessor, under the provision of a lease such as that in controversy, was denied against an insolvent lessee on the ground that it was dependent upon a contingency, not merely as to the amount of liability, but as to whether it would ever attach or arise out of the covenant. "The lessors," the court said, "in their discretion might not relet the premises, but resume possession of them." This case rests on the principle *expressed[368] by Judge Lowell, speaking for the circuit court of appeals, that if the lessor avail himself of the covenant and re-enter he may exercise his discretion to relet the premises at risk of the lessee or occupy them. If he elect to relet he must make "an honest and reasonable attempt to relet." And this is a reasonable and just exaction. It is the spirit as well as the letter of the covenant, fulfilling its security without unnecessary loss to the lessee.

Whether the bank could have made a lease to extend beyond its charter life we need not decide.

Judgment affirmed.

ANN E. J. CRUIT, Appt.,
v.
KATE DEAN OWEN and Jessie Owen Cugle.

(See S. C. Reporter's ed. 368–372.)

Wills—interests of several—survivorship.

1. The surviving daughter of the testator does not take to the exclusion of her sister's children under a will executed after the marriage of such sister, devising the testator's real property in trust to his daughters "for and during their respective lives . . . and from and after their death in trust for the child or children of each of my said daughters then alive in fee simple," and providing that, if any of the daughters should die without having been married, her share should pass to the survivors.

Trust—termination—death of trustee.

2. A testamentary trust survives the death of the trustee where the will provides that, if the executrix, who was also named as trustee, should die or for any cause should become unable to act in the trust, a new trustee should be appointed by the court, so that the trusts thereby created should be at all times preserved and carried into effect.

[No. 51.]

Argued October 19, 22, 1906. Decided December 3, 1906.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District in a suit to construe a will. Affirmed.

See same case below, 25 App. D. C. 514.

The facts are stated in the opinion.

Mr. Edward H. Thomas argued the cause and filed a brief for appellant:

The words "respective," "share and share alike," and others indicate a technical grasp on judicial decisions defining and applying those terms under like circumstances to those surrounding the testator, as indicated in his will. The testator, therefore, had an intention which is to be ascertained by construing his will in harmony with the meaning of the technical words whereby he has manifested it.

Lambert v. Paine, 3 Cranch, 134, 2 L. ed. 390; Doe ex dem. Kean v. Roe, 2 Harr. (Del.) 103, 29 Am. Dec. 342.

Testator gave certain estate to his sisters P. and M. "for the term of their natural lives," and provided that, "after the decease of both of my said sisters," a part should go to relatives and the residue to an orphan asylum. Held, survivor took the use of the whole estate, and not of a half only.

Glover v. Stillson, 56 Conn. 316, 15 Atl. 752.

A testatrix in her will gave to a trustee named, "income to be paid equally to my brother and my sister during their natural lives, and at their death the principal I give to my nephews and nieces then surviving."

The brother died after the testatrix, and left the sister surviving. Held, that the whole income of the property was payable thereafter to the sister until her death, until which time the gift over in remainder to the nephews and nieces was not to take effect.

Loring v. Coolidge, 99 Mass. 191.

Wherever it appears to be the intention of a testator that the whole of his estate shall go over together, upon the failure of issue of more than two tenants in common, cross remainders shall be implied between them in the meantime in order to effectuate that intent.

Doe ex dem. Gorges v. Webb, 1 Taunt. 234.

Though the words "equally to be divided" and "share and share alike" are in general construed in a will to create a tenancy in common, yet, where the contract shows a joint tenancy to be intended, the words shall be construed accordingly.

Armstrong v. Eldridge, 3 Bro. Ch. 215.

Testator gave to the children of Mr. John Glass, deceased, and the children of Mrs. Lyon, deceased, the interest of £1,500 for life, to be equally divided between them, and, at their decease, the same to be divided between the grandchildren of each, Mr. Glass and Mrs. Lyon. John Glass died in the lifetime of the testator, leaving no children but leaving, at the decease of the testator, five grandchildren. Mrs. Lyon died in the lifetime of testator, leaving three children. Held, that children of Mrs. Lyon shall take the whole interest, nothing passing to the grandchildren until the death of all.

Malcolm v. Martin, 3 Bro. Ch. 50.

W. L. devised as follows: "I hereby desire my executor to invest all my estate that may be left so that the interest shall be paid to my daughters, Sarah J. Lazier and Louisa R. Lazier, during their lifetime, or as long as they remain single, and at their death or marriage I hereby desire that amount shall be equally divided among all my children." Held, that said estate was not distributable so long as either Sarah J. Lazier or Louisa R. Lazier was in life and remained single, and that, said Louisa R. having died unmarried, said Sarah J. was entitled to the interest on assets as long as she lived and remained single.

Lazier v. Lazier, 35 W. Va. 567, 14 S. E. 148.

Where a testator in his will devises certain land to his two daughters for their natural lives and after their death to their lawful children forever, if they shall have any; and further provides that, if both said daughters die childless, then the land shall go to the testator's grandson, his heirs and assigns forever,—held, that the daughters take as tenants in common for life, with cross remainder for life necessarily implied between them.

Smith v. Usher, 108 Ga. 231, 33 S. E. 876.

The rule is that the extent of the trustee's title depends more on the requirement of the trust than on the terms of its grant.

Doe ex dem. Poor v. Considine, 6 Wall. 458, 18 L. ed. 869; Young v. Bradley, 101 U. S. 782, 787, 25 L. ed. 1044, 1045.

Where the testatrix devised an estate to a trustee to hold for her single daughters and pay the income during their lives, free from the debts of any husband they may have or take, etc., the trust for their separate use fell, there being no coverture when the will took effect.

Yarnall's Appeal, 70 Pa. 335.

An active trust for coverture, there being no immediate marriage contemplated, cannot take effect, because there is no object to accomplish for the benefit of the *cestui que trust*.

Ogden's Appeal, 70 Pa. 501; Williams's Appeal, 83 Pa. 390; Tullett v. Armstrong, 1 Beav. 32, 4 Myl. & C. 397; Cooney v. Woodburn, 33 Md. 326, Schouler, Dom. Rel. §§ 107–127.

A tenant in common in possession under the mistaken idea that he is entitled to the whole interest is not liable to account for the use thereof, where there is no exclusion or claim made upon him to protect the other's rights.

Sailer v. Sailer, 41 N. J. Eq. 398, 5 Atl. 319.

Mr. Chapin Brown argued the cause, and, with Mr. J. P. Earnest, filed a brief for appellees:

The testator devised and bequeathed his whole estate.

Smith v. Bell, 6 Pet. 68, 8 L. ed. 322; Given v. Hilton, 95 U. S. 591, 24 L. ed. 458.

Even if the language were not so strong and so plain in giving the daughters only a life estate, yet, there being no words of limitation to the devise to them, they would take an estate for life only.

Jarman, Wills, *1131; Wright v. Denn, 10 Wheat. 204, 6 L. ed. 303; King v. Ackerman, 2 Black, 408, 17 L. ed. 292.

The fee-simple title of all the real estate devised by the will vested in them in remainder, at the death of the testator, subject to be opened to let in any after-born children of any of the daughters of the testator.

McArthur v. Scott, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; Croxall v. Sherrerd (Den ex dem. Croxall v. Sherrerd) 5 Wall. 268, 18 L. ed. 572; Doe ex dem. Poor v. Considine, 6 Wall. 458, 18 L. ed. 869; Daniel v. Whartenby, 17 Wall. 639, 21 L. ed. 661; Cropley v. Cooper, 19 Wall. 167, 22 L. ed. 109.

Although words as they stand are not absolutely senseless or contradictory, transposition will be made if it be required to effectuate the intention clearly expressed or indicated by the context.

Wilson v. Eden, 1 Exch. 772, 14 Q. B. 256, 4 H. L. Cas. 257; 1 Jarman, Wills, *468; see also as to the Transposition of Words and Clauses, 1 Jarman, Wills, *465.

If there had not been any other language in the will to explain this word "their," yet it would necessarily have to be construed as reading or meaning "their respective deaths."

Wills v. Wills, L. R. 20 Eq. 342; 1 Jarman, Wills, Bigelow's 6th Am. ed. *470.

Where, as in the CRUIT CASE, the children or other devisees of a testator take for life as tenants in common, with remainder over to their children, the children of the life tenants take immediately upon the death of each life tenant, *per stirpes*, that is, the share of the parent respectively. There is no exception to this rule.

2 Jarman, Wills, **1052, 1053.

The language of the will, namely, "equally, share and share alike," creates a tenancy in common.

Jarman, Wills, Bigelow's 6th Am. ed. **1121 et seq.; Schouler, Wills, 3d ed. § 566; Barribeau v. Brant, 17 How. 43, 15 L. ed. 34.

Each daughter of Robert Cruit took, at the time of his death, a life estate, as tenant in common, with the others in one fourth each of the real estate, with the possibility of the life estate being increased by express cross remainders, if any one or more daughters died without leaving a child or children.

McAleer v. Schneider, 2 App. D. C. 461; Wright v. Denn, and King v. Ackerman, supra; Jarman, Wills, Bigelow's 6th Am. ed. **1131 et seq.

Cross remainders cannot be implied where there are express cross limitations among the devisees in tail in certain events.

Jarman, Wills, *1553; Clache's Case, 3 Dyer, 330 b.

The well-established principles of law in reference to trust estates show that this is still a trust estate.

Hill, Trustees, **232, 234, 273; 2 Jarman, Wills, Bigelow's ed. **1137, 1139, notes; Perry, Trustees, § 307; Barker v. Greenwood, 4 Mees. & W. 421; Keene ex dem. Byron v. Deardon, 8 East, 248; White v. Parker, 1 Bing. N. C. 573.

Mr. Justice McKenna delivered the opinion of the court:

This suit involves the construction of the will of Robert *Cruit, deceased, and, as dependent thereon, the liability of appellant to account to the appellees for the rents of certain real estate located in the city of Washington and in the state of Virginia. Decree in the supreme court passed for appellees, which was affirmed by the court of appeals. 25 App. D. C. 514. [369]

The will was executed September 1, 1858, and was duly admitted to probate.† The testator left surviving him a wife *and four daughters,—Catherine E., then the wife of [370]

†This is the last will and testament of me Robert Cruit of the city of Washington in the District of Columbia.

First I give to my two nephews Edwin Cruit the son of George, and Henry the son of John L. Cruit, the legacy of one hundred dollars, to each of them, to be paid as soon after my death as may be. And all the rest residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever situated, I give, devise and bequeath unto my dear daughter Susan Cruit her heirs executors and administrators upon the following trusts to wit: In trust for my dear wife Catherine for and during her life, and to permit her to receive and take the whole income thereof after paying taxes repairs and insurance, and to apply and dispose of

Samuel Owen, Susan, Ann (appellant), and Louisa. The widow of the deceased died May 13, 1876; Louisa died January 2, 1876, Susan died December 31, 1900, and Catherine E. Owen died May 14, 1901. Susan and Louisa never married, nor has Ann up to the present time. Catherine E. Owen left surviving her three daughters, Evania F. Mackall and the appellees, Kate D. Owen and Jessie Owen Cugle. The property produces an income of $11,000 or $12,000.

The question in the case is whether appellant succeeded to the whole estate upon the death of Catherine E. Owen, or whether the children of the latter, appellees, were the successors of their mother.

The will gives small legacies to two nephews, and disposes of "all the rest and residue and remainder of the testator's estate to Susan Cruit in trust (1) for his wife for and during her life, and to permit her to take and receive the whole income thereof; (2) in trust, as to testator's real estate, to his daughters equally, share and share alike, for and during their respective lives, . . . and from and after their death in trust for the child or children of each of my said daughters, then alive, in fee simple, such child or children, respectively, to take the share to which his, her or their parent was entitled. And if any of my said daughters shall die without having been married, her share shall pass to her or their surviving sisters or sister for life equally, and upon her or their death the same shall vest in her or their child or children in the same manner and for the same estate and pass on her or their death, as her or their original share or shares."

We do not think it is difficult to discern the intention of the testator. There is very little ambiguity in the will. If ambiguity exist it is in the pronoun "their" in the provision "and from and after their death in trust for the child or children of each of my said daughters then living in fee simple, such *child or children respectively to take the share to which his, her or their parent was entitled." It is contended by appellant that it is manifest from these words and others in the will that it was drawn by a skilful hand, to create a joint tenancy in the daughters of the testator, and cases are cited in which wills containing such words have been construed, it is contended, as giving such effect. We might review these cases and those cited in opposition by appellees if the will in controversy were less clear in its meaning. Provision for his daughters and equality between them were clear and definite in the mind of the testator. One daughter was married and that the others might be was contemplated, and that children might result therefrom. This idea is especially prominent and is carefully expressed, and provision is made for such children. The contention of appellant militates against this idea. It would leave grandchildren unprovided for. If such had been the intention of the testator, we think he would have explicitly expressed it. It was not so natural an intention as the other. It is not the first impression of the will, and can only be made out by rigidly giving plurality to the pronoun "their" in the provision "and from and after *their* death in trust for the child or children of each of my said daughters, then living, in fee simple." But the word is qualified and made several by what precedes it. The devise is to his daughters "for and during *their respective* lives." It is qualified also by what follows it. One of the daughters of the testator was married, the others were not, and might not be, and anticipating this

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such income as she my said wife may think proper and from and after her decease, in trust, as to my real estate for my dear daughters Catherine E. the wife of Samuel Owens, Ann Cruit, Louisa Cruit, and herself the said Susan Cruit, equally share and share alike, for and during their respective lives, for their own sole and separate benefit free from the control of the husband of my said daughter Catherine and any husband or husbands she or my said other daughters or any of them may hereafter happen to marry, and not to be liable in any way for the debts of any such husbands, the receipts of my said daughters alone being a valid discharge. And from and after their death in trust for the child or children of each of my said daughters then living in fee simple, such child or children respectively to take the share to which his, her or their parent was entitled. And if any of my said daughters shall die without having been married, her share shall pass to her or their surviving sisters or sister for life equally; and upon her or their death the same shall vest in her or their child or children in the same manner, and for the same estate and pass on her or their death, as her or their original shares or share. And as to my personal property, also given in trust as above expressed. I direct that the same shall after the death of my said wife, be divided equally among all my said children, Catherine, Susan, Ann and Louisa share and share alike, and I accordingly give the same to them as aforesaid for their own sole and separate use.

And lastly I appoint my said daughter Susan Cruit sole executrix of this my last will and testament. And if my said daughter shall die or from any cause should become unable to act in the trust, I direct that a trustee shall be appointed by the circuit court so that the trusts hereby created shall be at all times preserved and carried into effect.

possibility the testator provided that, if any of his daughters should die without having been married, her share should pass to the survivors. In other words, it was only upon the death of a daughter "without having been married" (and without issue possibly), that her share was to pass to her sisters or sister. We also agree with the courts below that the trust continues.

The concluding paragraph of the will is:

"And lastly I appoint my said daughter 372 Susan Cruit sole *executrix of this my last will and testament. And if my said daughter shall die or from any cause should become unable to act in the trust, I direct that a trustee shall be appointed by the circuit court so that the trusts hereby created shall be at all times preserved and carried into effect."

Decree affirmed.

CHARLES K. OFFIELD, Plff. in Err.,
v.
NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY.

(See S. C. Reporter's ed. 372-378.)

Error to state court—Federal question.

1. The contention that the proceedings taken under Conn. Pub. Laws, §§ 3694, 3695, by a railway company which is the lessee of another railway, and the owner of three fourths of its stock, to condemn the outstanding shares owned by a person who refuses to agree to the terms of purchase, violate the due process of law clause of the 14th Amendment to the Federal Constitution, and impair contract obligations, is not so frivolous as to require the dismissal of a writ of error from the Supreme Court of the United States to a state court.

Constitutional law—due process of law—condemnation for public use.

2. The improvement of the New Haven & Derby Railroad is a public use for which the New York, New Haven, & Hartford Railroad Company, which is the lessee of the former road, and the owner of three fourths of its stock, may proceed under Conn. Pub. Laws, §§ 3694, 3695, without violating the due process of law clause of the 14th Amendment to the Federal Constitution, to condemn the outstanding shares owned by a person who refuses to agree to the terms of purchase.

Constitutional law—impairing contract obligation.

3. Contract obligations are not impaired by the proceedings taken under Conn. Pub. Laws, §§ 3694, 3695, by the New York, New Haven, & Hartford Railroad Company, which is the lessee of the New Haven & Derby Railroad and the owner of three fourths of its stock, to condemn the outstanding shares owned by a person who refuses to agree to the terms of purchase.

[No. 59.]

Argued and submitted October 25, 1906.
Decided December 3, 1906.

IN ERROR to the Supreme Court of Errors of the State of Connecticut to review a judgment which affirmed a judgment of the Superior Court of New Haven County,

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NOTE.—On the condemnation of shares of minority stockholders in American corporations—see note to Spencer v. Seaboard Air Line R. Co. 1 L.R.A.(N.S.) 605.

As to what is a public use for which private property may be taken by eminent domain—see note to Pittsburg, W. & K. R. Co. v. Benwood Iron Works, 2 L.R.A. 680; Barre R. Co. v. Montpelier & W. River R. Co. 4 L.R.A. 785; and Sweet v. Rechel, 40 L. ed. U. S. 188.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

Necessity of color of merit in Federal question to sustain writ of error to state court.

It may, with some show of reason, be said that, no matter how lacking in merit the Federal contention may be, the Supreme Court of the United States cannot logically, for that reason alone, decline to entertain jurisdiction of a writ of error to a state court. But the court is committed to the doctrine that a real, and not a fictitious, Federal question is essential to the exercise of this jurisdiction. Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Millingar v. Hartupee, 6 Wall. 258, 18 L. ed. 829; Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; St. Louis, C. G. & Ft. S. R. Co. v. Missouri, 156 U. S. 478, 39 L. ed. 502, 15 Sup. Ct. Rep. 443; Illinois C. R. Co. v. Chicago, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123; Clarke v. McDade, 165 U. S. 168, 41 L. ed. 673, 17

in that state, for the condemnation of certain shares of railway stock owned by a person who refuses to agree to the terms of purchase offered by a railway corporation which has acquired three fourths of such stock. Affirmed.

See same case below, 78 Conn. 1, 60 Atl. 740.

The facts are stated in the opinion.

Messrs. Edward H. Rogers and W. H. H. Miller submitted the cause for plaintiff in error. Mr. Charles K. Bush was on the brief:

The right of eminent domain can only be legally exercised when the property taken is taken for a public use.

Farist Steel Co. v. Bridgeport, 60 Conn. 278, 13 L.R.A. 590, 22 Atl. 561.

The question of what is a public use is always one of law.

Cooley, Const. Lim. 774; Re Niagara Falls & W. R. Co. 108 N. Y. 375, 15 N. E. 429; Re Split Rock Cable Road Co. 128 N. Y. 408, 28 N. E. 506.

It is a serious error to treat the question of What is a public use? as though the question was, For what purpose may the power of eminent domain be properly exercised?

1 Lewis, Em. Dom. § 163.

The courts everywhere agree that the power of eminent domain is the power of a sovereign state to appropriate private property to particular uses for the purpose of promoting the general welfare.

Ibid.

Sup. Ct. Rep. 284; Iowa v. Rood, 187 U. S. 87, 47 L. ed. 86, 23 Sup. Ct. Rep. 49.

And, because the contention based on Federal law, though raised in the pleadings, was regarded by him as clearly unfounded, Sanderson, Ch. J., in Greely v. Townsend, 25 Cal. 604, denied an application for a citation upon a writ of error sued out for the purpose of a review of the judgment of the state court in the Supreme Court of the United States.

A Federal question may have been so explicity foreclosed by prior decisions as to afford no basis for a writ of error from the Supreme Court of the United States to a state court. Leonard v. Vicksburg, S. & P. R. Co. 198 U. S. 416, 49 L. ed. 1108, 25 Sup. Ct. Rep. 750.

A claim that the appointment of a receiver in a foreclosure suit deprives defendant of its property without due process of law does not raise a real, as distinguished from a fictitious, Federal question which will sustain a writ of error to a state court from the Supreme Court of the United States. St. Louis, C. G. & Ft. S. R. Co. v. Missouri, supra.

There is no color for a contention that a man is deprived of property without due process of law by enforcing against him a decree for alimony rendered in another state in a proceeding in which he appeared and was heard. Lynde v. Lynde, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555.

A party who seeks and is given opportunity in the state court to litigate the rights claimed by it cannot have the judgment reviewed in the Supreme Court of the United States on the ground that due process of law was denied because the litigation did not result successfully. Remington Paper Co. v. Watson, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456.

No Federal question is presented by a contention with respect to due process of law which is based simply upon a change by the state court of the established construction of a state statute. Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

A claim that a right under the Federal Constitution would be denied by the rendition of a decree of foreclosure by a state court, unless leave to file a supplementary answer should be granted, is so clearly without foundation, where the defense sought to be interposed is without merit, as to confer no jurisdiction on the Supreme Court of the United States of a writ of error to the state court. Sawyer v. Piper, 189 U. S. 154, 47 L. ed. 757, 23 Sup. Ct. Rep. 633.

A decision by a state supreme court that the granting of a nonsuit, instead of submitting the case to the jury, where the facts are admitted, does not deprive the plaintiff of due process of law, does not raise a Federal question which will entitle him to a writ of error from the Supreme Court of the United States. Apex Transp. Co. v. Garbade, 32 Or. 582, 62 L.R.A. 513, 52 Pac. 573, 54 Pac. 367, 882.

The misconception of the application of U. S. Const., 14th Amend., is so obvious in the contention in a state court that due process of law was denied by an indictment, where the objection was in effect to the technical sufficiency of the indictment in the ordinary administration of criminal law, and there is nothing special, partial, or arbitrary, or in violation of fundamental principles, in the law of the state in accordance with which the indictment was found, and as applied in passing upon its sufficiency, as to justify the Supreme Court of the United States in declining jurisdiction,—especially where the contention was first made on petition for rehearing. Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224.

The decision of a state court upholding the validity of a state statute providing for the infliction of the death penalty by the application of electricity is so plainly right, so far as any question of due process of law or of any other right secured by the Federal Constitution is concerned, that an application to the Supreme Court of the United States for a writ of error will be denied. Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930.

The contention that a state railroad com

The use of a thing is, strictly and properly, the employment of the thing in some manner; and this employment must be something more than a merely incidental public benefit.

Re Eureka Basin Warehouse & Mfg. Co. 96 N. Y. 42; Re Niagara Falls & W. R. Co. and Re Split Rock Cable Road Co. supra.

The attempted exercise of the power of eminent domain in this case can only be justified, if at all, on the ground that the right is broad enough to include those cases where the general public has only an indirect and qualified or constructive use of the property condemned, or, perhaps, properly, no use of any kind of the property condemned, but simply derives from its use, by and for a private person or corporation, some indirect advantages, as by the promotion of the general prosperity of the community.

Now, in order to bring this within that class of cases, the defendant in error must show that it is possessed of *each and all* of these three qualifications:

First. The general public must have a definite and fixed use of the property to be condemned,—a use independent of the will of the private person or private corporation in whom the title of the property when condemned will be vested; a public use which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the legislature.

Second. This public use must be clearly a

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missioner was deprived of his property without due process of law, or was denied the equal protection of the laws, by his temporary suspension from office by the governor of the state by proceedings taken in accordance with the state laws and Constitution is too unfounded in substance to confer jurisdiction on the Supreme Court of the United States, where there was not, by reason of the statute and the proceedings under it, a plain and substantial departure from the fundamental principles upon which the government is based. Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435.

And the claim that a forfeiture of the charter of a waterworks company for maintaining illegal rates by a decree of a state court after full hearing by all parties in a proceeding by quo warranto impaired the obligation of a contract, or deprived the company of its property without due process of law, or denied it the equal protection of the laws, because by its charter mandamus was prescribed as the remedy for illegal rates,—is so clearly without color of foundation as to give the Supreme Court of the United States no jurisdiction to review such decree. New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

There is no color of foundation for the claim that a Federal question arises from the forfeiture of a charter of a corporation for alleged violation of its terms, by a decree of a state court, made after a full hearing by all the parties in a proceeding in the nature of quo warranto, instituted in the name of the state by the attorney general, to whom the matter had been referred by the legislature to bring such suit or take such other action as he might think proper. Ibid.

There is no color of merit in the contention that a Missouri court, by dismissing the petition of a railway company—against which a judgment for wages and one in garnishment on account of the same indebtedness had been recovered respectively in Missouri and Illinois—to require the judgment creditors to interplead, denied full faith and credit to the Illinois judgment. Wabash R. Co. v. Flannigan, 192 U. S. 29, 48 L. ed. 328, 24 Sup. Ct. Rep. 224.

The unsubstantial character of the Federal contention may, perhaps, explain the course adopted in New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142, where the court thought that the ruling in Millingar v. Hartupee, 6 Wall. 258, 18 L. ed. 829, supra, necessitated the conclusion that, before the Supreme Court of the United States can take jurisdiction on the ground that the state court has upheld a state statute drawn in question as impairing the obligation of the contract, it should appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired. The court, therefore, declined jurisdiction despite the formal raising of the question, because it was of the opinion that no contract existed.

A somewhat analogous case is St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575, where a writ of error to review a judgment of a state court in a case in which the obligation of a contract with a municipality was claimed to have been impaired by a subsequent municipal ordinance was dismissed for want of jurisdiction on the ground that such ordinance was a mere denial of liability on the contract; and, hence, that there was no state legislation from the enforcement of which an impairment of the obligation of the contract did, or could, result.

And perhaps this is the best explanation for the holding in Mills v. St. Clair County, 8 How. 569, 12 L. ed. 1201, that the question whether the contract, if any, under which the owner of land holds under a grant in fee simple was violated by an abuse of the right of eminent domain under the sanction of a state statute, was not one which would confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court.

This principle must also account for the ruling in Price v. Pennsylvania R. Co. 113 U. S. 218, 28 L. ed. 980, 5 Sup. Ct. Rep. 427, that the contention in the state court

needful one for the public,—one which cannot be given up without obvious general loss and inconvenience:

Third. It must be impossible, or very difficult, at least, to secure the same public use and purposes in any other way than by authorizing the condemnation of private property. If any of these essentials is wanting the courts will declare the act of the legislature authorizing such condemnation of private property to be unconstitutional, because it would amount to taking private property for private, and not for public, uses.

Varner v. Martin, 21 W. Va. 534.

There can be no necessity for or propriety in the taking unless the rights of the public with reference to the property taken are to be enlarged, and that directly and actually, and not indirectly and constructively.

Evergreen Cemetery Asso. v. Beecher, 53 Conn. 551, 5 Atl. 353; Avery v. Vermont Electric Co. 75 Vt. 235, 59 L.R.A. 817, 98 Am. St. Rep. 818, 54 Atl. 179; Re Rhode Island Suburban R. Co. 22 R. I. 457, 52 L.R.A. 879, 48 Atl. 591; Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48, 103 Am. St. Rep. 438, 94 N. W. 379.

There is no right in the majority holders of a corporation to extinguish the right and stock of a dissenting minority by taking their shares at a valuation.

Clearwater v. Meredith (Ferguson v. Meredith 1 Wall. 25, 17 L. ed. 604; Stevens v. Rutland & B. R. Co. 29 Vt. 545.

So that, if a majority of the stockholders of the New Haven & Derby Railroad Company had undertaken to transfer the defendant's stock against his wishes, they could have been enjoined by him.

Clearwater v. Meredith (Ferguson v. Meredith) 1 Wall. 25, 41, 17 L. ed. 604, 608.

In the case at bar the real or actual taking was dependent upon a finding by a judge of the superior court of the state of Connecticut that the purchase would be for the public interest; which finding is an exercise of the judicial power which is vested in the superior court of the state of Connecticut, or a judge thereof, by the Constitution of that state.

New Milford Water Co. v. Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57; Norwalk

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that a postal clerk was, by reason of certain acts of Congress authorizing the appointment of postal clerks to be transported on mail trains without extra charge, a passenger within the meaning of a proviso in a state statute exempting passengers from the restrictions there made upon the right of recovery in negligence actions against railroad companies, did not present a Federal question.

And, apparently because of the obvious want of merit in the contention that a railroad corporation was deprived of its rights under U. S. Const. 14th Amendment, by enforcing a claim against it by mandatory injunction, instead of by another and summary form of action, the court, in Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344, dismissed, for want of jurisdiction, a writ of error to review a judgment of a state court compelling a railroad company to operate its road.

And this principle may explain decisions, which, like those in Yesler v. Washington Harbor Line, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190, and New Orleans v. New Orleans Waterworks Co. supra, have dismissed writs of error to state courts, sued out to review judgments adverse to the contention that property was taken without due process of law, because the Supreme Court could see that there had been no taking of property. A better explanation, however, would seem to be that suggested in the note to Burt v. Smith, ante, 121, to account for these and other decisions: viz., that, as the judgment below was not to be disturbed, it was of little importance whether that result was reached by dismissal or affirmance.

And see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513, on What adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts.

A bill averring that a railroad charter, and an exemption from taxation for a term of twenty years, contained therein, constitute a contract with the state, which is violated by subsequent legislation repealing the exemption, raises a Federal question for which there is sufficient color to sustain the jurisdiction of the Supreme Court of the United States on writ of error to a state court which has decided against the exemption. Gulf. & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26.

The question whether the California legislature could enact the act of April 2, 1866, ratifying conveyances made by the corporate authorities of the city of Monterey of pueblo lands confirmed to that city by the United States, and afterwards patented to it, its successors and assigns, is not so far unsubstantial as to justify dismissal of a writ of error to a state court. Monterey v. Jacks, 203 U. S. 360, ante, 220, 27 Sup. Ct. Rep. 67.

The court, in Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 L. ed. 266, 23 Sup. Ct. Rep. 170, refused to dismiss a writ of error to a state court in an action of ejectment, because it was of the opinion that the Federal questions involved in a decision of a state court adverse to a title claimed under a Spanish grant alleged to have been perfected under the treaty of February 22, 1819, with Spain, and a patent from the United States, in alleged confirmation of such claim, could not be considered frivolous and undeserving of notice.

Street R. Co.'s Appeal, 69 Conn. 576, 39 L.R.A. 794, 37 Atl. 1080, 38 Atl. 708; Betts v. Connecticut Indemnity Asso. 71 Conn. 751, 44 Atl. 65.

A taking for private use is unlawful; and if there can be any lawful taking under the statute, it is inseparably blended in the application with the unlawful one; and where the proceeding shows upon its face two distinct uses or purposes, one lawful and the other not, and which are so inseparably blended as not to be separable, it cannot be sustained.

7 Enc. Pl. & Pr. p. 527; Chicago & N. W. R. Co. v. Galt, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674.

If the statute, while permitting the private use of the property condemned, may also permit of a public use of it, the statute and the application are still invalid.

1 Lewis, Em. Dom. § 20.

As was stated by this court in Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251, it is a fundamental principle of American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner, —a principle which grows out of the essential nature of all free government.

If the purpose be public the taking may be outright, provided reasonable, certain, adequate provision is made at the time of the appropriation to ascertain and secure the compensation to be made to the owner.

Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641–649, 34 L. ed. 295–299, 10 Sup. Ct. Rep. 965; Sweet v. Rechel, 159 U. S. 380–399, 40 L. ed. 188–196, 16 Sup. Ct. Rep. 43; Western U. Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 540, 49 L. ed. 312, 25 Sup. Ct. Rep. 133. Any state enactment in violation of these principles is inconsistent with the due process of law prescribed by the 14th Amendment.

Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239–252, 49 L. ed. 462–467, 25 Sup. Ct. Rep. 251.

A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States; and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226–241, 41 L. ed. 979–986, 17 Sup. Ct. Rep. 581.

And the proposition that the state itself is the exclusive and final judge of what is a public use, so as to prevent any Federal question or Federal interference, is subject to this limitation: that if the use for which the property taken is a private one, the taking is not valid, just as much as though there were a taking for a public purpose without compensation.

Missouri P. R. Co. v. Nebraska, 164 U. S. 403–417, 41 L. ed. 489–495, 17 Sup. Ct. Rep. 130.

It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain, either as to the nature of the use or the necessity of the use of any particular property. For if the use be not public, or no necessity for the taking exists, the legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required.

Tracy v. Elizabethtown, L. & B. S. R. Co. 80 Ky. 259; Madisonville Traction Co. v. St. Bernard Min. Co. supra.

Mr. George D. Watrous argued the cause, and, with Mr. Edward G. Buckland, filed a brief for defendant in error:

The taking of the property of plaintiff in error will be for public use, and therefore not without due process of law.

Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301.

Property taken by a railroad company for the improvement of its facilities for public service, and declared by the highest state court to be for a public use, under a statute with an appropriate provision for compensation, is not taken without due process of law.

Cherokee Nation v. Kansas Southern R. Co. 135 U. S. 657, 34 L. ed. 302, 10 Sup. Ct. Rep. 965.

The statutes in question and the action taken thereunder do not impair the obligation of any contract within the meaning of art. 1, § 10 of the Constitution of the United States.

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718.

Mr. Justice McKenna delivered the opinion of the court:

This writ of error brings up for review a judgment of the supreme court of errors of the state of Connecticut, rendered in a proceeding under the statutes of that state for the condemnation of two shares of stock

owned by plaintiff in error in the New Haven & Derby Railroad Company.

There was a demurrer to the application, which was overruled by the advice of the supreme court of errors, the judgment on demurrer having been reserved, under the practice of the state, for the advice and consideration of that court. 77 Conn. 417, 59 Atl. 510. Upon the hearing judgment was rendered for defendant in error, which was affirmed by the supreme court of errors. 78 Conn. 1, 60 Atl. 740.

Defendant in error is the lessee of the New Haven & Derby Railroad Company, and has acquired all of the shares of stock of the latter road except the two shares owned by plaintiff in error.

That the lease and acquisition of stock are valid under the laws of the state is decided by the supreme court of errors, and it is sought by proceedings under review to [376] obtain the two *shares of stock owned by plaintiff in error, under §§ 3694 and 3695 of the Public Laws of Connecticut, which are as follows:

"Sec. 3694. In case any railroad company, acting under the authority of the laws of this state, shall have acquired more than three fourths of the capital stock of any steamboat, ferry, bridge, wharf, or railroad corporation, and cannot agree with the holders of outstanding stock for the purchase of the same, such railroad company may, upon a finding by a judge of the superior court that such purchase will be for the public interest, cause such outstanding stock to be appraised in accordance with the provisions of § 3687. When the amount of such appraisal shall have been paid or deposited as provided in said section, the stockholder or stockholders whose stock shall have been so appraised shall cease to have any interest therein, and on demand shall surrender all certificates for such stock, with duly executed powers of attorney for transfer thereon, to the corporation applying for such appraisal.

"Sec. 3695. If any person holding a minority of the shares of stock in any corporation referred to in § 3694 cannot agree with the railroad company owning three fourths of such stock for the purchase of his shares, he may cause the same to be appraised in accordance with the provisions of § 3687. When such appraisal has been made and recorded in the office of the clerk of the superior court of any county where such railroad company operates a railroad, and the certificates for such stock, with duly executed powers of attorney for transfer thereon, have been deposited with such clerk for such railroad company, such appraisal shall have the effect of a judgment against such company and in favor of the holder of such stock, and at the end of sixty days, unless such judgment is paid, execution may be issued."

The purpose of the acquisition of the stock is to enable defendant in error to improve the New Haven & Derby Railroad.

*It is contended by plaintiff in error (1) that the purpose for which the stock is sought to be obtained is not a public use. (2) That defendant in error has the power and authority to make the improvements mentioned in its application, which would be as advantageous as taking the stock. (3) The proceedings and statutes are in violation of the due process clause of the 14th Amendment to the Constitution of the United States, and impair the contract rights of plaintiff in error as stockholder of the New Haven & Derby Railroad Company, and his rights in, under, and by virtue of, the lease to defendant in error.

These contentions raise a Federal question and we cannot say that it is frivolous. The motion to dismiss is therefore denied.

(1) The power of the state to declare uses of property to be public has lately been decided in Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, and in the case of Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301. These cases exhibit more striking examples of the power of a state than the case at bar. In the first case the statute of the state permitted an individual to enlarge the ditch of another to obtain water for his own land; in the second case the statute authorized the condemnation of a right of way to transport ore from a mine to a railroad station. In the first case it was said that the public policy of the state, declaring the character of use of property, depends upon the facts surrounding the subject. In the second case it was said, commenting on the first, "it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances, would be left wholly to voluntary consent." The case at bar does not need the support of such broad principles. The ultimate purpose of defendant in error in the case at bar is the improvement of the New Haven & Derby Railroad, which "connects [we quote from the opinion of the supreme court of errors, 77 Conn. 419, 59 Atl. 511] at *New Haven, on the east, with four, and at its western terminals with two, important railroad lines owned by the plaintiff [defendant in error] and forms a link in an all-rail route between Boston and the West, which

ly one controlled by the plaintiff, only one of any kind controlled by hich goods can be transported with lespatch in all weathers and at all

In this purpose the public has st, and to accomplish it the court he statute. The court observed: lop this route so as best to serve ic interest requires the laying of l tracks on the New Haven & Der- ad and other extensive and very provements. The lessor company er means nor credit whereby this ected on advantageous terms. The could and will effect it, and at cost, if it can acquire the two out- shares of the stock of the lessee. owned by the defendant, who re- gree on terms of purchase."

e contract which it is contended ired is the lease of the New Haven Railroad by defendant in error. is for a period of ninety-nine m July 1, 1892, at a rental of 4 per annum upon the capital stock, with the payment of taxes, assess- d interest upon the funded debt. l with this contention there is nore general, to the effect that the pairs the contract rights of plain- ror as a stockholder of the New Derby Railroad Company. We do it necessary to give precise and discussion to these contentions. to us to be but parts or incidents tention that the stock is sought ate use. If they are not incidents hey are answered and opposed by of Long Island Water Supply Co. yn, 166 U. S. 685, 41 L. ed. 1165, t. Rep. 718. Whatever value the s the shares of stock will be rep- n their appraisement.

nt affirmed.

IAVEN & WESTVILLE RAIL- D COMPANY, Plff. in Err.,

v.

ITY OF NEW HAVEN.

S. C. Reporter's ed. 379-390.)

state court—scope of review— s not involved in the record.

Federal question respecting the f a paving assessment against a way company is not open on writ rom the Supreme Court of the ates to a state court, where the latter court based its ruling that the question had no standing in the case upon its view as to the scope of the application of the railway company for relief from the assessment, and of the pleadings, and it is not contended that such view is erroneous.

Constitutional law—impairing contract obligations—reserved power to amend or repeal street railway charter.

2. The imposition upon street railway companies by Conn. act of July 1, 1895, of the cost of paving and repaving that part of the streets occupied by their tracks, is a valid exercise of the power reserved by the state to alter or amend the charter of a street railway company, which required such company to keep the street between its tracks and 2 feet on each side in good and sufficient repair.

[No. 84.]

Argued November 5 and 6, 1906. Decided December 3, 1906.

IN ERROR to the Supreme Court of Errors of the State of Connecticut to review a judgment which, on a third appeal, affirmed the judgment of the Superior Court of New Haven County, in that state, establishing an assessment against a street railway company for the cost of paving between its tracks and 1 foot on each side. Affirmed.

See same case below, 1st appeal, 75 Conn. 442, 53 Atl. 960; 2d appeal, 77 Conn. 219, 58 Atl. 703; 3d appeal, 77 Conn. 667, 60 Atl. 651.

The facts are stated in the opinion.

Messrs. **George D. Watrous** and **Talcott H. Russell** argued the cause and filed a brief for plaintiff in error:

Amendments must not defeat or substantially impair the object of the grant, or any rights which have vested under it.

Inland Fisheries v. Holyoke Water Power Co. 104 Mass. 446, 6 Am. Rep. 247.

A clause in the charter of the corporation, allowing repeal or alteration, must not be interpreted as giving the legislature power to take the property of the railroad without compensation, and without due process of law. It does not remove such property from the protection of the law.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep 565; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; State v. Haun, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340.

Messrs. **Leonard M. Daggett** and **E. P. Arvine** argued the cause and filed a brief for defendant in error:

The special act of 1895, even though it be regarded as imposing a new burden, is constitutional.

As to reserved power to alter, repeal corporate charters—see eenwood v. Union Freight R. Co. J. S. 961.

Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Sioux City Street R. Co. v. Sioux City, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226; New York & N. E. R. Co. v. Bristol, 151 U. S. 567, 38 L. ed. 272, 14 Sup. Ct. Rep. 437; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; Pennsylvania College Cases (Jefferson College v. Washington & J. College) 13 Wall. 190, 20 L. ed. 550; Tomlinson v. Jessup, 15 Wall. 454, 21 L. ed. 204; 1 Morawetz, Priv. Corp. §§ 1093-1114.

Mr. Justice McKenna delivered the opinion of the court:

This case involves the validity of an assessment of $36,879, against plaintiff in error, for the cost of paving between its tracks and for 1 foot on each side thereof. Plaintiff in error operates a double track electric railway through West Chapel street in New Haven.

In pursuance of certain laws of the state the court of common council, through a con-
382 tractor, caused the street to be *paved with sheet asphalt. The work was begun in June, 1897, and completed in October or November of the same year. The city paid for the work, and, as provided by the statutes, assessed against plaintiff in error its proportion of the cost; to wit, $36,879. On appeal to the superior court for New Haven county, that court reduced the assessment to $5,823, and entered judgment against plaintiff in error for that sum.

The learned judge of the superior court expressed the contentions of the parties and his conclusions as follows:

"It is contended by the defendant that the assessment against the plaintiff is legal and valid under the act of 1895. Charter of New Haven, page 80.

"It is contended by the plaintiff that the act of 1895 is repealed by the act of 1899, Special Laws of 1899, p. 181; and if it is not repealed, the act of 1895 is unconstitutional and void.

"Inasmuch as I hold and rule that the act of 1895 is repealed by the act of 1899, it is unnecessary to pass upon the constitutionality of the former. The intention and effect of the latter act is to repeal the former. The last act covers the whole subject-matter of assessments for benefits and damages arising from paved streets, and provides expressly for the assessments of benefits and damages for pavements already constructed in West Chapel street.

"This conclusion entitles the plaintiff to relief from the assessment as laid by the amendment to the report of the bureau of compensation; and it is therefore ordered that the assessment be reduced to the su of $5,823, as recommended by the bure of compensation."

And the judgment of the superior co recited:

"The asphalt pavement in said street not a direct benefit to the plaintiff or i property, but, on the other hand, is a d rect damage to the plaintiff and its prope ty, inasmuch as it largely increases the e pense of repairing the roadway between th rails, and of general repairs to the trac ties, and structure of the railroad. Th only benefit to the railroad is such as 'r sults from the general improvement to th locality by reason of such pavement tend ing to increase the population and traffic i that section of the city. Such benefit doe not exceed the amount of $5,823."

Upon the appeal of the city the judgmen was reversed by the supreme court of er rors. 75 Conn. 442, 53 Atl. 960. On the re turn of the case to the superior court tha court rendered judgment dismissing the ap plication of plaintiff in error, and confirm ing and establishing the assessment o $36,879. The judgment was reversed by the supreme court of errors and the case re manded to the superior court, with direc tions to deduct from the assessment th cost of repair. In accordance with this di rection the superior court deducted from th assessment the sum of $3,590.85, and con firmed the assessment less such deduction This judgment was affirmed by the suprem court of errors.

The statutes under which the street wa paved and the assessment against plain tiff in error was made may be summarized as follows: Section 9 of the charter o plaintiff in error authorized the commo council of the city to establish such regula tions in regard to the railway as might b required for "paving . . . in and alon the street," and the company was require to conform to the grades then existing o thereafter established. And it was pro vided that the company should "keep the portion of the streets and avenues ove which their road or way shall be laid down with a space of 2 feet on each side of th track or way, in good and sufficient repai without expense to the city or town o New Haven, or the owners of land adjoin ing said track or way."

It was provided (§ 13) that the act migh be altered, amended, or repealed at th pleasure of the general assembly.

The charter was amended July 9, 189 and the company was authorized to la down its tracks and run its cars throug Chapel street, subject to the prohibitions o the 9th section of its original charter.

3 a general law was passed applica-
l railways, *by § 6 of which it was
l that every street railway was re-
o keep so much of the street or
as is included within its tracks,
pace of 2 feet on the outer side of
r rails, in repair, to the satisfac-
the authorities of the city, town,
gh which was bound by law to
such street or highway. More ex-
material, however, was not to be
than that used on the other parts
treet, except, however, for a space
t on each side of each rail, unless
expensive kind of material was re-
the order permitting the original
of such railway. If the railway
did not make such repairs after
was provided that the city might
d recover the expense thereof from
pany. And it was provided that
hould be deemed an amendment to
ters of all existing railway com-

y 1, 1895, an act was passed author-
d empowering the court of common
of the city to issue bonds for the
tion of permanent pavements, and
that all pavements laid by au-
of the act should be laid upon the
the street, and the city was em-
to collect the cost thereof from
ers of abutting land. The act con-
he following provisions as to rail-

ll streets occupied by the track, or
of any railway company or com-
said company or companies shall
sed and shall severally pay to the
cost of paving and repaving the
th, and 9 feet wide for each and
e of track of such railway or rail-
w existing, or that may hereafter
in any street of said city."
pplement to this act, passed in
1897, it was provided that, in es-
the cost of each square yard to
sed, the entire cost of laying the
t and the agreement to keep the
t in repair for a period not ex-
fifteen years should be considered.
t passed, April 28, 1899, provided
ssessment *upon the "grand list"
on the dollar for the paving of
to be expended only for the original
tion of pavements. There was a
for the laying of benefits and
, and a specification of limits of
ssment, varying with the kind of
used for paving. Assessment of
and damages for the pavement on
streets and on West Chapel street
uired to be laid in accordance with
ision of the act. Anyone aggrieved
by the assessment was given the right of appeal to the superior court. The act was declared to be an amendment to the charter of the city, and acts inconsistent therewith were repealed. The liability of street railway companies under the general laws was preserved.

The statutes and the assessments made under them are attacked by plaintiff in error as repugnant to the contract clause of the Constitution of the United States and the 14th Amendment.

1. The contention that the assessment was unconstitutional, even though the act of 1895 is constitutional, was commented on by the supreme court of errors on the second appeal as follows:

"Other claims new to the case are made, to the general effect that, as the street had been paved twenty-three years before, and the plaintiff had been assessed a portion of the cost thereof, and especially as the city had not shown the need of the new pavement as a means of repair, an unconstitutional use of the act would result if the present charge against the plaintiff was enforced. These claims have no foundation, either in the application or pleadings, and therefore have no standing in the case. We do not hesitate to say, however, without discussion, that in view of the pleadings, which did not put the defendant to the proof of the necessity of the new work as a means of repair and proper maintenance of the street, the facts indicated could not be held sufficient to accomplish the results claimed for them." [77 Conn. 224, 58 Atl. 705.]

Plaintiff in error contests this conclusion of the court, and *insists that the claims [386] were made on the first appeal of the case, and were overlooked by the court. It is questionable whether we may dispute the ruling of the supreme court of errors as to what the record in the case before it showed. But, granting we have such power, the record does not justify the assertion of plaintiff in error. A bill of exceptions was tendered by plaintiff in error to the superior court of certain claims and requests for rulings made by plaintiff in error, so that the questions arising thereon could be considered by the supreme court of errors in connection with those by the appeal of the city, and one of the claims was "that the repavement, if required at all, could only be required when it was found to be a satisfactory, or the most satisfactory, method of repair, which did not appear in this case."

The bill of exceptions stated also that the court did not rule upon the requests, because it was of opinion that the act of 1895, so far as it affects the pavement in

question, was repealed by the act of 1899, "and therefore decided against said requests." The court allowed the bill of exceptions, and expressed the reason as follows: "Being of the opinion that some, at least, of the questions arising upon the above bill of exceptions will arise again if a new trial of this cause should be had, the above bill of exceptions is hereby allowed, and ordered to be made a part of the record."

But this does not militate with the ruling of the supreme court of errors, nor indicate that the court did not consider the claims and requests of plaintiff in error. The ruling was based upon the application or pleadings, and it is not contended that the court's view of the application or pleadings was erroneous. Indeed, on the return of the case to the superior court an application was made by plaintiff in error for leave to amend its application by adding six paragraphs, setting out the grounds indicated above and other grounds why the assessment was an unconstitutional exercise of the authority in terms conferred by the act of 1895. The motion was denied on the ground (1) that the court had [387] no power to allow the amendment, and (2) that the amendment ought not, as a matter of discretion, to be allowed. The ruling was affirmed by the supreme court of errors. Justifying its ruling, the court denied that it thereby enforced a stringent rule of pleading, but said it enforced only the familiar one which confined the evidence to the matters pleaded, and that it was the duty of plaintiff in error to have made its application full enough to cover all the claims desired to be made.

(2) It will be observed that the superior court ruled that the act of 1895 was repealed by the act of 1899, and that the latter act covered the whole subject-matter of assessment for benefits and damages accruing from paved streets, and provided expressly for the assessments of benefits and damages for pavements which had been constructed on West Chapel street. The supreme court of errors reversed the ruling and sustained the contention of the city that the assessment should be made under the act of 1895. The court said: "This difference of view explains the situation disclosed by the case. The city bases its claim to the larger sum assessed by it upon the rule of recovery laid down in the act of 1895; the railway company claims to limit its liability at least to the smaller sum assessed by the court, upon the strength of the rule of assessment prescribed in the act of 1899, as interpreted by the court and accepted by the company." And after the construction and discussion of the provision of the two acts the court said: "The situation is, we think, susceptible of a simple explanation. The act of 1899 is to be taken in its natural meaning. Its provisions relating to assessments were intended to deal only with assessments of benefits and damages in favor of or against owners of land whose land adjoins the street in which the pavement is laid, by reason of some benefit or damage received affecting its value. The railway companies were not meant to be and are not to be regarded as within their scope. No change in the burden already upon them for the completed work was intended to be effected." [75 Conn. 446, 450, 53 Atl. 962, 963.]

So, deciding between the statutes, the court adjudged that the act of 1895 was [388] constitutional, on the ground that it was a proper exercise of the police power of the state, and on the ground that the act was an exertion of the power reserved by the state of altering, amending, or repealing the charter of the railway company. If either ground is tenable the judgment must be affirmed. We will place our decision on the second ground, as being of more local character, and because the exercise of the power expressed only comes under our review in its excesses.

We accept the decision of the supreme court of errors, that the statutes were intended as an exercise of the power of amendment reserved by the state, although plaintiff in error contends that such was not their intention. The court treated the question involved as primarily one on statutory construction, and "best approached," to use the language of the court, "by an examination of the statutory situation," and upon that examination pronounced its conclusion that "the act of 1895 was in effect an amendment of the plaintiff's charter," citing Bulkley v. New York & N. H. R. Co. 27 Conn. 479; New York & N. H. R. Co. v. Waterbury, 60 Conn. 1, 22 Atl. 439. Was such an amendment in excess of the power of the state? The limitation upon the power of amendment of charters of corporations has been defined by this court several times. It is said in one case that such power may be exercised to make any alteration or amendment in a charter granted that will not defeat or substantially impair the object of the grant or any rights which have vested under it, which the legislature may deem necessary to secure either the object of the grant or any other public right not expressly granted away by the charter. Holyoke Water-Power Co. v. Lyman, 15 Wall. 522, 21 L. ed. 149. In another case it was said that the "alterations must be reasonable; they must be

ade in good faith, and be consistent with e scope and object of the act of incorpo- ition. Sheer oppression and wrong cannot inflicted under the guise of amendment alteration." Shields v. Ohio, 95 U. S. 4, 24 L. ed. 359. Later cases have re- ated these definitions. *Sinking fund ses, 99 U. S. 720, 25 L. ed. 502; Green- ood v. Union Freight R. Co. 105 U. S. 1, 26 L. ed. 961; Close v. Glenwood Cem- ery, 107 U. S. 476, 27 L. ed. 412, 2 Sup. t. Rep. 267. In the Sinking Fund Cases, it as said that whatever regulations of a rporation could have been inserted in its arter can be added by amendment. All e cases are reviewed and their principles firmed in Stanislaus County v. San Joaquin K. River Canal & Irrig. Co. 192 U. S. 201, 1 L. ed. 406, 24 Sup. Ct. Rep. 241, and ter rates fixed by the board of super- ors of the county of Stanislaus under a w of the state sustained though the in- me of the company was reduced from 1½ cent per month to 6 per cent per annum. In the light of these cases let us exam- what the statutes of Connecticut require plaintiff in error. By its original char- (1862) plaintiff in error was required to p the street between its tracks, with a ce of 2 feet on each side of the tracks, good and sufficient repair. In the amend- nt of the charter in 1864 this obligation s retained, and also in the public acts 1893. In the act of 1895 the duty of ring and repaving was imposed on all lway companies. We shall assume, for purpose of our discussion, that the duty repair did not include the duty to pave d repave, although much can be said and es can be cited against the assumption. es the change and increase of burden up- the plaintiff in error come within the nitations upon the reserved power of the ate? Has it no proper relation to the jects of the grant to the company or any the public rights of the state? Can it said to be exercised in mere oppression d wrong? All of these questions must be swered in the negative. The company as given the right to occupy the streets. exercised this right first with a single ack, and afterwards with a double track. efore granting this right the state cer- inly could have, and reasonably could ave, put upon the company the duty of aving as well as of repairing. Such re- uirement would have been consistent with he object of the grant. It is yet consist- nt with the object of the grant. It is not nposed in sheer oppression and wrong, and he good faith of the *state cannot be ques- ioned. It is imposed in the exercise of one f the public rights of the state,—the estab- shment, maintenance, and care of its high- ways. The extent of this right is illustrated by West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518, and cases cited.

Judgment affirmed.

CHATTANOOGA FOUNDRY & PIPE WORKS and South Pittsburg Pipe Company, Plffs. in Err.,

v.

CITY OF ATLANTA.

(See S. C. Reporter's ed. 390-399.)

Monopolies—antitrust act—action for threefold damages.

1. The action for threefold damages for injury to "business or property" authorized by the antitrust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3202), § 7, in cases of violations of that act, may be maintained by a Georgia municipal corporation against the foreign corporate members of a combination forbidden by that act, where the municipality was led, by reason of the illegal combination, to purchase from an Alabama corporation at an excessive price the iron pipe needed for its waterworks system.

Limitation of actions—threefold damages under antitrust act.

2. The limitation of five years prescribed by U. S. Rev. Stat. § 1047, U. S. Comp. Stat. 1901, p. 727, for any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," does not apply to the action for threefold damages for injury to "business or property," authorized by the antitrust act of July 2, 1890, § 7, in cases of violations of that act.

Limitation of actions—threefold damages under antitrust act.

3. The ten years limitation prescribed by Tenn. Code, § 2776, for "all other cases not expressly provided for," rather than the

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NOTE.—On illegal trusts under modern antitrust acts—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

On contracts in restraint of trade—see notes to Leslie v. Lorillard, 1 L.R.A. 456; People v. North River Sugar Ref. Co. 2 L.R.A. 33; Bowman v. Phillips, 3 L.R.A. 632; Richardson v. Buhl, 6 L.R.A. 457; People ex rel. Peabody v. Chicago Gas Trust Co. 8 L.R.A. 500; National Benefit Co. v. Union Hospital Co. 11 L.R.A. 437; Western Wooden Ware Asso. v. Starkey, 11 L.R.A. 503; Lovejoy v. Michels, 13 L.R.A. 770; People v. North River Sugar Ref. Co. 9 L.R.A. 38; Oregon Steam Nav. Co. v. Winsor, 22 L. ed. U. S. 315; Fowle v. Park, 33 L. ed. U. S. 67; United States v. Trans-Missouri Freight Asso. 41 L. ed. U. S. 1008; Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co. 9 C. C. A. 666; and Cravens v. Carter-Crume Co. 34 C. C. A. 486.

one year limitation prescribed by § 2772 for "statute penalties," or the three years limitation prescribed by § 2773 for injuries to personal or real property, governs an action for threefold damages for injury to "business or property" brought under the antitrust act of July 2, 1890, § 7, in which the right of recovery is based on the excessive price for iron water pipe which a municipality was led to pay by reason of an illegal arrangement between the members of a trust or combination formed in violation of that act.

[No. 94.]

Argued November 9 and 12, 1906. Decided December 3, 1906.

IN ERROR to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Tennessee, in favor of plaintiff, in an action to recover threefold damages for injury to business or property, sustained by reason of a violation of the antitrust act. Affirmed.

The facts are stated in the opinion.

Mr. Frank Spurlock argued the cause, and, with Mr. Foster V. Brown, filed a brief for plaintiffs in error:

The declaration failed to state a cause of action under § 7 of the antitrust act.

Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607; Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; Mogul S. S. Co. v. M'Gregor, L. R. 15 Q. B. Div. 476, L. R. 21 Q. B. Div. 544, L. R. 23 Q. B. Div. 598; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 247, 44 L. ed. 136, 149, 20 Sup. Ct. Rep. 96; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Gibbs v. McNeeley, 60 L.R.A. 152, 55 C. C. A. 70, 118 Fed. 127; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454.

Defendant in error contracted with the Anniston Company for the purchase of pipe at an agreed price, fixed in the contract. This agreement was legal and binding upon the defendant in error under the laws of Georgia, where it was made and to be performed, notwithstanding the fact that the selling company was a party to a contract in restraint of trade, which was illegal under the laws of the United States.

National Distilling Co. v. Cream City Importing Co. 86 Wis. 352, 39 Am. St. Rep. 902, 56 N. W. 864; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

An action for three-fold damages under the act of Congress will only lie where there has been an actual, direct injury inflicted by something done in violation of the act (Minnesota v. Northern Securities Co. 194 U. S. 48, 70, 48 L. ed. 870, 880, 24 Sup. Ct. Rep. 598), and this injury must have been done to the person suing, in his business of interstate commerce, or in his property while the subject of interstate commerce.

The action of defendant in error is barred as for a statute penalty under the section of the Tennessee Code limiting the time for commencing such actions to one year.

Young v. Donaldson, 2 Heisk. 55; Merchants' Bank v. Bliss, 35 N. Y. 412; Stokes v. Stickney, 96 N. Y. 326; Beadle v. Kansas City, Ft. S. & M. R. Co. 48 Kan. 379, 29 Pac. 696, 51 Kan. 252, 32 Pac. 910; Ashland Sav. Bank v. Bailey, 66 N. H. 334, 21 Atl. 221; Baker Wire Co. v. Chicago & N. W. R. Co. 106 Iowa, 239, 76 N. W. 665; Atchison, T. & S. F. R. Co. v. Tanner, 19 Colo. 502, 36 Pac. 541; State Sav. Bank v. Johnson, 18 Mont. 440, 33 L.R.A. 552, 56 Am. St. Rep. 591, 45 Pac. 662; Ratican v. Terminal R. Asso. 114 Fed. 666; Davis v. Mills, 113 Fed. 678, 58 C. C. A. 123, 121 Fed. 703; Patterson v. Wade, 53 C. C. A. 1, 115 Fed. 770; Goodridge v. Union P. R. Co. 35 Fed. 35; Barry v. Edmunds, 116 U. S. 550, 565, 29 L. ed. 729, 734, 6 Sup. Ct. Rep. 501; Missouri P. R. Co. v. Humes, 115 U. S. 522, 29 L. ed. 466, 6 Sup. Ct. Rep. 110; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 588, 9 Sup. Ct. Rep. 207; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Atchison T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Illinois C. R. Co. v. Crider, 91 Tenn. 490, 19 S. W. 618.

If not barred as a statute penalty in one year, the action is within § 2747 of the Tennessee Code of 1858, providing that all wrongs and injuries to the property and person in which money only is demanded as damages may be redressed by an action on the facts of the case, and § 2773, providing that actions for injuries to personal or real property and actions for the detention or conversion of personal property (shall be commenced) within three years from the accruing of the cause of action.

The following cases will illustrate the character of injuries which, before the adoption of the Code of 1858, would support an action on the case:

The value of a chattel fraudulently paid for in counterfeit bank notes: Lane v. Hogan, 5 Yerg. 290. Loss in the value of an article bought on fraudulent representations; a debt lost, where the credit was given on false and deceitful representations

party was solvent and worthy of
llison v. Tyson, 5 Humph. 449;
Hancock, 3 Sneed, 434; Gwinther
ıg, 3 Head, 198. Generally the
r which redress was sought in ac-
he case involved no injury to any
articles or things, but the depre-
value of some right or estate by
alice, deceit, or other misconduct
damages was the legal compen-

ce the Code, the courts of Tennes-
recognized as actionable the same
njuries by trespass or wrong.
Doughty, 2 Tenn. 584; Louisville,
o. v. Guthrie, 10 Lea, 432; Ramsey
e, 3 Lea, 252; Rhea v. Hooper, 5
J. M. James Co. v. Continental
k, 105 Tenn. 1, 51 L.R.A. 255, 80
tep. 857, 58 S. W. 261.
er a statute creates a right, but
as to the remedy, the party en-
the right may resort to any com-
action which will afford him ade-
appropriate means of redress.
older v. Kansas, 83 Mo. 488; Tap-
rbes, 2 Allen, 24; Addison, Torts,
lton v. Ackley, 8 Cush. 97; Stearns
c & St. L. R. Co. 46 Me. 114; Pol-
ailey, 20 Wall. 520, 527, 22 L. ed.
Hightower v. Fitzpatrick, 42 Ala.

ases that follow, an action on the
held to be the proper remedy:
v. Howard, 7 R. I. 199, where the
oited was the building of a house
to specifications in fire limits de-
statute. The damage sued for by
was the increased danger from fire
joining building, increase of in-
ates, and decrease in rental value.
v. Haskell, 50 Me. 86, where a
llowed the recovery of double the
building defendant's part of a
fence.
. Northfield, 13 Pick. 99, 23 Am.
where the recovery authorized was
e damage caused by a defect in a

n v. Bedell, 22 N. H. 238, and Rus-
ouisville & N. R. Co. 93 Va. 325,
99, in both of which cases the dis-
was stated between suits on stat-
penalties of forfeiture, where the
as by an action in debt, and suits
ges consequent on a prohibited act,
e is the proper remedy.
ar distinction is made in Mount v.
58 Ill. 246, construing a statute
e owner liable in damages for al-
eep to run at large while affected
tagious disease. Case was held
proper remedy, and the action was

within the statute of limitations applicable to actions on the case.

Boyn v. Smith, 17 Wend. 88, for treble damages for using false weights.

The decision of the court of appeals is opposed to principles which have been long settled by this court.

Beatty v. Burnes, 8 Cranch, 98, 108, 3 L. ed. 500, 503; M'Cluny v. Silliman, 3 Pet. 270, 7 L. ed. 676.

Actions for liabilities arising out of duties imposed or acts prohibited by statutes have been held to be within the limitation imposed on all similar actions.

Metropolitan R. Co. v. District of Columbia, 132 U. S. 1, 13, 33 L. ed. 231, 236, 10 Sup. Ct. Rep. 19; Carrol v. Green, 92 U. S. 509, 23 L. ed. 738; Campbell v. Haverhill, 155 U. S. 610, 39 L. ed. 280, 15 Sup. Ct. Rep. 217.

The liabilities created by the statutes authorizing the organization of national banks, or for the infringement of patent rights, or rights founded on other acts of Congress, have never been treated as specialties, even though sometimes clearly in the nature of debt.

McDonald v. Thompson, 184 U. S. 72, 46 L. ed. 437, 22 Sup. Ct. Rep. 297; Cockrill v. Butler, 78 Fed. 680.

Messrs. **George Westmoreland and Churchill P. Goree** argued the cause, and, with Messrs. Linton A. Dean and J. L. Foust, filed a brief for defendant in error:

If it be true that plaintiff's cause of action was for the recovery of a statutory penalty, inasmuch as it was created by an act of Congress, therefore the statute of limitations of the state of Tennessee with reference to statutory penalties would not apply, but U. S. Rev. Stat. § 1047, U. S. Comp. Stat. 1901, p. 727, would apply.

Raymond v. United States, 14 Blatchf. 51, Fed. Cas. No. 11,596; Campbell v. Haverhill, 155 U. S. 610–614, 39 L. ed. 280, 281, 15 Sup. Ct. Rep. 217; Brady v. Daly, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62.

But the circuit court and the circuit court of appeals both held that plaintiff's suit was not a penal action.

Atlanta v. Chattanooga Foundry & Pipeworks Co. 64 L.R.A. 721, 61 C. C. A. 387, 127 Fed. 28.

The statute of limitations of three years has no application to this action.

Kirkman v. Philips, 7 Heisk. 222; State use of Henning v. Keller, 11 Lea, 401; Glenn v. Moore, 11 Lea, 256; Blocker v. Boswell, 109 Ga. 230, 34 S. E. 289; Bassett v. Bassett, 20 Ill. App. 543.

We cite the following cases on liability created by statute, and the statute of limitation applicable thereto:

Lane v. Morris, 10 Ga. 162; Atwood v.

Rhode Island Agri. Bank, 1 R. I. 376; Van Hook v. Whitlock, 2 Edw. Ch. 304; Shackelford v. Staton, 117 N. C. 73, 23 S. E. 101; Seymour v. Pittsburg, C. & St. L. R. Co. 44 Ohio St. 12, 4 N. E. 236.

Mr. Justice Holmes delivered the opinion of the court:

This is an action by the city of Atlanta (Georgia) against two Tennessee corporations, members of the trust or combination held unlawful in Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96. The object of the suit is to recover threefold damages for alleged injury to the city in its business or property, under § 7 of the act of July 2, 1890, chap. 647 (26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3202). The alleged injury is that the city, being engaged in conducting a system of waterworks, and wishing to buy iron water pipe, was led, by reason of the illegal arrangements between the members of the trust, to purchase the pipe from the Anniston Pipe & Foundry Company, an Alabama corporation, at a price much above what was reasonable or the pipe was worth. The purchase was made after a simulated [396] *competition, at a price fixed by the trust, and embracing a bonus to be divided among the members. The plaintiffs in error demurred to the declaration, and pleaded not guilty, and that the action accrued more than one year and more than three years before the suit was brought, relying upon §§ 2772 and 2773 of the Code of Tennessee, the eastern district of Tennessee being the district in which the suit was brought. The demurrer to the declaration was overruled and the plaintiff had a verdict and judgment in the circuit court. The verdict was for the difference between the price paid and the market or fair price that the city would have had to pay under natural conditions had the combination been out of the way, together with an attorney's fee. The judgment trebled the damages. It was affirmed by the circuit court of appeals, the plaintiffs in error having saved their rights at every stage. The discussions of the law took place before the jury trial was reached. They will be found in 64 L.R.A. 721, 61 C. C. A. 387, 127 Fed. 23, and 101 Fed. 900. For our purposes it seems unnecessary to state the case at greater length.

The facts gave rise to a cause of action under the act of Congress. The city was a person within the meaning of § 7 by the express provision of § 8. It was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property. The transaction which did the wrong was a transaction between parties in different states, if that be material. The fact that the defendants and others had combined with the seller led to the excessive charge, which the seller made in the interest of the trust by arrangement with its members, and which the buyer was induced to pay by the semblance of competition, also arranged by the members of the trust. One object of the combination was to prevent other producers than the Anniston Pipe & Foundry Company, the seller, from competing in sales to the plaintiff. There can be no doubt that Congress had power to give an *action for damages to an individual who suffers by breach of the law. W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307. The damage complained of must almost or quite always be damage in property, that is, in the money of the plaintiff, which is owned within some particular state. In other words, if Congress had power to make the acts which led to the damage illegal, it could authorize a recovery for the damage, although the latter was suffered wholly within the boundaries of one state. Finally, the fact that the sale was not so connected in its terms with the unlawful combination as to be unlawful (Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431) in no way contradicts the proposition that the motives and inducements to make it were so affected by the combination as to constitute a wrong. In most cases where the result complained of as springing from a tort is a contract, the contract is lawful, and the tort goes only to the motives which led to its being made, as when it is induced by duress or fraud.

The limitation of five years in Rev. Stat. §1047, U. S. Comp. Stat. 1901, p. 727, to any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," does not apply. The construction of the phrase "suit for a penalty," and the reasons for that construction, have been stated so fully by this court that it is not necessary to repeat them. Indeed, the proposition hardly is disputed here. Huntington v. Attrill, 146 U. S. 657, 668, 36 L. ed. 1123, 1128, 13 Sup. Ct. Rep. 224; Brady v. Daly, 175 U. S. 148, 155, 156, 44 L. ed. 109, 112, 113, 20 Sup. Ct. Rep. 62.

Thus we come to the main question of the case, namely, which limitation under the laws of Tennessee is applicable, the matter being left to the local law by the silence of the statutes of the United States. Rev. Stat. § 721, U. S. Comp. Stat. 1901, p. 581; Campbell v. Haverhill, 155 U. S. 610, 39 L.

15 Sup. Ct. Rep. 217. The material ns of the Tennessee Code are as fol- By article 2769 (Shannon, 4466) all ions are to be commenced within the prescribed, with immaterial excep- By article 2772 (Shannon, 4469) among others, for "statute penal- thin one year after cause of action ." By 2773 * (Shannon, 4470) "actions ries to personal or real property; for the detention or conversion of l property, within three years from ruing of the cause of action." By hannon, 4473) certain actions enumer- nd all other cases not expressly pro- r, within ten years after the cause n accrued." The circuit court of ap- ld that the case did not fall within 2773, but only within 2776, and e was not barred. Although the is appealed from, as this question the construction of local law, we but attribute weight to the opinion udge who rendered the judgment, in his experience upon the supreme f Tennessee. And although doubts ised by the argument, we have come with his interpretation in the main. the article touching actions for penalties, notwithstanding some for distinguishing it from Rev. 1047, which were pointed out, so his liability under the laws of the States is concerned we must adhere construction of it which we already lopted. The chief argument relied that this suit is for injury to person- rty, and so within article 2773. It ssed upon us that formerly the limi- addressed themselves to forms of that actions upon the case, such as ald have been, were barred in three ollowing Stat. 21 Jac. I. chap. 21, § hat when a change was necessitated doing away with the old forms of it is not to be supposed that the was intended to affect the substance, than the mode of stating the time Of course, it was argued also that s an injury to property, within the eaning of the words. But we are , on the whole, and in view of its sition with detention and conversion, phrase has a narrower intent. It that it has a somewhat broader han was intimated below, and that rongs are within it besides physical to tangible property. But there is iently clear distinction between in- property *and "injured in his busi- property," the latter being the lan- f the act of Congress. A man is in- his property when his property is diminished. He would not be said to have suffered an injury to his property unless the harm fell upon some object more definite and less ideal than his total wealth. A trademark, or a trade name, or a title, is property, and is regarded as an object capable of injury in various ways. But when a man is made poorer by an extravagant bill we do not regard his wealth as a unity, or the tort, if there is one, as directed against that unity as an object. We do not go behind the person of the sufferer. We say that he has been defrauded or subjected to duress, or whatever it may be, and stop there. It was urged that the opening article to which we have referred expressed an intention to bar all civil actions, but that hardly helps the construction of any particular article following, since the dragnet at the end, 2776, catches all cases not "expressly provided for." On the whole case we agree with the court below.

Judgment affirmed.

The CHIEF JUSTICE and Mr. Justice Peckham dissent.

FRANK W. GUY, W. T. Stanworth, et al.
v.
JOHN A. DONALD.

(See S. C. Reporter's ed. 399-408.)

Pilots—liability for each other's negligence.

Members of a voluntary, unincorporated pilot association, which, under the state laws, could neither select nor discharge its members, nor control or direct them in the performance of their duties as licensed pilots, whether technically partners or not, are not liable to the owners of piloted vessels for the negligence of each other because, instead of taking their fees as they earn them, such fees go into a common fund, and, after deducting expenses, are distributed to the several members according to the number of days they respectively were on the active list.

[No. 90.]

Argued November 8, 1906. Decided December 3, 1906.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fourth Circuit, presenting questions as to the liability of members of a pilot associa-

NOTE.—As to powers and liabilities of pilots—see note to Thompson v. The Great Republic, 23 L. ed. U. S. 55.

Associations as partnerships—see notes to Brown v. Stoerkel, 3 L.R.A. 430, and McCabe v. Goodfellow, 17 L.R.A. 204.

tion for the negligence of each other. Answered in the negative.

The facts are stated in the opinion.

Mr. D. Tucker Brooke and R. C. Marshall argued the cause and filed a brief for Guy et al.:

The question of partnership or no partnership is not to be settled by arbitrary tests; to attempt to do so is mischievous, resulting in error.

Beecher v. Bush, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785; Mechem, Elements of Partn. § 63, note, § 68.

What, then, in the absence of conclusive tests, is the essential element of copartnership? That the parties are mutually principals of and agents for each other.

Beecher v. Bush, supra.

In the case of pilot associations the individual pilots are not, and under our statutes cannot be, each the agent of the other members.

Our entire system of statutes on this subject show that the individual pilots are quasi-public officers; they derive their authority, not from the association, but from the state; their service is personal, and in its performance they represent only themselves, individually, with a responsibility only to the state; their right to compensation is given to them individually by statute, as officers of the state; their fees are fixed by statute as the fees of other state officers are; and there can be no copartnership in state officers.

Mechem, Elements of Partn. § 18.

These pilots are quasi-public officers, or, at least, invested with a personal trust; this being so, they cannot occupy the relation of principals for themselves and agents for their associates (without which a partnership cannot exist), for, under the principles of the common law, it is against public policy for a copartnership to exist in public offices.

Jons v. Perchard, 2 Esp. 507; Canfield v. Hard, 6 Conn. 180; Gaston v. Drake, 14 Nev. 175, 33 Am. Rep. 548; Seely v. Beck, 42 Mo. 143; Bowen v. Richardson, 133 Mass. 293; Gould v. Kendall, 15 Neb. 549, 19 N. W. 483; Warner v. Griswold, 8 Wend. 665; Wolcott v. Gibson, 51 Ill. 69.

The exact question here involved has been decided in our favor.

The City of Dundee, 103 Fed. 696, Affirmed in 47 C. C. A. 581, 108 Fed. 679; see also Mason v. Ervine, 27 Fed. 459.

Mr. Robert M. Hughes argued the cause and filed a brief for Donald:

There is such a community of profits and losses shown as to constitute the Virginia Pilot Association a partnership.

Fleming v. Lay, 48 C. C. A. 748, 109 Fed 952; Brown v. Higginbotham, 5 Leigh, 583, 27 Am. Dec. 618; Keasley v. Codd, 2 Car. & P. 408; Davison v. Holden, 55 Conn. 103, 3 Am. St. Rep. 40, 10 Atl. 515; Megovern v. Robertson, 116 N. Y. 61, 5 L.R.A. 559, 22 N. E. 398; Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 41 Am. Rep. 85, 8 N. W. 772; Jones v. Murphy, 93 Va. 214, 24 S. E. 825; Robbins v. Butler, 24 Ill. 387; Boston & A. R. Co. v. Pearson, 128 Mass. 445; Frost v. Walker, 60 Me 468; Kramer v. Arthur, 7 Pa. 165; Ricker v. American Loan & T. Co. 140 Mass. 346, 5 N. E. 284; Fleming v. Lay, 48 C. C. A. 748, 109 Fed. 955; Mechem, Elements of Partn. § 43, p. 31; Jones v. Fell, 5 Fla. 510.

Even if the pilot association is an illegal partnership, this can only be set up as among themselves, and is no answer to a suit against them by a third party.

Brett v. Beckwith, 3 Jur. N. S. 31; Mechem, Elements of Partn. § 20, p. 16; Hale v. Hale, 4 Beav. 369; United States v. Baxter, 46 Fed. 350.

The members of such a partnership are liable for each other's torts if in furtherance of the objects of the association, and if the fruits of their labors are received by the association.

Hyrne v. Erwin, 23 S. C. 226, 55 Am. Rep. 15; Fleming v. Lay, 48 C. C. A. 748, 109 Fed. 952; Mellors v. Shaw, 1 Best & S. 437; Ashworth v. Stanwix, 3 El. & El. 701; United States v. Baxter, supra; Cobb v. Abbot, 14 Pick. 289; Strang v. Bradner, 114 U. S. 555, 29 L. ed. 248, 5 Sup. Ct. Rep. 1038.

The pilots, if not a partnership, are jointly liable.

This is well settled by a number of decisions, as in case of joint owners of stage coaches.

Champion v. Bostwick, 18 Wend. 175, 31 Am. Dec. 376; Moreton v. Harden, 4 Barn. & C. 223; Wisconsin C. R. Co. v. Ross, 142 Ill. 9, 34 Am. St. Rep. 49, 31 N. E. 412; Cobb v. Abbot, supra; Steel v. Lester, L. R. 3 C. P. Div. 121; Connolly v. Davidson, 15 Minn. 519, 2 Am. Rep. 154, Gil. 428.

Mr. Justice Holmes delivered the opinion of the court:

This case comes before us on a certificate from the circuit court of appeals. It is a libel brought by the owners of a steamer against the members of the Virginia Pilot Association, and seeks to hold them all liable for the alleged negligence of Guy, one of their number. For the proceedings in the district court see 127 Fed. 228, 135 Fed. 429. The negligence occurred when Guy was acting as pilot of the steamer and led to a collision, for which the owners of steamer paid damages to the other vessel in order to end a suit. The questions certified are (1)

whether the members of *the association are partners on the facts set forth; (2) whether, if partners, they are liable to owners of piloted vessels for the negligence of each other; (3) whether, if not technically partners, they nevertheless are so liable.

The facts appear in the third article of the libel, which was excepted to, and in answers to interrogatories. They are as follows: The defendants are a voluntary, unincorporated association. By their agreement they take turns in boarding vessels required by law to take a pilot, and the fees, which otherwise would be paid to the pilot that boarded the vessel, are paid, except in cases of national vessels and disputed bills, to the association upon bills made out by it, and go into a common fund, from which the association pays the expenses of the business, including office rent. At the time of the accident the net profits were divided according to the number of days the several pilots were upon the active list. The constitution and by-laws of the association are exhibited and will be referred to. It is proper to add here a few words as to the Virginia law. By the Code of 1887 a board of commissioners is instituted to examine persons applying for branches as pilots; and the commissioners are given "full authority to make such rules as they may think necessary for the proper government and regulation of pilots licensed by them." § 1955. There are details as to the qualification and classification of pilots and their duties, including a requirement as to boats, of the pilot "or the company to which he belongs." § 1960. Acting as pilot without authority is punished. § 1963. Certain vessels are required to take the first pilot that offers his services or to pay full pilotage. § 1965. See § 1976. The amount of pilotage is fixed. § 1969. A personal liability is imposed for the amount, and it is to be noticed that it is a liability to the individual pilot employed. § 1978. The pilot's right to collect his account is fortified by a penalty. § 1979. The board of commissioners is authorized to decide any controversy between licensed pilots or between a pilot and the master, owner, or consignee of a vessel, and to enter judgment, *which, if for money, may be collected by a sheriff, etc. § 1980. But a judgment of suspension against a pilot is limited in general to between one and twelve months. § 1981. And the board cannot decide upon the liability of "a pilot" to any party injured by his negligence. § 1982. Pilots demanding or receiving more or less than their lawful fees are subjected to a forfeiture. § 1985. And certain further duties are prescribed.

The rules of the board of commissioners provide for the appointment by them of a supervisory board from the pilot association, to report to the president of the board of commissioners all cases of insubordination, breach of rules, etc., or any misdemeanor, afloat or on shore, on the part of any member of the association. A pilot desiring to go off duty for five days or longer is required to apply to the board of commissioners. Suspensions, by whomsoever ordered, are to be reported within twenty-four hours to the president of the board, and are to be acted upon by the board. All pilots are required to lookout for their turns, and each pilot is held responsible for whatever turn he may hold upon the list, officers being prohibited from having anything to do with the swapping of turns. It will be seen that the rules of the board, made under the authority of this statute, recognize the association, as does the Code, more vaguely, in § 1960, quoted above. The rules also recognize the substitution of turns for the free competition of which there are traces in the Code. The rules tacitly assume that every pilot is a member of the association. All punishment and suspension is in the hands of the board, except, as may be added here, that the by-laws of the association impose a fine of $10 for a first violation of the rules of the association, of $20 for a second offense, and provide that a third shall be reported to the board of pilot commissioners. Thus substantially the whole government of the association is in the hands of the board.

The questions certified very properly go beyond the question *of the existence of a [406] partnership. As long as the matter to be considered is debated in artificial terms there is a danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied. The substance of the case is this: A man who is responsible before the law is alleged to have committed a tort. It is proposed to make other men pay for it who not only have not commanded it or any act of which it was the natural consequence, but who would have prevented it if they could, and who have done what they could to prevent it, so far as the qualifications and employment of the pilot were not taken out of their hands by law. Why they should have to pay is the problem recurring through agency in all its forms, and whatever may be thought of some of the reasons that have been offered when the obligation has been imposed, it is certain that something more and better must be found than that the defendants divide the pay for the work that they have done, or that it is a convenience to the party aggrieved to discover a full purse to which to resort.

Whether the ground be policy or tradition, such a liability is imposed, as we all know, in many cases. When a man is carrying on business in his private interest and intrusts a part of the work to another, the world has agreed to make him answer for that other as if he had done the work himself. But there is always a limitation. It is true that he is not excused by care in selection or orders sufficient to secure right conduct, if obeyed. But when he could not select, could not control, and could not discharge, the guilty man, he does not answer for his torts. As a familiar instance, the servants of an independent contractor are not the servants of the contractee. The liability of a vessel when in the hands of a compulsory pilot is not put upon the ground that the pilot is the agent or servant of the owners, and therefore does not bear upon the question. The China (The China v. Walsh) 7 Wall. 53, 19 L. ed. 67. Now, we are not curious to inquire what form of test [407] shall be accepted as *the most profound for the existence of a partnership when considering liability for debts; but it is plain that when we are considering a liability for torts under the circumstances supposed no stricter or different criterion ought to be applied than in those cases where agency is the admitted ground. The rule, however stated, presses to the verge of general principles of liability. It must not be pressed beyond the point for which we can find a rational support.

So far as appears, the Virginia Pilot Association had no one of the three powers which we have mentioned. Seemingly it could neither select nor discharge its members, as certainly it could not control or direct them in the performance of their duties as pilots. To take the last first, it is quite plain that the Virginia Code contemplates a bond of mutual personal liability between the master of a vessel and the pilot on board. If we imagine such a pilot performing his duties within sight of the assembled association, he still would be sole master of his course. If all of his fellows passed a vote on the spot that he should change, and shouted it through a speaking trumpet, he would owe no duty to obey, but would be as free as before to do what he thought best. Then, as to the selection of members, there is no indication of any in the Code, the rules of the board, or the constitution and by-laws of the association. Nothing is said about membership, and the implication is plain that a condition of the association being permitted by the board to exist is that every pilot belongs to it. Probably, while it exists, a pilot scarcely would find it possible to compete from the outside. It is still plainer that the only provision for expul which would follow upon a pi deprived of his license. The asso no power over that.

All that there is upon which joint liability is that the pilots, taking their fees as they earn th plish substantially the same resu gling them in the first place, and paying expenses, distributing the on the active list according to t of *days they respectively have Apart from the possible slight between the proportion of days on list and days of active service, the same as if each pilot kep merely contributing to keep up office from which his bills might and where a few details of comm could be attended to. In the this suit hardly would have bee The distinction between it and bar is not great enough to jus ferent result. See The City of C. C. A. 581, 108 Fed. 670, 684 696. The second and third ques fied are answered "No."

UNITED STATES, App
v.
THEODORE DALCOUR et al.,
John Forbes, Deceased, et

(See S. C. Reporter's ed. 40

Appeal—from district court—land claim cases.

1. The appeal required by June 22, 1860 (12 Stat. at L. 8 188), § 11, to be taken to th Court of the United States if th the district court in certain p claim cases is against the Uni is "otherwise provided by law" meaning of the act of March Stat. at L. 828, chap. 517, U. S. 1901, p. 550), § 6, making the c of appeals the proper tribunal view of final decisions of the di in other than certain excepted include those where it is otherw ed by law.

Private land claims—rejection grant.

2. Judges of the superior co Florida were "public officers a authority of Congress" within t of the proviso in the act of Ju § 3, prohibiting commissioners bracing among the Florida which ought to be confirmed which has been heretofore presen

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NOTE.—On direct appeals fr circuit or district courts to the preme Court—see note to Gwi States, 46 L. ed. U. S. 741.

firmation before any board of commissioners or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means."

Private land claims—rejection of Spanish grant.

3. A judge of the superior court of West Florida, acting under the act of May 23, 1828 (4 Stat. at L. 284, 285, chap. 70), § 6, had jurisdiction to reject a Florida land claim because of an unwarranted alteration in the date of the registro which would save the grant from invalidity under the treaty of February 22, 1819 (8 Stat. at L. 258), with Spain, although a proviso to that section excluded him from taking cognizance of any claims annulled by the treaty.

Private land claims—rejection of Spanish grant.

4. Florida land claims which previously had been rejected as fraudulent or maintained by improper means, when the fraud addressed itself to avoiding the treaty of February 22, 1819, with Spain, as well as when the fraud related to some other fact material to the validity of the claims at the time when they were created, were covered by the proviso in the act of June 22, 1860, § 3, prohibiting commissioners from embracing among the claims which ought to be confirmed "any claim which has been heretofore presented for confirmation before any board of commissioners or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means."

Private land claims—rejection of Spanish grant.

5. The rejection of a Florida land claim by a judge of the superior court of West Florida, acting under the act of May 23, 1828, § 6, because of an unwarranted alteration of the date in the registro which would save the grant from invalidity under the treaty of February 22, 1819, with Spain, brings the case within the proviso of the act of June 22, 1860, § 3, prohibiting commissioners from embracing among the claims which ought to be confirmed "any claim which has been heretofore presented for confirmation before any board of commissioners or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means."

[No. 69.]

Argued October 30 and 31, 1906. Decided December 3, 1906.

APPEAL from the District Court of the United States for the Southern District of Florida to review a decree establishing title under a Spanish land grant. Reversed.

The facts are stated in the opinion.

Solicitor General Hoyt and Mr. Robert A. Howard argued the cause and filed a brief for appellant.

Mr. William A. Blount argued the cause, and, with Messrs. William W. Dewhurst and A. C. Blount, Jr., filed a brief for appellees:

While the act of June 22, 1860, under which this suit is brought, authorizes an appeal direct from the district court, yet it is clear that since the judiciary act of March 31, 1891, the appellate jurisdiction of this court is to be found only under the provisions of that act.

The Paquete Habana, 175 U. S. 685, 43 L. ed. 323, 20 Sup. Ct. Rep. 290; United States v. Rider, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983.

In order that this court may have jurisdiction because the construction or validity of a treaty is in question, a right, privilege, or immunity dependent on the treaty must be so set up or claimed as to require the circuit court to pass on the question of validity or construction in disposing of the right asserted.

Muse v. Arlington Hotel Co. 168 U. S. 431, 42 L. ed. 531, 18 Sup. Ct. Rep. 109.

Even if the grant in fact had been made by Spain within the time limited in the treaty, its efficacy would not have depended upon the treaty within the rule mentioned, for it would have been protected without the treaty, and could not be said to be dependent upon it.

Muse v. Arlington Hotel Co. 168 U. S. 436, 42 L. ed. 533, 18 Sup. Ct. Rep. 109.

The treaty is not even in the chain of title upon which the petitioners rely, for the grant does not depend for its efficacy upon the treaty, but upon the act of 1860. Without either the treaty or the act, the petitioners would have had a vested, perfected right by virtue of the grant itself, although it might have been unenforceable without legislation by Congress. Even if, however, it had been a part of the chain of title, that would not have been sufficient to give the court jurisdiction, unless it directly, and not incidentally, involved the construction of the treaty.

De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715.

Of course, the mere assertion by the United States of a contention on its part which no one controverts, and which did not enter into the decree below, can be no foundation for any jurisdiction of this court, for there must be a bona fide contention, the determination of which was necessary in the decision of the case. To change a little the application of the decisions of this court, there must be color for the assertion, and

the right must be substantially drawn in question.

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 26 L. ed. 936, 22 Sup. Ct. Rep. 691; Iowa v. Rood, 187 U. S. 92, 47 L. ed. 89, 23 Sup. Ct. Rep. 49; Sloan v. United States, 193 U. S. 614, 48 L. ed. 814, 24 Sup. Ct. Rep. 570.

By § 6 of the act of May 23, 1828 (4 Stat. at L. 284, chap. 70), under which the superior court of West Florida acquired jurisdiction of the case, the rules of decision were prescribed, and all claims were required to be received and adjudicated according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district judge and claimants by the act of May 26, 1824 (4 Stat. at L. 52, chap. 173). By § 2 of this act the court was required to determine the question of the validity of the title according to "the stipulations of any treaty and proceedings under the same."

United States v. Clarke, 8 Pet. 467, 8 L. ed. 1012; Smith v. United States, 10 Pet. 327, 9 L. ed. 442; United States v. Wiggins, 14 Pet. 350, 10 L. ed. 489.

Of course, in proceedings under any particular statute, the limitations prescribed by that statute must control.

Ely v. United States, 171 U. S. 224, 43 L. ed. 144, 18 Sup. Ct. Rep. 840; United States v. Arredondo, 6 Pet. 711, 8 L. ed. 554.

The court can neither change nor modify the act of Congress; and if it attempts so to do, its orders are void.

United States v. Curry, 6 How. 112, 113, 12 L. ed. 365, 366.

The superior court had jurisdiction to decide in the first place whether, according to the principles which the political departments of the government had established, this was a grant which the United States had stipulated to recognize. The moment the court found that the grant fell within the class which Congress and the President had expressly refused to recognize, that moment its jurisdiction, under the act of 1828, to inquire into and decide upon the validity of the claim, ceased. The United States would not have been bound by its judgment had it been adverse to them, and hence cannot claim the benefit of a favorable judgment.

Moore v. Albany, 98 N. Y. 408; United States v. Baca, 184 U. S. 653, 46 L. ed. 733, 22 Sup. Ct. Rep. 541.

By virtue of the validating power of the act of 1860 a right of enforcement has been created which was not in existence in 1830, and therefore could not have been adjudicated in that suit; such new right would not be barred by an adjudication as to the right previously vested. This is the doctrine of the general law of estoppel.

Southern P. R. Co. v. United States, 168 U. S. 49, 42 L. ed. 377, 18 Sup. Ct. Rep. 18; De Chambrun v. Schermerhorn, 59 Fed. 508; 24 Am. & Eng. Enc. Law, 2d ed. p. 777; Norton v. Huxley, 13 Gray, 290; Merriam v. Whittemore, 5 Gray, 317; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Utter v. Franklin, 172 U. S. 424, 43 L. ed. 501, 19 Sup. Ct. Rep. 183.

This is also the doctrine of decisions of this court upon the statute directly in point.

United States v. Lynde, 11 Wall. 632, 20 L. ed. 230; Dauterive v. United States, 161 U. S. 700, 25 L. ed. 869; United States v. Morant, 123 U. S. 342, 31 L. ed. 173, 8 Sup. Ct. Rep. 189.

If, upon the face of a record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel when pleaded, and nothing conclusive in it when offered as evidence.

Russell v. Place, 94 U. S. 610, 24 L. ed. 216; Fahey v. Esterley Mach. Co. 3 N. D. 223, 44 Am. St. Rep. 554, 55 N. W. 581.

And one who pleads an estoppel by judgment which might have proceeded upon two or more facts must prove that it was decided on the particular fact as to which he seeks to assert the estoppel.

Zoeller v. Riley, 100 N. Y. 107, 53 Am. Rep. 157, 2 N. E. 388; Lewis v. Ocean Nav. & Pier Co. 125 N. Y. 348, 26 N. E. 303; Dygert v. Dygert, 4 Ind. App. 280, 29 N. E. 491.

Mr. Henry R. Hatfield also argued the cause and filed a brief for appellees.

Mr. Justice Holmes delivered the opinion of the court:

This is a petition to establish title by a grant of about 1,850,000 acres of land in Florida, brought in the district court under the act of June 22, 1860, chap. 188, § 11 (12 Stat. at L. 85, 87), extended by act of June 10, 1872, chap. 421 (17 Stat. at L. 378), for three years from the last date. The petitioners had a decree in the district court, and the United States appealed to this court under the above mentioned § 11.

As the jurisdiction of this court is denied, we will dispose of that question before going further into the facts. The ground of the denial is that by § 6 of the act of March 3, 1891, chap. 517 [26 Stat. at L. 828, U. S. Comp. Stat. 1901, p. 550], the circuit court of appeals shall exercise appellate jurisdiction to review final decisions in the district courts, etc., in all cases other than those provided for in the preceding section, "unless otherwise provided by law." There is no doubt that this enactment was intended to supersede previous general provisions, and to establish in what cases and to what courts appeals might be taken from

the district courts. The Paquete Habana, 175 U. S. 677, 686, 44 L. ed. 320, 323, 20 Sup. Ct. Rep. 290. But the statute recognizes, in addition to the exceptions which it enumerates, others *where it is "otherwise provided by law." These words must be taken to refer to existing provisions, and not to be merely a futile permission to future legislatures to make a change. They do not save every existing provision, of course, or the act would fail of its purpose. But they save some. There is no case to which they can apply more clearly than one in which, by reason of its interest, the United States has manifested its will to submit to a judgment not sanctioned by its highest court. The language of § 11 is not the usual permission to appeal, such as existed in the act of March 3, 1851, chap. 41, §§ 9, 10 (9 Stat. at L. 632, 633), referred to in Gwin v. United States, 184 U. S. 669, 46 L. ed. 741, 22 Sup. Ct. Rep. 526. See also act of August 4, 1852, chap. 108, § 12 (10 Stat. at L. 99). It bears the unusual form of a positive requirement. "If the decree be against the United States, an appeal shall be entered to the Supreme Court of the United States." This is a provision based on a specific policy with regard to a certain class of claims. It is not a matter of general principle, but a special trust. See also act of May 23, 1828, chap. 70, § 9 (4 Stat. at L. 284, 286); May 26, 1824, chap. 173, § 9 (4 Stat. at L. 55). It stands on the same ground of peculiar importance that is the foundation of the express grant of certain direct appeals in § 5 of the act of 1891. Therefore, without considering whether the case at bar falls within the other exceptions, we are of opinion that the jurisdiction of this court given by § 11 of the act of 1860 remains unchanged.

The petition was filed on March 3, 1875, by the heirs of John Forbes. It alleged a grant to John Forbes by the Captain General of Cuba, on January 10, 1818; that is, a grant made in time to escape the 8th article of the treaty with Spain, of February 22, 1819 [8 Stat. at L. 258], declaring all such grants made after January 24, 1818, void. On the other hand, it invoked the earlier part of the same article, by which all grants made by the King of Spain or by his lawful authorities, in the territories ceded to the United States, before January 24, were to be confirmed to the same extent as if the territories had not been sold. On December 14, 1878, an amendment was allowed, *by which the grant was alleged to have been made to John Forbes & Company, a partnership consisting of Forbes, James Innerarity, and John Innerarity, and the Innerarity heirs were joined as parties. The rights of the United States, especially under the statute of limitations, were saved, and one question argued is whether this amendment could be allowed, when the time for bringing suit under the act of 1860 had expired. We shall not find it necessary to discuss this question, and shall assume, for the purposes of decision, that the amendment properly was allowed. United States v. Morant, 123 U. S. 335, 343, 31 L. ed. 171, 173, 8 Sup. Ct. Rep. 189. We shall assume that the proceeding is to establish the claim and appropriate the land to it, rather than to determine in detail the present holders of the claim. See Butler v. Goreley, 146 U. S. 308–310, 36 L. ed. 984, 985, 13 Sup. Ct. Rep. 84, 147 Mass. 8, 12, 16 N. E. 734; Pam-to-pee v. United States, 187 U. S. 371, 379, 380, 47 L. ed. 221, 225, 226, 23 Sup. Ct. Rep. 142.

It is unnecessary to trace all the vicissitudes of the case or to explain the delays. It is enough for our purposes to say that the parties reached an issue on May 29, 1903. A master was appointed and testimony was taken. At the hearing before him the United States put in the registro, or instrument of grant, which was in fact the original instrument, although the document of title under Spanish law is a copy delivered to the grantee, while the registro is retained by the government. It appeared upon inspection that this instrument had been altered in the date to January 10, from February 20, 1818, the true date making the grant void under the treaty. Thereupon the petitioners asked leave to amend by adding an allegation that the grant was made on February 20, 1818, but had been altered so that it purported to have been made on January 10. The result of this amendment was that, whereas the ground of recovery previously had been the treaty, now it was that the act of 1860 had given a right to recover in a case which the treaty put an end to in so many words. It abandoned the old ground, and that no longer could be relied upon if the amendment was allowed. The amendment, *although filed, was not formally allowed before the hearing, and after the hearing the United States filed a suggestion that it had been treated as allowed, and that an order should be made *nunc pro tunc* that the amendment had been allowed. Thereupon the order suggested was made, and an additional answer was filed, setting up the treaty and the limitation in the statutes. We do not perceive that the United States, by its course, lost its right to maintain that the amendment set up a new cause of action, which was barred by the limitation fixed by the statutes on the matter, and it urges that defense. Union P. R. Co. v. Wyler, 158 U. S. 285, 298, 39 L. ed. 983, 991, 15 Sup. Ct. Rep. 877.

It has been decided that a decree upon a

bill to have a patent declared void as forfeited under an act of Congress was a bar to a subsequent bill for the same purpose upon the different ground that the land was excepted from the grant as an Indian reservation. United States v. California & O. Land Co. 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266. In that case it was intimated that in general a judgment is a bar to a second attempt to reach the same result by a different *medium concludendi*. But while such a decision might be persuasive on the question whether the cause of action is the same or different for the purposes of amendment, it has been decided that an amendment could not be allowed in a Missouri district, changing the ground of recovery from the common law to the common law as modified by a Kansas statute, which did away with the defense that the negligence complained of was that of a fellow servant, in actions against railroads. Union P. R. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877. In the present case the change is a change in the allegations of fact, and was most material, because it necessarily was followed by a direct facing about with regard to the law. We shall not dispose of the case on this ground, but we think it proper to say that the difficulties in the way of upholding this amendment under the last-mentioned decision have not been removed from our minds.

The fundamental questions in the case are whether the petitioners are within the act [424] of 1860, and, if they are, whether *they are not met by an exception to which we shortly shall refer. The former we shall not decide. The statute by § 1 gave a petition to any persons "who claim any lands lying within the states of Florida, Louisiana, or Missouri, by virtue of grant . . . emanating from any foreign government, bearing date prior to the cession to the United States of the territory out of which said states were formed, or during the period when any such government claimed sovereignty or had the actual possession of the district or territory in which the lands so claimed are situated." And somewhat similar language is used in § 11, allowing a proceeding in the district court. There, however, the words apply only in case of a complete grant or concession and separation from the mass of the public domain prior to the cession to the United States, "or where such title was created and perfected during the period while the foreign governments from which it emanated claimed sovereignty over, or had the actual possession of, such territory."

The petitioners rely upon the words of the act and upon United States v. Morant, 123 U. S. 335, 31 L. ed. 171, 8 Sup. Ct. Rep. 189. That case involved lands in Florida, lying, like the present, east of the river Perdido, of which the grant was made before January 24, 1818, but the survey was not completed until afterwards. The court, while intimating that such a grant well might have been held to be saved by the treaty, pointed out that the treaty was not signed until February 22, 1819, or possession taken until July, 1822, and held that the case was within the act.

On the other hand, there must be, and it has been intimated that there are, some limits to the generality of the words of the statute. Certain large grants were expressly excepted from recognition by the King of Spain on his ratification of the treaty. The act was not intended to bring them to life. There is a strong argument that it no more was intended to validate all other grants expressly annulled, but rather that what was aimed at was the so-called disputed territory lying west of the river Perdido, of which a short and clear account *is to be found in United States v. Lynde, 11 [6] Wall. 632, 20 L. ed. 230. In the light of that history and in view of the alternative ground of decision kept open in United States v. Morant, if there are no other possible distinctions between that case and this, we also shall leave it open whether the intimation in that case is right, or whether the same justice was more accurate when he said, even with regard to grants of land in the disputed territory, that the intention of the act was to validate them, "subject, of course, to the express exceptions of the treaty of 1819 and the supplementary declaration of the King of Spain finally annexed thereto." United States v. Lynde, 11 Wall. 632, 646, 647, 20 L. ed. 230, 234, 235. See McMicken v. United States, 97 U. S. 204, 208, 209, 24 L. ed. 947, 948, 949; United States v. Clamorgan, 101 U. S. 822, 825, 826, 25 L. ed. 836 ("which passed by the Louisiana purchase," in 25 L. ed. 836).

However it may be as to the question upon which we have touched, we are of opinion that this case "comes within the purview of the 3d section of this act" (of 1860) in the words of § 11, in which event the petition is not allowed to be maintained. The 3d section provides for a division of the claims into three classes, numbers one and two containing claims which ought to be confirmed, number three containing those which ought to be rejected, "Provided, that in no case shall said commissioners embrace in said classes *number one* and *number two* any claim which has been heretofore presented for confirmation before any board of commissioners, or other public officers acting under authority

of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means." We are of opinion that this proviso excludes the petitioners, for the reasons which we proceed to state.

Before the act of 1860 was passed, an act of May 23, 1828, chap. 70, § 6 (4 Stat. at L. 284, 285), authorized the presentation of certain land claims in Florida to a judge of the superior court of West Florida, subject to the restrictions of the act of May 26, 1824, chap. 173 (4 Stat. at L. 52). This claim was presented by the Inneraritys for themselves and the Forbes heirs, and after [426] a *trial the prayer for confirmation of the title was "refused and rejected" for the reasons set forth in an opinion which is in the record before us. The general ground was the unwarranted alteration of the registro, which we have mentioned above. The judge was careful not to implicate the public officer, remarking that it would be unjust, when he was not a party and had no opportunity of defense. He also stated that it was not intended to implicate the parties in interest. But he pointed out that the inducement for an alteration of the registro a year or two after it was made, when the time became essential in consequence of the treaty, was obvious, and as plainly intimated that he considered the alteration fraudulent, as he could without saying so in words. He simply avoided finding by whom the alteration was made. He quoted the Curia Filipica for the invalidity of a public instrument which does not authenticate alterations by a salvado, and he concluded that the claimants had no legal grant prior to January 24, 1818. He relied upon the absence of a salvado, no doubt, but only as one of the grounds for deciding that the alterations were made without authority of law, and as leading to the further consequence that the instrument was void.

The United States set up this adjudication as a bar under the above-mentioned § 3. The petitioners make several replies. In the first place they contend that if a decision by a judge had been embraced within the proviso of § 3, he would not have been referred to in a slight, subordinate, and alternative way, under the general head of "other public officers acting under authority of Congress," after the specific mention of "any board of commissioners." The reason seems plain enough, however. The whole scheme of the earlier acts was that the claims should be presented to a board of commissioners. Act of May 8, 1822, chap. 129 (3 Stat. at L. 709); March 3, 1823, chap. 29 (3 Stat. at L. 754); February 8, 1827, chap. 9 (4 Stat. at L. 202). The right to present a claim to a judge came in only by way of a late supplement in a limited number of cases. Act of May 23, 1828, chap. 70, § 6 (4 Stat. at L. 284, 285). The judges referred *to were judges of a territorial court [427] established by the acts of March 30, 1822, chap. 13, § 6 (3 Stat. at L. 654), and March 3, 1823, chap. 28, § 7 (3 Stat. at L. 750). They were not district judges, and there was a certain ambiguity in their standing which was under discussion when the act of 1828 was passed, and has been discussed since. American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 243; McAllister v. United States, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949. It was most natural to use cautious words, but there was no other public officer which the act of 1860 is likely to have had in mind. No further argument seems necessary to justify the conclusion that these judges were embraced within the actual, as well as the literal, meaning of the words used.

In the next place, it is said the claim was not found to be fraudulent or maintained by fraudulent or improper means. With regard to this we think that we have said enough already. The claim was found to be based upon an alteration, the motive for which was pointed out, and to be maintained by a reliance upon the unlawful alteration. The main contention is that the judge had no jurisdiction to reject the claim on that ground, because, the moment that he decided the true date of the grant to be after January 24, he fell within a proviso of the act of May 23, 1828, chap. 70, § 6 (4 Stat. at L. 285), which excluded him from taking cognizance of any claims annulled by the treaty. United States v. Baca, 184 U. S. 653, 46 L. ed. 733, 22 Sup. Ct. Rep. 541. It appears to us that this argument rests on too narrow a view of the statutes and of what was done. The claim as presented was within the judge's jurisdiction. He had authority to inquire whether it was so in fact. The document produced by the petitioner showed a claim which he could decide upon the merits, for the copy did not disclose the alteration. When the registro was put in it appeared that the date had been altered. He still had authority to decide whether the alteration was valid. He decided that it was unlawfully and fraudulently made. It would be an extraordinary refinement to say that he had authority to decide that it was made unlawfully, but not to decide why it was unlawful. The illegality did not *fol- [428] low from the mere fact of alteration. Had there been a salvado it might have been valid. He could not come to his conclusion without some definite ground.

Moreover, while it is true that the limitation in § 6 of the act of 1828 in form provides that the act shall not be taken to

authorize the judge to take cognizance of any claim annulled by the treaty, etc., in substance it is addressed to maintaining the invalidity of the excluded claims. The jurisdiction of the judge was no different from what it would have been if the proviso had declared that nothing in the act should be taken to validate or to authorize the recognition of any claim which the treaty declared void. We are of opinion that the judge had authority to find the claim to be fraudulent and maintained by improper means.

The decree "rejected" the claim upon the grounds which we have stated, and an opinion was expressed that the grant was not merely annulled by the treaty, but void under Spanish law. But the objection remains to be answered that even if "reject" was a proper term for the decree in such a case, and even if the jurisdiction to reject included authority to find that the claim had been saved from the treaty by fraud, still there was no jurisdiction to pass upon its validity apart from the treaty, and that, therefore, the claim now may be set up since the act of 1860 has brought it to life. The proviso in § 3 of the act of 1860, it may be said, refers to claims rejected on their merits, when all the merits as admitted by that act were open. We are of opinion that there is no reason for thus artificially narrowing words that on their face include all cases. They include as well any claim which previously had been rejected as fraudulent or maintained by improper means, when the fraud addressed itself to avoiding the treaty, as when it related to some other fact material to the validity of the claim at the time when it was created. The fraud went to the merits of the case. For, by the meaning of the act of 1828, as just explained, the date of the grant was as material to the validity of the claim as [429] the authority of the Captain General *of Cuba to convey on behalf of the King. Therefore it is our opinion that the claim is barred by the decree, even if it could escape from the other objections upon which we have found it unnecessary to pass.

Decree reversed.

NEW YORK FOUNDLING HOSPITAL, Appt.,
v.
JOHN C. GATTI.

(See S. C. Reporter's ed. 429–441.)

Appeal—from territorial supreme court—in habeas corpus case.

A determination by the supreme court of the territory of Arizona in a habeas corpus case as to which custodian a child of tender years shall be committed to is not appealable to the Supreme Court of the United States under U. S. Rev. Stat. § 1909, as a case "involving the question of personal freedom" within the meaning of that section.

[No. 21.]

Argued April 26, 1906. Decided December 3, 1906.

APPEAL from the Supreme Court of the Territory of Arizona to review a judgment on a writ of habeas corpus, awarding the care and custody of an infant to the respondent. Dismissed for want of jurisdiction.

See same case below (Ariz.) 79 Pac. 231.

The facts are stated in the opinion.

Mr. D. Cady Herrick argued the cause, and, with Messrs. Charles E. Miller and William C. Trull, filed a brief for appellant.

Mr. Walter Bennett argued the cause, and, with Mr. A. A. Hoehling, Jr., filed a brief for appellee.

Mr. Justice Day delivered the opinion of the court:

The suit below was begun by a petition for a writ of habeas corpus, by the New York Foundling Hospital, a corporation of the state of New York, against John C. Gatti, to command *said Gatti to produce [434] the body of one William Norton, an infant, and to show by what right he held such infant under his custody and control.

The petitioner set out in substance that, by its charter, granted by the legislature of New York, it was authorized to receive and

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NOTE.—As to review by the United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

Federal questions as sustaining appellate jurisdiction of Supreme Court of the United States over territorial supreme courts.

I. Under act of March 3, 1885.
- a. In general.
- b. Questions respecting Federal law.
- c. Questions respecting Federal authority.
- d. Criminal cases.
- e. Habeas corpus cases.

II. Under statutes relating to particular courts.

I. Under act of March 3, 1885.

a. In general.

Congress, by the act of March 3, 1885 (23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572), § 2, invested the Fed-

er its charge, custody, and control of the age of two years or under, the city of New York, abandoned ed, and left in the crib or other of petitioner for foundlings, and uch children during infancy; that William Norton had come to it dling within the terms of its char- the petitioner, on the 4th of Octo- to October 2, 1904, had the care, ustody, and management of said at on or about the 1st of October, tioner placed the child in the home ain person in the town of Clifton, Graham, territory of Arizona, to nd cared for by the said person in temporarily, and at all times sub- e supervision of the petitioner and its officers and agents; that at such time the petitioner had officers and agents of trained experience at the town of Clifton, with instructions to supervise said child and the care and management of it while temporarily in the charge and care of the said person as aforesaid; that at all times the petitioner had the right at will to withdraw the child from the care and charge of the said person, and retain the custody thereof, and continue to keep the said child in pursuance of law under its care, charge, custody, and management during the term of its infancy, as aforesaid.

Upon information and belief it charges that thereafter, and on or about the 2d day of October, 1904, one John C. Gatti, residing at the said town of Clifton, his servants

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eme Court with appellate jurisdic- thout regard to the sum or value e," over the supreme court of the of Columbia and the territorial courts in "any case wherein is in- e validity of any patent or copy- in which is drawn in question the of a treaty or statute of or an au- xercised under, the United States." ntly, by § 15 of the circuit courts s act of March 3, 1891, the circuit appeals were given appellate jur- over the territorial supreme courts in which the decisions of such urts of appeals were made final by at act, when reviewing judgments s of the circuit or district courts. es are those in which jurisdiction pends solely upon citizenship or and those arising under the patent revenue laws, or the criminal laws; iralty cases. The effect of these s on the appellate jurisdiction of al Supreme Court over the terri- preme courts was considered in Keyser, 149 U. S. 649, 37 L. ed. 884, t. Rep. 960, where the court said: nothing to indicate an intention judgments and decrees of the su- rt of the territories should not be le of review in the class of cases in re was no appeal or writ of error cuit courts of appeals. The result as the acts regulating appeals or error from or to the supreme courts ritories to or from this court were led, except to the extent specified, l or writ of error lies to this court judgments or decrees of those cept in cases where the judgments rcuit courts of appeals are made nd this conclusion was approved Min. Co. v. Ripley, 151 U. S. ed. 80, 14 Sup. Ct. Rep. 236. ct that the act of March 3, 1885, s well to the supreme court of the of Columbia as to the territorial courts, makes it advisable to con- VII. of the note to United States Taylor v. Taft, post, 269, on the jurisdiction of the Federal Supreme Court over the District of Columbia courts. In this connection may also well be considered, as pointed out in the note to which reference has just been made, decisions construing somewhat similar language in the statutes regulating writs of error from the Supreme Court of the United States to state courts. See divs. IV. b, IV. c, in note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513, on What adjudications of state courts can be brought up for reveiew in the Supreme Court of the United States by writ of error to those courts.

Any inferences which could be drawn from the holding in The Coquitlam v. United States, 163 U. S. 346, 41 L. ed. 184, 16 Sup. Ct. Rep. 1117, that the district court of Alaska was a territorial supreme court so far as appellate jurisdiction to review its judgments was concerned, can no longer arise since the enactment of the act of June 6, 1900 (31 Stat. at L. 414, chap. 786), which, in § 504, specially provides for the review of the judgments of that court in the Federal Supreme Court.

The words "without regard to the sum or value in dispute," as used in the act of March 3, 1885, refer only to the amount, and a matter in dispute measurable by some sum or value in money is essential to the exercise by the Supreme Court of the United States of the appellate jurisdiction conferred by this section. Albright v. New Mexico, 200 U. S. 9, 50 L. ed. 346, 26 Sup. Ct. Rep. 210; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, ante, 78, 27 Sup. Ct. Rep. 1. See also infra, I. d, Farnsworth v. Montana, 129 U. S. 104, 32 L. ed. 616, 9 Sup. Ct. Rep. 253.

A suit in which the matter in dispute is the right of consignors to have a consignment shipped by a common carrier to its destination involves a valuable right, measureable in money, and therefore satisfies this requirement. New Mexico ex rel. McLean v. Denver & R. G. R. Co. supra.

But the liability to a fine on a judgment of ouster in quo warranto proceedings, or the possible effect of such judgment in subsequent litigation over the emoluments of the

and employees, unlawfully and with force and violence entered into the house of the said person, where, at the time of said unlawful entrance, the said child, William Norton, was, having been placed there as aforesaid, and forcibly, unlawfully and without right, took possession of said William Nor-
[435] ton, and removed him hence to *the custody of the said John Gatti. That the said child has ever since said day been in the custody and under the control of the said Gatti, and that the said child is now restrained of its liberty by the said Gatti, without the consent or license of the petitioner, and against its desire, intention, and protest, and in violation of its rights under the laws of the state of New York, of the United States, and of the territory.

The respondent made return and claimed to be entitled to the custody of the child named in the petition as the legally appointed guardian, duly qualified as such under letters of guardianship issued by the probate court of Graham county, Arizona. And further set forth in the return that the child in question is a white, Caucasian child; that the petitioner, on or about the 1st day of October, 1904, brought the said child to the territory of Arizona, and abandoned him to the keeping of a Mexican Indian, whose name is unknown to the respondent, but one financially unable to properly clothe, shelter, maintain, and educate said child, and, by reason of his race, mode of living, habits, and education, unfit to have the custody, care, and education of the child; that said

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office, does not make the matter in dispute in the quo warranto proceedings after the term of office has expired measureable by some sum or value in money, and, thus bring the judgment within the scope of this statute. Albright v. New Mexico, supra.

b. Questions respecting Federal law.

The validity of a statute, as these words are used in the act of Congress of March 3, 1885, refers to the power of Congress to pass the particular statute at all, and not to mere judicial construction, as contradistinguished from a denial of the legislative power. Linford v. Ellison, 155 U. S. 503, 39 L. ed. 239, 15 Sup. Ct. Rep. 179.

No question as to the validity of a Federal law arises, within the meaning of this statute, when its application to the cause only is involved. Cameron v. United States, 146 U. S. 533, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184.

The validity of a statute of the United States, within the meaning of this act, is drawn in question when the existence or constitutionality or legality of such statute is denied, and the denial forms the subject of direct inquiry. Linford v. Ellison, supra.

The decision of a territorial supreme court sustaining a territorial statute providing for verdicts by less than the whole number of jurors, on the ground that the organic act gave the territorial legislature unlimited legislative power, against the contention that the organic act as so construed violated the Federal Constitution, is reviewable in the Supreme Court of the United States, as the question involved was not the construction, but the validity, of the territorial act, and this depended upon the validity of the act of Congress giving it the scope which the court attributed to it. Springville v. Thomas, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717.

See also infra, I. c,—New Mexico ex rel. McLean v. Denver & R. R. G. Co. 203 U. S. 38, ante. 78, 27 Sup. Ct. Rep. 1; Maricopa & P. R. Co. v. Arizona, 156 U. S. 347, 39 L. ed. 447, 15 Sup. Ct. Rep. 391.

c. Questions respecting Federal authority.

The validity of an authority exercised under the United States is drawn in question within the meaning of this statute when the existence or constitutionality or legality of such authority is denied, and the denial forms the subject of direct inquiry. Linford v. Ellison, supra.

A controversy as to the constitutional right of a territorial legislature to pass a specified law under the broad legislative power conferred by U. S. Rev. Stat. § 1851, involves the validity of an authority exercised under the United States, within the meaning of this statute. New Mexico ex rel. McLean v. Denver & R. G. R. Co. supra.

A controversy as to the power of a territory, under its organic act, to tax that part of a railroad which is in an Indian reservation created by an act of Congress, presents a question as to the validity of an authority exercised under the United States, within the meaning of this statute. Maricopa & P. R. Co. v. Arizona, supra. See also supra, I. b,—Springville v. Thomas.

Mandamus proceedings to check an alleged usurpation, by bodies claiming to constitute the legislative assembly of a territory, of the legislative power conferred by Congress upon such legislative assembly, draw in question the lawful existence of these bodies and, consequently, the validity of an authority which they have assumed, as the legislative assembly, to exercise under the United States. Clough v. Curtis, 134 U. S. 361, 33 L. ed. 945. 10 Sup. Ct. Rep. 573.

A controversy as to the power of the governor of a territory, under its organic act, to appoint an auditor of public accounts in the place of one who has been elected as such officer, likewise presents a question respecting the validity of an authority exercised under the United States. Clayton v. Utah, 132 U. S. 632, 33 L. ed. 455, 10 Sup. Ct. Rep. 190.

The validity of such an authority is not so drawn in question because it was contended that the territorial court misconstrued

, to whom petitioner is alleged to ıbandoned said child, voluntarily sur- ed it to certain persons, who there- laced it in the care, custody, and con- respondent, who is a fit person for urpose, and it will be to the best in- of the child that he be permitted to with the respondent, whose purpose tention it is to rear, maintain, edu- nd provide for said child as though his own.

petitioner traversed the return, and that the said minor was in the care, , and control of the respondent by of letters of guardianship, and al- hat the said minor has been in the ustody, and control of respondent y force and violence, and without authority of law or of any person legally authorized to place the child in the custody of the respondent.

The case came to trial on the issues of fact raised in the petition, return, and traverse thereof by the petitioner, and *the [436] testimony having been heard in open court, a final order was made, adjudging the said William Norton to be a minor of the age of two and one-half years, and that his best interests required that the said John C. Gatti have the care, custody, and control of said infant, who was thereupon remanded to the care, custody, and control of said respondent.

In the view which we take of the jurisdiction of this court to entertain the appeal in this case, it is unnecessary to con-

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the statute upon which the prosecu- is based, and acted beyond the au- which it conferred. Snow v. United 118 U. S. 346, 30 L. ed. 207, 6 Sup. . 1059. Jurisdiction could have been here, because the case was a crim- . See infra, I. d.

ision of a territorial supreme court truing the organic law and the scope authority of the legislature as to a small village with extensive cor- limits the right, under its charter, farming lands for municipal pur- they lie outside the platted portion far removed that the owner will no benefit from the municipal gov- . does not involve the validity of an y exercised under the United States, be reviewable in the Supreme Court United States. Linford v. Ellison, S. 503, 39 L. ed. 239, 15 Sup. Ct. 9.

uthority exercised under the United within the meaning of this statute, thority exercised or claimed in favor of the parties to the cause, the va- of which was put in issue on the the cause, and, hence, does not in- n authority exercised by the United in removing a fence inclosing public pursuant to the judgment sought viewed. Cameron v. United States, S. 533, 36 L. ed. 1077, 13 Sup. Ct. 1.

d. Criminal cases.

s contended in Farnsworth v. Mon- 9 U. S. 104, 32 L. ed. 616, 9 Sup. 253, that because the act of March conferred appellate jurisdiction upreme Court of the United States supreme courts of the territories involving the validity of a patent ight, or a treaty or statute of, or ority exercised under, the United without regard to the sum or value te," a writ of error would lie in a case involving such a question; but t held the contrary, saying that ute clearly required that there be some pecuniary matter in dispute measurable by some sum or value. See also supra, I. a,—Albright v. New Mexico, 200 U. S. 9, 50 L. ed. 346, 26 Sup. Ct. Rep. 210; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, ante, 78, 27 Sup. Ct. Rep. 1. And see infra, II.,—Watts v. Washington, 91 U. S. 580, 23 L. ed. 328; Snow v. United States, supra; New v. Oklahoma, 195 U. S. 252, 49 L. ed. 182, 25 Sup. Ct. Rep. 68.

e. Habeas corpus cases.

Provision for a review in the Supreme Court of the United States by writ of error or appeal of decisions of the territorial supreme courts upon writs of habeas corpus involving a question of personal freedom was made by U. S. Rev. Stat. § 1909. Snow v. United States, supra.

This provision was not repealed by the act of March 3, 1885, regulating appeals from the territorial supreme courts. Gonzales v. Cunningham, 164 U. S. 612, 41 L. ed. 572, 17 Sup. Ct. Rep. 182.

It was under this provision that the appeal in NEW YORK FOUNDLING HOSPITAL v. GATTI was attempted.

Except for this provision the rule would be the same as in cases coming up from the District of Columbia courts; see div. V. in note to United States ex rel. Taylor v. Taft, post, 269.

II. Under statutes relating to particular courts.

The act of March 3, 1885, has been so superseded by the admission of the various territories as states, as now to apply only to Arizona and New Mexico.

Special provisions relating to particular territorial supreme courts have existed, and, in a few instances, now exist.

A writ of error from the Supreme Court of the United States to the supreme court of the territory of Utah was authorized by the act of June 23, 1874 (18 Stat. at L. 253, chap. 469), § 3, in criminal cases in which the accused was sentenced to capital punishment or convicted of bigamy or polyg-

sider the elaborate findings of fact made in the supreme court of Arizona as the basis of its order, further than they bear upon the question of jurisdiction to entertain this appeal.

It was found that the children were taken into the territory by the representatives of the foundling hospital, to remain there and be placed in suitable homes in Arizona; but, by imposition practised upon the agents of the society, the children were distributed among persons wholly unfit to be intrusted with them, being, with one or two exceptions, half-breed Mexican Indians of bad character. That thereupon a committee was appointed from the citizens resident of the vicinity, who visited the homes of the persons having possession of the children, stating to them that they had been appointed by the American residents to take possession of the children, who were then voluntarily surrendered by such persons. The children were taken charge of by certain good women, and afterwards the child William Norton was given to the respondent, who has since had his care, custody, and control. This was done without the consent of the society or its agents. Afterwards letters of guardianship were issued to the respondent by the probate court of Graham county, Arizona. The petitioner took an appeal from the order granting the letters of guardianship to the district court of the county. Pending this appeal the petition for the writ of habeas corpus was filed.

The court, acting upon the principle that the best interests of the infant are controlling, awarded the care and custody thereof to the respondent (79 Pac. 231) and the petitioner took an appeal to this court.

*The jurisdiction of the supreme court of the territory to issue the writ of habeas corpus is not called in question in this case.

We are met at the threshold with an objection to the appellate jurisdiction of this court. The appeal in such cases is allowed under cover of § 1909, Rev. Stat. Gonzales v. Cunningham, 164 U. S. 612, 41 L. ed. 572, 17 Sup. Ct. Rep. 182. That section provides:

"Sec. 1909. Writs of error and appeals from the final decisions of the supreme court of either of the territories of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana, and Wyoming shall be allowed to the Supreme Court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by the oath of either party, or of other competent witnesses, exceeds one

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amy. Snow v. United States, 118 U. S. 346, 30 L. ed. 207, 6 Sup. Ct. Rep. 1059.

This provision did not authorize such a writ of error to review a conviction under the act of March 22, 1882 (22 Stat. at L. 30, chap. 47. U. S. Comp. Stat. 1901, p. 3633), § 3, of cohabiting with more than one woman. Snow v. United States, supra.

Special provision was made by the Revised Statutes for a review in the Supreme Court of the United States of the decisions of the supreme court of Washington territory "in all cases where the Constitution of the United States or a treaty thereof or acts of Congress are brought in question." Snow v. United States, supra.

The intimation in Watts v. Washington 91 U. S. 580, 23 L. ed. 328, that a criminal case involving such a question could be so reviewed, was held to be *obiter* in Farnsworth v. Montana, 129 U. S. 104, 32 L. ed. 616, 9 Sup. Ct. Rep. 253. See this case as discussed supra, I. d.

Under a similar provision defining the appellate jurisdiction of the Supreme Court of the United States over the supreme court of the territory of Oregon, the Federal question must have been raised and decided in the court below, and must so appear in the record. Lownsdale v. Parrish, 21 How. 290, 16 L. ed. 80.

The appellate jurisdiction of the Federal Supreme Court over the circuit courts was, by the act of May 2, 1890, § 9, made the measure of the appellate jurisdiction of the former court over the supreme court of Oklahoma territory, provided the jurisdictional amount was involved. New v. Oklahoma, 195 U. S. 252, 49 L. ed. 182, 25 Sup. Ct. Rep. 68.

Lack of statutory authority precluded any such review in capital cases. Ibid.

The jurisdiction of the Supreme Court of the United States to review judgments of the courts of the territory of Hawaii is, under the act of April 30, 1900 (31 Stat. at L. 141, chap. 339), § 86, to be measured by the power conferred upon the former court to review judgments of state courts. Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123.

See note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513, on What adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts.

The dismissal, on motion, of a writ of error to the supreme court of the territory of Hawaii, which is governed by the principles controlling writs of error to state courts, will be ordered instead of granting a motion to affirm, where the subject-matter of the controversy is not inherently Federal, and the only Federal question raised has been so explicitly decided by the Supreme Court of the United States in accordance with the ruling of the lower court as to foreclose further argument on the subject. Equitable Life Assur. Soc. v. Brown, supra.

d dollars, except that a writ of er-
appeal shall be allowed to the Su-
Court of the United States from the
of the supreme courts created by
le, or of any judge thereof, or of the
courts created by this title, or of
ge thereof, upon writs of habeas cor-
olving the question of personal free-

question is, therefore, is this a writ
as corpus "involving the question of
l freedom?" That this section of
tute does not permit appeals from
s in which the writ is issued is mani-
the use of language in the act spe-
limiting the right of review in this
o cases of writs which involve the
n of personal freedom.

ief consideration of the history and
of the writ will, we think, make
t the purpose of Congress in using
strictive language giving the right
al. The writ is usually granted in
o institute an investigation into the
imprisonment or wrongful detention
alleging himself to be unlawfully
ed of his liberty.

jurisdiction is conferred to enable
se of restraint *to be inquired into,
person imprisoned or wrongfully de-
of freedom restored to liberty.

subject was discussed by Mr. Justice
in the case of Re Burrus, 136 U. S.
L. ed. 500, 10 Sup. Ct. Rep. 850, in
it was held that a district court of
ited States has no authority to is-
writ of habeas corpus to restore an
to the custody of its father when
ully detained by its grandparents.

nded to that case, and printed by
of the members of the court, is an
tive opinion by Judge Betts, deliv-
the case of Re Barry, United States
court for the southern district of
ork, in which he reached the conclu-
hat a circuit court of the United
had no jurisdiction in habeas corpus
rtain a controversy as to the custo-
a child when the father sought to
the mother to deliver it to him,—a
n not decided in Re Burrus. In the
of the discussion the learned judge
out the origin of the writ as a means
f from arrest or forcible imprison-
and its growth in later use as a
of determining the custody of chil-

re is no reason to doubt that origi-
the common-law writ was granted
in cases of arrest and forcible im-
ent under color or claim of warrant

"As late as 2 James II. the court expressly denied its allowance in a case of detention or restraint by a private person (Rex v. Drake, Comb. 35; 16 Vin. Abr. 213), and the habeas corpus act of Charles II., which is claimed as the Magna Charta of British liberty, has relation only to imprisonment on criminal charges (3 Bacon, Abr. 438, note).

"It is not important to inquire at what period the writ first was employed to place infant children under the disposal of courts of law and equity. This was clearly so in England, anterior to our Revolution (Rex v. Smith, 2 Strange, 982; Rex v. Delaval, 3 Burr. 1434; Blissets's Case, Lofft. 748), and the practice has been fully confirmed in the continued assertion of the authority by those courts unto the present day (King v. De Manneville, 5 East, 221; De Manneville v. *De Manneville, 10 Ves. Jr. 52; Ball v. [439] Ball, 2 Sim. 35; Ex parte Skinner, 9 J. B. Moore, 278; King v. Greenhill, 4 Ad. & El. 624); and this indifferently, whether the interposition of the court is demanded by the father or mother (4 Ad. & El. 624, ubi supra; 9 J. B. Moore, 278, ubi supra.

. . . . . .

"The authority to take cognizance of the detention of infants by private persons, not held under claim or color or warrant of law, rests solely in England on the common law. It is one of the eminent prerogatives of the Crown, which implies in the monarch the guardianship of infants paramount to that of their natural parents. The royal prerogative, at first exercised personally *ad libitum* by the King (Kendall v. United States, 12 Pet. 630, 9 L. ed. 1223), and afterwards, for his relief, by special officers, as the Lord High Constable, the Lord High Admiral, and the Lord Chancellor, in process of time devolved upon the high courts of equity and law, and in them this exalted one, of allowing and enforcing the writ of habeas corpus ad subjiciendum, became vested as an elementary branch of their jurisdiction. In the performance, however, of this high function in respect to the detention of infants by parents, etc., the court or judge still acts with submission to the original principle, out of which it sprang, that infants ought to be left where found, or be taken from that custody and transferred to some other, at the discretion of the prerogative guardian, and according to its opinion of their best interest and safety."

It was in the exercise of this jurisdiction as *parens patriæ* that the present case was heard and determined. It is the settled doctrine that in such cases the court exercises a discretion in the interest of the child to de-

termine what care and custody are best for it in view of its age and requirements. Such cases are not decided on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but upon the court's view of the best interests of those whose welfare requires that they be in custody of one person or another. In such cases the question [440] *of personal freedom is not involved except in the sense of a determination as to which custodian shall have charge of one not entitled to be freed from restraint. As was said by Sharkey, Ch. J., in [Foster v. Alston] 6 How. (Miss.) 472:

"An infant is not entitled to his freedom; an adult is. When a habeas corpus is granted to an adult, the object is to inquire whether he is legally restrained of his liberty; because if he is not, he must be set free, for the plain reason that by law he is entitled to his freedom. But if the court is also to set the infant free, they give him a right to which he is not entitled, and deprive the parent or guardian of a right to which he is entitled; to wit, the custody of the infant."

We think that such considerations as these induced Congress to limit the right of appeal to this court in habeas corpus cases. The discretionary power exercised in rendering the judgment, the ability of local tribunals to see and hear the witnesses and the rival claimants for custody of children, induced, in our opinion, the denial of appeal in such cases as the one at bar, as distinguished from those of a different character, where personal liberty is really involved, and release from illegal restraint—a high constitutional and legal right, not resting in the exercise of discretion—is sought, in which an appeal is given to this court.

In the present case there was no attempt to illegally wrest the custody of the child from its lawful guardian while temporarily in the territory of Arizona. The society voluntarily took the child there with the intention that it should remain. Through imposition the child was placed in custody of those unfit to receive or maintain control over it, and, as above stated, came into the custody and possession of the respondent.

The child was within the jurisdiction of the court under such circumstances that rival claimants of the right of custody might invoke the jurisdiction of a competent court of the territory to determine, not the right of personal freedom, but to which custodian a child of tender years should be committed. Woodworth v. Spring, 4 Allen, 321.

[441] *We do not think that the case comes within the provisions of § 1909, permitting an appeal to this court only in c volving the question of personal fre

The appeal will be dismissed for jurisdiction.

Mr. Justice Brewer took no part decision of this case.

HENRY A. CRANE, Plff. in]
v.
CORNELIUS F. BUCKLEY,]
Spreckles, and Timothy Hopkin in Err.

(See S. C. Reporter's ed. 441-4

Appeal—supersedeas—prosecuting t

A party who, on appeal fro cree for the recovery of possession property unless the balance of the p price should be paid before January secures an extension of the time f payment until November 1, 1899, prosecuted his appeal to effect, wit meaning of a supersedeas bond to the adverse party from loss in the possession of the premises, as to any recovery on such bond for the occupation of the property betwee dates.

[No. 58.]

Argued and submitted October 2 Decided December 3, 1906.

IN ERROR to the United States Court of Appeals for the Ninth to review a judgment affirming, on ond writ of error, a judgment of t cuit Court for the Southern District ifornia in favor of defendant in an on a supersedeas bond. Affirmed.

See same case below, 70 C. C. A. Fed. 22. On first appeal, 59 C. C. 123 Fed. 29.

The facts are stated in the opinio

Mr. Charles S. Cushing argued th and, with Mr. William Grant, filed for plaintiff in error:

The affirmance of the judgment upper court conclusively establishes bility of the appellant on the bond.

Davis v. Patrick, 6 C. C. A. 632 S. App. 629, 57 Fed. 909; Babbitt (Babbitt v. Shields) 101 U. S. 7, 2 820.

The term "prosecute to effect" "prosecute with success."

10 Am. & Eng. Enc. Law, 2d ed. Perreau v. Bevan, 5 Barn. & C. 284; v. Warner, 3 Wend. 54; Karthaus ings, 6 Harr. & J. 138.

The construction placed upon this "prosecute with effect," by the bulk

s that the suit shall be prosecuted
y to a final judgment.
Howell v. Alma Mill Co. 38
p. 706; Wood v. Thomas, 5 Blackf.
t v. Rhomberg, 66 Tex. 253, 18
Seacord v. Morgan, 3 Keyes, 636;
rpart, 101 U. S. 391, 25 L. ed.

he judgment is affirmed wholly
ight of recovery and partially as
ount, or as to certain of the de-
he sureties are still liable on their

to Howell v. Alma Mill Co. 38
ep. 709.
al is not prosecuted to effect un-
dgment is reversed *in toto*.
Stinger, 4 Cranch, C. C. 252, Fed.
246; Hopkins v. Orr, 124 U. S.
ed. 523, 8 Sup. Ct. Rep. 590.
phin Michael Delmas submitted
or defendants in error:
t to remain in possession of the
premises is co-extensive with the
ay the balance of the purchase
until that period of time has ex-
of the rights of the vendee in
premises can, to any extent, or
thod except by agreement, be in-
th or prejudiced.
v. Palmateer, 89 Cal. 91, 13 L.R.A.
c. 608, 26 Pac. 789; Dingley v.
Ventura, 57 Cal. 471; Avery v.
Cal. 619, 22 Am. St. Rep. 272, 25
Sparks v. Hess, 15 Cal. 194; Pur-
, 120 Cal. 218, 52 Pac. 489.
part of the decree entered in
court in the action in which the
s bond was given with which the
in this case were or are con-
at part relating to the possession
erty. This is apparent because,
nal decree had provided that Dr.
ould have until November 1, 1899,
o complete the payment for the
nd that until the expiration of
his rights to an interest in the
volved in said suit should not
ted, and that no writ of pos-
oust him from the occupation
ld be executed or issued, then
l be no consideration for a bond,
son he would have retained pos-
the land, not because of any
bond, but because of his right
eated by his contract with Crane
dgment of the court rendered

. Crane, 67 Cal. 65, 7 Pac. 135;
Chabot, 93 Cal. 266, 28 Pac.
llion v. Hibernia Sav. & L. Soc.
33 Pac. 329.
, if the original decree was modi-
court so as to effect the same

result, it must likewise follow that the appeal of Dr. Buckley to this court from the decree, so far as the right to remain in the possession of said property until November 1, 1899, was concerned, was prosecuted to effect, and no breach of the supersedeas bond occurred.

The surety's obligation is *strictissimi juris*, and he has a right to stand upon the precise terms of his contract.

Elder v. Kutner, 97 Cal. 490, 32 Pac. 563; People v. Buster, 11 Cal. 220; McDonald v. Fett, 49 Cal. 355; Pierce v. Whiting, 63 Cal. 543.

The following cases sustain the contention of defendants in error:

Heinlen v. Beans, 71 Cal. 295, 12 Pac. 167, 73 Cal. 240, 14 Pac. 855; Chase v. Ries, 10 Cal. 518; Daggitt v. Mensch, 141 Ill. 396, 31 N. E. 153; Poppenhusen v. Seeley, 41 Barb. 450, Affirmed in 3 Keyes, 150; Perkins v. Spalding, 3 T. B. Mon. 12; Kibble v. Butler, 27 Miss. 587.

Mr. Justice Day delivered the opinion of the court:

This was an action upon a supersedeas bond, brought by the plaintiff in error, Henry A. Crane, against defendants in error, Cornelius F. Buckley, as principal, and Rudolph Spreckles and Timothy Hopkins, as sureties.

The bond was given in an action brought by Crane against Buckley in the superior court of Tulare county, California, removed to the United States circuit court of the southern district of California.

Crane brought suit to foreclose a contract for the sale of certain lands to Buckley and for the recovery of possession thereof. Upon answer and cross bill Buckley made the defense that the sale was procured by false and fraudulent statements and misrepresentations. The court found for complainant, Crane; that the charges of fraud were not sustained; that the rights, interests, and claims of Buckley in and to the property should be foreclosed, subject to the equitable privilege that if Buckley should pay to Crane prior to January 1, 1899, the unpaid portion of the purchase price and the interest thereon, with taxes and costs, Crane should convey to Buckley all the said real estate, pursuant to the agreement of purchase, and it was provided in said decree:

"And unless said respondent shall place on file herein some sufficient and satisfactory evidence that he has paid, or has tendered, and is able, ready, and willing to pay, to said complainant, Henry A. Crane, the amounts of money hereinbefore provided to be paid for the purchase of said property, on or *before the 1st day of [444] January, A. D. 1899, it is ordered, adjudged,

and decreed that the clerk of this court do, on request of said complainant, Henry A. Crane, or of his counsel, issue a suitable and sufficient order or writ to the marshal of this court, and under the seal thereof, to remove said respondent, Cornelius F. Buckley, from the possession, use, and occupation of said real property, water ditches, water rights, and rights of way, and to place complainant, Henry A. Crane, or his legal representatives, in the exclusive possession, use, and occupation thereof."

This decree was entered on November 16, 1898; on December 16, 1898, Buckley appealed from the decree to the circuit court of appeals, and a supersedeas bond in the sum of $8,000, being the one in suit, was given. This bond is as follows:

"Whereas, the said respondent and cross-complainant is desirous of staying the execution of the said judgment so appealed from in so far as it relates to the possession of the land and premises involved therein, and is desirous of staying the execution of said judgment or decree, so appealed from, in so far as it relates to the costs awarded to complainant therein:

"Now, the condition of the above obligation is such that if the said C. F. Buckley shall prosecute his appeal to effect, and shall answer all damages and costs that have been and shall be awarded against him, if he fails to make his appeal good, and if he shall answer all damages that shall accrue to the said respondent by reason of the value of the use and occupation of the land and premises from the time of said appeal until the delivery of possession thereof to said Henry A. Crane, and for all waste committed thereon, then the above obligation to be void, else to remain in full force and effect."

October 2, 1899, the circuit court of appeals affirmed the decree. On October 19, 1899, Buckley having filed a petition for rehearing as to a part of the judgment given October 2, 1899, or for such modification thereof as would allow him until November 1, 1899, within which to make the payments required, the circuit court of appeals found:

[445] *"The record does show that the appellant made large payments under the contract, and that he has made other large expenditures in the improvements of the property which was the subject of the contract. It is also true that the sums remaining due from the appellant under the contract were large. These payments, the decree of the court below, which was entered on the 16th day of November, 1898, required to be made prior to January 1, 1899, in order that the rights and interests of the appellant in the property be saved, which were by the decree otherwise forever foreclosed and ended. Under the circumstances appearing in the record this court is of the opinion that it is equitable and just to allow the appellant until the 1st day of November, 1899, within which to make the payments required by the decree from which the appeal is taken, and, accordingly, it is ordered that the judgment of this court entered herein on the 2d day of October, 1899, be, and hereby is, so modified as to read: 'Cause remanded to the court below, with directions to substitute for the 1st day of January, 1899, the 1st day of November, 1899, within which the payments therein provided for are permitted to be made, and, as so modified, the decree is affirmed.'". 38 C. C. A. 688, 97 Fed. 980.

Upon mandate from the circuit court of appeals, this modification was entered in the circuit court.

Possession of the property was not in fact delivered till November 4, 1899. After the proceedings above recited, action was commenced on the bond to recover $8,000, the penalty thereof, for the alleged value of the use and occupation of the premises by Buckley, between January 1 and November 1, 1899, and waste.

On the first trial of the case in the circuit court a verdict of $5,000 was rendered against the present defendant in error, afterwards reduced to $3,000.

This judgment was reversed upon writ of error to the circuit court of appeals. 59 C. C. A. 109, 123 Fed. 29.

Upon a subsequent trial of the case, upon instructions following the ruling of the circuit court of appeals, a verdict and *judgment were rendered in favor of the defendant in error. Another writ of error being taken to the circuit court of appeals, this judgment was affirmed, and the plaintiff in error brought the case here.

The question in this case as presented here is briefly this: Can the plaintiff in error recover upon the supersedeas bond for the value of the use and occupation of the premises in question from January 1, 1899, to November 1, 1899? This was the period for which the circuit court of appeals, upon the application for rehearing, modified the decree so far as to extend the right of Buckley, one of the defendants in error, and the principal in the bond, to remain in possession of the premises, postponing the foreclosure of his rights therein until the end of the period named in the extension. The bond was given under cover of § 1000 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 712), which provides:

"Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States or by di-

rection of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

The object and purpose of this section and the bond given in pursuance thereof is to indemnify the party prevailing in the original suit against loss in the respects stated in the bond, by reason of an ineffectual attempt to reverse the holding of the trial court. The successful party in this case, the plaintiff, could not have the decree executed, so far as the possession of the property was concerned, after the supersedeas bond was given, and the purpose of that instrument was to secure him from loss during the time and to the extent that his hand was stayed from action. In order to keep the obligation of the bond it was necessary that the plaintiff in error should substantially reverse the judgment [447] or decree in the respects in *which the bond was indemnity. As was said by Mr. Chief Justice Waite, in Gay v. Parpart, 101 U. S. 391, 392, 25 L. ed. 841:

"If, on the final disposition of a writ of error or appeal, the judgment or decree brought under review is not substantially reversed, it is affirmed, and the writ of error or appeal has not been prosecuted with effect."

It is elementary that the obligation of sureties upon bonds is *strictissimi juris* and not to be extended by implication or enlarged construction of the terms of the contract entered into. What, then, was the attitude of the case when this appeal bond was given? The action had been brought to foreclose a contract of purchase. The defense had proved unavailing. The decree had provided that unless Buckley made the payments required by January 1, 1899, his right and interest in the property should be forever foreclosed, and a writ should issue to put the plaintiff in possession of the property.

From this decree Buckley appealed, and, in order to prevent its execution, gave the bond in suit, which recites that he is desirous of staying the execution of the judgment appealed from in so far as it relates to the possession of the lands and premises involved, and as to costs, which are not now in controversy. Then comes the condition of the obligation, that the appellant shall prosecute his appeal to effect, and the undertaking that if he fails to make his appeal good he shall answer in damages which shall accrue by reason of the value of the use and occupation of the premises until the delivery of the possession thereof, and for waste committed thereon. The effect of this bond was to permit Buckley to remain in possession, and to require him to prosecute his appeal to effect; in default of which he and his sureties may be subjected to liability upon the bond.

What is meant by prosecuting his appeal to effect? It is an expression substantially equivalent to prosecuting his appeal with success; to make substantial and prevailing his attempt to reverse the decree or judgment awarded against him.

It is to be remembered that there is not involved in this suit *any right to recover [448] for use and occupation other than that between the dates of January 1, 1899, and November 1, 1899. This is the very time during which, by the modified decree entered by virtue of the order of the circuit court of appeals, the foreclosure of the contract was postponed and the defendant in error, Buckley, permitted to remain in possession of the premises.

As we have said, the appeal bond was to secure the plaintiff from loss in the use and possession of the premises, unless Buckley prosecuted his appeal to effect. It is manifest that the effect of the decree in the circuit court of appeals was to extend the time of rightful possession for the period covered in this suit. This right of possession, withheld from the plaintiff in error by the extension awarded in the court of appeals, was the essence of the thing for which the plaintiff in error was indemnified by the terms of the obligation. We cannot think it makes any legal difference in the liability of the sureties upon the bond that Buckley did not pay the balance of the purchase money within the time of the extension. The effect of the decree was to extend the right of possession and to prevent a foreclosure of his rights after January 1, 1899, until the date named,—November 1, 1899.

This extended right of possession and postponement of foreclosure to November 1, 1899, Buckley gained by the appeal, which, in our view, he thus prosecuted to effect; or, what is another way of saying the same thing, to a successful issue upon the very thing—the wrongful possession of the property—against which the plaintiff in error was indemnified by the terms of the obligation sued upon. In this view of the case the judgment of the Circuit Court of Appeals is affirmed.

449] *Ex parte ABRAHAM C. WISNER.

(See S. C. Reporter's ed. 449-461.)

Removal of causes—diverse citizenship—nonresidence of both parties—consent.

1. A suit which, by reason of the nonresidence of both parties, could not have been brought in the Federal circuit court in the first instance, cannot be removed to that court from a state court, under the acts of March 3, 1887 (24 Stat. at L. 552, chap. 373), and August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), on the ground of diverse citizenship, at least where the plaintiff resists such removal, even if the consent of both parties could confer jurisdiction.

Mandamus—to remand case to state court.

2. Mandamus, rather than prohibition, is the proper remedy where the circuit court of the United States refuses to remand to the state court from which it was removed a case over which the Federal court has no jurisdiction.

[Nos. 9, 10, Original.]

Submitted May 14, 1906. Decided December 10, 1906.

PETITION for a writ of mandamus to compel the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri to remand a cause to the Circuit Court of the City of St. Louis, from which it was removed. Awarded. Also a

PETITION for a writ of prohibition to stay proceedings in the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri in a cause alleged to have been removed improperly to that court from the Circuit Court of the City of St. Louis. Dismissed.

Statement by Mr. Chief Justice Fuller:

Abram C. Wisner, a citizen of the state of Michigan, commenced an action at law, on February 17, A. D. 1906, in the circuit court in and for the city of St. Louis and state of Missouri, against John D. Beardsley, a citizen of the state of Louisiana, by filing a petition, together with an affidavit on which that court issued a writ of attachment, in the usual form, directed to the sheriff of St. Louis. The sheriff returned no property found, but that he had garnisheed the Mississippi Valley Trust Company, a corporation of Missouri, and also had serv Beardsley with summons in the city of S Louis.

Saturday, March 17, A. D. 1906, the ga nishee answered, and on the same da Beardsley filed his petition to remove th action from the state court into the circu court of the United States for the easte division of the eastern district of Missou on the ground of diversity of citizenshi together *with the bond required in su case. An order of removal was thereup entered by the state court and the transcri of record was filed in the circuit court the United States.

Monday, March 19, Wisner moved to re mand in these words:

"Now at this day comes plaintiff, by hi attorneys, Jones, Jones, & Hocker, and ap pearing specially for the purposes of thi motion only, saving and reserving any an all objections which he has to the manifol imperfections in the mode, manner, an method of the removal papers, and expres ly denying that this court has jurisdictio of this cause, or of the plaintiff therein, re spectfully moves the court to remand thi cause to the circuit court of the city of St Louis, from whence it was removed, for th reason that this suit does not involve controversy or dispute properly within th jurisdiction of this court, and that it ap pears upon the face of the record herein tha the plaintiff is a citizen and resident of th state of Michigan and the defendant a citi zen and resident of the state of Louisiana and the cause is not one within the origina jurisdiction of this court; hence this cour cannot acquire jurisdiction by removal."

The motion was heard and denied Apri 2, 1906, the circuit court referring to Foul v. Gray, 120 Fed. 156, and Rome Petroleu & Iron Co. v. Hughes Specialty Well Drill ing Co. 130 Fed. 585, as representing the dif ferent views of the courts below on the que tion involved.

On April 23, Wisner applied to this cour for leave to file a petition for mandamus a well as a petition for prohibition; leave wa granted, and rules entered, returnable Ma 14, 1906, and the cases submitted on the re turns to the rules.

Messrs. J. J. Darlington, James C. Jone and H. S. Mecartney submitted the cau for petitioner. Messrs. C. G. B. Drummon

NOTE.—On removal of causes in cases of diverse citizenship—see notes to Whelan v. New York, L. E. & W. R. Co. 1 L.R.A. 65; Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108; Huskins v. Cincinnati, N. O. & T. P. R. Co. 3 L.R.A. 545; Bierbower v. Miller, 9 L.R.A. 228; Brodhead v. Shoemaker, 11 L.R.A. 567; Delaware R. Constr. Co. v. Meyer, 25 L. ed. U. S. 593; Buth v. National Home for Disabled Volunte Soldiers, 36 L. ed. U. S. 346; and Torren v. Shedd, 36 L. ed. U. S. 528.

On the distinction between prohibiti and mandamus—see note to Fleming Guthrie, 3 L.R.A. 56.

Oliver & Mecartney, Jones, Jones, & Hocker were on the brief:

The record shows that neither of the parties to the suit involved in this application resided in the eastern judicial district of Missouri, so that it could not have been maintained in that court if it had been brought there originally by original process.

Shaw v. Quincy Min. Co. (Ex parte Shaw) 145 U. S. 444, 448, 449, 36 L. ed. 768, 770, 771, 12 Sup. Ct. Rep. 935; McCormick Harvesting Mach. Co. v. Walthers, 134 U. S. 43, 44, 33 L. ed. 834, 835, 10 Sup. Ct. Rep. 485; Smith v. Lyon, 133 U. S. 319, 33 L. ed. 636, 10 Sup. Ct. Rep. 303; St. Louis & S. F. R. Co. v. McBride, 141 U. S. 128, 129, 35 L. ed. 660, 11 Sup. Ct. Rep. 982.

In order to make a suit removable under this section of the act it must be one which the plaintiff could have brought originally in the United States circuit court to which it would be removed, by original process.

Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 245, 246, 49 L. ed. 464, 465, 25 Sup. Ct. Rep. 251; Mexican Nat. R. Co. v. Davidson, 157 U. S. 208, 39 L. ed. 675, 15 Sup. Ct. Rep. 563; Cochran v. Montgomery County, 199 U. S. 272, 50 L. ed. 188, 26 Sup. Ct. Rep. 58; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; Minnesota v. Northern Securities Co. 194 U. S. 48–64, 48 L. ed. 870–878, 24 Sup. Ct. Rep. 598; Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 640, 47 L. ed. 632, 23 Sup. Ct. Rep. 434; Cates v. Allen, 149 U. S. 459, 460, 37 L. ed. 808, 809, 13 Sup. Ct. Rep. 883, 977; Sweeney v. Carter Oil Co. 199 U. S. 252, 50 L. ed. 178, 26 Sup. Ct. Rep. 55; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; Anderson v. Watt, 138 U. S. 701, 702, 34 L. ed. 1080, 1081, 11 Sup. Ct. Rep. 449; Neel v. Pennsylvania Co. 157 U. S. 153, 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 589; Hanrick v. Hanrick, 153 U. S. 198, 38 L. ed. 687, 14 Sup. Ct. Rep. 835; Powers v. Chesapeake & O. R. Co. 169 U. S. 99, 42 L. ed. 675, 18 Sup. Ct. Rep. 264; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510.

The only districts in which a defendant can be sued under the act of 1888 are that of the residence of the plaintiff and that of the residence of the defendant (Smith v. Lyon, supra; McCormick Harvesting Mach. Co. v. Walthers, 134 U. S. 44, 33 L. ed. 834, 10 Sup. Ct. Rep. 485; Mexican Nat. R. Co. v. Davidson, supra; Shaw v. Quincy Min. Co. [Ex parte Shaw] 145 U. S. 448, 449, 36 L. ed. 770, 771, 12 Sup. Ct. Rep. 935), and such district is, therefore, the only "proper district," within the meaning of the 1st section of the act.

This case does not fall within the principle of the cases which apply when the question of waiver is raised by suit being brought originally in the Federal court.

Central Trust Co. v. McGeorge, 151 U. S. 134, 38 L. ed. 100, 14 Sup. Ct. Rep. 286; Shaw v. Quincy Min. Co. (Ex parte Shaw) 145 U. S. 453, 36 L. ed. 772, 12 Sup. Ct. Rep. 935.

Prohibition is a proper remedy.

2 Coke, Inst., title *Articuli Cleri*, 602; Carter v. Southall, 3 Mees. & W. 126; Re Alix, 166 U. S. 137, 41 L. ed. 948, 17 Sup. Ct. Rep. 522; Smith v. Whitney, 116 U. S. 167, 173, 29 L. ed. 601, 602, 6 Sup. Ct. Rep. 570; Ex parte Easton, 95 U. S. 77, 24 L. ed. 376; Re Morrison (Morrison v. District Court) 147 U. S. 36, 37 L. ed. 68, 13 Sup. Ct. Rep. 246; Re Fassett, 142 U. S. 486, 35 L. ed. 1089, 12 Sup. Ct. Rep. 295; Re Cooper, 143 U. S. 495, 36 L. ed. 239, 12 Sup. Ct. Rep. 453; United States v. Hoffman, 4 Wall. 161, 18 L. ed. 355; Re Huguley Mfg. Co. 184 U. S. 301, 46 L. ed. 551, 22 Sup. Ct. Rep. 455; Ex parte Pennsylvania, 109 U. S. 175, 176, 27 L. ed. 895, 3 Sup. Ct. Rep. 84; Bronson v. Lacrosse & M. R. Co. 1 Wall. 408, 17 L. ed. 618; Fitzherbert, Nat. Brev. (46a) *108; Jones v. Owen, 18 L. J. Q. B. N. S. 8; Ex parte Phenix Ins. Co. 118 U. S. 610, 625, 626, 30 L. ed. 274, 280, 7 Sup. Ct. Rep. 25; Re Rice, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; Minnesota v. Northern Securities Co. 194 U. S. 65, 66, 48 L. ed. 878, 879, 24 Sup. Ct. Rep. 598; Neel v. Pennsylvania Co. supra; Tennessee v. Union & Planters' Bank, 152 U. S. 461, 38 L. ed. 514, 14 Sup. Ct. Rep. 564; Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 143, 37 L. ed. 1030, 1032, 14 Sup. Ct. Rep. 35; Hanrick v. Hanrick, 153 U. S. 192 198, 38 L. ed. 685, 687, 14 Sup. Ct. Rep. 835.

Even if your petitioner had a remedy by appeal or error, yet it must be an adequate remedy to bar it from a right to the writ of prohibition under the facts shown by the petition for removal and record in the suit involved in this proceeding.

Re Huguley Mfg. Co. supra; Re Atlantic City R. Co. 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208.

The writ of mandamus is also a proper remedy for the assumption and exercise of excess of jurisdiction complained of in this proceeding, and more especially for causing the doing of that which it is the court's duty to do under the circumstances by express command of the law, and affording affirmative relief.

Virginia v. Rives (Ex parte Virginia) 100 U. S. 323, 25 L. ed. 671; Ex parte Bradley, 7 Wall. 364, 377, 19 L. ed. 214, 219; Virginia

v. Paul, 148 U. S. 123, 37 L. ed. 392, 13 Sup. Ct. Rep. 536; Gaines v. Rugg (Gaines v. Caldwell) 148 U. S. 243, 37 L. ed. 437, 13 Sup. Ct. Rep. 611.

Messrs. John M. Moore, Edward C. Eliot, and George H. Williams submitted the cause for respondent:

Jurisdiction of the circuit courts of the United States is conferred by the first clause of § 1 of the judiciary acts of 1887, 1888, and the subsequent clause of said section merely limits the venue of suits, *i. e.*, confers a special privilege on a defendant.

McCormick Harvesting Mach. Co. v. Walthers, 134 U. S. 41, 33 L. ed. 833, 10 Sup. Ct. Rep. 485; Davidson v. Mexican Nat. R. Co. 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563.

The clause of § 1, providing that suit shall only be brought in the district of either the residence of the plaintiff or the defendant, is a special and personal privilege, inuring to the benefit of the defendant,—a privilege which may be waived.

Ex parte Schollenberger, 96 U. S. 369, 24 L. ed. 853; St. Louis & S. F. R. Co. v. McBride, 141 U. S. 131, 35 L. ed. 661, 11 Sup. Ct. Rep. 982; Central Trust Co. v. McGeorge, 151 U. S. 131, 38 L. ed. 99, 14 Sup. Ct. Rep. 286.

The right of removal is given wholly to the defendant, without any reference in a remote degree to the plaintiff or his wishes; so no waiver on the part of the plaintiff is necessary or proper.

Virginia-Carolina Chemical Co. v. Sundry Ins. Cos. 108 Fed. 452.

The cases supporting the right of removal are:

Vinal v. Continental Constr. & Improv. Co. 34 Fed. 229; Rome Petroleum & Iron Co. v. Hughes' Specialty Well Drilling Co. 130 Fed. 585; Morris v. Clark Constr. Co. 140 Fed. 756; American Finance Co. v. Bostwick, 151 Mass. 19, 23 N. E. 656.

Mr. Chief Justice Fuller delivered the opinion of the court:

By article 3 of the Constitution the judicial power of the United States was "vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish."

And the judicial power was extended "to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different state between citizens of the same state claimi lands under grants of different states, a between a state or the citizens thereof, a foreign states, citizens, or subjects."

The Supreme Court alone possesses juri diction derived immediately from the Co stitution, and of which the legislative pow cannot deprive it (United States v. Hudso 7 Cranch, 32, 3 L. ed. 259); but the jurisdi tion of the circuit courts depends upon som act of Congress (Turner v. Bank of Nort America, 4 Dall. 8, 10, 1 L. ed. 718, 719 McIntire v. Wood, 7 Cranch, 504, 506, 3 L ed. 420, 421; Sheldon v. Sill, 8 How. 441 448, 12 L. ed. 1147, 1150; Stevenson v. Fai 195 U. S. 165, 167, 49 L. ed. 142, 143, 25 Su Ct. Rep. 6). In the latter case we said "The use of the word 'controversies' as i contradistinction to the word 'cases,' an the omission of the word 'all' in respect o controversies, left it to Congress to define th controversies over which the courts it wa empowered to ordain and establish mig exercise jurisdiction, and the manner i which it was to be done."

The 1st section of the act of March 3 1887 (24 Stat. at L. 522, chap. 373), as cor rected by the act of August 13, 1888 (2 Stat. at L. 433, chap. 866), amended §§ 1 2, and 3 of the act of Congress of March 3 1875 (18 Stat. at L. 470, chap. 137, U. S Comp. Stat. 1901, p. 508), as follows:

"That the circuit courts of the Unite States shall have original cognizance, con current with the courts of the several state of all suits of a civil nature, at common la or in equity, where the matter in disput exceeds, exclusive of interest and costs, th sum or value of two thousand dollars, an arising under the Constitution or laws o the United States, or treaties made, or whic shall be made, under their authority, or i which controversy the United States a plaintiffs or petitioners, or in which the shall be a controversy between citizens o different states, in which the matter in di pute exceeds, exclusive of interest and cost the sum or value aforesaid; . . . Bu no person shall be arrested in one distri for trial in another in any civil action b fore a circuit or district court; and no civ suit shall be brought before either of sa courts against any person by any origin process or proceeding in any other distri than that whereof he is an inhabitant; bu where the jurisdiction is founded only o the fact that the action is between citize of different states, suit shall be brought on in the district of the residence of either th plaintiff or the defendant; . . .

"Sec. 2. That any suit of a civil nature, a law or in equity, arising under the Constitu tion or laws of the United States, or tre

ties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the [457] defendant *or defendants therein, being nonresidents of that state. And when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that, from prejudice or local influence, he will not be able to obtain justice in such state court, . . .

"Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

Section 3, as amended, provided for petition and bond for "the removal of such suit into the circuit court to be held in the district where such suit is pending."

As it is the nonresident defendant alone who is authorized to remove, the circuit court for the proper district is evidently the circuit court of the district of the residence of the plaintiff.

And it is settled that no suit is removable under § 2 unless it be one that plaintiff could have brought originally in the circuit court. Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; Mexican Nat. R. Co. v. Davidson, 157 U. S. 208, 39 L. ed. 675, 15 Sup. Ct. Rep. 563; Cochran v. Montgomery County, 199 U. S. 272, 50 L. ed. 188, 26 Sup. Ct. Rep. 58.

*In Shaw v. Quincy Min. Co. (Ex parte [458] Shaw) 145 U. S. 444, 446, 36 L. ed. 768, 770, 12 Sup. Ct. Rep. 935, 936, Mr. Justice Gray, speaking for the court, in disposing of the question whether, under § 1, "a corporation incorporated in one state of the Union, and having a usual place of business in another state in which it has not been incorporated, may be sued in a circuit court of the United States held in the latter state, by a citizen of a different state," said:

"This question, upon which there has been a diversity of opinion in the circuit courts, can be best determined by a review of the acts of Congress, and of the decisions of this court, regarding the original jurisdiction of the circuit courts of the United States over suits between citizens of different states.

"In carrying out the provision of the Constitution which declares that the judicial power of the United States shall extend to controversies 'between citizens of different states,' Congress, by the judiciary act of September 24, 1789, chap. 20, § 11, conferred jurisdiction on the circuit court of suits of a civil nature, at common law or in equity, 'between a citizen of the state where the suit is brought and a citizen of another state,' and provided that 'no civil suit shall be brought' 'against an inhabitant of the United States,' 'in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.' 1 Stat. at L. 78, 79."

And, after observations in relation to the use of the word "inhabitant" in that act, and referring to the act of May 4, 1858 (11 Stat. at L. 272, chap. 27), § 1, and the act of March 3, 1875 (18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508), § 1, Mr. Justice Gray thus continued:

"The act of 1887, both in its original form, and as corrected in 1888, re-enacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: 'But where the jurisdiction [of either] is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of *either the plaintiff or the [459] defendant.' 24 Stat. at L. 552, chap. 373; 25 Stat. at L. 434, chap. 866, U. S. Comp. Stat. 1901, p. 508. As has been adjudged by this court, the last clause is by way of proviso

to the next preceding clause, which forbids any suit to be brought in any other district than that whereof the defendant is an inhabitant; and the effect is that 'where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides.' McCormick Harvesting Co. v. Walthers, 134 U. S. 41, 43, 33 L. ed. 833, 834, 10 Sup. Ct. Rep. 485. And the general object of this act, as appears upon its face, and as has been often declared by this court, is to contract, not to enlarge, the jurisdiction of the circuit courts of the United States. Smith v. Lyon, 133 U. S. 315, 320, 33 L. ed. 635, 637, 10 Sup. Ct. Rep. 303; Re Pennsylvania Co. 137 U. S. 451, 454, 34 L. ed. 738, 740, 11 Sup. Ct. Rep. 141; Fisk v. Henarie, 142 U. S. 459, 467, 35 L. ed. 1079, 1082, 12 Sup. Ct. Rep. 207.

"As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of earlier acts upon the same subject, and of the judicial construction thereof, is that the phrase 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant,' and cannot be construed as giving jurisdiction, by reason of citizenship, to a circuit court held in a state of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides, within the state of which he is a citizen; and that this act, therefore, having taken away the alternative, permitted in the earlier acts, of suing a person in the district 'in which he shall be found,' requires any suit, the jurisdiction of which is founded only on its being between citizens of different states, to be brought in the state of which one is a citizen, and in the district therein of which he is an inhabitant and resident."

In short, the acts of 1887, 1888 restored the rule of 1789, as we stated in Cochran v. Montgomery County, supra.

[460] *In the present case neither of the parties was a citizen of the state of Missouri, in which state the suit was brought, and, therefore, it could not have been brought in the circuit court in the first instance.

Wisner did not, of choice, select the state court as the forum, since he could not have sued in the circuit court under the act, because neither he nor Beardsley was a citizen of Missouri. And the question of jurisdiction relates to the time of commencing the suit.

But it is contended that Beardsley was entitled to remove the case to the circuit court, and as, by his petition for removal, he waived the objection so far as he was personally concerned that he was not sued in his district, hence that the circuit court obtained jurisdiction over the suit. This does not follow, inasmuch as, in view of the intention of Congress by the act of 1887 to contract the jurisdiction of the circuit courts, and of the limitations imposed thereby, jurisdiction of the suit could not have obtained, even with the consent of both parties. As we have heretofore remarked: "Jurisdiction as to the subject-matter may be limited in various ways as to civil and criminal cases; cases at common law or in equity or in admiralty; probate cases, or cases under special statutes; to particular classes of persons; to proceedings in particular modes; and so on." Louisville Trust Co. v. Comingor, 184 U. S. 18, 25, 46 L. ed. 413, 416, 22 Sup. Ct. Rep. 293. In Central Trust Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98, 14 Sup. Ct. Rep. 286, it was assumed, however, that the requirement that no suit should be brought in any other district than that of the plaintiff or of the defendant might be waived, where neither resided therein, because, in that case, the nonresident plaintiff had sued in the circuit court and the nonresident defendant had answered on the merits, which showed the consent of both parties, and not unnaturally led to the result announced, while in this case there was no such consent. As was stated by Mr. Justice Brewer, in Kinney v. Columbia Sav. & L. Asso. 191 U. S. 78, 82, 48 L. ed. 103, 105, 24 Sup. Ct. Rep. 30, 32: "A petition and bond for removal are in the nature of process. They *constitute the process by which the case is transferred from the state to the Federal court." When, then, Beardsley filed his petition for removal, he sought affirmative relief in another district than his own. But plaintiff, in resisting the application, and moving to remand, denied the jurisdiction of the circuit court. In St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982, where the plaintiffs were citizens and residents of the western district of Arkansas, and commenced their action in the circuit court of the United States for the district, and the defendant was a corporation and citizen of the state of Missouri, it was held that, as the defendant appeared and pleaded to the merits, he thereby waived his right to challenge thereafter the jurisdiction of the court over him, on the ground that the suit had been brought in the wrong district. And there are many other cases to the same effect.

Our conclusion is that the case should

e remanded; and, as the circuit
d no jurisdiction to proceed, that
us is the proper remedy.
mus awarded; petition for prohi-
smissed.

stice Brewer concurred in the result.

STATES ex rel. REBECCA J.
TAYLOR, Plff. in Err.,
v.
AM H. TAFT, Secretary of War.

S. C. Reporter's ed. 461–465.)

District of Columbia court of ap-
question respecting Federal au-
.
e validity of an authority exer-
der the United States was not
question so as to sustain the ap-
urisdiction of the Supreme Court
nited States over the court of ap-
the District of Columbia, under
le (31 Stat. at L. 1189, 1227, chap.
233, by a petition for man-

-The appellate jurisdiction of the
Supreme Court over the District of
courts.

general.
de of review.
Writ of error or appeal.
Cases certified; certiorari.
ality of determination.
isdictional amount
beas corpus cases.
iminal cases.
ses involving Federal questions.
In general.
Patent and copyright cases.
Questions respecting Federal law
or treaty.
Questions respecting Federal au-
thority.

I. In general.

ess by the act of February 27, 1801
at L. 106, chap. 15, U. S. Comp.
01, p. 573), § 8, authorized a review
of error or appeal in the Supreme
f the United States of "any final
t, order, or decree" of the circuit
the District of Columbia, "wherein
ter in dispute, exclusive of costs,
eed the value of $100," to be prose-
the same manner, under the same
ns, and the same proceedings shall
therein, as is or shall be provided
se of writs of error on judgments
ls upon orders or decrees rendered
reuit court of the United States."
clause did not determine the na-
he "case" reviewable, but only in-
he mode in which a case might be
up for review. Ormsby v. Webb,

damus to compel the restoration to her position in the classified civil service of a clerk whose contention is not that the President and his representatives were without authority to dismiss her, but that her dismissal was illegal because the requisite formalities prescribed by the civil service regulations were not observed.

[No. 300.]

Submitted November 19, 1906. Decided December 10, 1906.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, denying a writ of mandamus to compel the restoration of a clerk to her former position in the classified civil service. Dismissed for want of jurisdiction.

See same case below, 24 App. D. C. 95.

Statement by Mr. Chief Justice Fuller:

*Relator was, on May 12, 1902, a clerk in [462]

134 U. S. 47, 33 L. ed. 805, 10 Sup. Ct. Rep. 478.

And when a supreme court for the District was established by the act of March 3, 1863 (12 Stat. at L. 764, chap. 91), a review of its judgments, orders, and decrees in the Federal Supreme Court was authorized by § 11 in the same cases and in like manner as was then provided in reference to the judgments, orders, and decrees of the circuit courts for the District. Brown v. Wiley, 4 Wall. 165, 18 L. ed. 384.

Under this statute the Federal Supreme Court could revise the judgments of the supreme court of the District, sitting as a district court of the United States, only after they had been reviewed by the supreme court of the District, sitting as a circuit court. Garnett v. United States, 11 Wall. 256, 20 L. ed. 79.

Later, by the act of March 3, 1885 (23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572), § 2, Congress extended this appellate jurisdiction to cases, "without regard to the sum or value in dispute" (see, however, infra, IV.) in which the validity of a patent or copyright was involved, or in which was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States. And when the circuit court of appeals for the District of Columbia was created by the act of February 9, 1893 (27 Stat. at L. 436, chap. 74, U. S. Comp. Stat. 1901, p. 573), the appellate jurisdiction of the Federal Supreme Court was, by § 8, defined in practically the same terms. The present statute, which is, in effect, a re-enactment of the last-named section (Sinclair v. District of Columbia, 192 U. S. 16, 48 L. ed. 322, 24 Sup. Ct. Rep. 212; Metropolitan R. Co. v. District of Columbia [Metropolitan R. Co.

the classified civil service of the United States, and employed in the War Department. On that day an article purporting to be signed by her, and making very serious reflections on the President of the United States, appeared in a newspaper published at Washington. Some days thereafter the Secretary of War directed that relator be called upon to state whether she was the author of the publication, and, if so, it was ordered that her attention should be invited to § 8 of civil service rule II., and that she be allowed three days in which to submit any answer or statement she might wish to make.

To this relator answered, admitting that she was the author of the article, but insisting that she had not been notified of any charge calling for answer under the rule.

Thereupon the Secretary entered an order dismissing her from the service, and filed a memorandum assigning as reason therefor the publication of the article.

Relator then filed her petition for mandamus in the supreme court of the District, to compel the Secretary to restore her. The petition recited §§ 3 and 8 of civil service rule II., and assigned as grounds of relief that the procedure was not in conformity with the executive regulations set out, in that no reasons for removal had been furnished relator, and also in that the real reason of her removal was because of her political opinions and the expression of them.

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v. Macfarland] 195 U. S. 322, 49 L. ed. 219, 25 Sup. Ct. Rep. 28), reads as follows: "Any final judgment or decree of the court of appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States upon writ of error or appeal in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of $5,000, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the supreme court of the District of Columbia on February 9, 1893, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States." 31 Stat. at L. 1227, chap. 854, § 233.

Provision for a review by certiorari (see infra, II. b.) in cases not falling within this section is made by the succeeding section, which is a re-enactment of the act of March 3, 1897 (29 Stat. at L. 692, chap. 390, U. S. Comp. Stat. 1901, p. 574).

The affirmative description of this appellate jurisdiction of the Supreme Court of the United States must be understood as a regulation prescribed by Congress, which prohibits the exercise of other powers than those described. United States v. More, 3 Cranch, 159, 2 L. ed. 397.

The words "any final judgment, order, or decree" in the statute defining the appellate jurisdiction of the Federal Supreme Court over the circuit court for the District of Columbia were held, in Custiss v. Georgetown & A. Turnp. Co. 6 Cranch, 233, 3 L. ed. 209, to embrace an appeal from an order quashing an inquisition in the nature of a writ ad quod damnum.

And such statute authorized a writ of error from the Supreme Court of the United States to review a judgment of the circuit court of the District of Columbia awarding a peremptory mandamus to restore an office, where the requisite jurisdictional amount was involved. Columbian Ins. Co. v. Wheelwright, 7 Wheat. 535, 5 L. ed. 516.

A decision of the court below upon an agreed case could also be reviewed by writ of error. United States v. Eliason, 16 Pet. 291, 10 L. ed. 968.

And an appeal lay from a final decree of the circuit court of the District of Columbia affirming a decree of the orphans' court of Alexandria county, which dismissed a petition to revoke the probate of a will. Carter v. Cutting, 8 Cranch, 251, 3 L. ed. 553.

A proceeding in the supreme court of the District of Columbia involving the validity, as a last will and testament, of an instrument offered for probate, and its admission to probate, was a "case," final judgment in which could be reviewed in the United States Supreme Court by writ of error if the value of the matter in dispute was sufficient. Ormsby v. Webb, supra.

A judgment of the supreme court of the District of Columbia confirming an assessment for damages sustained by reason of the use of a street by a railroad company in front of a church could also be reviewed in the Federal Supreme Court by writ of error. Baltimore & P. R. Co. v. Sixth Presby. Church, 19 Wall. 62, 22 L. ed. 97.

And the Federal Supreme Court's appellate jurisdiction was not defeated by any limitations on the right to appeal contained in the Maryland or Virginia laws.

Thus, the Federal Supreme Court had jurisdiction of an appeal from a decree of a circuit court in the District of Columbia, affirming a judgment of the orphans' court, although, by the Maryland laws, the decision of a court of chancery or law on an appeal from the orphans' court was made final and conclusive. Nicholls v. Hodges, 1 Pet. 562, 7 L. ed. 263; Carter v. Cutting, supra.

And a writ of error lay from the Federal Supreme Court to the supreme court of the District of Columbia, although the proceedings were governed by a statute of Maryland which did not provide for appeal or writ of error. Baltimore & P. R. Co. v. Sixth Presby. Church, supra.

So, the saving clause in the statute, authorizing appeals from the circuit court of the District of Columbia to the Supreme Court of the United States, that nothing

he Secretary answered the petition, set- out the facts in detail, denying that tor was removed on account of her po- al opinions, and averring that the action taken because of the publication of article, containing derogatory and disre- tful statements of and concerning the ident of the United States in relation is conduct as Commander in Chief, and h he decided "was prejudicial to order the efficiency of said War Department, such offense as rendered the further ction of the petitioner with said serv- compatible with the best interests of same." And while insisting that all done or caused to be done by *him were nformity with the civil service rules, the Secretary submitted that the petitioner showed by her petition "no vested right, title, or interest in or to the employment formerly exercised by her in the office of the Adjutant General of the United States Army, and that the relation of such petitioner, as an employee, to the executive civil service, in respect of appointment, promotion, and removal, is a matter wholly within the competence and cognizance of the political department, and the action of the head of an executive department in respect thereof is not subject to be reviewed, reversed, set aside, or controlled by a court of law, nor can his action in that behalf be commanded, directed, or compelled by the

in contained shall impair any corporate s, only saved existing rights, and there- did not give the bank of Alexandria at court the exemption from appeals judgments in its favor which that cor- ion enjoyed under its charter in the nia courts. Young v. Bank of Alex- a, 4 Cranch, 384, 2 L. ed. 655.

II. Mode of review.

a. Writ of error or appeal.

proceeding in the supreme court of the ict of Columbia involving the original te of a last will and testament was strictly a proceeding in equity, and t be brought up to the Federal Su- e Court by writ of error. Ormsby v. , 134 U. S. 47, 33 L. ed. 805, 10 Sup. Rep. 478; Campbell v. Porter, 162 U. 8, 40 L. ed. 1044, 16 Sup. Ct. Rep.

it of error, and not appeal, is the only of reviewing a judgment of the court peals of the District of Columbia sus- g an assessment and award in con- ation proceedings instituted under the f Congress of June 6, 1900 (31 Stat. at 8, chap. 810), in view of the provision C. Code, § 233 (31 Stat. at L. 1227, 854), that the power to review judg- s or decrees of that court is to be d only in the same manner, and un- he same regulations, as prevailed be- its organization in cases of writs of to, or appeals from, the supreme of that District. Metropolitan R. Co. strict of Columbia (Metropolitan R. Macfarland) 195 U. S. 322, 49 L. ed. 5 Sup. Ct. Rep. 28.

eptions to an accounting by an exec- in the supreme court of the District lumbia sitting as an orphans' court a case for equitable cognizance, and cree of the court of appeals approving nal account is properly reviewed in upreme Court by appeal rather than it of error. Kenaday v. Sinnott, 179 606, 45 L. ed. 339, 21 Sup. Ct. Rep.

b. Cases certified; certiorari.

The practice of certifying to the Federal Supreme Court a division of opinion of the judges of a circuit court upon a question arising in the cause had no application to the circuit court for the District of Columbia. Ross v. Triplett, 3 Wheat. 600, 4 L. ed. 469.

By the act of March 3, 1897, the Supreme Court of the United States was authorized to issue writs of certiorari in cases made final in the court of appeals in the District of Columbia, to bring them up for review and determination, and this provision was carried forward into § 234 of the Code of the District of Columbia (31 Stat. at L. 1227, chap. 854). Sinclair v. District of Columbia, 192 U. S. 16, 48 L. ed. 322, 24 Sup. Ct. Rep. 212.

III. Finality of determination.

The general principle governing the exercise of appellate jurisdiction, that only final adjudications are reviewable by appeal or writ of error, is, of course, applicable. Ross v. Triplett, supra; Van Ness v. Van Ness, 6 How. 62, 12 L. ed. 344; Brown v. Wiley, 4 Wall. 165, 18 L. ed. 384; Washington, G. & A. R. Co. v. Bradley (Washington, G. & A. R. Co. v. Washington) 7 Wall. 575, 19 L. ed. 274; Benjamin v. Dubois, 118 U. S. 46, 30 L. ed. 52, 6 Sup. Ct. Rep. 925; Grant v. Phoenix Mut. L. Ins. Co. 121 U. S. 118, 30 L. ed. 909, 7 Sup. Ct. Rep. 841; District of Columbia v. McBlair, 124 U. S. 320, 31 L. ed. 449, 8 Sup. Ct. Rep. 547; Hume v. Bowie, 148 U. S. 245, 37 L. ed. 438, 13 Sup. Ct. Rep. 582; Hollander v. Fechheimer, 162 U. S. 326, 40 L. ed. 985, 16 Sup. Ct. Rep. 795; Kenaday v. Sinnott, supra; Macfarland v. Brown, 187 U. S. 239, 47 L. ed. 159, 23 Sup. Ct. Rep. 105; Macfarland v. Byrnes, 187 U. S. 246, 47 L. ed. 162, 23 Sup. Ct. Rep. 107; Clark v. Roller, 199 U. S. 541, 50 L. ed. 300, 26 Sup. Ct. Rep. 141; Warner v. Grayson, 200 U. S. 257, 50 L. ed. 470, 26 Sup. Ct. Rep. 240; Chesapeake & P. Teleph. Co. v. Manning, 186

writ of mandamus, as the petitioner in her said petition has prayed."

Relator filed a demurrer to the answer, which was overruled, whereupon she elected to stand by the demurrer, and judgment was entered denying the writ. The judgment was affirmed by the court of appeals (24 App. D. C. 95), and this writ of error then sued out.

Solicitor General Hoyt in support of motion to dismiss:

The motion to dismiss for want of jurisdiction should be granted.

South Carolina v. Seymour (United States ex rel. South Carolina v. Seymour) 153 U. S. 353, 38 L. ed. 742, 14 Sup. Ct. Rep. 871; United States v. Lynch, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114.

Mr. Noble E. Dawson, opposed:

A case may be considered to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either.

Cohen v. Virginia, 6 Wheat. 375, 5 L. ed. 284.

Or whenever the rights set up by a party may be defeated by one construction, or sustained by the opposite construction.

Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Starin v. New York, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28.

The jurisdiction for review of the judgments of courts extends to adverse decisions

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U. S. 241, 46 L. ed. 1145, 22 Sup. Ct. Rep. 881.

IV. Jurisdictional amount.

See also infra, V.,—Perrine v. Slack, 164 U. S. 452, 41 L. ed. 510, 17 Sup. Ct. Rep. 79; VI.,—United States v. More, 3 Cranch, 159, 2 L. ed. 397; Sinclair v. District of Columbia, supra.

The jurisdictional amount necessary to sustain the appellate jurisdiction of the Supreme Court of the United States over the circuit court of the District of Columbia was originally fixed at $100. Wise v. Columbia Turnp. Co. 7 Cranch, 276, 3 L. ed. 341; Carter v. Cutting, 8 Cranch, 251, 3 L. ed. 553.

This amount was afterwards increased to $1,000. Columbian Ins. Co. v. Wheelright, 7 Wheat. 535, 5 L. ed. 516; Nicholls v. Hodges, 1 Pet. 562, 7 L. ed. 263; Lee v. Lee, 8 Pet. 48, 8 L. ed. 862; Pierce v. Cox, 9 Wall. 786, 19 L. ed. 786.

And when the supreme court for the District was established the jurisdictional amount was left unchanged. Keogh v. Orient F. Ins. Co. 154 U. S. 639, Appx. and 24 L. ed. 650.

But the jurisdictional amount was raised to $2,500 by the act of February 25, 1879 Baltimore & P. R. Co. v. Grant, 98 U. S. 398, 25 L. ed. 231; Bank of the Republic v. Millard (National Bank v. Miller) 154 U. S. 656, Appx. and 25 L. ed. 529; Baltimore & P. R. Co. v. Trook, 100 U. S. 112, 25 L. ed. 571; Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494.

And still later by the act of March 3, 1885 (23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572), the jurisdictional amount was increased to $5,000 except in cases involving the validity of a patent or copyright or the validity of a treaty or statute of, or authority exercised under, the United States, in which a review was authorized "without regard to the sum or value in dispute." Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; Re Craft, 124 U. S. 370, 31 L. ed. 449, 8 Sup. Ct. Rep. 509; Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 L. ed. 903, 9 Sup. Ct. Rep. 503; District of Columbia v. Gannon, 130 U. S. 227, 32 L. ed. 922, 9 Sup. Ct. Rep. 508; District of Columbia v. Brewer, 131 U. S. 434, 33 L. ed. 213, 9 Sup. Ct. Rep. 797; Hollander v. Fechheimer, 162 U. S. 326, 40 L. ed. 985, 16 Sup. Ct. Rep. 795.

The same jurisdictional amount, subject to this exception in favor of cases involving the validity of a patent or copyright, or treaty or statute of, or authority exercised under, the United States, was established by § 8 of the act of February 9, 1893, creating a court of appeals for the District of Columbia. South Carolina v. Seymour (United States ex rel. South Carolina v. Seymour) 153 U. S. 353, 38 L. ed. 742, 14 Sup. Ct. Rep. 871; Durham v. Seymour, 161 U. S. 237, 40 L. ed. 683, 16 Sup. Ct. Rep. 452; Willis v. Eastern Trust & Bkg. Co. 167 U. S. 76, 42 L. ed. 83, 17 Sup. Ct. Rep. 739; Overby v. Gordon, 177 U. S. 214, 44 L. ed. 741, 20 Sup. Ct. Rep. 603; Chamberlin v. Browning, 177 U. S. 605, 44 L. ed. 906, 20 Sup. Ct. Rep. 820; Magruder v. Armes, 180 U. S. 496, 45 L. ed. 638, 21 Sup. Ct. Rep. 454; Shappirio v. Goldberg, 192 U. S. 232, 48 L. ed. 419, 24 Sup. Ct. Rep. 259.

The present statute, D. C. Code, § 223, 31 Stat. at L. 1227, chap. 854, makes the same requirement. United States ex rel. Holzendorf v. Hay, 194 U. S. 373, 48 L. ed. 1025, 24 Sup. Ct. Rep. 681.

Even where the case involves the validity of a patent or copyright or of a treaty or statute of, or authority exercised under, the United States, a matter in dispute measureable by some sum or value in money must be involved. Cross v. Burke, 146 U. S. 82, 36 L. ed. 896, 13 Sup. Ct. Rep. 2; Washington & G. R. Co. v. District of Columbia, 146 U. S. 227, 36 L. ed. 951, 13 Sup. Ct. Rep. 64; Chapman v. United States, 164 U. S. 436, 41 L. ed. 504, 17 Sup. Ct. Rep. 76; Prather v. United States, 164 U. S. 452, 41 L. ed. 510, 17 Sup. Ct. Rep. 97.

The statute increasing the jurisdictional amount to $1,000 provided for the judicial allowance of a writ of error or appeal, when the amount in controversy was between

upon rights and titles claimed under the Constitution, laws, or treaties of the United States.

Carson v. Dunham, 121 U. S. 421, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030.

When the decision is against the right claimed under the Constitution or laws of the United States, a writ of error will lie to bring the judgment of the court before this court for re-examination and revision.

Ableman v. Booth, 21 How. 506, 16 L. ed. 169.

If a question is fairly presented by the record, and its decision is necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right as if it had been specifically referred to, and the right directly refused.

Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 31 L. ed 235, 8 Sup. Ct. Rep. 211.

Mr. Chief Justice Fuller delivered the opinion of the court:

This case comes before us on a motion to dismiss the writ of error for want of jurisdiction. The right to such a writ is given in § 233 of the Code of the District of Columbia (31 Stat. at L. 1189, 1227, chap. 854), which reads:

"Any final judgment or decree of the court of appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ

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$100 and $1,000, if some principle of extensive interest and operation rendered a final decision by the Supreme Court desirable. Campbell v. Read, 2 Wall. 198, 17 L. ed. 779.

But, when the jurisdictional amount was raised to $2,500, this provision was omitted. United States ex rel. Trask v. Wanamaker, 147 U. S. 149, 37 L. ed. 118, 13 Sup. Ct. Rep. 279; Dennison v. Alexander, 103 U. S. 522, 26 L. ed. 313.

Cases not involving the jurisdictional amount may now be reviewed by certiorari. See supra, II. b.

The question when the jurisdictional amount is involved is one to be decided by the general principles applicable to all appellate courts whose jurisdiction depends on the amount in controversy, and is not here discussed.

V. Habeas corpus cases.

In Wales v. Whitney, 114 U. S. 565, 29 L. ed. 277, 5 Sup. Ct. Rep. 1050, the court thought that the restoration, by the act of March 3, 1885 (23 Stat. at L. 437, chap. 353, U. S. Comp. Stat. 1901, p. 595), of the appellate jurisdiction of the Federal Supreme Court in habeas corpus cases over decisions of the circuit courts, necessarily included jurisdiction over similar judgments of the supreme court of the District of Columbia, in view of the controlling statutory provision which, the court said, made the appellate jurisdiction over judgments and decrees of the circuit courts the measure of the Supreme Court's jurisdiction, except as to amounts in controversies, over judgments and decrees of the supreme court of the District in similar cases.

But the court later said that this provision did not determine the nature of the case reviewable, but only indicated the mode of review. Ormsby v. Webb, 134 U. S. 47, 33 L. ed. 805, 10 Sup. Ct. Rep. 478. And the view announced in Wales v. Whitney was questioned in Re Heath, 144 U. S. 92, 36 L. ed. 358, 12 Sup. Ct. Rep. 615. And in Cross v. Burke, 146 U. S. 82, 36 L. ed. 896, 11 Sup. Ct. Rep. 22, the court squarely held that the Supreme Court of the United States had no appellate jurisdiction over the supreme court of the District of Columbia in habeas corpus cases; and this decision was followed in Re Schneider, 148 U. S. 157, 37 L. ed. 404, 13 Sup. Ct. Rep. 572.

And in Perrine v. Slack, 164 U. S. 452, 41 L. ed. 510, 17 Sup. Ct. Rep. 79, it was held that a writ of error does not lie to the court of appeals of the District of Columbia in a habeas corpus case involving a question as to the custody and care of children in a controversy between their mother and a testamentary guardian, as the matter in dispute was incapable of being reduced to a pecuniary standard of value.

VI. Criminal cases.

The decisions have uniformly denied any appellate jurisdiction over the District of Columbia courts in criminal cases. United States v. More, 3 Cranch, 159, 2 L. ed. 397 (error to circuit court for the District); Re Heath, supra (error to supreme court of District); Cross v. United States, 145 U. S. 571, 36 L. ed. 821, 12 Sup. Ct. Rep. 842 (error to supreme court of District); Chapman v. United States, 164 U. S. 436, 41 L. ed. 504, 17 Sup. Ct. Rep. 76 (error to court of appeals of District); Prather v. United States, 164 U. S. 452, 41 L. ed. 510, 17 Sup. Ct. Rep. 997 (error to court of appeals of District); Sinclair v. District of Columbia, 192 U. S. 16, 48 L. ed. 322, 24 Sup. Ct. Rep. 212 (error to court of appeals of District).

A sufficient reason for this view is that a criminal case—although the punishment in case of conviction may embrace a fine—is not a case in which there is a pecuniary matter in dispute, which, as we have seen (see supra, IV.) must exist even where the validity of a treaty or statute of, or authority exercised under, the United States, is drawn in question. United States v. More, Chapman v. United States, Prather v. United States, and Sinclair v. District of Columbia,—supra.

A judgment convicting a chancery receiver

of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regu-
[464] lations as existed in *cases of writs of error on judgments, or appeals from decrees rendered in the supreme court of the District of Columbia, on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

If this writ of error can be maintained, it is on the ground that the validity of an authority exercised under the United States was drawn in question.

The relator did not, however, question the authority of the President or his representatives to dismiss her, if the required for-

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of embezzling money which had come into his possession in his official capacity is not reviewable on writ of error from the Federal Supreme Court to the court of appeals of the District of Columbia on the theory that the forfeiture by defendant, under D. C. Code, § 841, 31 Stat. at L. 1326, chap. 854, defining the offense, of all right or claim to any commissions, was determined by the judgment, and that therefore the jurisdictional amount prescribed by § 233 of such Code was involved, since the forfeiture of commissions does not follow the judgment, but follows the wrongful conversion or appropriation of the moneys. Fields v. United States, 205 U. S. 292, post, ——, 27 Sup. Ct. Rep. 543.

Judgments of the supreme court of the District of Columbia in criminal cases were not embraced in the provisions of the act of Congress of March 3, 1891, for a direct review in the Supreme Court of the United States of the judgments of the district courts or the existing circuit courts in cases of conviction of a capital or otherwise infamous crime, although the statute governing the appellate jurisdiction over the supreme court of the District of Columbia defines such jurisdiction as existing in the same cases and in like manner as provided by law in reference to the final judgments, orders, and decrees of the circuit courts. Re Heath, supra.

A review in the Supreme Court of the United States of a judgment of the general term of the supreme court of the District of Columbia affirming the judgment of a criminal term of that court, adjudging a person guilty of murder, and sentencing him to death, was not authorized by the provision of the act of February 6, 1889, for writs of error to courts of the United States in capital cases, which manifestly contemplates a review of the final judgment of the trial court. Cross v. United States, supra.

The judgments of the circuit court of appeals of the District in criminal cases may, however, be reviewed by certiorari, in the discretion of the Federal Supreme Court. Sinclair v. District of Columbia, supra; Winston v. United States, 172 U. S. 303, 43 L. ed. 456, 19 Sup. Ct. Rep. 212.

VII. Cases involving Federal questions.

a. In general.

Congress, by the act of March 3, 1885 (23 Stat. at L. 443, chap. 355), § 2, authorized a review in the Federal Supreme Court of judgments or decrees of the supreme court of the District of Columbia "without regard to the sum or value in dispute" in any case "wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States." And when the circuit court of appeals for the District of Columbia was created by the act of February 9, 1893, the appellate jurisdiction of the Supreme Court of the United States was defined by the 8th section of that act practically in the same terms.

This section and the present statute, § 233 of the Code of the District of Columbia, are in substance the same, and must bear the same construction. Sinclair v. District of Columbia, 192 U. S. 16, 48 L. ed. 332, 24 Sup. Ct. Rep. 212; Metropolitan R. Co. v. District of Columbia (Metropolitan R. Co. v. Macfarland) 195 U. S. 322, 49 L. ed. 219, 25 Sup. Ct. Rep. 28.

Since the provision of the act of March 3, 1885, § 2, applied as well to territorial supreme courts as to the supreme court of the District of Columbia, the note to New York Foundling Hospital v. Gatti, ante, 254, on Federal questions as sustaining the appellate jurisdiction of the Federal Supreme Court over territorial supreme courts should be consulted for further authorities on the questions discussed below.

In this connection may also well be considered decisions construing somewhat similar language in the statutes regulating writs of error from the Supreme Court of the United States to state courts. See, on this point, divs. IV. b and IV. c, in note to Apex Transp. Co. v. Garbade, 68 L.R.A. 513, on What adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts. But a difference between the controlling statutes should be noted. Since provision is not made for a review of a decision by the District of Columbia court of appeals upon a claim of right or title under a Federal law or an authority exercised under the United States, such review being authorized only where the validity of such law or authority is drawn in question, a judgment of the District of Columbia court may not be re-

had been complied with. What she was that there were certain rules ulations of the civil service which t observed in the matter of her dis- and that, therefore, such dismissal gal.

his contention did not draw in ques- validity of an authority exercised he United States, but the construc- l application of regulations of the of such authority.

As Mr. Justice Gray said, in South Carolina v. Seymour (United States ex rel. South Carolina v. Seymour) 153 U. S. 353, 38 L. ed. 742, 14 Sup. Ct. Rep. 871, referring to an identical provision of the laws of the District prior to the Code: "In order to come within this clause, the validity, and not the construction only, of a treaty or statute of the United States, or of an authority exercised under the United States must be directly drawn in question."

, which, had it been rendered by a urt, would have been the subject review, as being a denial of a right, ivilege, or immunity claimed under or authority. It should also be ered that, unlike the judgments of e courts, those of the courts under ation need not be against the va- f the law or authority drawn in , in order to be subject to review. re & P. R. Co. v. Hopkins, 130 U. 32 L. ed. 908, 9 Sup. Ct. Rep. 503.

. Patent and copyright cases.

peal from a decree of the court of for the District of Columbia dis- a bill filed in accordance with U. Stat. § 4915, U. S. Comp. Stat. 1901, to obtain a patent for an invention, be taken to the Supreme Court of ted States on the ground that the of a patent is involved. Durham our, 161 U. S. 237, 40 L. ed. 683, Ct. Rep. 452.

ions respecting Federal law or treaty.

Supreme Court has jurisdiction where e presents for determination the of the validity of Congressional on. Capital Traction Co. v. Hof, S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. rsons v. District of Columbia, 170 5, 42 L. ed. 943, 18 Sup. Ct. Rep.

the validity, and not the construc- a treaty or statute of the United must be directly drawn in question. Carolina v. Seymour (United States South Carolina v. Seymour) 153 U. 38 L. ed. 742, 14 Sup. Ct. Rep. ited States v. Lynch, 137 U. S. 280, . 700, 11 Sup. Ct. Rep. 114.

words, "the validity of . . . a " as used in this act of March 3, fer only to the power of Congress the statute as it is by its terms de to read by construction, and not judicial construction, as contradis- ed from a denial of the legislative Baltimore & P. R. Co. v. Hopkins, S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep.

, the validity of certain statutes of ted States under which a railroad company claimed the right to the use of a city's streets was not drawn in question so as to authorize the Supreme Court of the United States to review a judgment of the supreme court of the District of Columbia in an action to recover damages from the railroad company for maintaining a nuisance, where the court did not deny the right of the company to use the streets, but limited its right to the use held by it to be authorized by such statute. Ibid.

Whenever the power to enact a statute as it is by its terms or is made to read by construction is fairly open to denial, and denied, the validity of the statute is drawn in question; but not otherwise. Baltimore & P. R. Co. v. Hopkins, supra.

See also infra, VII. d,—Re Craft, 124 U. S. 370, 31 L. ed. 449, 8 Sup. Ct. Rep. 509.

d. Questions respecting Federal authority.

It is the validity, and not the construction merely, of an authority exercised under the United States, which must be drawn in question in order to come within the statute. South Carolina v. Seymour, supra.

The "validity of an authority exercised under the United States" is not drawn in question every time an act done by such authority is disputed. United States v. Lynch, supra.

The validity of the authority of the second comptroller and fourth auditor of the United States is not drawn in question, when it is merely claimed that, in the exercise of a valid authority, they erred in disallowance of mileage to a naval officer. Ibid.

Neither the question whether the Commissioner of Patents rightly decided upon the presumptive lawfulness of the right of a state to the trademark sought to be registered by it, or whether the Commissioner's duty in the premises was of such a character that mandamus would lie to compel its performance, involves any question as to the validity of the authority exercised by him under the United States. South Carolina v. Seymour, supra.

Nor does a decision which does not deny the right of a railroad company to the use of the city streets by virtue of certain acts of Congress, but limits such right to the use held by it to be authorized by such

And, prior to that case, we had disposed of the same question in United States v. Lynch, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114. That was a petition for a writ of mandamus against the Fourth Auditor and the Second Comptroller of the Treasury, to compel them to audit the account of petitioner, who was an officer in the Navy. It was insisted that by the disallowance of petitioner's claim for mileage these officers exercised a discretion which they did not possess; that this was an invalid exercise of an authority under the United States; and that hence the validity [465]*of the authority was drawn in question. We held otherwise, and said:

"The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed. . . .

"What the relator sought was an order coercing these officers to proceed in a particular way, and this order the supreme court of the District declined to grant. If we were to reverse that judgment upon the ground urged, it would not be for want of power in the Auditor to audit the account, and in the Comptroller to revise and pass upon it, but because those officers had disallowed what they ought to have allowed and erroneously construed what needed no construction. This would not in any degree involve the validity of their authority."

United States ex rel. Steinmetz v. Allen, 192 U. S. 543, 48 L. ed. 555, 24 Sup. 416, is not to the contrary, for th validity of a rule constituting the a of certain officers in the Patent Off drawn in question.

Writ of error dismissed.

GILA VALLEY, GLOBE, & NOR RAILWAY COMPANY, Plff. in v. A. J. LYON.

(See S. C. Reporter's ed. 465-47

Trial—question for jury—negligence

1. Evidence tending to show that railroad track was not a safe and structure for the operation of cars cient to carry to the jury, on the q of the negligence of the railway co an action to recover for the killin brakeman while riding on a car plunged over the end of the spur tr though the evidence for the railwa pany tended to show that the accide due to the negligence of a fellow ser ordering the car to be detached fr train and engine.

Appeal—prejudicial error—instructio

2. Charging the jury that, unless cident to a railway brakeman was solely by the negligence of the con the defendant railway company was even if erroneous in that "sole cause" synonymous with "proximate cause not prejudice the defendant, where instructions, given at its request, v

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statute, draw in question the validity of any such authority. Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503.

Nor is the validity of the authority conferred upon the District commissioners drawn in question by the refusal to give instructions in an action against the District of Columbia to recover damages for personal injuries, which involved the acts of Congress creating the District government only so far as they bore upon the question of the liability of the District for negligence in failing to keep the streets in repair, and by way of construction, and did not deny the validity of the acts themselves, or of the authority exercised under them. District of Columbia v. Gannon, 130 U. S. 227, 32 L. ed. 922, 9 Sup. Ct. Rep. 508.

An injunction restraining a person from prosecuting an ordinary suit in replevin in a court established under the authority of the United States does not necessarily involve a question of the validity of a treaty or statute of, or an authority exercised under, the United States. Re Craft, 124 U. S. 370, 31 L. ed. 449, 8 Sup. Ct. Rep. 509.

But the validity of such an authority is so drawn in question when its exist constitutionality is denied, and the forms the subject of direct inquiry. ed States v. Lynch, supra.

The validity of an authority ex under the United States was drawn i tion in determining whether the spec sessment authorized by Congress for lic improvement contained a sufficie scription of the property assesse whether sufficient notice was afforded sons v. District of Columbia, 170 U. 42 L. ed. 943, 18 Sup. Ct. Rep. 52

A suit in which the validity of lation established by the Commissi Patents, under the authority of U. Stat. § 483, U. S. Comp. Stat. 1901, for the conduct of proceedings in th ent Office, is assailed, is one in whic is drawn in question the validity authority exercised under the States" within the meaning of the February 9, 1893, § 8 (27 Stat. at chap. 74, U. S. Comp. Stat. 1901, giving an appeal in such cases from th judgment or decree of the court of of the District of Columbia to the Supreme Court. United States Steinmetz v. Allen, 192 U. S. 543, ed. 555, 24 Sup. Ct. Rep. 416.

:t that, if the conductor's negligence
: proximate cause of the accident,
uld be no recovery, and the court's
n was not specifically drawn to the
n to the word "sole."

eception of evidence—expert testi-

The discretion of the trial court is
ised by permitting witnesses who
d practical railroad experience and
iliar with overhead structures and
to testify as to whether a buffer at
of a spur track was a reasonably
l proper one, and as to whether rea-
and proper care had been exercised
ilding an overhead structure as to
the use of the hand brakes on a
car until about 100 feet from the end
pur track.

[No. 96.]

ed November 13, 1906. Decided
December 10, 1906.

ROR to the Supreme Court of the
itory of Arizona to review a judg-
hich affirmed, on a second appeal,
nent of the District Court of Gila
in that territory, in favor of plain-
in action to recover damages for the
negligent killing of a railway em-
Affirmed.

ame case below (Ariz.) 80 Pac. 337;
appeal, 71 Pac. 957.

ment by Mr. Justice Peckham:
lefendant in error, who was plaintiff
recovered a judgment against the
l company, plaintiff in error, in a
urt in Arizona territory, for the
t killing of her son, which judgment
irmed by the supreme court of the
y, and the company brings the case

deceased was a brakeman and had
nployed by the defendant company
for a few weeks before the accident
l in which he lost his life. He act-
ne of the brakemen upon the freight
which was pushed up on a spur
hat ran from the main line in the
Globe, in the territory, to a mining
about 500 yards away. The acci-
hich resulted in the death of the
l, occurred on this spur track on
h of July, 1900. The grade of the
fter leaving the main line, was, for
t distance, level. It then became
teep upgrade, getting steeper and
until it again became level, under
termed the tramway house. This
tructure erected over the tracks, and
tom of it was only 2 feet above the
the freight cars, and from that
y structure to the end of the road
the grade was about level, and the distance a little over a hundred feet. The track ended on a trestle, with a buffer at the end, which was not calculated to resist a car pushed by an engine, but only to stop one pushed by hand or by the wind. The trestle ended at the side of a cañon, and there was at that point an abrupt fall to the bottom of the cañon of 75 feet. There was a curve on the spur track, which would prevent the engineer from seeing the end of his train, and he would have to obtain signals from others in order to run his engine. The upgrade was so steep that only a few cars could be taken up from the main track at any one time.

On the occasion of the accident the train started from the *main line, and was pushed [467] up grade by the engine in the rear. The deceased was on top of the front car of the train, being farthest away from the engine at the time the train was being pushed up. The conductor was on the car next to that of the deceased, and by his orders the engineer shoved the train as rapidly as he could, and ran it at the rate of 5 or 6 miles an hour, and then after a shove the two cars on which were the deceased and the conductor were detached from the train and passed along at that rate of speed under the tramway house and on to the level portion of the road, which ended in about a hundred feet at the side of the cañon. The deceased was unable to control the speed of the cars with his brakes, and the car on which he was riding passed along and knocked away the buffer and plunged down to the bottom of the cañon. Eyewitnesses of the accident immediately descended the side of the cañon and found at the bottom the car and the dead body of the deceased.

There was evidence tending to show that the spur track was not a safe and proper structure to operate over its length with cars, for the reason that the tramway house was so close to the top of the cars when passing under it that the brakes could not be handled, and there was not sufficient length of road after the train passed under the house during which to get the cars under control and stop them before they arrived at the end of the track and the side of the cañon. The only way in which it ought ever to have been done was to have the engine at all times attached to the train, and even then, if anything got out of order with the engine, the train was not under control of the brakeman, on account of the tramway house. The buffer at the end of the track was also asserted to be insufficient, and witnesses were called who testified that the track was not a reasonably safe one upon which to conduct the business of the road.

The company, on its part, gave evidence tending to show that the track was properly constructed; that the buffer was sufficient for the purpose intended, and that the whole [468]structure *was a reasonably safe place, and that the accident was caused simply by the flagrant negligence of the conductor, in ordering the two cars to be detached from the train, and thus taken away from the control of the engine. It also gave evidence that the buffer was not to be used at the end of the track to stop cars in motion, nor were the hand brakes intended to be so used at that spot, as it was intended that the engine should control the cars and should not be there detached from them. They therefore insist that, when the operation was properly performed, the matters of the low shed, short track, and insufficient buffer were immaterial. It was all predicated upon the fact that the cars should be under the control of the engine, and should not be detached therefrom, as these cars were, under the orders of the conductor.

Mr. Frank W. Burnett submitted the cause for plaintiff in error:

The jury should have been instructed to render a verdict for the plaintiff in error.

Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322.

It is the master's duty to provide a safe place to work, but that principle is not applicable when the place becomes dangerous in the progress of the work, from the manner in which the work is done.

Callaway v. Allen, 12 C. C. A. 114, 24 U. S. App. 388, 64 Fed. 297; Cleveland, C. C. & St. L. R. Co. v. Brown, 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970; Hussey v. Coger, 112 N. Y. 614, 3 L.R.A. 559, 8 Am. St. Rep. 787, 20 N. E. 556; Hogan v. Smith, 125 N. Y. 774, 26 N. E. 742.

Negligence of conductor need not have been the sole cause of the accident, to relieve plaintiff in error from liability.

Vizelich v. Southern P. Co. 126 Cal. 587, 59 Pac. 129; Little Rock & M. R. Co. v. Barry, 43 L.R.A. 349, 28 C. C. A. 644, 56 U. S. App. 37, 84 Fed. 944; Wharton, Neg. 2d ed. § 85; Zopfi v. Postal Teleg. Cable Co. 9 C. C. A. 308, 22 U. S. App. 136, 60 Fed. 987; Evansville & R. R. Co. v. Henderson, 134 Ind. 636, 33 N. E. 1021; Allen v. New Gas Co. L. R. 1 Exch. Div. 251, 45 L. J. Exch. N. S. 668, 34 L. T. N. S. 541; Conger v. Flint & P. M. R. Co. 86 Mich. 76, 48 N. W. 695; Kevern v. Providence Gold & S. Min. Co. 70 Cal. 392, 11 Pac. 740; Whitman v. Wisconsin & M. R. Co. 58 Wis. 408, 17 N. W. 124; Course v. New York, L. E. & W. R. Co. 17 N. Y. S. R. 715, 2 N. Y. Supp. 312; Cincinnati, N. O. & T. P. R. Co. v. Mealer, 1 C C. A. 633, 6 U. S. App. 86, 50 Fed. 725; Gowen v. Harley, 6 C. C. A. 190, 12 U. S. App. 574, 56 Fed. 973; Morris v. Duluth, S. S. & A. R. Co. 47 C. C. A. 661, 108 Fed. 749; Norfolk & W. R. Co. v. Brown, 91 Va. 668, 22 S. E. 496; Bull v. Mobile & M. R. Co. 67 Ala. 206; Rose v. Gulf, C. & S. F. R. Co. (Tex.) 17 S. W. 789; New York, C. & St. L. R. Co. v. Pardguey, 138 Ind. 414, 34 N. E. 233, 37 N. E. 976; Union P. R. Co. v. Callaghan, 6 C. C. A. 205, 12 U. S. App. 541, 56 Fed. 988; St. Louis & S. F. R. Co. v. McClain, 80 Tex. 85, 15 S. W. 789; Atchison, T. & S. F. R. Co. v. Lannigan, 56 Kan. 109, 42 Pac. 343; Broughel v. Southern New England Teleph. Co. 73 Conn. 617, 84 Am. St. Rep. 176, 48 Atl. 751; Edmonson v. Kentucky C. R. Co. 105 Ky. 479, 48 S. W. 200, 448; Youngbluth v. Stephens, 104 Wis. 343, 80 N. W. 443; Holland v. Tennessee Coal, Iron. & R. Co. 91 Ala. 445, 12 L.R.A. 232, 8 So. 594; 21 Am. & Eng. Enc. Law, 2d ed. p. 483.

Witnesses not competent to undertake the building of such or similar structures are not competent to advise a jury as to the work of men thoroughly versed in their profession.

Ballard v. New York L. E. & W. R. Co. 126 Pa. 141, 19 Atl. 35.

Mr. Waters Davis submitted the cause for defendant in error:

The court properly refused to instruct the jury to return a verdict for defendant.

Paulmier v. Erie R. Co. 34 N. J. L. 151; Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; Morrisey v. Hughes, 65 Vt. 553, 27 Atl. 205; Elmer v. Locke, 135 Mass. 575; Gonzales v. Galveston, 84 Tex. 6, 31 Am. St. Rep. 17, 19 S. W. 284; Clyde v. Richmond & D. R. Co. 59 Fed. 398; Louisville & N. R. Co. v. Cooley, 20 Ky. L. Rep. 1372, 49 S. W. 338; Pennsylvania R. Co. v. Jones, 59 C. C. A. 87, 123 Fed. 753; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24; New Jersey & N. Y. R. Co. v. Young, 1 C. C. A. 428, 1 U. S. App. 96, 49 Fed. 725; Lake Shore & M. S. R. Co. v. Wilson, 11 Ind. App. 488, 38 N. E. 363; Southern P. Co. v. Yeargin, 48 C. C. A. 497, 109 Fed. 436.

As a matter of law, a railway company is negligent in having even a low bridge over its track.

Louisville & N. R. Co. v. Cooley, supra.

The negligence of appellant in the case at bar was much greater, and its defense of fellow servant's negligence is much weaker, than in the case of Paulmier v. Erie R. Co. supra.

So long as defendant's negligence has some share (however little) in the accident, the plaintiff is entitled to recover.

Trunk R. Co. v. Cummings, supra; n, H. & S. A. R. Co. v. Croskell, 6 App. 160, 25 S. W. 486.

nost generally recognized that in a concurrent negligence there is no oximate cause.

v. Empire State Teleph. Co. 13), 34 N. Y. Supp. 470; Laible v. New & H. R. R. Co. 13 App. Div. 574, 43 N. 1003; Chicago & N. W. R. Co. v. 23 L.R.A. 654, 8 C. C. A. 109, 19 p. 291, 59 Fed. 237; Clyde v. Rich- D. R. Co. supra; Norfolk & W. R. Tuckols, 91 Va. 193, 21 S. E. 344; & T. C. R. Co. v. Kelly (Tex. Civ. S. W. 879; Waller v. Missouri, K. Co. 59 Mo. App. 410; Galveston, H. R. Co. v. Croskell, supra; Phillips York C. & H. R. R. Co. 127 N. Y. N. E. 978; Young v. Shickle, H. & H. 103 Mo. 324, 15 S. W. 772; Deweese mec Iron Min. Co. 128 Mo. 423, 31 13; New Jersey & N. Y. R. Co. v. supra; Towns v. Vicksburg, S. & P. 7 La. Ann. 630, 55 Am. Rep. 511; P. Co. v. Yeargin, supra.

the injury is caused partly by the ce of a fellow servant and partly failure of the company to provide nd suitable apparatus, the negligence servant will not exonerate the com- m the consequences of its own de-

Trunk R. Co. v. Cummings, supra; & Eng. Enc. Law, p. 905; Ellis v. New E. & W. R. Co. 95 N. Y. 546.

the trial court adopts the theory dvocated by one of the parties, the cannot successfully challenge that n appeal. MacDonald v. Tittmann, App. 536, 70 S. W. 502; "Parties are y bound on appeal by positions y them in the trial court." Harper v. 114 Mo. 317, 21 S. W. 517. "Errone- ructions cannot be complained of by nt, when given at its request."

s City Suburban Belt R. Co. v. Kan- , St. L. & C. R. Co. 118 Mo. 599, . 479; Sanders v. Brock (Tex. Civ. 1 S. W. 311.

ty who asks an instruction, the same ance as that given by the court, can- plain of error in the latter instruc-

ns v. Crane, 116 Mo. 408, 22 S. W. artin v. Missouri P. R. Co. (Tex.) 22 S. W. 195; Dunnington v. Frick Ark. 250, 30 S. W. 212; Simpson v. 4 Tex. Civ. App. 235, 38 S. W. 474; ional & G. N. R. Co. v. Newman v. App.) 40 S. W. 854; International R. Co. v. Sein, 89 Tex. 63, 33 S. W. Tex. Civ. App. 386, 33 S. W. 558; is Bridge & Iron Co. v. St. Louis Brewing Asso. 129 Mo. 343, 31 S. W. 765; Byrd v. Ellis (Tex. Civ. App.) 35 S. W. 1070; 3 Century Dig. p. 1327, § 3602.

The question of the admissibility of expert testimony is for the determination of the trial court, and the action of the trial court will not, except in an extreme case, be disturbed.

Chateaugay Ore & Iron Co. v. Blake, 144 U. S. 476, 36 L. ed. 510, 12 Sup. Ct. Rep. 731; Congress & E. Spring Co. v. Edgar, 99 U. S. 645, 25 L. ed. 487; Murphy v. New York C. R. Co. 66 Barb. 125; Ft. Wayne v. Coombs, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743; Lynch v. Grayson, 5 N. M. 487, 25 Pac. 992; St. Louis & S. F. R. Co. v. Bradley, 4 C. C. A. 528, 13 U. S. App. 68, 54 Fed. 632; Conkling v. Manhattan R. Co. 36 N. Y. S. R. 124, 12 N. Y. Supp. 846; Ives v. Leonard, 50 Mich. 296, 15 N. W. 463; Maughan v. Burns, 64 Vt. 316, 23 Atl. 583.

Were there any foundation for the criticisms of plaintiff in error, its objections would go to the weight rather than to the admissibility of the evidence of plaintiff's experts.

Ft. Worth & D. C. R. Co. v. Wilson (Tex. Civ. App.) 24 S. W. 686.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The first question presented by the plaintiff in error is founded upon an exception to the refusal of the court to instruct the jury to render a verdict for the plaintiff in error, on the ground that there was no evidence that the railroad company was guilty of negligence by failing to provide a reasonably safe place for the servants of the company to work in; that the cause of the accident was the gross negligence of the conductor in ordering the cars to be detached from the train and engine, and that such negligence was that of a fellow servant of the deceased, and did not form the basis for a recovery against the defendant. We are of opinion that, taking the whole evidence, enough was proved on the part of the plaintiff below to make it proper to send the case to the jury on the question of the negligence of the company.

The next question arises in regard to the charge of the court upon the proximate cause of the accident, whether it was the *negligence of the defendant company in not [471] furnishing a proper and reasonably safe place for its employees to work, or that it was the negligence of the conductor (a fellow servant of the deceased) in ordering the cars detached from the engine. The court charged that—

"The conductor of the train was a fellow servant of the man who was killed, and if

the accident was brought about solely by the negligence of the conductor of the train, then the defendant company is not liable; or if the accident was brought about by the negligence of the conductor and the negligence of the man who was killed, the defendant company is not liable. If, however, the accident was caused by a failure of the defendant company to provide a reasonably safe place to perform the work in which the man who was killed was engaged, then the defendant company is liable in damages for the death, if it was negligent in not providing such safe place.

"The fundamental question, therefore, for you to determine in this case is, What was the cause of this accident; what brought it about?

"If you find that this accident was caused solely by the action of the conductor in the method which he employed in putting cars on the spur at the time in question, then you should find a verdict for the defendant company, and you should not award any damages to the plaintiff in this case; or if you should find that the dead man has, through his own negligence, brought about this accident or contributed to it, then you should find for the defendant, and you should not award any damages in this case.

"On the other hand, if you find that the defendant company was negligent in not providing a reasonably safe place for the performance of the work, you should find for the plaintiff and award her damages, provided that the negligence of the defendant in not providing such a safe place was the cause of the accident, or contributed to the accident.

"To find for the plaintiff, it is not enough that you should find that the premises were [472] unsafe, or that the defendant *company was negligent in that respect, in not providing a safe place; you must also find that the place was unsafe, and that the accident was brought about or contributed to by reason of that unsafe place. That is, if you should find that the act of the conductor was the sole, or if you should find that it was the proximate, or the procuring, cause of the accident, then you should not award damages; but if you find that the accident was caused by the acts of the conductor and also by the negligence of the defendant company in not providing a safe place to do the work, then you should find damages for the plaintiff. In other words, in order to award damages to the plaintiff, you must find, first, that the defendant company was negligent in not providing a safe place to do the work, and that such negligence was the cause of the accident or contributed thereto. If you find the accident was brought about solely by the acts of the conductor, you not award damages. If the acts of ductor alone did not cause the accid the accident was contributed to by ligence of the defendant company providing a safe place to work, t should award damages."

Again:

"Was the place where the deceas working a reasonably safe place for formance of the work to be done t reasonably safe place, considering t acter of the work to be done and th ter of the premises?

"If you find it was not reasonal and the defendant company was n in that respect, did that fact have a to do with the accident, or was it ca the negligence of the conductor of t alone?

"If it was caused solely or pro brought about by the negligence of ductor, then the defendant is not li the negligence of the defendant contributed to the accident, then the ant is liable, provided the dead m self was not guilty of any negligen contributed to the accident."

The company now finds fault w charge, on the ground "that it was charge that unless the accident wa solely by the action of the condu defendant was liable; that "sole" not synonymous with "proximate" the action of the conductor may n been the sole, although at the same may have been the "proximate," ca if it was the proximate cause, the would not be liable. The rule wo to be that if the negligence of the had a share in causing the injury deceased, the company was liable, standing the negligence of a fellow contributed to the happening of t dent. Grand Trunk R. Co. v. Cumm U. S. 700, 27 L. ed. 266, 1 Sup. Ct. E Ellis v. New York, L. E. & W. R N. Y. 546, 552. But, in addition to t charge above set forth, the court the jury at the request of the co defendant as follows: that if the of throwing the cars, as testified unsafe, and the conductor caused to be so thrown by that unsafe met if such act of the conductor was th mate cause of the accident, and th unsafe method was adopted by t ductor without the authority or dir the defendant, the plaintiff cannot that if the jury believed that the to the deceased was proximately ca the negligence of the conductor, it material whether the deceased had

experience as a brakeman, or not; lithough the jury might believe from dence that other, better, and safer ces might have been used by the de- company, yet the defendant was reby rendered liable in this action, proximate cause of the accident was ligence of the conductor in the man- which he conducted the work on the in question; that, as the conductor fellow servant of the deceased, the nt could not be held liable if the ac- was proximately caused by negli- n the part of the conductor; that if y believed, from the evidence, that liances furnished by the defendant y were defective, yet if they further , from the evidence, that the con- was negligent in the manner in which lucted *the work on the occasion, and ich negligence was the proximate f the accident, without which such t would not have happened, then the ould find for the defendant.

hink the defendant received no preju- m the charge as given, taken in con- with the defendant's requests to which were complied with. If the nt had desired to obtain a more spe- rge in relation to the distinction be- 'sole" and "proximate" cause of the t, as applied to the negligence of the or, the court should have had its at- specifically drawn to the objection word "sole," and the particular free- om liability asserted if the negli- f the conductor were the proximate f the accident, as distinguished from cause. A general exception to the as given would not raise the ques- Congress & E. Spring Co. v. Edgar, 99 45, 659, 25 L. ed. 487, 491. The re- to charge as given show the jury attention drawn to the proximate nd that if the conductor's negligence e proximate cause, the plaintiff could over.

ird question arises upon the admis- evidence. Certain of the witnesses intiff were called to prove that, in pinion, the company had not fur- a reasonably safe place for its em- to work in. This was objected to ground that the witnesses testifying ere not properly experts and should permitted to testify. One witness, tified that the buffer was not a rea- safe and proper one, said that he n railroading for fifteen years, fol- the business of trackman during that hat it was his business to go over k and see if it was in proper shape, t he had had something to do with the construction of a railroad; that he was familiar with the construction of tracks, trestles, and buffers; that that was what he had had to do; that overhead structures came under another department; that he considered it unsafe for the reason that the buffer would afford an obstruction to the wheels and *that the car would slide [475] off the trucks and go over into the ravine.

Another witness said that he had been working on railroads for twenty years, and that from his experience he had had occasion to become acquainted with structures over tracks, over bridges and highways, and buffers at the end of chutes and tracks, and as to the control of the cars, their operation and the operation of the brakes on the cars, the stopping cars, the resisting power of buffers, etc. He said that, in his opinion, the tramway house was too close to the top of a car, and that it was an impediment to the operation of the hand brake of the car, and that the buffer at the end was not an effective obstruction. Evidence was given by other witnesses, by depositions, in regard to the structure over the railroad track and the character of the buffer.

In the cases of all the witnesses, we think the question of the admissibility of their evidence was one within the reasonable discretion of the trial court, and that the discretion was not abused. All the witnesses had had practical experience on railroads, and were familiar with structures and the character of buffers mentioned in the evidence. There was certainly enough to call upon the court to decide upon the admissibility of their opinions under these circumstances, and we ought not to interfere with the decision of the trial court in this case. Congress & E. Spring Co. v. Edgar, supra; Chateaugay Ore & Iron Co. v. Blake, 144 U. S. 476, 484, 36 L. ed. 510, 512, 12 Sup. Ct. Rep. 731.

There is no error in the record and the judgment is affirmed.

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*UNITED STATES EX REL. GEORGE A. LOWRY and Planters' Compress Company, Plffs. in Err., [476]

v.

FREDERICK I. ALLEN, Commissioner of Patents.

(See S. C. Reporter's ed. 476–483.)

Patents—appeal from interlocutory decision.

An appeal from a decision of the primary examiner upon a motion to dissolve an interference, holding that the party had the right to make the interfering claims, may be prohibited by the rules of the Pat-

ent Office without infringing the right of appeal in interferences given by U. S. Rev. Stat. §§ 482, 483, 4904, 4909, U. S. Comp. Stat. 1901, pp. 272, 3389, 3390, since the appeal therein provided for must be deemed limited to final decisions upon the question of priority of invention, which, under these statutes, is the sole question for determination in interference cases.

[No. 56.]

Argued October 24, 25, 1906. Decided December 10, 1906.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which reversed a judgment of the Supreme Court of that District, granting a mandamus to require the Commissioner of Patents to direct the board of examiners in chief to take jurisdiction of an appeal from a ruling of the primary examiner, upon a motion to dissolve an interference. Affirmed.

See same case below, 26 App. D. C. 8.

The facts are stated in the opinion.

Mr. Oliver Mitchell argued the cause, and, with Messrs. Edmund Wetmore and Meyers, Cushman, & Rea, filed a brief for plaintiffs in error.

Assistant Attorney General McReynolds argued the cause, and, with Mr. John M. Coit, filed a brief for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

This is a petition for mandamus, filed in the supreme court of the District of Columbia, requiring the Commissioner of Patents to direct the board of examiners in chief to reinstate and take jurisdiction of the appeal of petitioners from the decision of the primary examiner, refusing to dissolve an interference between a patent granted to Lowry and an application for a patent by one William L. Spoon. The supreme court granted the mandamus. Its judgment was reversed by the court of appeals.

The question in the case is whether the rule of the Patent Office which denies an appeal from a ruling of a primary examiner, upon motion to dissolve an interference, is contrary to the Revised Statutes, and therefore void. Rule 124 provides that "from a decision of a primary examiner affirming the patentability of the claim or the applicant's right to make the same, no appeal can be taken."

Plaintiffs in error attack the rule as inconsistent with the sections of the Revised Statutes which provide for interferences. These sections are inserted in the margin.†

*The facts are as follows: Lowry was granted a patent for a bale of fibrous material January 29, 1897. An interference was declared between his patent and application of one William Spoon, to which interference Lowry was made a party. He *moved to dissolve the interference upon the ground, among others, that Spoon's press was inoperative. The primary examiner granted the motion and Spoon appealed to the board of examiners in chief, who confirmed the decision. Upon petition of Spoon the Commissioner of Patents remanded the case to the primary examiner for further consideration, and the latter officer, upon the filing of additional affidavits, decided that Spoon's application disclosed an operative device. From this decision an appeal was taken to the board of examiners in chief, which was dismissed by that board for want of jurisdiction. Thereupon Lowry petitioned the Commissioner to direct the board to issue an appeal. The petition was denied, the Acting Commissioner remarking:

"The rule prohibiting an appeal from a decision upon a motion holding that a party has the right to make the claim of the issue is in accordance with the practice which has prevailed in this office for many years, and has the support of all decisions of the courts

†Rev. Stat. Sec. 4904, U. S. Comp. Stat. 1901, p. 3389. Whenever an application is made for a patent which, in the opinion of the Commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof to the applicants, or applicant and patentee, as the case may be, and shall direct the primary examiner to proceed to determine the question of priority of invention. And the Commissioner may issue a patent to the party who is adjudged the prior inventor, unless the adverse party appeals from the decision of the primary examiner, or of the board of examiners in chief, as the case may be, within such time, not less than twenty days, as the Commissioner shall prescribe.

Rev. Stat. Sec. 4909, U. S. Comp. Stat. 1901, p. 3390. Every applicant for a patent or for the reissue of a patent, any of the claims of which have been twice rejected, and every party to an interference, may appeal from the decision of the primary examiner, or of the examiner in charge of interferences in such case, to the board of examiners in chief, having once paid the fee for such appeal.

Rev. Stat. Sec. 4910, U. S. Comp. Stat. 1901, p. 3391. If such party is dissatisfied with the decision of the examiners in chief he may, on payment of the fee prescribed, appeal to the Commissioner in person.

Rev. Stat. Sec. 4911, U. S. Comp. Stat. 1901, p. 3391. If such party, except a party to an interference, is dissatisfied with the

ave been rendered on the subject. ems to be no reason for regarding it sistent with the statute. It seems ar that the decision in this case is al adverse decision, since it is not a hat Lowry is not entitled to his pat- at is a matter which may be deter- the further proceedings, and there- s clear that the decision relates to interlocutory matter.

petition is denied."

filed another petition, appealing to missioner "in person," to direct the examiners in chief to entertain his The petition was considered and In passing on the petition the Com- r said:

r the express provisions of rule 124 no appeal to the examiners in chief h decision rendered on an interlocu- tion. It is believed that there is in that rule inconsistent with law, t therefore it has the force of law. t of appeal in interferences given in terms in the statute is a very differ- g from the *right of appeal on all in the interference. To permit ap- motions would multiply litigation nd the proceedings in interferences ll reasonable limits. It would work rdship to parties. The appellate tri- f this office are no more required to es piecemeal consideration than are llate courts. The whole case should for appeal when the appeal pro- r by the statute is taken.

. . . . . .

to be particularly noted that there no decision as to the rival claims of ies to this interference. It has not ided which party is entitled to the If it should at any time be decided on is entitled to the patent, Lowry e the right of appeal, but until such ision is rendered the statute gives right of appeal.

"It would seem upon general principles of law that Lowry could then present for determination by his appeal any question which, in his opinion, vitally affects the question which party is entitled to the patent. The only ground upon which he can reasonably claim the right of appeal on this motion is that the question vitally affects his claimed right to a patent, and if it does that, he can raise it at final hearing and contest it before the various appellate tribunals, including the court of appeals.

"The refusal to permit the present appeal on motion is therefore not a denial of an opportunity to have the matter reviewed by the several appellate tribunals mentioned in the statute."

And further: "No good reason is seen for changing the provisions in Rule 124 here in controversy, which was adopted and approved by a long line of Commissioners of Patents, among whom have been some of the ablest patent lawyers in the country, and which rule has been acquiesced in by patent attorneys practising before the office for the last quarter of a century."

*There is quite a sharp controversy be- [482] tween the parties as to the effect of the ruling of the Commissioner. Plaintiffs in error are apparently convinced that the ruling of the primary examiner involves a fundamental right which, if not decided on Lowry's appeal, will be forever foreclosed to him for review. A different view is expressed by defendant in error. However this may be, we think the question in the case is in quite narrow compass. The statutes involved are not difficult of interpretation. The determining sections are 482, 483, 4904, and 4909 (U. S. Comp. Stat. 1901, pp. 272, 3389, 3390). Plaintiffs in error put especial stress upon §§ 482 and 4909. Section 482 provides for the appointment of examiners in chief, "whose duty it shall be, on the written petition of the appellant, to revise and determine upon the

of the Commissioner, he may ap- the supreme court of the district of a, sitting in banc.

). (Act of February 9, 1893 [27 L. 436, chap. 74, U. S. Comp. Stat. 3391].) That the determination of from the decision of the Commis- f Patents, now vested in the general the supreme court of the District mbia, in pursuance of the provisions on seven hundred and eighty of the Statutes of the United States, re- to the District of Columbia, shall r be, and the same is hereby, vested ourt of appeals created by this act; addition, any party aggrieved by a of the Commissioner of Patents in erference case may appeal therefrom court of appeals.

Stat. Sec. 482, U. S. Comp. Stat. . S.

1901, p. 272. The examiners in chief shall be persons of competent legal knowledge and scientific ability, whose duty is shall be, on the written petition of the appellant, to revise and determine upon the validity of the adverse decisions of examiners upon applications for patents, and for reissues of patents, and in interference cases; and, when required by the Commissioner, they shall hear and report upon claims for extensions, and perform such other like duties as he may assign them.

Rev. Stat. Sec. 483, U. S. Comp. Stat. 1901, p. 272. The Commissioner of Patents, subject to the approval of the Secretary of the Interior, may, from time to time, establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office.

validity of the adverse decisions of examiners . . . in interference cases." Section 4909 provides that "every party to an interference may appeal from the decision of the primary examiner or of the examiner in charge of interferences in such case, to the board of examiners in chief." The contention is that this section gives the right of appeal unreservedly and any limitation of it by a rule is void. Such might not be the result, even if there was no qualification of those sections in other sections. As said by the Commissioner: "The right of appeal in interferences given in general terms in the statute is a very different thing from the right of appeal on all motions in the interference." It certainly could not have been the intention to destroy all distinctions in procedure. But we are not left to inference. The statute is explicit. It limits the declaration of interferences to the question of priority of invention. Section 4904 provides that in case of conflict of an application for a patent with a pending application or with an unexpired patent (as in the case at bar), the Commissioner shall give notice thereof, "and shall direct the primary examiner to proceed to determine the question of *priority of invention.*" (Italics ours.) And it is provided that the Commissioner shall issue a patent to the party adjudged the prior inventor, unless the adverse party appeals from the decision of the primary examiner [483] or examiners in chief, as the case may be. The history of the sections and the rules are gone into at length by the court of appeals in its opinion. We need not repeat the discussion. It answers the detailed reasoning of plaintiffs in error. We concur with the views expressed, that the statutes provide only for appeals upon the question of priority of invention. Appeals on other questions are left to the regulation of the Patent Office under the grant of power contained in § 483.

Judgment affirmed.

Mr. Justice Peckham and Mr. Justice Day dissent.

STATE OF NEW JERSEY, Appt.,
v.
WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company.

(See S. C. Reporter's ed. 483–495.)

Bankruptcy—preferences—franchise tax.

1. The claim of the state of New Jersey against the estate of a bankrupt corporation organized under the laws of that state, but doing no business and having no property there, for the "annual license fee or franchise tax" on its outstanding capital stock, imposed under N. J. Gen. Stat. 1895, §§ 251, 252, 257, 258, 260, is for a tax legally due and owing to the state, which, under the bankrupt act of July 1, 1898 (30 Stat. at L. 563, chap. 541, U. S. Comp. Stat. 1901, p. 3447), § 64a, must be paid in advance of dividends to creditors.

Bankruptcy—preferences—franchise tax.

2. The finding of the state board of assessors as to the amount of outstanding capital stock of a corporation, made for the purpose of fixing the amount of the annual license fee or franchise tax imposed by N. J. Gen. Stat. 1895, §§ 251, 252, 257, 258, 260, is not conclusive on the bankruptcy court, in view of the provisions of the bankrupt act of July 1, 1898, § 64a, that, in case any question arises as to the amount or legality of any tax entitled to priority of payment under that section, the same shall be heard and determined by the court.

Bankruptcy—preferences—franchise tax.

3. The franchise tax assessed under N. J. Gen. Stat. 1895, §§ 251, 252, 257, 258, 260 on the basis of the capital stock of a corporation issued and outstanding on the 1st of January preceding the making of the return, is "legally due and owing" within the meaning of the bankrupt act of July 1, 1898, § 64a, providing that taxes must be paid in advance of the payment of dividends to creditors, although such tax may not have been collectible until after the corporation was adjudged a bankrupt.

[No. 49.]

Argued and submitted October 19, 1906. Decided December 10, 1906.

APPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed a judgment of the District Court for the Northern District of Illinois, which had, in turn, affirmed the finding of a referee in bankruptcy, denying to the state of New Jersey a preference for alleged franchise taxes due from the estate of a bankrupt corporation. Reversed and remanded to the District Court for further proceedings.

See same case below, 70 C. C. A. 388, 137 Fed. 858.

Statement by Mr. Justice Day:

This is an appeal from the judgment of the circuit court of appeals for the seventh circuit, affirming the order of the district court, which affirmed the finding of the referee in bankruptcy, denying to the state of New Jersey a preference for alleged franchise taxes from the estate of a bankrupt, the Cosmopolitan Power Company.

On December 21, 1903, the claim for the state was filed, under the provisions of § 64a of the bankrupt law. [30 Stat. at L.

363, chap. 541, U. S. Comp. Stat. 1901, p. 3447.] The claim is set forth as follows:

Tax—1902	$5,750 00
Interest to October 15, 1903	891 25
Costs on injunction proceedings, because of nonpayment of taxes..	26 15
Tax—1903	2,500 00
Interest to October 15, 1903	87 50
	$9,254 90

The Cosmopolitan Power Company is a corporation organized under the laws of the state of New Jersey on April 30, 1900, for the purpose of dealing in engines, machines, etc. By its charter it had power to do business in any state or territory of the United States. While it had its principal office in the state of New Jersey, located under the terms of its certificate of incorporation, it had no property in that state, and conducted its business in the state of Illinois.

The capital stock of the corporation on January 1, 1902, was forty millions of dollars, of which there was ten millions outstanding. On May 13, 1902, its capital stock, pursuant to the laws of New Jersey, was reduced to $2,500,000. The company was adjudicated a bankrupt on April 23, 1903, upon an involuntary petition filed in the district court for the northern district of Illinois.

On November 7, 1902, the state board of assessors of New Jersey, the company having failed to make return, levied an assessment for the license or franchise tax in question for the year 1902 in the sum of $5,750.00. On June 1, 1903, there was assessed against the company for the year beginning January 1, 1903, a similar tax on outstanding capital stock in the sum of $2,500.00, in accordance with the return of the company filed on May 1, 1903.

On February 12, 1904, the state of New Jersey filed its motion before the referee for the payment of said taxes as a preferential debt. The referee disallowed the 1903 tax altogether, and allowed the 1902 tax as a general claim against the estate for the sum of $4,945.08. This reduction was made from the assessment for the year 1902, because the state board had made the assessment upon the basis of $40,000,000 of outstanding capital stock, whereas, in fact, only $10,000,000 was then issued and outstanding, upon which basis the referee made the allowance. The district court affirmed the order of the referee. Upon appeal to the circuit court of appeals that court modified the judgment of the district court so as to allow the taxes claimed for the year 1903, as a general debt, and in other respects affirmed the district court. 70 C. C. A. 388, 137 Fed. 858. The case was then brought here.

Mr. Edward D. Duffield argued the cause, and, with Messrs. Levy Mayer and Robert H. McCarter, filed a brief for appellant:

The action of the assessors is not subject to collateral attack, and this rule is not changed by the provisions of § 64a of the bankrupt act.

King v. American Electric Vehicle Co. (N. J. Eq.) 62 Atl. 381; Arimex Consol. Copper Co. v. State Assessors, 69 N. J. L. 121, 54 Atl. 244.

The fact that the obligation does not mature until July 1st is entirely immaterial.

Re Flynn, 134 Fed. 145; Re Prince, 131 Fed. 546; Re United States Car Co. 60 N. J. Eq. 514, 43 Atl. 673.

Even if we assume that the corporate franchise is of no value whatever to the bankrupt estate, and even though the trustee never gets the title or possession of it, nevertheless, the franchise taxes are clearly entitled to priority.

Re Tilden, 91 Fed. 500; Chattanooga v. Hill, 71 C. C. A. 584, 139 Fed. 600; Re Baker, 1 Am. Bankr. Rep. 526.

Messrs. Robert H. McCarter and Levy Mayer also filed a separate brief for appellant:

The claim of the appellant is a tax within the meaning of the bankruptcy act, and is entitled to priority as such.

Tennessee v. Whitworth, 117 U. S. 129, 136, 29 L. ed. 830, 832, 6 Sup. Ct. Rep. 645; State, Evening Journal Asso., Prosecutor, v. State Assessors, 47 N. J. L. 36, 52 Am. Rep. 107; State Assessors v. Central R. Co. 48 N. J. L. 146, 4 Atl. 578; Standard Underground Cable Co. v. Atty. Gen. 46 N. J. Eq. 270, 19 Am. St. Rep. 394, 19 Atl. 733; State, Tide-Water Pipe Line Co., Prosecutor, v. Berry, 52 N. J. L. 308, 19 Atl. 665; State, Trenton Sav. Fund Soc., Prosecutor, v. Richards, 52 N. J. L. 156, 18 Atl. 582; Honduras Commercial Co. v. State Assessors, 54 N. J. L. 278, 23 Atl. 668; Lumberville Delaware Bridge Co. v. State Assessors (State, Lumberville Delaware Bridge Co., Prosecutors, v. State Assessors) 55 N. J. L. 529, 25 L.R.A. 134, 26 Atl. 711; State, Marsden Co., Prosecutor, v. State Assessors, 61 N. J. L. 461, 39 Atl. 638; Hancock v. Singer Mfg. Co. 62 N. J. L. 289, 42 L.R.A. 852, 41 Atl. 846; Re Mutual Mercantile Agency, 8 Am. Bankr. Rep. 435; Myers v. Campbell, 64 N. J. L. 186, 44 Atl. 863; Chesapeake & O. R. Co. v. Atlantic Transp. Co. 62 N. J. Eq. 751, 48 Atl. 997; Newark v. State Bd. of Taxation, 67 N. J. L. 246, 51 Atl. 67; Arimex Consol. Copper Co. v. State As-

sessors, 69 N. J. L. 121, 54 Atl. 244; Hardin v. Morgan, 70 N. J. L. 484, 57 Atl. 155; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961, 141 U. S. 40, 45, 35 L. ed. 628, 630, 11 Sup. Ct. Rep. 889; Wilmington & W. R. Co. v. Reid, 13 Wall. 264, 20 L. ed. 568; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; Western U. Teleg. Co. v. Missouri, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730; 14 Am. & Eng. Enc. Law, 2d ed. p. 6; 27 Am. & Eng. Enc. Law, 2d ed. pp. 578, 932; Illinois C. R. Co. v. Decatur, 147 U. S. 190, 199, 37 L. ed. 132, 135, 13 Sup. Ct. Rep. 293; Camden v. Allen, 26 N. J. L. 398; First Nat. Bank v. Aultman, M. & Co. 12 Am. Bankr. Rep. 12; 2 Cook, Corp. 5th ed. 561-563.

Messrs. Frederick D. Silber and Horace Kent Tenney submitted the cause for appellees:

The license fee or "franchise tax" in question is not a tax, according to the decisions of the courts of New Jersey, and other courts.

Re United States Car Co. 60 N. J. Eq. 514, 43 Atl. 673; Re Ott, 2 Am. Bankr. Rep. 637; Re Danville Rolling Mill Co. 10 Am. Bankr. Rep. 327; First Nat. Bank v. Aultman, M. & Co. 12 Am. Bankr. Rep. 12; North Jersey Street R. Co. v. Jersey City (N. J. L.) 63 Atl. 83; 1 Cooley, Taxn. pp. 6, 7; State, Singer Mfg. Co., Prosecutor, v. Heppenheimer, 58 N. J. L. 634, 32 L.R.A. 643, 34 Atl. 1061; Hancock v. Singer Mfg. Co. 62 N. J. L. 289, 42 L.R.A. 852, 41 Atl. 846; Lumberville Delaware Bridge Co. v. State Assessors (State, Lumberville Delaware Bridge Co., Prosecutors, v. State Assessors) 55 N. J. L. 537, 25 L.R.A. 134, 26 Atl. 711; American Smelting & Ref. Co. v. People, 34 Colo. 240, 82 Pac. 531.

The claim for 1903 should be disallowed, because said claim was not in existence, and did not constitute a debt, at the time the bankruptcy petition was filed, and was not then "a tax legally due and owing."

First Nat. Bank v. Aultman, M. & Co. supra; Emmerman v. Ohio Steel & I. Specialty Co. 13 Am. Bankr. Rep. 40, note.

Mr. Justice Day delivered the opinion of the court:

The provisions of the bankrupt law governing the payment of taxes are found in § 64a, act of 1898 (30 Stat. at L. 563, chap. 541, U. S. Comp. Stat. 1901, p. 3447), which reads:

"Sec. 64a. The court shall order the trustee to pay all taxes legally due and owing [488] by the bankrupt to the United *States, state, county, district, or municipality, in advance of the payment of dividends to creditors, and, upon filing the receipts of the proper public officers for such payment, he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court."

The statute of the state of New Jersey (Gen. Stat. 1895, §§ 251, 252, 257, 258, 260) by its title undertakes to provide for the imposition of state taxes upon certain corporations, and for the collection thereof. It requires the corporation to make return to the state board of assessors on or before the first Tuesday in May of each year, and to pay an annual license fee or franchise tax of a certain per cent on its capital stock issued and outstanding on January 1 of each year, up to and including $3,000,000; a different per cent on sums in excess of $3,000,000, and not exceeding $5,000,000, and on outstanding capital stock exceeding $5,000,000, $50 per million or any part thereof. In case the corporation shall fail to make return the state board shall ascertain and fix the amount of the annual license fee or franchise tax, and shall report to the comptroller on or before the first Monday in June the basis and amount of the tax as returned by each company to, or ascertained by, the board, which shall then become due and payable, and it shall be the duty of the state treasurer to receive the same. If the tax remains unpaid on July 1st after the same becomes due it shall thenceforth bear interest at the rate of 1 per cent per month. That the tax shall be a debt due from the company to the state, for which it may maintain an action at law for recovery thereof, after the same shall have been in arrears for the period of one month, and the tax shall be a preferred debt in cases of insolvency, and in cases of arrears for three months the state may apply for an injunction to restrain the company from exercising its corporate franchise; and that if any corporation shall be delinquent for two years its charter shall be void, unless further time be given for the payment of taxes.

*It is contended for the appellee that these provisions do not entitle the state to the payment of its claim as a preferred tax within the meaning of the bankrupt act. It is insisted, in the first place, that a proper construction of the act of 1898 does not require the payment of taxes to a state wherein the bankrupt has no property, and the state no means of collecting the tax from property within its jurisdiction. And it is urged that the taxes to be paid are those legally due and owing to the United States, state, county, district, or municipality, which does not contemplate payment to any and all states, but only to THE state, which

it is insisted, should be interpreted with the limitation stated.

It is to be noted that there is a very significant difference in this respect, in the act of 1898, from the provisions of the bankrupt act of 1867 (14 Stat. at L. 530, chap. 176), the law in force last before, and doubtless in the view of Congress when the present law was drafted. That act of 1867 gave priority of payment to all debts due to the United States, and all taxes and assessments under the laws thereof, all debts due to the state in which the proceedings in bankruptcy were pending, and all taxes and assessments made under the laws of *such* state, and provided that nothing contained in the act should interfere with the assessment and collection of taxes by the authority of the United States or any state.

The requirement of the present law is a wide departure from the act of 1867, and specifically obliges the trustee to pay all taxes legally due and owing, without distinction between the United States and the state, county, district, or municipality.

An argument is made as to the alleged injustice of this requirement, in that it may take away from the local creditors in the state where the property of the corporation is situated practically all the assets of the corporation in favor of the state where the corporation is organized, but has no business or property. And it is urged that to permit a state, under such circumstances, to have a preference in the payment of *taxes would give to it an advantage which it could not otherwise obtain for want of charge or lien upon the property. But considerations of this character, however properly addressed to the legislative branch of the government, can have no place in influencing judicial determination. It is the province of the court to enforce, not to make, the laws, and, if the law works inequality, the redress, if any, must be had from Congress.

The question is, Is the claim a tax legally due and owing to the state of New Jersey? We have been cited to many cases in the state of New Jersey, some of which, it is alleged, maintain the theory of the appellant that this is a tax, and some the contrary view.

Without undertaking to analyze these numerous cases or to harmonize the views expressed by different judges, we think the weight of judicial decision in that state favors the view that this is a tax imposed upon the right of the corporation to continue to be a corporation, with power to exercise its corporate franchises, based upon the amount of its capital stock issued and outstanding.

In Hancock v. Singer Mfg. Co. 62 N. J. L. 289, 42 L.R.A. 852, 41 Atl. 846, it was said:

"The act of 1884 (Pamph. L. p. 232) is entitled 'An Act to Provide for the Imposition of State Taxes upon Certain Corporations and for the Collection Thereof.'

"In this act this imposition is called a yearly license fee or tax.

"In a supplement passed to the act of 1884 (Pamph. L. 1891, p. 150) it is styled 'a tax.'

"In a further supplement, passed in 1892 (Pamph. L. p. 136), it is called 'an annual license fee or franchise tax.'

"It is wholly immaterial what name may be given to it. The fact that it is called a 'license fee' or 'franchise tax' cannot validate it. It is levied under an act passed 'to authorize the imposition of state taxes,' and it is none the less an interdicted imposition [having reference to the charter *then being [491] considered], and none the less a tax because it is given a new name.

"Although under our adjudications, it is not a tax on property in a sense which brings it within article 4, § 7, paragraph 12, of our state Constitution, it is a tax on the capital stock of the corporation. Otherwise the act would be manifestly void for want of a title expressing its object, and the state would be deprived of all its revenue under the act of 1892. The franchise of the company is the right to hold property and exercise its corporate privileges. The Supreme Court of the United States has decided that where a corporation is exempted from taxation, it is not subject to a tax on its franchise. Wilmington & W. R. Co. v. Reid, 13 Wall. 264, 20 L. ed. 568."

While we take this view of the decisions of the supreme court of New Jersey, and reach the conclusion that the claim in question is for a tax within the meaning of the law as construed by that court, the bankruptcy act is a Federal statute, the ultimate interpretation of which is in the Federal courts. It is doubtless true, as was said in the opinion of the learned judge speaking for the circuit court of appeals, in this case, that if the highest court of the state should decide that a given statute imposed no tax within the meaning of the law as interpreted by it, a Federal court, in passing upon the bankruptcy act, would not compel the state to accept a preference from the bankrupt's estate upon a different view of the law. Conceding the doctrine that the meaning of a statute is a state question, except where rights, the subject of adjudication by the Federal courts, have accrued before its construction by the state court, or the question of contract within the protection of the Federal Constitution is involved, still a state court, while entitled to great consideration, cannot conclusively decide that to be a tax within the meaning of a Federal law pro-

viding for the payment of taxes, which is not so in fact. The section (64a) itself declares that, in case of disputes as to the amount or legality of any such tax, they [492] *shall be heard and determined by the court. The state court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a Federal statute, giving a preference to taxes, is a Federal question, of ultimate decision in this court.

We are of opinion that this claim was for a tax. The language of the act, as we have said, is very broad, and includes all taxes. It is not necessary to enter upon a discussion of the different forms which taxes may take. Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the government. We think this exaction is of that character. It is required to be paid by the corporation after organization *in invitum*. The amount is fixed by the statute, to be paid on the outstanding capital stock of the corporation each year, and capable of being enforced by action against the will of the taxpayer. As was said by Mr. Justice Field, speaking for the court in [Meriwether v. Garrett] 102 U. S. 472, 26 L. ed. 197:

"Taxes are not debts. It was so held by this court in the case of Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some states—and we believe in Tennessee—an action of debt may be instituted for their recovery. The form of procedure cannot change their character."

It is urged by the appellee, and upon this ground the case was decided in the circuit court of appeals, that this is in no just sense a tax levied by the state, but is the result of a contract by which the corporation was brought into existence, the consideration being the payment of annual sums for the privileges given it by the state, for which no lien is given upon the property, but only a right of action for their recov- [493] ery. *But this imposition is in no just sense a contract. The amount to be paid, fixed by the statute, is subject to control and change at the will of the state. It is imposed upon all corporations, whether organized before or after the passage of the act. The corporation is not consulted in fixing the amount of the tax, and under the laws of New Jersey the charter of such corporations as this may be amended or repealed. Hancock v. Singer Mfg. Co. 62 N. J. L. 289-328, 42 L.R.A. 85, 41 Atl. 846.

The form of the collection of taxes is left to the discretion of the taxing power; sometimes a lien is provided, sometimes a summary method of collection is awarded; in other cases, an action for debt is given; and as in the present case, with the right of prohibition of the exercise of corporate franchises by injunction for failure to pay.

We think, then, that, as denominated in the statute, this was a tax imposed by the state upon the corporation for the privilege of existence and the continued right to exercise its franchise.

The state which created this corporation had the right to fix the terms of its existence, and to provide, if it saw fit so to do, that, for the continued existence of its franchise, the corporation should pay certain sums to the state, fixed by the amount of its yearly outstanding capital stock. New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1-37, 50 L. ed. 65-75, 25 Sup. Ct. Rep. 705, et seq.

Coming to the specific objections to the claim for the year 1902, the claim was presented upon the basis of $40,000,000 of outstanding capital stock, when in fact there was only $10,000,000 of such stock, the assessment by the state board being upon the former sum, and made upon the failure of the corporation to report. But we do not think the finding of the state board is conclusive. The tax is to be assessed upon capital stock actually outstanding. It may well be doubted whether the board had power to tax any other stock. But be that as it may, § 64a specifically provides that in case any question arises as to the amount or legality of taxes, the same shall be heard and determined by the court, with a view to ascertaining *the amount really due. We do not think it was the intention of Congress to conclude the bankruptcy courts by the findings of boards of this character, and that the claim should have been upon the basis of the capital stock actually outstanding.

The amount claimed for the year 1903, it is insisted, had not accrued at the time of the adjudication in bankruptcy, which was on April 23, 1903, the return being made on May 2, 1903, and the assessment was not made until July 1, 1903; but the annual return, required to be made to the board on or before the first Tuesday in May, is upon the basis of the capital stock issued and outstanding the first of January preceding the making of the return. The bankrupt act requires the payment of all taxes legally due and owing. We think the tax thus assessed upon that basis was legally due and owing

although not collectible until after the adjudication.

We reach the conclusion that, under the bankruptcy act, these taxes, in the amounts bereinbefore indicated, were entitled to preferential payment in favor of the state of New Jersey, and that the Circuit Court of Appeals erred in reaching a contrary conclusion.

Its judgment will be reversed and the cause will be remanded to the District Court for further proceedings in conformity with this opinion.

Mr. Justice Harlan (with whom concurred Mr. Chief Justice Fuller and Mr. Justice Peckham) dissenting:

The Chief Justice, Mr. Justice Peckham, and myself dissent from the opinion of the court. In our judgment the "taxes" owing by a bankrupt to a state—which § 64a of the bankruptcy act [30 Stat. at L. 563, chap. 541, U. S. Comp. Stat. 1901, p. 3447] provides shall be paid in advance of the payment of dividends to creditors—do not embrace an "annual license fee or franchise tax" (the words of the New Jersey statute), which, strictly, is not a property tax, but only an exaction by the state for the privi-
[95] lege given to a corporation *to do certain business under its charter. We think the bankruptcy act should be so construed. It cannot be otherwise construed without doing gross injustice to those creditors of the bankrupt corporation who have business transactions with it at its place of business. Here the bankrupt corporation did no business in New Jersey. So far as appears, it did not have, nor expect to have, any connection with that state except to become incorporated under its laws. It had its seat of operations and all its tangible property in the state of Illinois. It had no property in New Jersey. Its scheme was to get a charter from New Jersey and then go to another state for purposes of its business. We do not think that Congress intended that, in the distribution of the assets of a bankrupt, preference should be given to the claims of a state which have their origin in, and are wholly based upon, a *bargain* with the state whereby certain privileges are granted in exchange for certain payments,—privileges which the state may grant or withhold at pleasure. In our opinion the word "taxes" in the bankruptcy act was intended to embrace only burdens or charges imposed *in invitum*, and which were in their nature and in reality "taxes," as distinguished from governmental exactions for privileges granted. The claim of New Jersey, whatever its true amount, should not be given priority, but should be placed upon the same footing with claims of other creditors. This view is consistent with the act of Congress.

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*ALABAMA & VICKSBURG RAILWAY [496]
COMPANY and Robert H. Thompson and Thomas A. McWillie, Its Sureties, Plffs. in Err.,

v.

RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI.

(See S. C. Reporter's ed. 496-501.)

Carriers—state regulation of railway rates.

The state of Mississippi may, so far as the Federal Constitution is concerned, establish a flat rate of 3½ cents per 100 pounds on grain and grain products carried from Vicksburg to Meridian over the road of the Alabama & Vicksburg Railway Company, where that company, under the guise of a "rebilling rate," gives any Vicksburg merchant receiving a car load of grain or grain products over the Vicksburg, Shreveport, & Pacific Railroad a rate of 3½ cents per 100 pounds on any grain he may ship to Meridian.

[No. 97.]

Argued November 13, 14, 1906. Decided December 17, 1906.

IN ERROR to the Supreme Court of the State of Mississippi to review a decree which affirmed a decree of the Chancellor of the Fifth Chancery District of that state, dismissing a bill to restrain the enforcement of an order of the state railroad commission establishing a rate on grain and grain products. Affirmed.

See same case below, 86 Miss. 667, 38 So. 356.

Statement by Mr. Justice Brewer:

On November 16, 1903, the railroad commission of Mississippi, by written order, directed the Alabama & Vicksburg Railway Company, hereinafter called the Vicksburg company, to put into effect, over its line of road from Vicksburg to Meridian, a flat rate of 3½ cents per 100 pounds on grain and grain products. December 3, 1903, an application was made by the railway com-

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NOTE.—On legislative power to fix tolls, rates, or prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 179.

On the reasonableness of state limitation of railroad rates—see note to Chicago, M. & St. P. R. Co. v. Tompkins, 44 L. ed. U. S. 417.

As to unconstitutional inequality or discrimination in state regulation of tolls or rates—see note to Cotting v. Godard, 46 L. ed. U. S. 92.

pany to the chancellor of the fifth chancery district of the state to restrain the enforcement of this order. July 11, 1904, a temporary injunction issued on the filing of the bill was dissolved and the bill dismissed. On appeal to the supreme court of the state this decree of the chancellor was affirmed (86 Miss. 667, 38 So. 356), and thereupon this writ of error was sued out.

Mr. Harry H. Hall argued the cause, and, with Messrs. McWillie & Thompson, filed a brief for plaintiffs in error:

The institution, adoption, and establishment, on the part of the railway company, of a "division" or "proportion" of a joint through rate, is not the same as, or anything like, the adoption, establishment, or institution of a local, intrastate rate, and is no discrimination.

Chicago & N. W. R. Co. v. Osborne, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 915; Parsons v. Chicago & N. W. R. Co. 167 U. S. 447, 457, 458, 42 L. ed. 231, 235, 17 Sup. Ct. Rep. 887; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

A voluntary act of a carrier in establishing low rates is no warrant for a legislature or governmental bureau to force said low rates upon a carrier.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684-697, 43 L. ed. 858-864, 19 Sup. Ct. Rep. 565; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 268, 46 L. ed. 1157, 22 Sup. Ct. Rep. 900.

The rate of 3½ cents is less than the actual cost of hauling. For a state, under pretense of regulating tariffs, to require a railroad company to carry freight at a loss, would be a taking of private property for public use without compensation and without due process of law.

Jack v. Williams, 113 Fed. 827; Chicago, St. P. M. & O. R. Co. v. Becker, 35 Fed. 883; Ames v. Union P. R. Co. 64 Fed. 188; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Northern P. R. Co. v. Keyes, 91 Fed. 47; Southern P. Co. v. Railroad Comrs. 78 Fed. 236; Metropolitan Trust Co. v. Houston & T. C. R. Co. 90 Fed. 683; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

To enforce this flat rate of 3½ cents would be denying to plaintiffs in error the equal protection of the law.

Louisville & N. R. Co. v. McChord, 103 Fed. 217; Lake Shore & M. S. R. Co. v. Smith, supra.

It is perfectly lawful, and in the highest interest of commerce and the public, and in no way discriminatory, for carriers to form exclusive connections and make joint through rates and tariffs, both one or more carriers to the exclusion of others.

Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 288, 2 Inters. Com. Rep. 351, 37 Fed. 567; Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 465; Ilwaco R. & Nav. Co. v. Oregon Short Line & U. N. R. Co. 5 Inters. Com. Rep. 627, 6 C. C. A. 496, 15 U. S. App. 173, 57 Fed. 673; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; Express Cases, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628; Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745.

But, conceding, for the purposes of argument, only, that undue discrimination is created by confining the interstate rebilling arrangement in question exclusively to the Vicksburg, Shreveport, & Pacific Railway and the Mobile & Ohio Railroad Company, it is not within the province of the Mississippi railroad commission to attempt a correction of such discrimination as to interstate traffic.

Wabash, St. L. & P R. Co. v. Illinois, 118 U. S. 557-577, 30 L. ed. 244-251, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Gulf C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; Smyth v. Ames and Northern P. R. Co. v. Keyes, supra.

The mere fact that a greater charge is made between two points for transporting an article or passenger in the same car does not in itself constitute undue discrimination, but all the circumstances surrounding the traffic must be taken into consideration.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 948, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

A railroad may prefer itself and its connections without being guilty of undue discrimination.

Kemble v. Boston & A. R. Co. 8 Inters. Com. Rep. 110; Re Unlawful Rates, 8 Inters. Com. Rep. 121; Re Relative Rates, 8 Inters. Com. Rep. 214; Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Gulf,

F. R. Co. v. Miami S. S. Co.; Ken-
t I. Bridge Co. v. Louisville & N. R.
egon Short Line & U. N. R. Co. v.
n P. R. Co.; Ilwaco R. & Nav. Co. v.
Short Line & U. N. R. Co.; Atchi-
& S. F. R. Co. v. Denver & N. O. R.
uisville & N. R. Co. v. West Coast
tores Co. and Express Cases supra;
n P. Co. v. Interstate Commerce
sion, 200 U. S. 536, 50 L. ed. 585,
Ct. Rep. 330.

s. Hannis Taylor and C. H. Alexan-
ied the cause, and, with Mr. Monroe
, filed a brief for defendant in er-

ecree of the lower court was confined
ngle subject-matter wholly within
rol of the state of Mississippi, and
ject to any of the clauses of the
Constitution which the plaintiffs in
ve invoked.

ille, N. O. & T. R. Co. v. Missis-
3 U. S. 587, 33 L. ed. 784, 2 Inters.
p. 801, 10 Sup. Ct. Rep. 348; Le-
lley R. Co. v. Pennsylvania, 145
2, 36 L. ed. 672, 4 Inters. Com. Rep.
p. Ct. Rep. 806; Osborne v. Florida,
. 654, 41 L. ed. 587, 17 Sup. Ct. Rep.
w York ex rel. Pennsylvania R. Co.
t, 192 U. S. 21, 48 L. ed. 325, 24
Rep. 202; Leffingwell v. Warren, 2
99, 17 L. ed. 261; New York v.
100 U. S. 539, 25 L. ed. 705; Noble
ell, 164 U. S. 367, 41 L. ed. 472,
Ct. Rep. 110; Postal Teleg. Cable
harleston, 153 U. S. 692, 38 L. ed.
nters. Com. Rep. 637, 14 Sup. Ct.
4; Pullman Co. v. Adams, 189 U.
7 L. ed. 877, 23 Sup. Ct. Rep. 494;
v. Stewart, 197 U. S. 67, 49 L. ed.
Sup. Ct. Rep. 403.

if the commerce in question was in-
, the order of the railroad commis-
hibiting a discrimination within the
s not illegal.

on, 14th Amendment, 188; Cum-
Teleph. & Teleg. Co. v. Texas &
o. 52 La. Ann. 1850, 28 So. 284;
ean Pub. Co. v. Associated Press,
438, 48 L.R.A. 568, 75 Am. St. Rep.
N. E. 822; People ex rel. Cairo
Co. v. Western U. Teleg. Co. 166
36 L.R.A. 637, 46 N. E. 731; Chi-
N. W. R. Co. v. Fuller, 17 Wall. 560,
d. 710; Denver & N. O. R. Co. v.
, T. & S. F. R. Co. 4 McCrary, 325,
650; Providence Coal Co. v. Provi-
W. R. Co. 15 R. I. 303, 4 Atl. 394;
v. Pennsylvania R. Co. 47 Pa. 338;
U. Teleg. Co. v. James, 162 U. S.
L. ed. 1105, 16 Sup. Ct. Rep. 934.

whole matter has twice been care-
onsidered by the Interstate Com-
Commission, and the practice, just

such as is here adopted, denounced as a "fiction," and the rate called a rebilling rate, as a local rate in reality.

Chicago, R. I. & P. R. Co. v. Chicago & A. R. Co. 2 Inters. Com. Rep. 721.

The fact that the freight is received in large quantities from a certain connecting carrier or shipper does not warrant giving a special rate.

Re Mobile & O. R. Co. 9 Inters. Com. Rep. 373.

The giving a rebilling privilege for ninety days to those only who had patronized the Vicksburg, Shreveport, & Pacific Railroad is a gross discrimination. Such discrimination is condemned in the severest language by the decisions.

Hays v. Pennsylvania Co. 12 Fed. 309.

The Alabama & Vicksburg Railway cannot give a better rate to the Vicksburg, Shreveport, & Pacific grain than to that brought in by rival carriers. It is liable in damages to the shipper or carrier discriminated against.

Samuels v. Louisville & N. R. Co. 4 Inters. Com. Rep. 420, 31 Fed. 57.

Discrimination is defined by Judge Brewer in Wight v. United States, 167 U. S. 518, 42 L. ed. 259, 17 Sup. Ct. Rep. 822, where he says that the purpose of all such acts is to enforce equality between shippers, and prohibit any rebate or other device by which two shippers shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

A railroad company cannot discriminate in favor of a shipper who is able to furnish a large amount of freight over another in same business; at least, where both ship in car-load lots.

Louisville, E. & St. L. Consol. R. Co. v. Wilson, 132 Ind. 517, 18 L.R.A. 105, 32 N. E. 311.

Where a carrier charges one connecting carrier more than another, the fact that the higher rate is not unreasonable does not relieve the discrimination.

Samuels v. Louisville & N. R. Co. supra.

The main purpose of all acts of legislatures creating commissions is to force equality of rights for all shippers.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; 7 Cyc. Law & Proc. p. 485.

Mr. Justice Brewer delivered the opinion of the court:

The facts in this case are few. The company made what it called a "rebilling rate" of 3½ cents per 100 pounds on grain and grain products shipped from Vicksburg to

Meridian, that rate, however, being applicable only in case of shipments over the Vicksburg, Shreveport, & Pacific Railroad, hereinafter called the Shreveport road. Instead of being enforced as solely a rebilling rate, the Vicksburg merchant who received a car load of grain or grain products over the Shreveport road was permitted to either forward it over the plaintiff's road to Meridian, or, at any time within ninety days, in lieu thereof, send a similar car load, no matter whence received, from Vicksburg to Meridian at the same rate. It was in consequence of this effort on the part of the plaintiff to favor shippers who brought grain to Vicksburg over the Shreveport road that the [500]*railroad commission made the order declaring that all grain products shipped from Vicksburg to Meridian should be at the same rate, 3½ cents per 100 pounds. The order of the commission merely meant this: If a Vicksburg merchant who received a car load of grain over the Shreveport road was permitted by the railway company to ship over the Vicksburg road to Meridian any other car load at 3½ cents per 100 pounds, every other merchant in Vicksburg should be permitted to ship at the same rate, although he had had no dealings with the Shreveport company. It is unnecessary to inquire whether the order could be sustained if it appeared that the plaintiff received only 3½ cents as its share of a total rate on through shipments to Meridian from the Northwest by the Shreveport road; for here, under the guise of a rebilling rate, the Vicksburg merchant who dealt with this Western road was given a rate of 3½ per cent on any grain that he might see fit to ship to Meridian. While it may be true that a local railway's share of an interstate rate may not be a legitimate basis upon which a state railroad commission can establish and enforce a purely local rate, yet, whenever, under the guise or pretense of a rebilling rate, some merchants are given a low local rate, the commission is justified in making that rate the rate for all. It is not bound to inquire whether it furnishes adequate return to the railway company, for the state may insist upon equality, to be enforced under the same conditions against all who perform a public or quasi public service. When voluntarily the Vicksburg company established a local rate of 3½ per cent from Vicksburg to Meridian for those who had, within 90 days, made a shipment over the Shreveport road, it estopped itself from complaining of an order making that rate applicable to all shipments, no matter whence they arose, and in favor of all merchants, whether those transporting over the Shreveport road or not.

We are not unaware of our decision in Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666, in which, on review of the interstate commerce act, we held that *a mere inequality [501] of rate was not always proof of undue discrimination, but we were passing upon an act of Congress, and seeking to ascertain its intent and scope. There was no intimation that it was not within the power of Congress to prescribe an absolute equality of rate. In the present case we are not construing an act of the state of Mississippi or passing upon the powers which by it are given to the state railroad commission. Those matters are settled by the decision of the supreme court of the state, and the question we have to consider is the power of the state to enforce an equality of local rates as between all parties shipping for the same distance over the same road. That a state has such power cannot be doubted, and it cannot be thwarted by any action of a railroad company which does not involve an actual interstate shipment, although done with a view of promoting the business interests of the company. Even if a state may not compel a railroad company to do business at a loss, and conceding that a railroad company may insist, as against the power of the state, upon the right to establish such rates as will afford reasonable compensation for the services rendered, yet, when it voluntarily establishes local rates for some shippers, it cannot resist the power of the state to enforce the same rates for all. The state may insist upon equality as between all its citizens, and that equality cannot be defeated in respect to any local shipments by arrangements made with or to favor outside companies.

We see no error in the ruling of the Supreme Court of the State of Mississippi, and its judgment is affirmed.

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*FREDERICK L. GRANT SHOE COMPANY, Appt., [502]

v.

W. M. LAIRD COMPANY.

(See S. C. Reporter's ed. 502–505.)

Appeal—in bankruptcy cases—distinction between appeal and writ of error.

Writ of error, and not appeal, is the only method of reviewing an adjudication of bankruptcy entered on a directed ver-

NOTE.—On appeal and review in bankruptcy cases—see note to Re Eggert, 43 C. C. A. 9.

On distinction between appeal and writ of error—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

dict on a jury trial demanded as of right by the alleged bankrupt under the bankrupt act of July 1, 1898 (30 Stat. at L. 551, chap. 541, U. S. Comp. Stat. 1901, p. 3429), § 19, for the determination of the issues as to insolvency and the commission of acts of bankruptcy.

[No. 63.]

Argued October 26, 1906. Decided December 17, 1906.

APPEAL from the District Court of the United States for the Western District of New York to review an adjudication of bankruptcy entered on a directed verdict at a jury trial demanded as of right by the alleged bankrupt for the determination of the issues as to insolvency and the commission of the acts of bankruptcy. Dismissed for want of jurisdiction.

Statement by Mr. Justice White:

In July, 1903, the W. M. Laird Company of Pittsburg, Pennsylvania, commenced proceedings in the district court of the United States for the western district of New York to cause the Frederick L. Grant Shoe Company, a corporation doing business in Rochester, New York, to be adjudicated involuntary bankrupts. The petition was solely made by the Laird Company, it averring, among other things, that the shoe company had less than twelve creditors, and that the petitioner was a creditor and had provable unsecured claims against the shoe company amounting in the aggregate to more than $500. The nature of the claim was detailed at length, and showed that it was one for unliquidated damages aggregating $3,732.80, asserted to have been suffered by reason of breaches of an alleged express warranty in the sale of merchandise. The alleged bankrupt answered, denying its insolvency and the commission of any of the acts of bankruptcy averred in the petition, and demanded a trial by jury of the said issues. It also denied being indebted in any amount to the petitioner.

Soon afterwards a motion was made to dismiss the petition on the ground that, because of the nature of the claim held *by the Laird Company, that company was not a creditor and the holder of a provable claim for any amount against the shoe company within the meaning of subdivision b of § 19 of the bankruptcy act, and consequently was not entitled to file a petition in bankruptcy against the alleged debtor. The motion to dismiss was denied by the district judge. 125 Fed. 576. In the order entered it was directed that the claim of the petitioner be liquidated by the jury at the jury trial demanded by the alleged bankrupt for the determination of the issues as to insolvency and the commission of acts of bankruptcy. On the petition of the alleged bankrupt to review this order it was affirmed by the circuit court of appeals for the second circuit. 66 C. C. A. 78, 130 Fed. 881.

A trial of the issues thus raised was had before a jury in May, 1905, and, as recited in the record, "at the close of all the evidence, the court having directed the jury to find a verdict that the said alleged bankrupt did, within four months of the filing of the petition herein, commit an act of bankruptcy, in that it transferred a portion of its property to the German-American Bank of Rochester, one of its creditors, with the intent to prefer said German-American Bank over its other creditors, and that, at the time of said transfer, said alleged bankrupt was insolvent, and that the petitioner has a provable claim against said alleged bankrupt for damages for the breach of warranty in the sale of shoes, and that the amount of such claim of the petitioner is the sum of $3,454.00, the jury found a verdict accordingly." An order was thereupon entered adjudicating the shoe company a bankrupt, and declaring that the claim of the Laird Company was liquidated at the sum of $3,454.00. The present appeal was then taken.

For the purpose of the appeal, and reciting that it was pursuant to the requirements of general order in bankruptcy No. 36, the trial judge made and filed findings of fact and conclusions of law. A single question of jurisdiction was also certified as having been raised at the opening of the hearing in September, 1905, by motion to dismiss, substantially *upon the grounds [504] urged in the previous motion to dismiss, which had been passed upon by the court of appeals.

Mr. Porter M. French argued the cause, and, with Messrs. Satterlee, Bissell, Taylor, & French, filed a brief for appellant.

Mr. Hiram R. Wood argued the cause, and, with Messrs. McGuire & Wood, filed a brief for appellee.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

Without considering whether the shoe company, appellant in this court, is not concluded by the decision of the circuit court of appeals upon the petition asking a review of the order of the district court in bankruptcy, denying the original motion to dismiss, we do not pass upon the question presented by this appeal, as we find we are without authority to do so. Elliott v.

Toeppner, 187 U. S. 327, 47 L. ed. 200, 23 Sup. Ct. Rep. 133. In the cited case, answering a question certified from the United States circuit court of appeals for the sixth circuit, it was held that a judgment that a person is not a bankrupt, entered by a court of bankruptcy on a verdict of not guilty in a trial by jury, demanded as of right under § 19 of the bankruptcy act, was reviewable only by writ of error. Section 25a of the bankruptcy act, which authorizes appeals, as in equity cases, to be taken to the circuit court of appeals, among other cases, from a judgment adjudging or refusing to adjudge the defendant a bankrupt, was expressly considered, and it was held that the provision only applied to judgments adjudging or refusing to adjudge the defendant a bankrupt, "when trial by jury is not demanded, and the court of bankruptcy proceeds on its own findings of fact." The reasoning upon which the decision was based was, in substance, that, as in the character of proceeding under consideration the right to a trial by jury was absolute, such a trial was a trial according to the course of the common law, and judgments therein rendered are revisable only on writ of error. P. 332, L. ed. p. 202, Sup. Ct. Rep. [505] p. 135. As, in *the case at bar, a jury was demanded, the trial was before such jury, and their verdict determined the questions at issue, it follows that the record should have been brought to this court by writ of error, and not by appeal.

Appeal dismissed.

WESTERN UNION TELEGRAPH COMPANY, Plff. in Err.,
v.
CHARLES E. HUGHES.

(See S. C. Reporter's ed. 505–507.)

Error to state court—what is highest court of state.

An inferior state court is the final court of the state where the Federal question involved can be decided, and therefore is the court to which a writ of error from the Supreme Court of the United States must be directed, where the highest state court, although discussing the Federal question in its opinion, and declaring it to be without merit, dismissed a writ of error to the inferior court solely and expressly for want of jurisdiction.

[No. 119.]

NOTE.—As to when writ of error may run to inferior state court—see notes to Kentucky v. Powers, 50 L. ed. U. S. 633; and Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

Argued December 6, 1906. Decided ber 17, 1906.

AN ERROR to the Supreme Court peals of the State of Virginia t an order dismissing, for want of tion, a writ of error to review a jud the Corporation Court of the City ville, in that state. Dismissed beca was directed to the wrong court.

See same case below, 104 Va. 240, 225.

The facts are stated in the opinio

Mr. Rush Taggart argued the ca with Messrs. John F. Dillon, Ge Fearons, and Francis Raymond Sta a brief for plaintiff in error.

No counsel for defendant in error

Mr. Justice White delivered the of the court:

By statutes of the state of Virgini bility to forfeit the sum of $100 posed upon a telegraph company omission to promptly transmit and telegrams received by it. Va. Cod §§ 1291, 1292. *On November 2 Hughes, the defendant in error, ha the Western Union Telegraph Comp its office in Danville, Virginia, a me be transmitted by wire to Pocahont ginia, and there delivered to the ad In regular course such message wou gone by way of Bluefield, West Virgi reached that point, but was not se ther. For failure to make delivery sued the telegraph company in the c tion court of the city of Danville to the statutory penalty, and obtained ment. Error was prosecuted to the s court of appeals of Virginia, upon t tention that the transmission of th sage in question was interstate co and not subject to the statutory reg of Virginia, heretofore referred to appellate court, however, held (104 51 S. E. 225) that the case was rul prior decision (Western U. Teleg. Co. nolds, 100 Va. 459, 93 Am. St. Rep. S. E. 856), and that such decision h been overruled by the decision of th in Hanley v. Kansas City Southern 187 U. S. 617, 47 L. ed. 333, 23 Sup. C 214, and being of opinion, as recited journal, "that the writ of error w providently awarded," and that it h jurisdiction to entertain the same missed the writ of error.

Treating the order of dismissal as judgment, we are now asked on th of error to reverse the ruling of t preme court of appeals of Virginia. however, we cannot do. It is imm that the supreme court of appeal

y the state Constitution with ap-
ırisdiction in all cases involving the
ionality of a law as being repug-
the Constitution of Virginia or of
d States, or that, in the opinion de-
y the court, it discussed the Fed-
tion and declared it to be without
'he fact is undoubted that the writ
was dismissed solely and expressly
of a want of jurisdiction, and the
the formal entry, adjudging that
was without jurisdiction to pass
questions presented by the writ of
nnot be different from what it
ıve been had the court not given
n to its views *in a written opin-
necessary result of the ruling
court had not jurisdiction of the
ror was to determine that the trial
s the final court where the ques-
sented by the writ could be de-
d, hence, the writ of error should
directed to that court. Missouri,
R. Co. v. Elliott, 184 U. S. 530, 539,
673, 678, 22 Sup. Ct. Rep. 446.
f error dismissed.

L. REARICK, Plff. in Err.,
v.
WEALTH OF PENNSYLVANIA.

S. C. Reporter's ed. 507-513.)

commerce—state regulations—
s and drummers.
terstate commerce is unlawfully
by a municipal ordinance exacting
fee from a person employed by a
orporation to solicit, within the
lity, orders for groceries, which the
fills by shipping goods to him for
ery to, and collection of the pur-
e from, the customer, who has the
refuse the goods if not equal to
uch goods always being shipped in
ackages, corresponding to the sev-
rs, except in the case of brooms,
ter being tagged and marked, like
articles, according to the number
are then tied together in bundles
a dozen, wrapped up conveniently
ent.

[No. 47.]

d October 19, 1906. Decided December 17, 1906.

ROR to the Superior Court of the
of Pennsylvania to review a judgment which affirmed a conviction in the Court of Quarter Sessions of Northumberland County, in that state, for violating a municipal ordinance exacting a license fee from the person soliciting orders for a foreign corporation and delivering the goods to the customer. Reversed.

See same case below, 26 Pa. Super. Ct. 384.

The facts are stated in the opinion.

Mr. Campbell M. Voorhees submitted the cause for plaintiff in error. Mr. Philemon S. Karshner was on the brief:

The negotiation of sales of goods that are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce, and is protected from local interference, burdens, or tax.

Robbins v. Taxing District, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Corson v. Maryland, 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50, 7 Sup. Ct. Rep. 655; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; McCall v. California, 136 U. S. 104, 34 L. ed. 392, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576.

The delivery of goods to a buyer at his residence in one state, that have been sent in pursuance of contract by a seller in another state, is interstate commerce, and subject to no state or local burdens.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 479, 31 L. ed. 700, 704, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; State Freight Tax Case, 15 Wall. 232, 275, 276, 21 L. ed. 146, 161, 162; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664.

The manner in which interstate commerce is transported cannot be controlled by the states.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, 29 L. ed. 158, 161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Re Spain, 14 L.R.A. 97, 3 Inters. Com. Rep. 738, 47 Fed. 208; Re Nichols, 48 Fed. 164; Re Tyerman, 48 Fed. 167; Huntington v. Mahan, 142 Ind. 695, 51 Am. St. Rep. 200, 42 N. E. 463; McClellan v. Pettigrew, 44 La. Ann. 356, 10 So. 853; State v. Willing-

-On peddlers and drummers as re-
interstate commerce—see notes to
v. Morgan, 46 L. ed. U. S. 785; Re
L.R.A. 97; and Cleveland, C. C.
R. Co. v. Backus, 38 L. ed. U. S.

ham, 9 Wyo. 290, 52 L.R.A. 198, 87 Am. St. Rep. 948, 62 Pac. 797; Stone v. State, 117 Ga. 292, 43 S. E. 740; Menke v. State, 70 Neb. 669, 97 N. W. 1020; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; Brennan v. Titusville, supra.

Congress has exclusive control over the transportation, purchase, sale, and exchange of commodities in interstate commerce.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; State Freight Tax Case, 15 Wall. 232, 279, 21 L. ed. 146, 162; Gloucester Ferry Co. v. Pennsylvania and Robbins Taxing District, supra; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; American Exp. Co. v. Iowa, supra; Adams Exp. Co. v. Iowa, 196 U. S. 147, 49 L. ed. 424, 25 Sup. Ct. Rep. 185.

The states cannot invoke their police power for the purpose of regulating commerce among the states that is national in its character.

Brennan v. Titusville, supra.

Mr. S. P. Wolverton submitted the cause for defendant in error. Mr. Harry S. Knight was on the brief:

Was Rearick, the plaintiff in error, at the time of delivering the goods, engaged in inter-state or intra-state commerce?

a. Where did the sale take place?

Com. v. Hess, 148 Pa. 98, 17 L.R.A. 176, 33 Am. St. Rep. 810, 23 Atl. 977; Com. v. Holstine, 132 Pa. 357, 19 Atl. 273; Garbracht v. Com. 96 Pa. 449, 42 Am. Rep. 550; Com. v. Fleming, 130 Pa. 138, 5 L.R.A. 470, 17 Am. St. Rep. 763, 18 Atl. 622.

b. Was delivery made to the consumer in the original package?

Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; May v. New Orleans, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976.

If Rearick, the plaintiff in error, at the time of delivering the goods, was engaged in interstate commerce, is the Sunbury ordinance in question an unconstitutional regulation of interstate commerce?

a. Considered as a license tax.

American Steel & Wire Co. v. Speed, 192 U. S. 518, 48 L. ed. 545, 24 Sup. Ct. Rep. 365; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Hinson v. Lott, 8 Wall. 148, 19 L. ed. 387; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347.

b. Considered as a police regulation.

Leisy v. Hardin, 135 U. S. 109, 34 L. ed. 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Plumley v. Massachusetts, 155 U. S. 478, 39 L. ed. 229, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; Com. v. Zelt, 138 Pa. 615, 11 L.R.A. 602, 21 Atl. 7.

Mr. Justice Holmes delivered the opinion of the court:

This case comes here upon a writ of error to the superior court of Pennsylvania, an appeal to the supreme court of the state having been disallowed by the last-named court. The superior court affirmed a conviction of the plaintiff in error for violating an ordinance of the borough of Sunbury, which made it unlawful to solicit orders for, sell, or deliver, at retail, either on the streets or by traveling from house to house, foreign or domestic goods, not of the parties' own manufacture or production, without a license, for which a large fee was required. In the court of quarter sessions, where the plaintiff in error was convicted, the case was heard upon an agreed statement of facts. Upon these facts the plaintiff in error asked for a ruling that his acts were done in carrying on interstate commerce, and that the ordinance was void as to him, under clause 3, § 8, article 1, of the Constitution, the commerce clause; and saved his rights. The 14th Amendment also was relied upon, but it is unnecessary to state details concerning that.

The following is a shortened statement of the facts agreed. An Ohio corporation employed an agent to solicit in Sunbury retail orders to the company for groceries. When the company had received a large number of such orders it filled them at its place of business in Columbus, Ohio, by putting up the objects of the several orders in distinct packages, and forwarding them to the defendant by rail, addressed to him "For A. B.," the customer, with the number of the order also on the package, for further identification. The company ultimately kept the orders, but it kept no book accounts with the customers, looking only to the defendant. The defendant alone had authority to receive the goods from the railroad, and when he received them he delivered them, as was his duty, to the customers, for cash paid to him. He then sent the money to the corporation. The customer had the right to refuse the goods if not equal to the sample shown to him when he gave the order. In that or other cases of nondelivery the defendant returned the goods to Columbus. No shipments were

made to the defendant except to fill such orders, and no deliveries were made by him except to the parties named on the packages. In the case of brooms, they were tagged and marked like the other articles, according to the number ordered, but they then were tied together into bundles of about a dozen, wrapped up conveniently for shipment. The defendant had no license, but relied upon the invalidity of the ordinance, as we have said.

If the acts of the plaintiff in error were done in the course of commerce between several states, the law is established that his request for a ruling was right, and that he should have been discharged. Robbins v. Taxing District, 120 U. S. 489, 497, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229. It will be seen from the insertion of the statement concerning the brooms that the ground *relied upon by the prosecution to avoid that conclusion was that the goods, or at least this part of them, were not in the original packages when delivered, and that therefore the case did not fall within the decisions last cited, but rather within Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; May v. New Orleans, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; and Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233. In other words, it was contended that the brooms, before they were sold, had become mingled with, or part of, the common mass of goods in the state, and so subject to the local law. But the doctrine as to original packages primarily concerns the right to sell within the prohibiting or taxing state goods coming into it from outside. When the goods have been sold before arrival the limitations that still may be found to the power of the state will be due, generally, at least, to other reasons, and we shall consider whether the limitations may not exist, irrespective of that doctrine, in some cases where there is no executed sale. Hence the prosecution, whatever its assumption on the point last mentioned, sought to show that there was no sale until the goods were delivered and the cash paid for them. The superior court contented itself with the suggestion that the contract would have been satisfied by the delivery of articles corresponding to sample, although bought at the next door. The argument submitted to us goes farther, and affirms that the order was not accepted and did not bind the corporation until the delivery took place.

The answer to the latter of the two positions just stated is simple. The fair meaning of the agreed fact that the orders were given to agents employed to solicit them is that the company offered the goods, and that the orders were acceptances of offers from the other side. If there were the slightest reason to doubt that the contracts were made with the company through its authorized agent at the moment when the orders were given, which we do not perceive that there is, certainly the contrary could not be assumed in order to sustain a conviction. It is for the prosecution to make out its case. We may mention here, in parenthesis, that of course it *does not [512] matter to the question before us that the contract was made in Pennsylvania. Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829. The other suggestion, that the company would have been free to deliver any articles equal to sample, as well if bought in Pennsylvania as if coming from Ohio, of course assumes that there was a contract. With regard to this argument it might be an interesting question whether the shipments described amounted to authorized appropriations of the goods to the contracts, notwithstanding the fact that the deliveries were to be only for cash; but we are not required to go into such niceties. The decisions already in the books go as far as it is necessary for us to go in order to decide this case.

"Commerce among the several states" is a practical conception, not drawn from the "witty diversities" ([Yaites v. Gough] Yelv. 33) of the law of sales. Swift & Co. v. United States, 196 U. S. 375, 398, 399, 49 L. ed. 518, 525, 526, 25 Sup. Ct. Rep. 276. The brooms were specifically appropriated to specific contracts, in a practical, if not in a technical, sense. Under such circumstances it is plain that, wherever might have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce. In Brennan v. Titusville, supra, pictures were sold by sample, as the brooms were here, and although the pictures were consigned to the purchasers directly, the railroad collecting the price, there was no discussion of the question whether the title had passed. In American Exp. Co. v. Iowa, 196 U. S. 133, 143, 49 L. ed. 417, 422, 25 Sup. Ct. Rep. 182, that question was referred to only to be waived. In Caldwell v. North Carolina, supra, the pictures were consigned to the defendant, an agent, as here, with the additional facts that the pictures and frames were sent in large packages, which were opened by the agent on their arrival, and that the pictures, then for the first time, were put into their proper frames, and, for all that appears, then for the first time appropriated

to specific purchasers. In the court below all the judges agreed that the title did not pass until delivery. 127 N. C. 521, 526, 527, [513] 37 S. E. 138. This court intimated *nothing to the contrary. On the special verdict it well might be that the sale was by sample, as in Brennan v. Titusville. It was decided that the intervention of an agent made no difference in the result. The superior court distinguished that case as one that necessarily involved interstate commerce because it called for the skill of the seller, but no such fact appears in the case or was referred to as a ground of decision, and there is no sufficient warrant for assuming it to be true.

Some argument was made, to be sure, that even if the defendant was engaged in interstate commerce when he delivered the goods, still the ordinance bound him. American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365, was especially relied upon. But that decision did not modify the cases that we have cited. It dealt with a case where a mass of nails and iron wire was collected at Memphis from other states, by a manufacturer, for all purposes; some of the goods to be sold on the spot, some ultimately to be forwarded to purchasers in other states, but no package being consigned to or intended for any special customer, or free from the chance of being sold by a new bargain in Tennessee. Under such circumstances the goods were liable to taxation in that state. The distinction between that case and the present does not need further emphasis. In view of the many decisions upon the matter we deem further argument unnecessary to show that the judgment below was wrong.

Judgment reversed.

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[514] *ILLINOIS CENTRAL RAILROAD COMPANY, Plff. in Err.,

v.

J. U. McKENDREE.

(See S. C. Reporter's ed. 514-530.)

Error to state court—Federal question—certificate.

1. The certificate of a state court that the defendant railway company, in a suit to recover damages for the infection of cattle because of a violation of the quarantine regulations promulgated by the Secretary of Agriculture under cover of the act of February 2, 1903 (32 Stat. at L. 791, chap. 349, U. S. Comp. Stat. Supp. 1905, p. 613), insisted that such statute was unconstitutional, and that, even if constitutional, did not authorize such regulations or give a remedy in damages, removes any doubt as to whether a Federal question was raised within the meaning and intent of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, governing writs of error to state courts, where, after a demurrer to the answer of the railway company setting forth the unconstitutionality of the law and the action of the Secretary thereunder had been sustained, verdict and judgment were rendered against the defendant.

Commerce—quarantine regulations.

2. Quarantine regulations promulgated by the Secretary of Agriculture acting under cover of the act of February 2, 1903, entitled "An Act to Enable the Secretary of Agriculture to More Effectually Suppress and Prevent the Spread of Contagious and Infectious Diseases of Live Stock, and for Other Purposes," are void as in excess of the powers conferred by that act, where, on their face, they apply as well to intrastate as to interstate commerce.

[No. 13.]

Submitted December 14, 1905. Restored to docket for oral argument December 18, 1905. Suggestion of lack of jurisdiction submitted April 16, 1906. Decided December 17, 1906.

IN ERROR to the Circuit Court of Carlisle County in the State of Kentucky to review a judgment in favor of plaintiff in an action to recover damages from a railway company for the infection of cattle because of a violation of quarantine regulations promulgated by the Secretary of Agriculture. Reversed and remanded for further proceedings.

Statement by Mr. Justice Day:

Defendant in error, plaintiff below, brought an action against the railroad company as a common carrier operating a railroad through Carlisle county, Kentucky, setting forth *that the defendant received certain cars of infected cattle and transported them to Arlington, Carlisle county, Kentucky, where they were unloaded July 13, 1903, and placed in stock pens where the cattle of the plaintiff, rightfully running

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NOTE.—On the certificate of a state court as showing presence of Federal question—see notes to Cincinnati, P. B. S. & P. Packet Co. v. Bay, 50 L. ed. U. S. 428; and Home for Incurables v. New York, 63 L.R.A. 33.

On the constitutionality of state legislation regulating the importation of infected animals—see notes to Reid v. Colorado, 47 L. ed. U. S. 108, and Grimes v. Eddy, 21 L.R.A. 638.

On inspection laws as regulations of commerce—see note to New Mexico ex rel. McLean v. Denver & R. G. R. Co. ante, 73.

On inspection, quarantine, and sanitary regulations interfering with interstate commerce—see note to Smith v. Lowe, 59 C. C. A. 191.

loose upon the commons, could and did come in contact with the infected cattle, and contracted Texas cow fever. That the company knew or could have known, by the exercise of reasonable care, that the cattle had infectious germs when unloaded, having been brought from an infected district, in conflict with well-known quarantine laws.

A general demurrer was interposed by defendant and overruled.

After an answer of general denial the defendant filed an amended answer:

"Further answering herein, the defendant says that the claims of the plaintiff herein asserted are based upon a certain alleged act of Congress of the United States of America approved February 2, 1903, entitled 'An Act to Enable the Secretary of Agriculture to More Effectually Suppress and Prevent the Spread of Contagious and Infectious Diseases of Live Stock, and for Other Purposes,' which act is published and contained in volume 32, United States Statutes at Large, beginning at page 791, chapter 349, and also in a supplement to the United States Compiled Statutes issued in 1903, by the West Publishing Company, St. Paul, Minnesota, beginning at page 372 of said volume (U. S. Comp. Stat. Supp. 1905, p. 913), and said claims are further based upon certain alleged regulations adopted and promulgated by the Secretary of Agriculture on March 13, 1903, pursuant to the authority attempted to be conferred upon him by said alleged act of Congress above mentioned, approved February 2, 1903.

"The defendant says that said act of Congress hereinbefore mentioned, and said regulations adopted by the Secretary of Agriculture, as hereinbefore stated, are each and all of them repugnant to and in contravention of the Constitution of the United States of America, and in excess of the powers of Congress and of the Secretary of Agriculture under the Constitution *of the United States, and they are each and all, therefore, unconstitutional and void, and, under the Constitution of the United States, this defendant has the right, privilege, and immunity of being exempt from the assertion or prosecution of any claims against it based upon or arising under such act of Congress or said regulation, or any of them, and this defendant, as permitted by § 709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575), hereby specially sets up and claims and pleads in defense of this action the right and privilege and immunity which is secured to it by the Constitution of the United States, to be exempt from all suits and prosecutions and all claims against it based upon or arising under such unconstitutional and void act of Congress and regulations adopted or promulgated by the Secretary of Agriculture."

A demurrer was filed by the plaintiff to the amended answer.

The plaintiff filed an amended petition, the affirmative allegations of which were controverted.

This amended petition sets forth:

"The plaintiff, J. U. McKendree, comes, and by leave of the court amends his petition, and says that the defendant, Illinois Central Railroad Company, on the 13th day of June, 1903, received one car of cattle at Grand Junction, Tennessee, to be transported to the town of Arlington, Kentucky, and on the 13th day of said month unloaded them in the stock pens in said town.

"That the town of Arlington is a small town, located on defendant's road in this, Carlisle, county, and defendant's stock pens are located adjacent to the public highway and commons, and that Grand Junction, Tennessee, is located on defendant's road and south of the quarantine line that was established on the 14th day of March, 1903, by and under the existing quarantine laws, and that said quarantine line, 'beginning on the Mississippi river, at the southeast corner of the state of Missouri, at the western boundary of Tennessee.' [Here follows a description of the quarantine line through the body of the state of Tennessee as set forth in amendment No. 4 to B. A. I., *Order No. 107.] And that the defendants received said cattle south of said quarantine line, and transported them north and out of a quarantine district, and south of the said quarantine line, and transported them north through the state of Tennessee into this county and state, and unloaded them in the town of Arlington, and placed them in their stock pens adjacent to the public highway and commons, where plaintiff's cows came in contact with the germ of Texas cow fever that said cattle had on them when put in the pens as aforesaid; that said stock pens were suffered and permitted to remain open and exposed to cattle after the removal of said cattle, without disinfecting, or any other effort to protect exposed stock, and plaintiff's cows contracted Texas cow fever from said germs produced from said cattle while in said stock pens, to the damage of plaintiff. [517

"Wherefore he prays as in his original petition."

The court sustained the demurrer to the amended answer of the defendant, and upon the issue joined, the case was sent to the jury. A verdict and judgment were rendered against the railroad company, and in favor of the plaintiff below.

There was no dispute as to the transportation of the cattle from a point south of

the quarantine line to a point north thereof, and the placing of them in pens at Arlington. The court, over the defendant's objection, submitted the case to the jury upon the questions of whether the transported cattle were infected, and, if so, whether the plaintiff's cattle contracted the disease from them while they were in the pens of the defendant company at Arlington.

The presiding judge of the Carlisle circuit court filed the following certificate:

"I, R. J. Bugg, sole presiding judge of the circuit court of Carlisle county, in the state of Kentucky, now and at the time of the trial of the above entitled cause, do hereby certify:

"That, upon the trial of said cause, the defendant, Illinois Central Railroad Company, relied for its defense upon certain rights, privileges, and immunities specially [518] claimed by it under *the Constitution of the United States of America, and it insisted upon its said rights, privileges, and immunities throughout the trial of said action, and in the assertion of them it claimed and contended that the various regulations and orders made and promulgated by the Secretary of Agriculture, and offered in evidence on behalf of the plaintiff herein over the objections of defendant, were unconstitutional, null, and void, as being in excess of the powers conferred, or which could be conferred, by act of Congress upon the Secretary of Agriculture under the Constitution of the United States of America, and that the said act of Congress, approved February 2, 1903, under which the Secretary of Agriculture assumed to promulgate said orders and regulations, was itself unconstitutional, null, and void, as being in conflict with the Constitution of the United States of America, and in excess of the powers conferred by it upon the Congress.

"Said defendant, Illinois Central Railroad Company, further contended throughout the trial of said cause that no right of action against it accrued to the plaintiff by reason of any of the alleged regulations or orders made or promulgated by the Secretary of Agriculture, and offered in evidence upon the trial of this action, or by reason of the alleged failure on the part of the defendant to observe or to comply with any of said regulations or orders, on the ground that the said regulations or orders did not assume or attempt to give, and that the said act of Congress did not assume or attempt to give, to the plaintiff herein, or to any other in like situation, a remedy by way of civil action against the defendant herein for its alleged breach of any of said regulations or orders made or promulgated by the Secretary of Agriculture, and throughout the trial of said action the defendant, Illinois Central Railroad Company, specially set up and claimed, even if said act of Congress and said regulations and orders were valid under the Constitution and laws of the United States, still it had a right, privilege, or immunity under the said act of Congress or the said regulations or orders, from any liability to the plaintiff, *J. U. McKendree, [519] in a civil action for damages claimed on account of its alleged breach of said regulations or orders.

"In allowing the said regulations or orders of the Secretary of Agriculture to be given in evidence before the jury, and in overruling the motion of defendant to peremptorily instruct the jury to return a verdict in its favor, the Carlisle circuit court disallowed the various contentions made as above stated on behalf of the Illinois Central Railroad Company, and denied the claims made by it of the rights, privileges, or immunities specially claimed by it as above stated, and held that the various claims made by it were not well founded in law under the Constitution and laws of the United States of America, and the claims of the plaintiff herein were established and a judgment in his favor rendered solely by reason of defendant's alleged breach of said regulations and orders."

The testimony tended to show that the cows of the plaintiff came in contact with cattle transported by the railroad company from a point south of the quarantine line set forth in the amended petition.

On March 13, 1903, the Secretary of Agriculture, acting under cover of the act of February 2, 1903 (32 Stat. at L. 791, chap. 349, U. S. Comp. Stat. Supp. 1905, p. 613), entitled "An Act to Enable the Secretary of Agriculture to More Effectually Suppress and Prevent the Spread of Contagious and Infectious Diseases of Live Stock, and for Other Purposes," established a quarantine line from west to east throughout the United States, from California to Maryland, and forbidding the transportation of cattle from points south of the line to points north of the line, except in the manner in the said order specified.

Section 9 of the order provided: "Violation of these regulations is punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment."

By amendment of March 14, 1904, the Secretary of Agriculture adopted as a quarantine line a line running from west to east of the state of Tennessee, from the south of which the cattle said to have infected those of the plaintiff were transported and

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& M. Canal Co. v. Patten Paper
S. 58, 67, 43 L. ed. 364, 368, 19
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g v. Athens County, 16 Pet. 281,
ed. 965, 966; Lawler v. Walker,
9, 153, 14 L. ed. 364, 366; Med-
hio, 24 How. 413, 414, 16 L. ed.

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Federal question was necessarily involved, and that the judgment could not have been rendered without deciding that question, then the certificate is admissible to show that it was raised, and the attention of the court called to it before judgment, and that the court did in fact pass on it.

Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 68, 46 L. ed. 86, 87, 22 Sup. Ct. Rep. 26; Armstrong v. Athens County, supra; Parmelee v. Lawrence, 11 Wall. 36, 39, 20 L. ed. 48, 49; Brown v. Atwell, 92 U. S. 327, 330, 23 L. ed. 511, 513; Gross v. United States Mortg. Co. 108 U. S. 477, 486, 27 L. ed. 795, 798, 2 Sup. Ct. Rep. 940; Roby v. Colehour, 146 U. S. 153, 160, 36 L. ed. 922, 924, 13 Sup. Ct. Rep. 47; Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 70, 41 L. ed. 72, 74, 16 Sup. Ct. Rep. 939; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 41, 48, 45 L. ed. 415, 418, 21 Sup. Ct. Rep. 256.

The record in the present case leaves no doubt upon the subject that the state court considered the Federal rights and immunities claimed by the plaintiff in error as having been raised, and denied the claim so asserted.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 657, 660, 41 L. ed. 1149, 1152, 1153, 17 Sup. Ct. Rep. 709; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 30, 24 L. ed. 989, 991; Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216.

The Federal questions were sufficiently presented.

Powell v. Brunswick County, 150 U. S. 433, 440, 37 L. ed. 1134, 1136, 14 Sup. Ct. Rep. 166; Marvin v. Trout, 199 U. S. 212, 223, 50 L. ed. 157, 161, 26 Sup. Ct. Rep. 31; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97.

Upon the question of jurisdiction the case is very similar to Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 621, 42 L. ed. 878, 881, 18 Sup. Ct. Rep. 488.

Where a statute is couched in terms so broad as to exceed the limits of the power of the legislature to enact it, the court will not, by construction, limit the statute to the scope which might constitutionally be given it by the legislature, but will hold the statute unconstitutional.

United States v. Reese, 92 U. S. 214, 221, 23 L. ed. 563, 565; Trade-Mark Cases, 100 U. S. 82, 98, 99, 25 L. ed. 550, 553, 554; Allen v. Louisiana, 103 U. S. 80, 85, 26 L. ed. 318, 319; United States v. Harris, 106 U. S. 629, 641, 642, 27 L. ed. 290, 294, 295, 1 Sup. Ct. Rep. 601; Poindexter v. Greenhow, 114 U. S. 270, 305, 29 L. ed. 185, 197, 5 Sup. Ct. Rep. 903, 962; Spraigue v. Thompson, 118 U. S. 90, 94, 30 L. ed. 115, 116, 6 Sup. Ct. Rep. 988; Baldwin v. Franks.

120 U. S. 678, 685, 689, 30 L. ed. 766, 768, 769, 7 Sup. Ct. Rep. 656, 763; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 565, 46 L. ed. 679, 692, 22 Sup. Ct. Rep. 431; James v. Bowman, 190 U. S. 127, 140, 47 L. ed. 979, 983, 23 Sup. Ct. Rep. 678; United States v. Ju Toy, 198 U. S. 253, 262, 49 L. ed. 1040, 1043, 25 Sup. Ct. Rep. 644.

Even an act of Congress covering legitimate as well as illegitimate fields of legislation in a single provision cannot be rendered effective by holding it invalid as to the field wherein Congress had no power to legislate.

United States v. Reese, Trade-Mark Cases, Spraigue v. Thompson, Baldwin v. Franks, and Conolly v. Union Sewer Pipe Co. supra.

Attorney General Moody, Solicitor General Hoyt, and Assistant Attorney General McReynolds submitted the cause for the United States in support of suggestion of lack of jurisdiction:

To give this court jurisdiction the Federal question must have been distinctly raised and passed upon by the state court. It cannot originate in the certificate, assignments of error, or brief.

Allen v. Arguimbau, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; Manning v. French, 133 U. S. 186, 33 L. ed. 582, 10 Sup. Ct. Rep. 258; Felix v. Scharnweber, 125 U. S. 54, 31 L. ed. 687, 8 Sup. Ct. Rep. 759; Mississippi & M. R. Co. v. Rock, 4 Wall. 177, 18 L. ed. 381; Maxwell v. Newbold, 18 How. 511, 15 L. ed. 506.

Where the state court sustains the validity of an act or authority called in question, its judgment cannot be reviewed by this court.

McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11; Jersey City & B. R. Co. v. Morgan, 160 U. S. 288, 40 L. ed. 430, 16 Sup. Ct. Rep. 276; Baker v. Baldwin, 187 U. S. 61, 47 L. ed. 75, 23 Sup. Ct. Rep. 19; Missouri ex rel. Carey v. Andriano, 138 U. S. 496, 499, 500, 34 L. ed. 1012, 1013, 1014, 11 Sup. Ct. Rep. 385.

When review of the judgment of a state court is sought, the right, privilege, or immunity claimed under the Constitution must have been indicated specifically by appropriate language, or by necessary intendment, making it clear that a certain definite provision was relied on.

Maxwell v. Newbold, 18 How. 511, 516, 517, 15 L. ed. 506, 508, 509; Sayward v. Denny, 158 U. S. 180, 184, 37 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; Clarke v. McDade, 165 U. S. 168, 172, 41 L. ed. 673, 674, 17 Sup. Ct. Rep. 284; Marvin v. Trout, 199 U. S. 212–224, 50 L. ed. 157–161, 26 Sup. Ct. Rep. 31.

Under the decisions of this court, the alleged Federal question referred to in the certificate was not raised in the court below at the proper time and in the proper way.

Spies v. Illinois (Ex parte Spies) 123 U. S. 181, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; Lawler v. Walker, 14 How. 152, 14 L. ed. 365; Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; Leeper v. Texas, 139 U. S. 467, 35 L. ed. 226, 11 Sup. Ct. Rep. 579; Powell v. Brunswick County, 150 U. S. 439, 37 L. ed. 1136, 14 Sup. Ct. Rep. 166; Dibble v. Bellingham Bay Land Co. 163 U. S. 69, 70, 41 L. ed. 74, 16 Sup. Ct. Rep. 939; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256.

Where a Federal question is raised in the state court, the party who brings the case to this court cannot raise here another Federal question which was not raised below.

Chapin v. Fye, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

Defendant's alleged right, under the act of February 2, 1903, to be exempt from a civil action by an individual for special damages occasioned him by a violation of the regulations of the Secretary of Agriculture made in pursuance thereof, is therefore clearly frivolous and fictitious, and made solely for the purpose of obtaining a review by this court of the constitutional questions involved.

Hamblin v. Western Land Co. 147 U. S. 531, 533, 37 L. ed. 267, 270, 13 Sup. Ct. Rep. 353.

No brief was filed for defendant in error.

Mr. Justice Day delivered the opinion of the court:

The government objects to the jurisdiction of this court to entertain the writ of error upon the ground that no Federal question is raised within the intent and meaning of § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575). But we are of opinion that such questions were raised, and that we are required upon this record to review the judgment of the state court.

An inspection of the record shows that the case as made by the plaintiff below upon the amended petition was to recover damages for the infection of his cattle because of coming in contact with cattle transported by the railroad company from a point south to a point north of the quarantine line established by the Secretary of Agriculture, in a manner violative of regulations for the transportation and keeping

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362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831."

To the same effect is Rector v. City Deposit Bank Co., supra.

Upon this record, read in the light of the certificate, we think the defendant raised Federal questions as to the constitutionality of the law, and, if constitutional, whether the Secretary's order was within the power therein conferred, and the right to a personal action for damages, in such manner as to give this court jurisdiction of them under § 709, Rev. Statutes.

The railroad company, by the proceedings and judgment in this case, was denied the alleged Federal rights and immunities specially set up in the proceedings, in the enforcement of a statute and departmental orders averred to be beyond the constitutional power of Congress and the authority of the Secretary of Agriculture, and in the rendition of a judgment for damages in an action under the statute and order, in opposition to the insistence of the defendant that, even if constitutional, the statute did not confer such power or authorize a judgment for damages.

The constitutional objections urged to the validity of the statute of February 2, 1903, and the Secretary's order, No. 107, purporting to be made under authority of the statute, raise questions of far-reaching importance as to the power of Congress to authorize the head of an executive department of the government to make orders of this character, alleged to be an attempted delegation of the legislative power solely vested by the Constitution in Congress. These questions, it is suggested by the counsel for the government, have become *academic by [527] reason of the passage of the later act of

was constitutional, and rightfully conferred the power upon the Secretary of Agriculture to make orders and regulations concerning interstate commerce, there was no power conferred upon the Secretary to make regulations concerning *intra*state commerce, over which Congress has no control, and concerning which we do not think this act, if it could be otherwise sustained, intended to confer power upon him. Assuming, then, for this purpose, that the Secretary was legally authorized to make orders and regulations concerning interstate commerce, we find that on March 13, 1903, he adopted, in the order No. 107, the following regulation:

"2. Whenever any state or territory located above or below said quarantine line, as above designated, shall duly establish a different quarantine line, and obtain the necessary legislation to enforce said last-mentioned line strictly and completely within the boundaries of said state or territory, and said last above-mentioned line and the measures taken to enforce it are satisfactory to the Secretary of Agriculture, he may, by a special order, temporarily adopt said state or territory line.

"Said adoption will apply only to that portion of said line specified, and may cease at any time the Secretary may deem it best for the interests involved, and in no instance shall said modification exist longer than the period specified in said special order; and, at the expiration of such time, said quarantine line shall revert, without further order, to the line first above described.

[528] *"Whenever any state or territory shall establish a quarantine line, for above purposes, differently located from the above-described line, and shall obtain by legislation the necessary laws to enforce the same completely and strictly, and shall desire a modification of the Federal quarantine line to agree with such state or territory line, the proper authorities of such state or territory shall forward to the Secretary of Agriculture a true map or description of such line and a copy of the laws for enforcement of the same, duly authenticated and certified."

And afterward, on March 14, 1903, the Secretary adopted the quarantine line agreed to be established by the state of Tennessee, and said to run about the middle of the state, and from the south of which the cattle in this case were transported, and provided:

"And whereas said quarantine line, as above set forth, is satisfactory to this Department, and legislation has been enacted by the state of Tennessee to enforce said quarantine line, therefore the above line is adopted for the state of Tennessee by this Department for the period beginni the date of this order and ending D 31, 1903, in lieu of the quarantine scribed in the order of March 13, 1 said area unless otherwise ordered.

The terms of order 107 apply to tle transported from the south of t to parts of the United States north It would, therefore, include cattle ported within the state of Tennes the south of the line as well as tho outside that state; there is no e in the order, and in terms it inch cattle transported from the south line, whether within or without t of Tennessee. It is urged by the ment that it was not the intention Secretary to make provision for in commerce, as the recital of the orde an intention to adopt the state lin the state by its legislature has pa necessary laws to enforce the sa pletely and strictly. But the order applies alike to interstate *and in commerce. A party prosecuted for v this order would be within its t the cattle were brought from the s the line to a point north of the line the state of Tennessee. It is true t retary recites that legislation h passed by the state of Tennessee to the quarantine line, but he do limit the order to interstate co coming from the south of the line, we have said, the order in terms c We do not say that the state lin not be adopted in a proper case, in ercise of Federal authority, if limite effect to interstate commerce comi below the line, but that is not the order, and we must deal with it as it. Nor have we the power to so li Secretary's order as to make it ap to interstate commerce, which it is all that is here involved. For au appears upon the face of the or Secretary intended it to apply to merce, and whether he would hav such an order, if strictly limited t state commerce, we have no means o ing. The order is in terms single divisible. In United States v. Ree S. 214, 221, 23 L. ed. 563, 565, upon t ject, this court said:

"We are, therefore, directly call to decide whether a penal statute, by Congress, with its limited power is in general language broad enough wrongful acts without as well as wi constitutional jurisdiction, can be lim judicial construction so as to make ate only on that which Congress ma fully prohibit and punish. For this we must take these sections of the

ey are. We are not able to reject a part is unconstitutional and retain the re-der, because it is not possible to sepa-that which is unconstitutional, if there y such, from that which is not. The sed effect is not to be attained by ng out or disregarding words that are e section, but by inserting those that ot now there. Each of the sections stand as a whole, or fall altogether. anguage is plain. There is no room for ruction, *unless it be as to the effect of Constitution. The question, then, to termined, is whether we can introduce of limitation into a penal statute of make it specific, when, as expressed, general only."

l the court declined to make such limi-.

l in Trade-Mark Cases, 100 U. S. 82, L. ed. 550, 553, the court said:

we should, in the case before us, un-te to make, by judicial construction, a which Congress did not make, it is probable we should do what, if the r were now before that body, it would willing to do; namely, make a trade-law which is only partial in its opera-nd which would complicate the rights parties would hold, in some instances, the act of Congress, and in others un-tate law. Cooley, Const. Lim. 178, Com. v. Hitchings, 5 Gray, 482."

see United States v. Ju Toy, 198 U. , 262, 263, 49 L. ed. 1040, 1043, 1044, p. Ct. Rep. 644.

think these principles apply to the t bar, and that this order of the Sec-, undertaking to make a stringent tion with highly penal consequences, gle in character, and includes com-wholly within the state, thereby ex-g any authority which Congress in-l to confer upon him by the act in on, if the same is a valid enactment. herefore, find it unnecessary to pass the other questions which were ht to be involved in the case at bar. judgment of the state court will be ed and the cause remanded to it for r proceedings not inconsistent with pinion.

Justice McKenna concurs in the re-

NOIS CENTRAL RAILROAD COMPANY, Plff. in Err.,

v.

T. C. EDWARDS.

(See S. C. Reporter's ed. 531.)

case is governed by the decision in s C. R. Co. v. McKendree, *ante*, 298.

Submitted December 14, 1905. Restored to docket for oral argument December 18, 1905. Decided December 17, 1906.

IN ERROR to the Circuit Court of Carlisle County in the State of Kentucky to review a judgment in favor of plaintiff in an action to recover damages from a railway company for the infection of cattle because of a violation of quarantine regulations promulgated by the Secretary of Agriculture. Reversed and remanded for further proceedings.

Messrs. J. M. Dickinson and Ermund F. Trabue submitted the cause for plaintiff in error.

For their contentions see their brief as reported in Illinois C. R. Co. v. McKendree, ante, 298.

No brief was filed for defendant in error.

Per Mr. Justice Day:

This case involves the same questions, upon similar facts as No. 13, just decided. Counsel filed a written stipulation that it shall be controlled and determined by the ruling made in that case. The judgment is reversed, and cause remanded to the state court for further proceedings not inconsistent with this opinion.

Mr. Justice McKenna concurs in the result.

ERNEST GATEWOOD, Plff. in Err.,

v.

STATE OF NORTH CAROLINA.

(See S. C. Reporter's ed. 531–543.)

Constitutional law—equal protection of the laws—discrimination.

1. The exception in favor of those engaged in the business of manufacturing or

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NOTE.—As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

As to dealings in futures—see notes to Preston v. Cincinnati, C. & H. Valley R. Co. 1 L.R.A. 140; Harvey v. Merrill, 5 L.R.A. 201, and Irwin v. Williar, 28 L. ed. U. S. 225.

As to what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On review of questions of fact on writ of error to state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

On statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363, and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

wholesale merchandising, made by § 7 of N. C. Laws 1905, chap. 538, enacted to prevent dealing in futures, does not make that act void, as repugnant to the equal protection of the law clause of the 14th Amendment to the Federal Constitution, where such section is interpreted by the highest state court simply as a declaration that the courts shall not so construe the act as to prevent persons thus engaged from buying and selling, for future delivery, the necessary commodities required in their ordinary business, and not as relieving them from the operation of the provisions of the 1st section of that act prohibiting the carrying on of a "bucket shop" business, or from the prohibitions of N. C. Laws 1889, chap. 221, concerning the making of gambling contracts for future delivery.

Error to state court—questions reviewable—statutory construction.

2. The construction given by the highest state court to a statute of that state is conclusive on the Supreme Court of the United States in determining, on writ of error to the state court, whether such statute is repugnant to the Federal Constitution.

Error to state court—questions reviewable.

3. Any unconstitutional discrimination in N. C. Laws 1905, chap. 538, enacted to prevent dealing in futures, which may be produced by provisions raising a prima facie presumption of guilt from the proof of certain acts when done by persons generally, and not when done by those engaged in manufacturing or wholesale merchandising, cannot be considered on writ of error from the Supreme Court of the United States to review a conviction under that act, where, from the state of the record, it cannot be affirmed that the finding of the jury as to the keeping of a place for gambling in futures was not based upon independent evidence, wholly irrespective of any presumption authorized by that act.

Statutes—validity—invalid in part.

4. The validity of so much of N. C. Laws 1905, chap. 538, enacted to prevent dealing in futures, as makes indictable the carrying on of a "bucket shop" business, is not affected by any repugnancy to the due process of law or equal protection of the laws clauses of the 14th Amendment to the Federal Constitution of the provisions of that act which raise a prima facie presumption of guilt from the proof of certain acts when done by persons generally, and not when done by those engaged in manufacturing or wholesale merchandising.

Error to state court—questions reviewable.

5. The power of the state, consistently with the due process of law clause of the 14th amendment to the Federal Constitution, to enact the provisions of N. C. Laws 1905, chap. 538, enacted to prevent dealing in futures, which raise a presumption of guilt on proof of the doing of certain acts specified in that statute, cannot be considered by the Supreme Court of the United States on writ of error to review a conviction under that act, where, from the state of the record, it cannot be affirmed that the finding of the jury as to the keeping of a place for gambling in futures was not based upon independent evidence, wholly irrespective of any presumption authorized by the statute.

[No. 105.]

Argued November 16, 1906. Decided December 24, 1906.

IN ERROR to the Supreme Court of the State of North Carolina to review a conviction in the Superior Court of Person County, in that state, of carrying on a "bucket shop" business. Affirmed.

See same case below, 138 N. C. 742, 51 S. E. 53.

The facts are stated in the opinion.

Mr. Robert W. Winston argued the cause, and, with Mr. Victor S. Bryant, filed a brief for plaintiff in error.

The case at bar is governed by Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

This case has been uniformly followed by courts since its rendition.

Union County Nat. Bank v. Ozan Lumber Co. 127 Fed. 211; Brown v. Jacobs' Pharmacy Co. 115 Ga. 453, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; State v. Mitchell, 97 Me. 66, 94 Am. St. Rep. 481, 53 Atl. 887; Matthews v. People, 202 Ill. 389, 63 L.R.A. 73, 95 Am. St. Rep. 241, 67 N. E. 28; Standard Oil Co. v Spartanburg, 66 S. C. 37, 44 S. E. 377; Kellyville Coal Co. v. Harrier, 207 Ill. 624, 99 Am. St. Rep. 240, 69 N. E. 927; Greenwich Ins. Co. v. Carroll, 125 Fed. 129; Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 62 L.R.A. 467, 95 Am. St. Rep. 476, 34 So. 533; Re Poll, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; People v. Orange County Road Constr. Co. 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; State v. Shippers Compress & Warehouse Co. 95 Tex. 603, 69 S. W. 58; State v. Laredo Ice Co. 96 Tex. 461, 73 S. W. 951; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379.

The act of 1905 is unusual in its artificial presumptions and in the manner in which it is engrafted upon the act of 1889, and it is not in harmony with the letter or spirit of the Constitution. The following cases are illustrative of the point at issue:

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 615, 47 N. E. 302.

Presumptions of guilt attempted to be raised by acts of legislatures are void.

People v. Lyon, 27 Hun, 180; State v. Peswick, 13 R. I. 218, 43 Am. Rep. 26; State v. Beach (Ind.) 43 N. E. 951; Cummings v. Missouri, 4 Wall. 328, 18 L. ed. 64; Wynehamer v. People, 13 N. Y. 446; San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 722.

Mr. Walter Clark, Jr. (by special leave), argued the cause, and, with Mr. Robert D. Gilmer, filed a brief for defendant in error:

N. C. Laws 1905, chap. 538, § 7, does not conflict with the 14th Amendment of the United States Constitution, guaranteeing equal protection of the laws.

Parker v. Otis, 130 Cal. 322, 92 Am. St. Rep. 56, 62 Pac. 571, 927; Fortenbury v. State, 47 Ark. 188, 1 S. W. 58.

Under the construction put upon this act by the supreme court of North Carolina, there is no Federal question presented, as by this construction the act is clearly constitutional.

State v. McGinnis, 138 N. C. 724, 51 S. E. 50; State v. Clayton, 138 N. C. 732, 50 S. E. 866.

When the construction of an act is in doubt, and the highest state court construes it so that it is constitutional, and no Federal question is raised, the Supreme Court of the United States has no jurisdiction.

Polk v. Wendal, 9 Cranch, 87, 3 L. ed. 665; Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289; Green v. Neal, 6 Pet. 291, 8 L. ed. 402; Davie v. Briggs, 97 U. S. 638, 24 L. ed. 1089; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; W. W. Cargill Co. v. Minnesota, 180 U. S. 466, 45 L. ed. 625, 21 Sup. Ct. Rep. 423.

Mr. Justice White delivered the opinion of the court:

North Carolina in 1889 enacted "An Act to Suppress and Prevent Certain Kinds of Vicious Contracts." Laws N. C. 1889, chap. 221. This law was thus summarized by the supreme court of that state in State v. McGinnis, 138 N. C. 724, 51 S. E. 50:

"Section 1 made void all contracts for the sale of articles therein named for future delivery, wherein (notwithstanding any terms used) it is not intended that the articles agreed to be sold and delivered shall be actually delivered, but only the difference between the contract price and the market value at the time stipulated shall be paid. Section 2 enacted that when the defense provided by that act is set up in a verified answer the burden shall be upon the plaintiff to prove a lawful contract, but the answer shall not be used against the defendant on an indictment for the transaction. Section 3 made the parties to such contract, and agents concerned therein, indictable, and § 4 made persons, while in this state, consenting to become parties to such contract, made in another state, and all agents in this state, aiding and furthering such contract, made in another state, indictable."

In 1905 there was adopted "An Act . . . to Prevent the Dealing in Futures." This law contains seven sections. The first and second made it "unlawful for any person, corporation, or other association of persons, either as principal or agents, to establish or open an office or other place of business . . . for the purpose of carrying on or engaging in any such business as is forbidden in this act or in chapter 221 *of the Public Laws of North Carolina of [536] 1889," and affixed a penalty for so doing. The law of 1889, referred to, is the one of which we have just previously given a summary.

The acts made punishable by the 1st and 2d sections of the act of 1905 were thus defined in State v. McGinnis, supra:

"The business forbidden by the act of 1905 is—to avoid a paraphrasis, and following the usual American method of describing an act by a word or a phrase—the business of running a 'bucket shop,' which is defined by the Century dictionary as 'an establishment, nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of bets or wagers, usually for small amounts, on the rise or fall of the prices of stocks, grain, oil, etc., there being no transfer or delivery of the stock or commodities nominally dealt in.'"

The 3d section provided that no person should be excused from testifying in any prosecution under the act of 1889, or its amendments, on the ground of self-incrimination, the section granting immunity to such persons so obliged to testify. It was declared by the 4th, 5th, and 6th sections of the act that in all prosecutions for a violation of the provisions of the act of 1889, or the act of 1905, a prima facie presumption of guilt should arise from the proof of certain facts stated in the sections in question. These sections are reproduced in the margin.† The 7th and last section of the act

† Sec. 4. That in all prosecutions under said act and amendment, proof that the defendant was a party to a contract, as agent or principal, to sell and deliver any article, thing, or property specified or named in said act, chapter 221, Public Laws of 1889, or that he was the agent, directly or indirectly, of any party in making, furthering, or effectuating the same, or that he was the agent or officer of any corporation or association, or person in making, furthering, or effectuating the same, and that the article, thing, or property agreed to be sold and delivered was not actually delivered,

[537] contained *provisions concerning dealing in futures by those engaged in the business of manufacturing or wholesale merchandising, which we do not presently reproduce, as we shall hereafter consider the section.

Gatewood, plaintiff in error, was indicted for the offense of establishing and keeping an office and place of business for the purpose of carrying on or engaging in the character of business made unlawful by the 1st section of the act of 1905; that is, the opening and carrying on a "bucket shop." The indictment, moreover, in an additional paragraph, alleged the doing of certain acts as though it was intended to charge them as distinct offenses from the one charged in the first paragraph. The two things thus alleged were as follows: First. That, on a date named, the accused "unlawfully and wilfully did post and publish, from information received over his wires, the fluctuations in prices of grain, cotton, provisions, stocks, bonds, and other commodities, contrary to the form of statute in such case made and provided," the acts so charged being those from the proof of which it was provided in the 6th section of the act of 1905 that a prima facie presumption of guilt would arise as to the commission of the acts forbidden by the 1st section of that act. Second. That, on a date named, the accused "unlawfully and wilfully did take and receive from E. T. Lea an order or contract to purchase on margin 100 bales of cotton for future delivery, to wit, August delivery, at 7 56.100 per pound, and that [538] said Lea did deposit with said *defendant at said time in said county the sum of $50.00 by way of margin fluctuations in said cotton, and that settlement between said parties for said cotton was agreed to be made upon the difference in value of said cotton at said date and the date of its delivery, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state." The acts thus charged being among those from which, when proved, there would arise a prima facie presumption of a guilty violation of certain of the provisions of the act of 1889.

The case was tried to a jury, and, as stated in the record, after proof and hearing a special verdict was returned. By this verdict it was separately found that the defendant had committed the several acts separately charged in the indictment; that is, in separate numbered paragraphs the jury returned that the defendant had kept an office for the unlawful dealing in futures forbidden by the 1st section of the act of 1905, that he had posted and published in such office the fluctuating prices of grain, etc., and that he had made the contract for future delivery upon margin with Lea. The evidence at the trial upon which the jury acted is not in the record. The court then directed a general verdict of guilty, and judgment was entered thereon. A motion for a new trial was made, "because the act of 1905, chapter —, is in conflict with the 14th Amendment, § 1, of the Constitution of the United States, to wit, the guaranty of equal protection of the laws." The new trial having been refused, and a fine of $5 and costs having been imposed, the case was taken to the supreme court of North Carolina. That court affirmed the conviction. The reasoning by which the action of the court was controlled was stated as follows: "Upon the authority of State v. McGinnis, at this term, there is no error." And in the judgment of affirmance there was embodied the record and opinion in State v. McGinnis, and such record and opinion are contained in the transcript before us.

*The assignments of error and the argument in support thereof involve three general contentions, *viz.:* the asserted repugnancy of the statute to the equal protection of the law clause of the 14th Amendment, and the alleged want of power of the state to enact the statute, because its provisions not only abridge the privileges and immunities of the plaintiff in error as a citizen of the United States, but also deprive him of his property without due process of law, in violation of the same Amendment. The contention that the statute denied the equal protection of the laws rests upon the terms of the 7th section, reading as follows:

"Sec. 7. That this act shall not be construed so as to apply to any person, firm,

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and that settlement was made or agreed to be made, upon the difference in value of said article, thing, or property, shall constitute against such defendant prima facie evidence of guilt.

Sec. 5. That proof that anything of value agreed to be sold and delivered was not actually delivered at the time of making the agreement to sell and deliver, and that one of the parties to such an agreement deposited or secured, or agreed to deposit or secure, what are commonly called "margins," shall constitute prima facie evidence of a contract declared void by chapter 221 of the Public Laws of 1889.

Sec. 6. That proof that any person, corporation, or other association of persons, either principals or agents, shall establish an office or place where are posted or published from information received the fluctuating prices of grain, cotton, provisions, stocks, bonds, and other commodities, or of any one or more of the same, shall constitute prima facie evidence of being guilty of violating § 1 of this act, and of chapter 221 of the Public Laws of 1889.

corporation, or his or their agent, engaged in the business of manufacturing or wholesale merchandising, in the purchase or sale of the necessary commodities required in the ordinary course of their business."

The alleged repugnancy of § 7, and consequently of the entire act, to the equality clause of the 14th Amendment, is sought to be sustained upon two grounds: First, because it is asserted that those engaged in the business of manufacturing or wholesale merchandising are permitted to commit without offense the act or acts which are made criminal by the laws of 1889 and 1905, when done by any other person; and, second, because, even if the terms of the 7th section do not effect such a result, the section nevertheless operates to produce an unlawful inequality, since it creates a prima facie presumption of guilt from the proof of certain acts as against all persons but those engaged in the business of manufacturing and wholesale merchandising.

It suffices to say, as to the first of these propositions, that the supreme court of the state, in the case upon the authority of which it placed its decision in this, expressly decided that the statute did not operate the asserted discrimination. Thus, after expressly holding that the effect of § 7 was not to relieve those engaged in manufacturing and wholesale merchandising from [the operation of the provisions of § 1 of *the act of 1905, prohibiting the opening and keeping of a place for gambling dealings in futures, denominated by the court a "bucket shop," the court came to consider whether the provisions of § 7 operated to relieve manufacturers or wholesale merchants from the prohibitions of the act of 1889, concerning the making of gambling contracts for future delivery. Considering this subject, the court, in express terms, decided that the 7th section did not have that effect, since the dealings which were prohibited by the acts of 1889 were alike prohibited as to all, including manufacturers and wholesale merchants. The court said:

"Section 7 does not confer any exclusive right or privilege upon manufacturers or wholesale merchants. It does not authorize them to engage in any business prohibited by the act of 1889. It does not authorize them to speculate in cotton or other commodities. It simply provides that the courts shall not construe the act of 1905 to have the effect of preventing . . . [manufacturers or wholesale merchants] from buying and selling for future delivery the necessary commodities required in their ordinary business."

"But a purchase for actual future delivery of necessary commodities, required in the ordinary course of business, and not for 'wagering' or gambling on the fluctuations of the market, would not be against the statute. The statute of this state does not prohibit all purchases or sales for future delivery, but only such dealings as are in the nature of gambling or wagering contracts. Though § 7 mentions only manufacturers and wholesale mercantile establishments as authorized to make bona fide dealings in 'futures,' this was done unnecessarily, we think, and only out of abundant caution. It is not a discrimination, for there is no prohibition upon anyone else or any other business to buy commodities for future delivery bona fide in the 'ordinary course of such business,' when not for speculative or gambling purposes. That no other businesses or persons are mentioned as authorized to deal bona fide for the purchase of commodities on 'margin' *is not an implied [541] restriction upon others to do an act not forbidden by any statute."

In the argument it is insisted that the construction given by the supreme court of North Carolina to the statute is wrong, since, in effect, it reads out the provisions of § 7, and it is urged that it is the duty of this court to disregard the interpretations affixed by the state court, thereby bringing the statute within the prohibitions of the 14th Amendment. But it is elementary that, under the circumstances, we must follow the construction given by the state court, and test the constitutionality of the statute under that view. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Smiley v. Kansas, 196 U. S. 447, 455, 49 L. ed. 546, 550, 25 Sup. Ct. Rep. 289, and cases cited.

As to the second proposition, *viz.*, the asserted discrimination, because of inequality produced by the engendering a prima facie presumption of guilt from the proof of certain acts when done by persons generally, and not raising such prima facie presumption from the same acts when done by those engaged in manufacturing or wholesale merchandising, we think the question is not open on this record. As we have stated, the indictment distinctly charged the commission of the offense prohibited by the 1st section of the act of 1905, *viz.*, the keeping a place for gambling in futures, and at the same time in a separate paragraph charged the doing of acts from which the presumption of guilt was authorized by certain sections of the act of 1905. Upon the indictment so framed a special verdict was returned, finding that the prohibited place of business had been opened and kept as charged, and that the other acts separately charged in the indictment had been committed. Now, as the evidence upon which

the jury acted is not in the record, and as there is nothing in the verdict tending to show that the separate conclusion as to the commission of the act forbidden by § 1 of the statute of 1905, *viz.*, the keeping of a place for gambling in futures, was found by the jury because of the presumptions authorized by the statute, it cannot be af-
[542]firmed that the finding of the jury *as to the keeping of the place for gambling in futures was not based upon independent evidence, wholly irrespective of any presumption authorized by the act of 1905. And this conclusion becomes irresistible when it is considered that there is nothing in the record disclosing any request made to the trial court for instructions concerning the effect of the presumption created by the act of 1905, or that any express rulings on that subject were made by the court.

The contention that the judgment of conviction should be reversed, even although it does not appear that the same was based upon the presumptions authorized by the act of 1905, because of the inseparability of the alleged unequal presumptions, is without merit. In State v. McGinnis, supra, after expressing an opinion as to the right of a state under its police power, without violating the 14th Amendment, to create presumptions of guilt as to some classes of persons which would not be applicable to the same acts when done by other classes, the court said:

"But, aside from what we have already said, the defendant is indicted for carrying on a 'bucket shop' business. The legislature had unquestionably power to make such business indictable. Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425, and other cases cited, supra. The facts found are that the defendant was carrying on the forbidden business. It can in no wise affect the validity of the statute making such business indictable that the purchase of commodities by others upon 'margin' shall, under certain circumstances, raise a prima facie case that such purchases were void, and under other circumstances shall not constitute such prima facie evidence. A statute may be void in part and valid in part. If the provision as to prima facie evidence, as to certain purchases upon 'margin,' were null, because not applying to all purchases upon 'margin,' this would in no wise invalidate that part of the statute which forbids carrying on the business of running a 'bucket shop.' The defendant is not indicted for buying commodities for future delivery upon a 'margin;' nor are manufac-
[543]turers and *wholesale merchants, nor anyone else, exempted from the prohibition of carrying on the 'bucket shop' business. Up-

on the special verdict the defe
properly adjudged guilty."

This ruling as to the separabil
statute is conclusive, and refute
tention that the entire law is
upon the hypothesis that the c
presumptions as to one class, n
ble to another class or classes, v
nant to the 14th Amendment.

It remains only to consider t
tions that the statute upon whic
viction was had was repugnant t
process clause of the 14th Amend
was, moreover, void because it ab
privileges and immunities of th
in error as a citizen of the Unit
As the first rests solely upon th
tion that there was a want of d
of law, because the state was wit
to authorize a presumption of guil
of the doing of certain acts speci
statute, it is disposed of by wha
already said. And as the secon
pressed in argument, and is not
the record to have been raised or
gested in the court below, we nee
ther consider it.

Affirmed.

MRS. CAMILLE CAHEN, Mrs. J
Eva Cahen, et al., Plffs. in
v.
JOHN BREWSTER, Tax Collect
Second District of the City of
leans, State of Louisiana, and
Wilson, President School Boa
City of New Orleans, State of

(See S. C. Reporter's ed. 543

Constitutional law—due process
state inheritance tax.

1. Universal legatees under the
person who died before the enactm

NOTE.—As to what constitute
cess of law—see notes to People
2 L.R.A. 255; Kuntz v. Sumption
655; Re Gannon, 5 L.R.A. 359;
Baltimore, 11 L.R.A. 224; Gilman
13 L.R.A. 304; Pearson v. Yew
ed. 436, and Wilson v. North C
L. ed. U. S. 865.

As to the validity of class le
see notes to State v. Goodwill, 6
and State v. Loomis, 21 L.R.A. 78

As to constitutional equality of
immunities, and protection—see m
isville Safety Vault & T. Co. v.
& N. R. Co. 14 L.R.A. 579.

As to taxes on succession and
inheritances—see notes to Re Ho
A. 825; Wallace v. Myers, 4 L
Com. v. Ferguson, 10 L.R.A. 24
maine, 12 L.R.A. 401, and Mago
nois Trust & Sav. Bank, 42 L. ed.

Louisiana inheritance tax law of June 28, 1904, are not deprived of their property without due process of law by subjecting their shares to the tax imposed by that statute, although, under the Louisiana Civil Code, the ownership of the property passed to such legatees upon the death of the testator.

Constitutional law—equal protection of the laws—state inheritance tax.

2. Successions which have been finally closed and administered upon may be exempted from the inheritance tax imposed by the Louisiana act of June 28, 1904, without rendering such statute void as making an arbitrary classification which amounts to a denial of the equal protection of the laws, where the highest state court makes the validity of the tax depend upon this classification by deciding that the state can tax the property until it has passed out of the succession of the testator.

[No. 91.]

Argued November 9, 1906. Decided December 24, 1906.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which affirmed a judgment of the Civil District Court for the Parish of Orleans, in that state, imposing an inheritance tax. Affirmed.

See same case below, 115 La. 377, 39 So. 37.

The facts are stated in the opinion

Messrs. **Charles Rosen** and **Gustave Lemle** argued the cause and filed a brief for plaintiffs in error:

An inheritance tax is not a tax on property, but on the right or privilege of inheriting.

United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; 27 Am. & Eng. Enc. Law, p. 338.

That the rights of these heirs and legatees vested at the moment of the death of the ancestor is beyond dispute.

Black, Constitutional Prohibitions, 1887 ed. pp. 239–242; Cooley, Const. Lim. 6th ed. 439; McGehee, Due Process of Law, 142–144.

In Louisiana the property, both real and personal, passes to the heir at the very moment of death, without administration, and without the intervention of a court.

State v. Brown, 32 La. Ann. 1020; O'Donald v. Lobdell, 2 La. 299; Touillier, Droit Civil Française, Div. 3, title 3, chap. 1; No. 79, vol. 4, p. 79; Code Napoleon, 724; Burbridge v. Chinn, 34 La. Ann. 682; Calvit v. Malhollan, 12 Rob. (La.) 258; Womack v. Womack, 2 La. Ann. 339; Frazier v. Hills, 5 La. Ann. 114; Glasscock v. Clark, 33 La. Ann. 584; Ware v. Jones, 19 La. Ann. 428; Le Page v. New Orleans Gaslight & Bkg. Co. 7 Rob. (La.) 184; Addison v. New Orleans Sav. Bank, 15 La. 527; Prevost's Succession, 12 La. Ann. 577; Arnaud v. His Executor, 3 La. 336; Tulane University v. Board of Assessors, 115 La. Ann. 1025, 40 So. 445.

Retroactive legislation that devests vested rights, that interferes with rights already acquired, that imposes a tax for the privilege of inherison where such privilege has been long since exercised, and, therefore, requires payment of such tax merely because it has the physical power to do so by reason of the fact that the owner is, from some delay or other accidental cause, not yet in possession, is a clear taking of property—a clear deprivation of property—without due process of law.

Cooley, Const. Lim. 6th ed. 436; Munn v. Illinois, 94 U. S. 113, 134, 24 L. ed. 77, 87; Norman v. Heist, 5 Watts & S. 171, 40 Am. Dec. 493; Beall v. Beall, 8 Ga. 210; Dufour's Succession, 10 La. Ann. 391; Amat's Succession, 18 La. Ann. 403; Crusius's Succession, 19 La. Ann. 369; Re Pell, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; Re Lansing, 182 N. Y. 238, 74 N. E. 882; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; McGehee, Due Process of Law, 1906, pp. 155, 215; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36.

To exact such tax from heirs of estates not yet finally closed, and not to exact it from other heirs similarly situated,—in the same class, inheriting at the same time, by the same title, and under the same right,—is a denial of the equal protection of the laws, and contrary to the 14th Amendment of the Constitution of the United States.

Re Pell, supra; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150–168, 41 L. ed. 666–673, 17 Sup. Ct. Rep. 255; Barbier v. Connolly, 113 U. S. 27–31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 108, 46 L. ed. 108, 22 Sup. Ct. Rep. 30; Cooley, Const. Lim. 355; Yick Wo v. Hopkins, 118 U. S. 356–369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 302; Smyth v. Ames, 169 U. S. 466, 526, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

Mr. **F. C. Zacharie** argued the cause, and filed a brief for defendants in error:

The Louisiana statute does not offend against the provisions of the Constitution

of the United States by making the statute operative on successions then open and in course of administration at the time of the passage of the act.

Carpenter v. Pennsylvania, 17 How. 456, 15 L. ed. 127; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; Gelsthorpe v. Furnell (State ex rel. Gelsthorpe v. Furnell) 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267; Lapeyre v. United States, 17 Wall. 206, 21 L. ed. 610; Burgess v. Salmon, 97 U. S. 384, 24 L. ed. 1106; United States v. Harris. 1 Abb. (U. S.) 115, Fed. Cas. No. 15,312; Griffing v. Gibb, McAll. 221, Fed. Cas. No. 5,819; Brooke v. McCraken, 10 Nat. Bankr. Reg. 464, Fed. Cas. No. 1,932.

Mr. Justice McKenna delivered the opinion of the court:

The case involves the validity, under the Constitution of the United States, of a burden imposed under the inheritance tax law of the state of Louisiana, passed June 28, 1904.

Mathias Levy, a resident of New Orleans, died in that city May 26, 1904. He was unmarried and left no ascendants, and was, therefore, without forced heirs. He left a last will and testament of the date of December 23, 1903, in which he named executors and made sundry particular bequests to charitable institutions. He bequeathed the balance of his estate, in equal shares, to [547] his two nieces, Camille Cahen and *Julie Kahn, constituting them thereby his universal legatees and instituted heirs.

The will was duly probated in the civil district court for the parish of Orleans, May 30, 1904. An inventory of his estate was taken June 9, 1904, and a supplementary inventory August 3, 1904. The inventories showed the total appraised value of the estate to be $64,676.05. Of this amount, after deducting the debts and charges of the estate and particular legacies, there was left, as the portion going to the universal legatees, $42,927.94.

The final accounting and tableau of distribution was filed August 3, 1904, and approved and homologated by judgment August 16, and the funds ordered to be distributed.

October 16 a motion was made for a rule on the executors to show cause why they should not pay over the legacies as ordered. In answer to which the executors replied that they were willing to do so, but that it was announced to them by the president of the school board of the parish that he intended to claim in behalf of said board a tax under the inheritance tax law of the state on the funds in their hands "and the shares coming to said movers." The executors also alleged the unconstitutionality of the tax and prayed that the school board of the parish, through its president, Andrew H. Wilson, be made a party to the proceedings. Wilson appeared and averred that the taxes were due the state, and not to the school board, and were collectible by the state tax collector, and "that this suit and the matters at issue herein should be litigated contradictorily with the state tax collector for the district in which the deceased resided when he departed this life."

The tax collector appeared. The agents and attorneys in fact of the legatees answered the demand of the school board to be paid the tax that $10,000 of the estate was in United States bonds, and not subject to taxation by the state, and averred that an inheritance tax was not due "to said board for the reason that said act has no application to the property *under this succession [548] or the legacies due to said movers in the motion aforesaid; that to give it such application would be to make said act retroactive and devest the vested rights of the said movers in said rule, which would be in violation of the Constitution of this state, and especially article 166 thereof, and in violation of the Constitution of the United States of America, and especially § 9 of article 1, and the 5th and 14th Amendments thereof, and in violation of the laws of the state and of the land; that it would be a deprivation of property without due process of law and a denial of the equal protection of the laws, in violation of the 5th and 14th Amendments of the Constitution of the United States of America."

Judgment was rendered in favor of the tax collector, condemning the executors to pay the tax, less the amount of United States bonds, and less the charitable and religious bequests. The judgment was affirmed by the supreme court of the state.

The law imposes a tax of 3 per cent "on direct inheritances and donations to ascendants or descendants," and 10 per cent upon donations or inheritances to collaterals or strangers. It is provided that the tax is "to be collected on all successions not finally closed and administered upon, and all successions hereafter opened."†

*It will be observed that when Levy died, [549] May 26, 1904, and when the will was probated, May 30, 1904, there was no inheritance tax in Louisiana. The act in controversy was passed June 28, 1904.

†Section 1. Be it enacted by the general assembly of the state of Louisiana, That there is now, and shall hereafter be, levied, solely for the support of the public schools, a tax upon all inheritances, legacies, and donations; provided, no direct inheritance or donation to an ascendant or descendant, be-

In support of the attack made upon the law, it is contended that an inheritance tax is not a tax on property, but on the right or privilege of inheriting, and that the right in the case at bar had been exercised at the moment of the testator's death under the then-existing law, and "to pass a law exacting such a tax and make it retroactive so as to devest a right previously acquired under then-existing laws is a deprivation of property already acquired, without due process of law, prohibited by the 14th Amendment of the Constitution of the United States."

To sustain their propositions the plaintiffs in error cite certain articles of the Louisiana Civil Code.† And it is urged *as indubitable that, under the law of Louisiana, a succession is acquired by the legal heir immediately after the death of the deceased, and, by the express terms of the Code, this rule applies to testamentary heirs, to instituted heirs, and universal legatees. In other words, that the acquisition of the succession by plaintiffs in error was at the very moment of Levy's death, and, therefore, necessarily before the act imposing inheritance taxes was passed. To sustain their view plaintiffs in error cite a number of cases decided prior to the decision of the case at bar, and the case of Tulane University v. Board of Assessors, 115 La. 1026, 40 So. 445, decided since the decision in the case at bar. Having established, as it is contended, that by operation of law the property is transmitted immediately from the testator to the heirs, it is also contended that from the very definition of an inheritance tax none could be imposed on plaintiffs in error as legatees of Levy.

For definitions of an inheritance tax plaintiffs in error adduce United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747. The tax was defined in the Perkins Case to be "not a tax upon the property itself, but upon its transmission by will or descent;" and in the Magoun Case, "not one on property, but one on the succession." In Knowlton v. Moore it was said that such taxes "rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested." But these definitions were intended only to distinguish the tax from one on property, and it was not intended to be decided that the tax must attach at the instant of the death of a testator or *intestate. In other [551] words, we defined the nature of the tax;

low $10,000 in amount or value, shall be so taxed; a special inheritance tax of 3 per cent on direct inheritances or donations to ascendants or descendants, and 10 per cent for collateral inheritances and donations to collaterals or strangers; provided, bequests to educational, religious, or charitable institutions shall be exempt from this tax; and provided, further, that this tax shall not be enforced when the property donated or inherited shall have borne its just proportion of taxes prior to the time of such donation or inheritance; this tax to be collected on all successions not finally closed and administered upon, and all successions hereafter opened.

†Article 940. A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds.

This rule applies also to testamentary heirs, to instituted heirs, and universal legatees, but not to particular legatees.

Article 941. The right mentioned in the preceding article is acquired by the heir, by the operation of the law alone, before he has taken any step to put himself in possession, or has expressed any will to accept it.

Thus, children, idiots, those who are ignorant of the death of the deceased, are not the less considered as being seised of the succession, though they may be merely seised of right, and not in fact.

Article 942. The heir being considered seised of the succession from the moment of its being opened, the right of possession which the deceased had continues in the person of the heir as if there had been no interruption, and independent of the fact of possession.

Article 944. The heir being considered as having succeeded to the deceased from the instant of his death, the first effect of this right is that the heir transmits the succession to his own heirs, with the right of accepting or renouncing, although he himself have not accepted it, even in case he was ignorant that the succession was opened in his favor.

Article 945. The second effect of this right is to authorize the heir to institute all the actions, even possessory ones, which the deceased had a right to institute, and to prosecute those already commenced. For the heir, in everything, represents the deceased, and is of full right in his place, as well for his rights as his obligations.

Article 1609. When, at the decease of the testator, there are no heirs to whom a proportion of his property is reserved by law, the universal legatee, by the death of the testator, is seised of right of the effects of the succession without being bound to demand the delivery thereof.

we did not prescribe the time of its imposition. To have done the latter would have been to prescribe a rule of succession of estates, and usurp a power we did not and do not possess. There is nothing, therefore, in those cases which restrains the power of the state as to the time of the imposition of the tax. It may select the moment of death, or it may exercise its power during any of the time it holds the property from the legatee. "It is not," we said in the Perkins Case, "until it has yielded its contribution to the state that it becomes the property of the legatee." See also Carpenter v. Pennsylvania, 17 How. 456, 15 L. ed. 127.

We must turn back, therefore, to the law of Louisiana for the solution of the questions presented in the case at bar. But we are not required to reconcile the Louisiana decisions. We accept that in the case at bar as a correct interpretation of the Code of the state. Nor may we regard Tulane University v. Board of Assessors as irreconcilable with it. That case was brought to enjoin the collection of state and city taxes which had been assessed against the succession of A. C. Hutchinson. The plaintiff university was the universal legatee of Hutchinson, and its property was exempt from taxation under the Constitution of the state. It is true the court said that the Code of the state "leaves no room whatever for doubt or surmises as to the fact of the property of a deceased person being transmitted directly and immediately to the legal heir, or, in the absence of forced heirs, to the universal legatee, without any intermediate stage, when it would be vested in the successive representative or in the legal abstract called 'succession.'"

But the decision in the case at bar was not overruled, but distinguished as follows: "The case of Levy's Succession, 115 La. 377, 39 So. 37, was decided from considerations peculiar to an inheritance tax, and which can have no application in the instant case. This inheritance tax was held to be due notwithstanding that, under the provisions of the Code, the ownership of the property [552] *passed to the heirs. The maxim, *Le mort saisit le vif*, was expressly recognized." Both decisions, therefore, must be considered as correct interpretations of the Code of the state. It is not our province to pronounce one more decisive than the other, or to pronounce a contradiction between them, which the court which delivered both of them has declared does not exist. We must assume that the Tulane Case approved the view expressed in the case at bar of the rights of legatees, as follows: "Furthermore, we have said, the legatees acquired no vested right to the property bequeathed which could enable them to successfully defend their inheritance against the demand of the state for the inheritance tax. It was property within the limits of the state, which the state could tax, for purposes mentioned, until it had passed out of the succession of the testator."

Plaintiffs in error also contended that the statute denied them the equal protection of the laws. This contention is based on the following provision of the statute: "This tax to be collected on all successions not finally closed and administered upon, and on all successions hereafter opened."

Successions which have been closed, it is said, are exempt from the tax, and a discrimination is made between heirs whose rights have become fixed and vested on the same day. Counsel say: "The closing of the succession cannot affect the question as to when the right of the heirs vested; and cannot be a cause for differentiation among the heirs; and such a classification is purely arbitrary. Besides, such a classification rests on the theory that the tax is one on property, when in fact it is one on the right of inheritance." But, as we understand, the supreme court made the validity of the tax depend upon the very fact which counsel attack as an improper basis of classification. The court decided that the property bequeathed was property the state could tax, "until it had passed out of the succession of the testator." It was certainly not improper classification to make the tax depend upon a fact without which it would have been invalid. In other words, those who are subject to be taxed cannot complain that they are denied the equal protection of the laws because those who cannot legally be taxed are not taxed.

Judgment affirmed.

BOARD OF EDUCATION OF THE KENTUCKY ANNUAL CONFERENCE OF THE METHODIST EPISCOPAL CHURCH, Plff. in Err.,

v.

PEOPLE OF THE STATE OF ILLINOIS.

(See S. C. Reporter's ed. 553-563.)

Constitutional law—privileges and immunities—equal protection of the laws—state inheritance tax.

Excluding foreign corporations from the exemption from an inheritance tax in favor of property devised for educational or religious uses, which is made by Ill. act May 10, 1901, amending Ill. Laws, 1895, p. 3[illegible],

NOTE.—As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges,

ot abridge privileges or immunities tens of the United States or deny the protection of the laws.

[No. 103.]

November 14, 1906. Decided December 24, 1906.

RROR to the Supreme Court of the tate of Illinois to review a judgment affirmed a judgment of the County of Cook County, in that state, im- an inheritance tax on property de- o a foreign corporation for educa- and religious purposes. Affirmed.

ame case below, 216 Ill. 23, 108 Am. . 189, 74 N. E. 809.

facts are stated in the opinion.

Charles H. Aldrich argued the cause, ith Messrs. Henry S. McAuley and ce Maxwell, Jr., filed a brief for f in error:

plaintiff in error, by probating the rough which its succession is derived, ing before the state appraiser in the nce tax proceeding, appealing from ion of such appraiser to the county f Cook county, and from its action supreme court of Illinois, brought ithin the jurisdiction of the state of , within the meaning of the 14th ment.

v. Caldwell, 83 Fed. 880; American hristian Union v. Yount, 101 U. S. 6, 25 L. ed. 888, 890.

is especially so as there are no rules bed by the laws of Illinois regard- admission to the state of corpora- ot for pecuniary profit, and the right corporations to take and hold prop- Illinois is fully established.

a Clara Female Academy v. Sullivan, 375, 56 Am. Rep. 776, 6 N. E. 183; an & F. Christian Union v. Yount, S. 352, 25 L. ed. 888; Pennsylvania Bauerle, 143 Ill. 459, 33 N. E. 166.

imposition of the succession tax rily implies that the person whose o succeed is so taxed is within the tion of the state.

nger Cases, 7 How. 283, 422, 12 L. 760; McGehee, Due Process of Law, Dewey v. Des Moines, 173 U. S. 193, L. ed. 665, 668, 19 Sup. Ct. Rep. 379; lle & J. Ferry Co. v. Kentucky, 188 5, 396, 47 L. ed. 513, 518, 23 Sup. Ct. 3; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 204, 50 L. ed. 150, 153, 26 Sup. Ct. Rep. 36.

The prohibitions of the 14th Amendment extend to all state agencies, whether executive, legislative, or judicial.

Scott v. McNeal, 154 U. S. 34, 45, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234, 41 L. ed. 979, 983, 17 Sup. Ct. Rep. 581; Missouri v. Dockery, 191 U. S. 165, 170, 48 L. ed. 133, 134, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53; Huntington v. New York, 118 Fed. 683.

An inheritance tax is not a tax upon property, but upon the privilege or right of succession to property.

United States v. Perkins, 163 U. S. 625, 628, 41 L. ed. 287, 288, 16 Sup. Ct. Rep. 1073; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 288, 42 L. ed. 1037, 1040, 18 Sup. Ct. Rep. 594.

A different rule obtains as to claimed exemptions from a general and a special tax, to which latter class the imposition in the case at bar belongs.

Eidman v. Martinez, 184 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515; Catlin v. Trinity College, 113 N. Y. 133, 3 L.R.A. 206, 20 N. E. 864; Re Swift, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096; Gurr v. Scudds, 11 Exch. 190; United States v. Wigglesworth, 2 Story, 369, Fed. Cas. No. 16,690; United States v. Watts, 1 Bond, 580, Fed. Cas. No. 16,653.

It is conceded that the respective states have plenary power to regulate the tenure of property within their respective limits, the modes of its acquisition and transfers, the rules of its descent, and the extent to which a testamentary disposition may be exercised by its owners, subject, however, to the equal rights clauses of the Constitution of the United States.

Mager v. Grima, 8 How. 490, 493, 12 L. ed. 1168, 1170; United States v. Fox, 94 U. S. 315, 24 L. ed. 192; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 292, 294, 42 L. ed. 1037, 1042, 1043, 18 Sup. Ct. Rep. 594; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 105, 43 L. ed. 909, 913, 19 Sup. Ct. Rep. 609.

The Constitution of the United States was largely the result of the demand that there should be no discrimination between the several states in commercial regulation and rights of persons or property.

Passenger Cases, 7 How. 283, 407, 449, 492, 12 L. ed. 702, 754, 771, 789; Crandall v. Nevada, 6 Wall. 35, 43, 48, 18 L. ed. 745,

ties, and protection—see note to Lou- Safety Vault & T. Co. v. Louisville . Co. 14 L.R.A. 579.

taxes on succession and collateral nces—see notes to Re Howe, 2 L. . S. R.A. 825; Wallace v. Myers, 4 L.R.A. 171; Com. v. Ferguson, 10 L.R.A. 240; Re Romaine, 12 L.R.A. 401; and Magoun v. Illinois Trust & Sav. Bank, 42 L. ed. U. S. 1037.

747, 748; Woodruff v. Parham, 8 Wall. 123, 140, 147, 19 L. ed. 382, 387, 391; Hinson v. Lott, 8 Wall. 148, 152, 19 L. ed. 387, 388.

This court has repeatedly denied to the states the right of discrimination in the exercise of their sovereign power of taxation.

Ward v. Maryland, 12 Wall. 418, 430, 431, 20 L. ed. 449, 452, 453; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Tiernan v. Rinker, 102 U. S. 123, 26 L. ed. 103; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454.

Corporations are not "citizens" within article IV., § 2, and the 14th Amendment of the Constitution.

Blake v. McClung, 172 U. S. 239, 259, 43 L. ed. 432, 439, 19 Sup. Ct. Rep. 165; Orient Ins. Co. v. Daggs, 172 U. S. 557, 561, 43 L. ed. 552, 554, 19 Sup. Ct. Rep. 281.

Corporations are "persons" within the 14th Amendment.

Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 189, 31 L. ed. 650, 653, 2 Inters. Com. Rep. 24, 18 Sup. Ct. Rep. 737; Home Ins. Co. v. New York, 134 U. S. 594, 606, 33 L. ed. 1025, 1031, 10 Sup. Ct. Rep. 593; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 391, 35 L. ed. 1051, 1053, 12 Sup. Ct. Rep. 255; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 592, 41 L. ed. 560, 565, 17 Sup. Ct. Rep. 198; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; Smyth v. Ames, 169 U. S. 466, 522, 42 L. ed. 819, 840, 18 Sup. Ct. Rep. 418.

The right of a state to prescribe the terms and conditions upon which foreign corporations may transact business within its borders, or to exclude such corporations altogether, is conceded, subject to the limitation that unconstitutional requirements cannot be made.

Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148; Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; Cable v. United States L. Ins. Co. 191 U. S. 288, 306, 48 L. ed. 188, 193, 24 Sup. Ct. Rep. 74; Dayton Coal & I. Co. v. Barton, 183 U. S. 23, 24, 46 L. ed. 61, 64, 22 Sup. Ct. Rep. 5; Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619.

When the corporation or the property is within the jurisdiction of the state, it is entitled to the equal protection of the laws; and different rates of taxation, either upon property or succession to property, cannot be applied as between foreign or domestic corporations.

Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; Erie R. Co. v. State, 31 N. J. L. 531, 86 Am. Dec. 226; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Home Ins. Co. v. New York, and Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, supra; New York v. Roberts, 171 U. S. 658, 663, 43 L. ed. 323, 325, 19 Sup. Ct. Rep. 58; Blake v. McClung, 172 U. S. 239, 255, 43 L. ed. 432, 438, 19 Sup. Ct. Rep. 165; Orient Ins. Co. v. Daggs, 172 U. S. 557, 566, 43 L. ed. 552, 555, 19 Sup. Ct. Rep. 281; Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064.

Mr. Edwin M. Ashcraft argued the cause, and, with Mr. William H. Stead, filed a brief for defendant in error:

If plaintiff in error seeks to reverse the judgment of the supreme court of Illinois upon the ground that the amendatory act of 1901, as construed by the supreme court of that state, is invalid because repugnant to the 14th Amendment to the Constitution of the United States, then

(a) In determining the validity of the amendatory act of 1901, this court should follow the construction placed upon that act by the supreme court of Illinois.

Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Ludeling v. Chaffe, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; New York v. Roberts, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58; Covington v. Kentucky, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383; Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 766, 19 Sup. Ct. Rep. 464; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; Western U. Teleg. Co. v. Missouri, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730.

(b) The construction of the amendatory act of 1901 by the supreme court of Illinois is correct.

Catlin v. Trinity College, 113 N. Y. 133, 3 L.R.A. 206, 20 N. E. 864; Re Prime, 136 N. Y. 347, 18 L.R.A. 713, 32 N. E. 1001; Re Balleis, 144 N. Y. 134, 38 N. E. 1007; Minot v. Winthrop, 162 Mass. 113, 26 L.R.A. 200, 38 N. E. 512; Alfred University v. Hancock (N. J.) 46 Atl. 178; United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16

Rep. 1073; People ex rel. Huck v. Seaman's Friend Soc. 87 Ill. 246; Theological Seminary v. Illinois, S. 662, 47 L. ed. 641, 23 Sup. Ct.

e amendatory act of 1901, as con- y the supreme court of Illinois, is gnant to the 14th Amendment to titution of the United States.

v. McClung, 172 U. S. 239, 43 L. 9 Sup. Ct. Rep. 165; Kochersperger , 167 Ill. 122, 41 L.R.A. 446, 47 N. Billings v. People, 189 Ill. 472, 59 07, 59 N. E. 798, 188 U. S. 97, 47 0, 23 Sup. Ct. Rep. 272; Magoun v. Trust & Sav. Bank, 170 U. S. 283, 1037, 18 Sup. Ct. Rep. 594; United . Perkins, 163 U. S. 625, 41 L. ed. Sup. Ct. Rep. 1073; Blackstone v. 88 U. S. 189, 47 L. ed. 439, 23 Sup. 277; Kidd v. Alabama, 188 U. S. L. ed. 669, 23 Sup. Ct. Rep. 401; . Tiernan, 148 U. S. 657, 37 L. ed. Sup. Ct. Rep. 721; Davidson v. New 96 U. S. 97, 24 L. ed. 616; Mer- & M. Nat. Bank v. Pennsylvania, S. 461, 42 L. ed. 236, 17 Sup. Ct. ; Bell's Gap R. Co. v. Pennsylvania, . 232, 33 L. ed. 892, 10 Sup. Ct. Rep. ited States v. Fox, 94 U. S. 315, d. 192; Humphreys v. State, 70 67, 65 L.R.A. 776, 101 Am. St. Rep. N. E. 957; Central Land Co. v. Laid- U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Marchant v. Pennsylvania R. Co. . 380, 38 L. ed. 751, 14 Sup. Ct. Rep. mpbell v. California, 200 U. S. 87, . 382, 26 Sup. Ct. Rep. 182.

ustice McKenna delivered the opin- e court.

writ of error is directed to a judg- the supreme court of the state of sustaining a tax assessed against in error under the inheritance tax that state, passed June 15, 1895, "An Act to Tax Gifts, Legacies, and nces in Certain Cases, and to Pro- the Collection of the Same." Laws p. 301.

acts are as follows: Fanny Speed, n and resident of Kentucky, died f certain real estate in the city of . She devised a one-half interest tiff in error, to be used as part of ational fund, "to be held, invested, inistered" as other properties form- rt of that fund. The will was pro- the probate court of Cook county, f Illinois. An inheritance tax of 0 was assessed by the county judge plaintiff in error, based on the value nterest devised.

iff in error was incorporated by an act of the legislature of the state of Kentucky to form an educational fund for the promotion of literature, education, art, morality, and religion. Its funds are held and used exclusively for such purposes, and are required to be wholly expended within the state of Kentucky. It is not permitted to make dividends or distribution of profits or assets among its members or stockholders. It does not have or maintain an office in the state of Illinois, or engage in educational or religious work therein.

From the action of the county judge imposing the tax, plaintiff in error appealed to the county court of Cook county and assigned as grounds of appeal: (1) That by reason of its organization and the purposes of its organization, as shown by the record, it was exempt from such tax under the act of May 10, 1901, amending the act of June 15, 1895. (2) For that the imposition of such tax upon it (the plaintiff in error), when* corporations organized for like pur- [559] poses under the laws of the state were exempt therefrom, was in conflict with the Constitution of the state of Illinois, and rendered said act void as to plaintiff in error, as in conflict with the 14th Amendment of the Constitution of the United States, in that it abridged the privileges and immunities of plaintiff in error, who was a citizen of the United States, and denied to it the equal protection of the laws. The county court sustained the tax and the supreme court affirmed the judgment. This writ of error was then sued out.

The assignment of errors in this court, omitting the specification of error based on the Constitution of the state, is the same as that in the state courts.

It is enough for our purpose to say that § 1 of the act of 1895 subjects to a tax all property situated within the state, which shall, by will or by the intestate laws, pass from any person who may die seised or possessed of the same. The act was amended in 1901 by adding thereto the following section:

"When the beneficial interest of any property or income therefrom shall pass to or for the use of any hospital, religious, educational, Bible, missionary, tract, scientific, benevolent, or charitable purpose, or to any trustee, bishop, or minister of any church or religious denomination, held and used exclusively for the religious, educational, or charitable uses and purposes of such church or religious denomination, institution, or corporation, by grant, gift, bequest, or otherwise, the same shall not be subject to any such duty or tax; but this provision shall not apply to any corporation which has the right to make dividends or distribute profits or assets among its members."

The supreme court decided that this amendment did not apply to "corporations created under the laws of a sister state." And also decided, as so construed, the amendment was not repugnant to the Constitution of the United States. The court said:

"A clear distinction exists between domes-
[560]tic corporations* and corporations organized under the laws of other states. Such corporations fall naturally into their respective classes. Over the one--that which the state has created—the state has certain powers of control; and the other is beyond its jurisdiction. Those of its own creation have been endowed with corporate powers for the purpose of subserving the interests of the state and its people; those which have been given life by the laws of a sister state have entirely different ends and objects to accomplish. The lawmaking power would find many weighty considerations authorizing the classification of foreign and domestic corporations into different classes and justifying the creation of liability on the part of foreign corporations to pay a tax on the right to take property by descent, devise, or bequest, under the laws of the state, and at the same time leaving the right of a domestic corporation so to take free of any such exaction." [216 Ill. 28, 74 N. E. 811.]

It will be seen by a reference to the assignment of errors that the ground of the attack by the plaintiff in error on the validity of the tax assessed against it is that the imposition of the tax upon it, while other corporations organized for like purposes under the laws of Illinois are exempt, renders the act of May 10, 1901, void, as to plaintiff in error. And, in their argument, counsel say: "It is the effect given by the supreme court of Illinois to this amendment (the act of 1901) that violates the rights claimed by the plaintiff in error under the Constitution of the United States." The construction of the act by the supreme court we must accept as determining the meaning of the act. In other words, we must regard the act as if the legislature had, in explicit language, excluded from its provisions foreign corporations. If this renders the act void, plaintiff in error, whether its argument be tenable or untenable, seems to be put in the dilemma urged by the defendant in error, and an affirmance of the judgment is required. If the act of May 10, 1901, is invalid, it cannot give exemption from taxation to either domestic or foreign corporations, and plaintiff in error was rightly taxed under the act of June 15, 1895.

[561]*Plaintiff in error, of course, does not desire to take exemption from domestic corporations. It desires to remove the discriminatory effect of the amendment of May 10, 1901, by including in its bounty foreign corporations. Can this be done? May a court by construction put into a law that which the legislature has left out? There is a difference between burdens and benefits, and it may well be that a law which confers the latter upon some persons, and thereby increases burdens on others, may be declared invalid by the courts. But if the courts may strike down privileges, may they extend favors and make objects of bounty those whom the legislature has excluded? The questions raise important considerations, but we may pass them, because the contention that the act of 1901 is invalid encounters an insuperable obstacle in the power of the state to classify objects of legislation and discriminate between classes. This power is not unconstitutionally exercised by legislation which exempts the religious and educational institutions of the state from an inheritance tax and subjects educational and religious institutions of other states to the tax. Regarding alone the purposes of the institutions, no difference may be perceived between them, but regarding the spheres of their exercise, and the benefits derived from their exercise, a difference is conspicuous. It is this benefit that may have constituted the inducement of the legislation.

Plaintiff in error contests the classification of the act of 1901 and the conclusions deduced from it in an able argument. We do not reply to the argument in detail, because we have defined so often the principles of classification that we must regard repetition as unnecessary. An observation or two, however, may be worth while. It is contended that the exemption of the amendment of 1901 "is not limited by the decision of the supreme court to corporate takers or users," and that the decision, by treating the act "as a grant of privileges and immunities to corporations," ignored "the test of use found in the inquiry 'To what purpose is the beneficial interest in the property devoted?'" and the consideration that there was no necessity for corporate agency in that connection. The result of this is, it is urged, that the court made the "power of state visitation and control" over corporations "the test of taxability or nontaxability upon the right of succession." Denying this to be the test, and contending that the test should be the use to which the property is devoted, and the question of tax or freedom from tax determined thereby, and asserting that plaintiff became a person within the jurisdiction of the state by going there to take title to property there situated, and by probating the will of Mrs. Speed as evidence of such title, it is deduced that it was not competent for

:o tax the property of plaintiff in
ıe rate and the property of corpo-
ganized under her laws, at anoth-

be kept in mind that the contro-
this case depend upon the power
e over inheritances, and the con-
may put upon them in the exer-
t power. And this is prominent
ision of the supreme court. In
this power, and classification
cise of this power, the court took
nt the greater control and direc-
ate had over domestic than over
porations. It did not put out of
ses of property expressed in the
l, nor ignore the consideration
was no necessity for a corporate
execute those uses. The case
especially a comparison of the
orporations, but the decision was
igh to consider natural persons.
such a tax" (an inheritance tax),
said, "the legislature may con-
elation which the person or cor-
iven the right of succession sus-
he deceased, to the property, or
te, and may regulate the amount
to be required in view of such
nd in exercising this power may
n the right of one class of persons
tions to take, and may deem it
npose no tax upon the right of
es of persons or corporations to
Federal court would hesitate in-
it impediments on this power or
alid any classification of persons
tions that had reasonable regard
poses of the state and its legisla-
it cannot be said that if a state
operty bequeathed for charitable
onal purposes from taxation it is
le or arbitrary to require the
be exercised or the education to
d within her borders and for her
ether exercised through persons
tions.
it affirmed.

TED STATES OF AMERICA
v.
IOHN F. SHIPP et al.

S. C. Reporter's ed. 563–575.)

**–disobeying order staying pro-
—jurisdiction.**

k of jurisdiction in the Federal
rt of a petition for habeas cor-
the Supreme Court of the appeal
order denying the writ, does not
sons to disregard, without lia-
rocess for contempt, the order of
the Supreme Court that "all proceedings against the appellant be stayed, and the custody of said appellant be retained pending this appeal," since that court necessarily has jurisdiction to decide whether the case is properly before it.

Contempt—purging by sworn denials.

2. Sworn answers denying any participation in the alleged murder of a prisoner under sentence of death in a state court, pending his appeal to the Federal Supreme Court from an order of a circuit court denying relief by habeas corpus, are not sufficient to purge the affiants of a charge of contempt of the Supreme Court by taking part in such murder after the appeal had been allowed and a stay of proceedings ordered.

Contempt—murder of prisoner pending his appeal.

3. Participation in the murder of a prisoner under sentence of death in a state court, with intent to prevent the delay attendant upon an appeal to the Federal Supreme Court from an order of the circuit court denying relief by habeas corpus, and to prevent the hearing of such appeal, is a contempt of the Supreme Court, where such murder was committed after the appeal had been allowed and that court had ordered that "all proceedings against the appellant be stayed, and the custody of said appellant be retained pending this appeal."

[No. 12, Original.]

Argued December 4, 5, 1906. Decided December 24, 1906.

INFORMATION charging a contempt of court in murdering a prisoner under sentence of death in the Criminal Court of Hamilton County, State of Tennessee, after his appeal to the Federal Supreme Court from an order of the Circuit Court for the Northern Division of the Eastern District of Tennessee, denying relief by habeas corpus, had been allowed and a stay of proceedings ordered. Certain preliminary legal objections overruled.

The facts are stated in the opinion.

Solicitor General Hoyt argued the cause, and, with Attorney General Moody, filed a brief for complainant:

A conspiracy such as alleged here would be punishable under U. S. Rev. Stat. § 5508, U. S. Comp. Stat. 1901, p. 3712, as depriving a citizen of a privilege secured to him by Federal law; but, whether or not that step shall follow this in due time, that liability cannot affect this proceeding.

Re Savin, 131 U. S. 267, 33 L. ed. 150, 9 Sup. Ct. Rep. 699.

It has been decided so often by this court that there is no right to a jury trial in con-

tempt cases that it is only necessary to cite the decisions.

Eilenbecker v. District Court, 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424; Ex parte Terry, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77; Re Savin, supra; Re Cuddy, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. Rep. 703; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 489, 38 L. ed. 1047, 1061, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

The circuit court had jurisdiction of Johnson's case.

Ex parte Royall, 117 U. S. 241, 251, 29 L. ed. 868, 871, 6 Sup. Ct. Rep. 734; Ex parte Terry, supra; Re Loney (Thomas v. Loney) 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584; Re Neagle (Cunningham v. Neagle) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; Re Wood (Wood v. Brush) 140 U. S. 278, 35 L. ed. 505, 11 Sup. Ct. Rep. 738; Cook v. Hart, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40; Re Frederich, 149 U. S. 70, 37 L. ed. 653, 13 Sup. Ct. Rep. 793; New York v. Eno, 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30; Whitten v. Tomlinson, 160 U. S. 240, 40 L. ed. 411, 16 Sup. Ct. Rep. 297; Baker v. Grice, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; Tinsley v. Anderson, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805; Davis v. Burke, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210; Wildenhus's Case (Mali v. Keeper of Common Jail) 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 385; Ex parte Fonda, 117 U. S. 516, 29 L. ed. 994, 6 Sup. Ct. Rep. 848; Re Duncan (Duncan v. McCall) 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; Re Burrus, 136 U. S. 586, 34 L. ed. 500, 10 Sup. Ct. Rep. 850.

On writ of error from the highest court of a state this court sometimes affirms the judgment, but sometimes dismisses the writ of error on the ground that no constitutional or other Federal question is really and substantially involved (Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; Spies v. Illinois [Ex parte Spies] 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; Craemer v. Washington, 164 U. S. 704, 41 L. ed. 1183, 17 Sup. Ct. Rep. 993): but in cases of habeas corpus from circuit courts involving the authority of state courts, the court has invariably affirmed or reversed the judgment below, thus sustaining the jurisdiction of the circuit court. Always a Federal question was necessarily alleged and was sufficiently involved for jurisdictional purposes.

Lack of jurisdiction in the circuit court to issue the writ would not mean lack of jurisdiction in this court to entertain and act upon the appeal.

Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734.

The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

Ex parte Robinson, 19 Wall. 505, 510, 22 L. ed. 205, 207; Ex parte Terry, 128 U. S. 289, 302, 303, 32 L. ed. 405, 408, 9 Sup. Ct. Rep. 77; Anderson v. Dunn, 6 Wheat. 204, 227, 5 L. ed. 242, 247; Re Cooper, 22 Vt. 257; Re Savin, 131 U. S. 267, 274, 33 L. ed. 150, 152, 9 Sup. Ct. Rep. 699; Eilenbecker v. District Court, 134 U. S. 31, 36, 37, 33 L. ed. 801, 803, 804, 10 Sup. Ct. Rep. 424; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 489, 38 L. ed. 1047, 1061, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Re Debs, 158 U. S. 564, 595, 596, 39 L. ed. 1092, 1106, 1107, 15 Sup. Ct. Rep. 900.

The opinions in Re Tampa Suburban R. Co. 168 U. S. 583, 42 L. ed. 589, 18 Sup. Ct. Rep. 177, and Re Vidal, 179 U. S. 126, 45 L. ed. 118, 21 Sup. Ct. Rep. 48, suggest, perhaps that the inherent general power of the court to issue writs may go further than the statutory authority. The statutory authority, however, is invoked in these cases for the refusal to issue the writ, rather than rejected. But we have no doubt that in any proper case the court would hold unhesitatingly that its general and inherent authority, of whatever nature, does not need any statutory grant of power, and is not subject to statutory restrictions.

But if U. S. Rev. Stat. § 725, U. S. Comp. Stat. 1901, p. 583, shall be held to apply to this court, the present case is included within its very language. We are not now concerned with contempt committed in the face of the court or so near as to be constructively in its presence (Ex parte Terry, 128 U. S. 289, 307, 32 L. ed. 405, 408, 9 Sup. Ct. Rep. 77; Re Savin, 131 U. S. 267, 277, 278, 33 L. ed. 150, 153, 154, 9 Sup. Ct. Rep. 699; 4 Bl. Com. 286); this is one of the matters that arise at a distance, and accordingly an instant attachment did not issue, but a rule to show cause. But, although a matter arising at a distance, and not a question of disturbance or disorder in or near the presence of the court, it is the vital matter of refusing to obey the court's command, which is as serious at the remotest corners of the country as in the court room.

Eilenbecker v. District Court, 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424.

3 L. ed. 801, 804, 10 Sup. Ct. Rep.

ower of a court to make an order
with it the equal power to punish
obedience of that order.
bs, 158 U. S. 564, 594, 595, 39 L.
1106, 15 Sup. Ct. Rep. 900.
ame act may be a crime both
a state and the United States, and
ed States has full power to pun-
ther the state does or not.
v. North Carolina, 132 U. S. 131,
. 287, 10 Sup. Ct. Rep. 47; Petti-
United States, 148 U. S. 197, 37 L.
13 Sup. Ct. Rep. 542; Crossley v.
a, 168 U. S. 640, 42 L. ed. 610, 18
Rep. 242.

. Judson Harmon and Robert B.
gued the cause, and, with Messrs.
Cooke and Mr. Robert Pritchard,
ief for defendants:
estion is fundamental whether the
which the order was made was one
fact, came within the limited ap-
urisdiction of the court; whether
really had the right of which the
ts are charged with depriving him,
his court hear his case; because, if
be made without jurisdiction,
be no punishment for contempt.
te Rowland, 104 U. S. 604–612, 26
–864; Ex parte Fisk, 113 U. S. 713,
1117, 5 Sup. Ct. Rep. 724; Re Saw-
U. S. 200, 31 L. ed. 402, 8 Sup. Ct.

sometimes been suggested that a
whom an order is directed will not
to question the authority of the
make it, when he is arraigned for
nce, as in Tornanses v. Melsing, 45
. 615, 106 Fed. 788; Anderson v.
, 48 C. C. A. 1, 109 Fed. 971. This
ms to have been negatived by in-
a Re McKenzie, 180 U. S. 536, 45
7, 21 Sup. Ct. Rep. 468, the court
hat the orders were not necessarily
refusing, for that reason only, to
he action of the circuit court of
But this suggestion has always
way of admonition only, because
of no case where it was made in
was ever the basis of punishment
mpt, the finding having always
the order disobeyed was in fact
d. And in such cases generally,
ways, the proceeding has had for
the suppression of a continuing
ice, and not mere punishment for

ent of the right of Federal courts
re by a writ of habeas corpus with
gs of courts and other authorities
is carefully defined by statute.
v. Peck, 199 U. S. 425, 433, 50 L.
59, 26 Sup. Ct. Rep. 87.

The reluctance with which this court will sanction Federal interference with a state in the administration of its domestic law for the prosecution of crime has been frequently stated in the deliverances of the court upon the subject. It is only where fundamental rights, specially secured by the Federal Constitution, are invaded, that such interference is warranted.

Rogers v. Peck, 199 U. S. 425, 50 L. ed. 256, 26 Sup. Ct. Rep. 87.

The case must involve the construction or application of the Constitution within the intent and meaning of the statute.

Re Lennon, 150 U. S. 393, 399, 37 L. ed. 1120, 1122, 14 Sup. Ct. Rep. 123.

See also Carey v. Houston & T. C. R. Co. 150 U. S. 170, 181, 37 L. ed. 1041, 1044, 14 Sup. Ct. Rep. 463; Carter v. Roberts, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713; Cincinnati, H. & D. R. Co. v. Thiebaud, 177 U. S. 615, 620, 44 L. ed. 911, 913, 20 Sup. Ct. Rep. 822; Kohl v. Lehlback, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; Reid v. Jones, 187 U. S. 153, 47 L. ed. 116, 23 Sup. Ct. Rep. 89; Minnesota v. Brundage, 180 U. S. 499, 505, 45 L. ed. 639, 642, 21 Sup. Ct. Rep. 455; New York v. Eno, 155 U. S. 89, 96, 97, 39 L. ed. 80, 83, 15 Sup. Ct. Rep. 30.

The constitutional question must be real and substantial.

Storti v. Massachusetts, 183 U. S. 138, 143, 144, 46 L. ed. 120, 124, 22 Sup. Ct. Rep. 72; Bradley v. Lightcap, 195 U. S. 25, 49 L. ed. 76, 24 Sup. Ct. Rep. 753; Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; Bonin v. Gulf Co. 198 U. S. 115, 117, 49 L. ed. 970, 971, 25 Sup. Ct. Rep. 608; Lampasas v. Bell, 180 U. S. 276, 282, 283, 45 L. ed. 527, 530, 21 Sup. Ct. Rep. 368.

The Federal question cannot be first raised in the assignment of errors, but there must have been a definite claim of a right under the Constitution or laws of the United States.

Muse v. Arlington Hotel Co. 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; Ansbro v. United States, 159 U. S. 695, 697, 40 L. ed. 310, 311, 16 Sup. Ct. Rep. 187; Chicago & N. W. R. Co. v. Chicago, 164 U. S. 454, 41 L. ed. 511, 17 Sup. Ct. Rep. 129.

It is true that the jurisdiction of the court in error to the state court of last resort depends on U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, which in terms requires the Federal right to be specially set up or claimed. But the above cases and many others show that the failure of the record to disclose a case of the kind which this court is authorized by law to review is held to amount to a lack of jurisdiction, not mere ground for affirmance.

See Arkansas v. Schlierholz, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229; Chicago & N. W. R. Co. v. Chicago, 164 U. S. 454, 457, 458, 41 L. ed. 511, 512, 17 Sup. Ct. Rep. 129; Hulbert v. Chicago, 202 U. S. 275, 281, 50 L. ed. 1026, 1028, 26 Sup. Ct. Rep. 617; Davis v. Texas, 139 U. S. 651, 657, 35 L. ed. 300, 303, 11 Sup. Ct. Rep. 675; Martin v. Texas, 200 U. S. 316, 50 L. ed. 497, 26 Sup. Ct. Rep. 338.

No question of the application or construction of the Constitution was raised or suggested at the trial in the state court, nor was there proof or tender of proof which could be the foundation for such question. Martin v. Texas, supra. The petition for habeas corpus alleged no lack of jurisdiction in the state court, either to try Johnson or to adjudge the sentence under which he was in custody. It is not charged that any of the alleged denials of rights secured to him by the Constitution of the United States were made by virtue or under color of the Constitution, laws, or rules of practice of the state. While an alleged denial of Constitutional rights by state officials acting contrary to the laws of the state may be subjected to review in this court, this cannot be done through a writ of habeas corpus, but only by writ of error to the highest court of the state.

Re Wood (Wood v. Brush) 140 U. S. 278, 35 L. ed. 505, 11 Sup. Ct. Rep. 738.

The same rule was applied in Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387. While that case related to habeas corpus issued under the removal act (U. S. Rev. Stat. §§ 641, 642, U. S. Comp. Stat. 1901, pp. 520, 521), it applies equally here because the principle is the same.

As the court said by Mr. Justice McKenna in Howard v. Kentucky, 200 U. S. 164, 173, 50 L. ed. 421, 425, 26 Sup. Ct. Rep. 189, it was not designed, as was observed by the Chief Justice in Re Converse, 137 U. S. 624, 631, 34 L. ed. 796, 799, 11 Sup. Ct. Rep. 191, to interfere with the power of the state to protect the lives, liberty, and property of its citizens; nor with the exercise of that power in the adjudication of the courts of the state in administering the process provided by the law of the state.

The claims of Johnson that he was deprived of constitutional rights were not real and substantial, but were "absolutely frivolous" and "wholly without foundation."

Storti v. Massachusetts, 183 U. S. 138, 46 L. ed. 120, 22 Sup. Ct. Rep. 72.

Mr. Lewis Shepherd also argued the cause, and, with Messrs. Martin A. Fleming and T. B. Shepherd, filed a brief for defendants:

The rule at common law was that a person charged with contempt of a court of law was made to answer the contempt on oath, and if, by his oath, he clear self of the contempt, he was dis No testimony was taken by the rebut his own; but, should he swear he was subsequently prosecuted jury. This is still the rule except affecting private property and privat It does not make so much difference the contempt proceeding is in a cour or a court of equity. The logical tion between contempts in this re lates to the nature of the particul tempt, rather than to the court in occurred.

Thompson v. Pennsylvania R. Co J. Eq. 105, 21 Atl. 182.

Manifestly, the contempt charged case belongs to the class known as or constructive contempts, in wh answer of the contemner is conclusi

King v. Vaughan, 2 Dougl. K. King v. Sims, 12 Mod. 511; United v. Dodge, 2 Gall. 313, Fed. Cas. No. Re May, 1 Fed. 737; Haskett v. S Ind. 176; Burke v. State, 47 Ind. 52 v. Earl, 41 Ind. 464; People ex rel. I Few, 2 Johns. 290; Re Walker, 82 N Re Moore, 63 N. C. 397; Thomas mins, 1 Yeates, 40; Underwood's Humph. 46; 9 Cyc. Law & Proc. p. 4 v. People, 192 Ill. 473, 56 L.R.A. 46 469; United States v. Debs, 5 Inter Rep. 163, 64 Fed. 724; Re Savin, 1 267, 33 L. ed. 150, 9 Sup. Ct. Rep. 6

Mr. G. W. Chamlee also argued t for defendants.

*Mr. Justice Holmes delivered the of the court:

This is an information charging tempt of this court, and is to the f effect. On February 11, 1906, one J a colored man, was convicted of ra a white woman, in a criminal court ilton county, in the state of Tenne was sentenced to death. On Mar presented a petition for a writ of corpus to the United States circui setting up, among other things, negroes had been excluded, illegall the grand and petit juries; that his had been deterred from pleading t or challenging the array on that and also from asking for a change to secure an impartial trial, or fo tinuance to allow the excitement side, by the fear and danger of lence; and that a motion for a new t an appeal were prevented by the sa For these and other reasons it was that he was deprived of various tional rights, and was about to be of his life without due process of l

On March 10, after a hearing u dence, the petition was denied, and

ordered that the petitioner be remanded to the custody of the sheriff of Hamilton county, to be detained by him in his custody for a period of ten days, in which to enable the petitioner to prosecute an appeal, and, in default of the prosecution of the appeal within that time, to be then further proceeded with by the state court under its sentence. On March 17 an appeal to this court was allowed by Mr. Justice Harlan. On the following Monday, March 19, a similar order was made by this court, and it was ordered further "that all proceedings against the appellant be stayed, and the custody of said appellant be retained pending this appeal."

The sheriff of Hamilton county was notified by telegraph of the order, receiving the news before 6 o'clock on the same day. The evening papers of Chattanooga published a full account of what this court had done. And it is alleged that the sheriff and his deputies were informed, and had reason to believe, that an attempt would be made that night by a mob to murder the prisoner. Nevertheless, if the allegations be true, the sheriff, early in the evening, withdrew the customary guard from the jail, and left only the night jailer in charge. Subsequently, it is alleged, the sheriff and the other defendants, with many others unknown, conspired to break into the jail for the purpose of lynching and murdering Johnson, with intent to show contempt for the order of this court, and for the purpose of preventing it from hearing the appeal and Johnson from exercising his rights. In furtherance of this conspiracy a mob, including the defendants, except the sheriff, Shipp, and the night jailer, Gibson, broke into the jail, took Johnson out and hanged him, the sheriff and Gibson pretending to do their duty, but really sympathizing with and abetting the mob. The final acts as well as the conspiracy are alleged as a contempt.

The defendants have appeared and answered, and certain preliminary questions of law have been argued which it is convenient and just to have settled at the outset before any further steps are taken. The first question, naturally, is that of the jurisdiction of this court. The jurisdiction to punish for a contempt is not denied as a general, abstract proposition, as, of course, it could not be with success. Ex parte Robinson, 19 Wall. 505, 510, 22 L. ed. 205, 207; Ex parte Terry, 128 U. S. 289, 302, 303, 32 L. ed. 405, 408, 9 Sup. Ct. Rep. 77. But it is argued that the circuit court had no jurisdiction in the habeas corpus case, unless Johnson was in custody in violation of the Constitution (Rev. Stat. § 753, U. S. Comp. Stat. 1901, p. 592), and that the appellate jurisdiction of this court was dependent on the act of March 3, 1891, chap. 517, § 5, 26 Stat. at L. 827, U. S. Comp. Stat. 1901, p. 549 (Re Lennon, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123), and by that act did not exist unless the case involved "the construction or application of the Constitution of the United States." If the case did not involve the application of the Constitution otherwise than by way of pretense, it is said that this court was without jurisdiction, and that its order might be contemned with impunity. And it is urged that an inspection of the evi- [573] dence before the circuit court, if not the face of the petition, shows that the ground alleged for the writ was only a pretense.

We regard this argument as unsound. It has been held, it is true, that orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt. Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; Ex parte Rowland, 104 U. S. 604, 26 L. ed. 861. But even if the circuit court had no jurisdiction to entertain Johnson's petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. On that question, at least, it was its duty to permit argument, and to take the time required for such consideration as it might need. See Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 387, 28 L. ed. 462, 465, 4 Sup. Ct. Rep. 510. Until its judgment declining jurisdiction should be announced, it had authority, from the necessity of the case, to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time. Rev. Stat. § 766; act of March 3, 1893, chap. 226, 27 Stat. at L. 751, U. S. Comp. Stat. 1901, p. 597. The fact that the petitioner was entitled to argue his case shows what needs no proof, that the law contemplates the possibility of a decision either way, and therefore must provide for it. Of course, the provision of Rev. Stat. § 766, that, until final judgment on the appeal, further proceedings in the state court against the prisoner shall be deemed void, applies to every case. There is no implied exception if the final judgment shall happen to be that the writ should not have issued or that the appeal should be dismissed.

It is proper that we should add that we are unable to agree with the premises upon which the conclusion just denied is based. We cannot regard the grounds upon which the petition for habeas corpus was pre-

sented as frivolous or a mere pretense. The murder of the petitioner has made it impos-
[574] sible to decide *that case, and what we have said makes it unnecessary to pass upon it as a preliminary to deciding the question before us. Therefore we shall say no more than that it does not appear to us clear that the subject-matter of the petition was beyond the jurisdiction of the circuit court, and that, in our opinion, the facts that might have been found would have required the gravest and most anxious consideration before the petition could have been denied.

Another general question is to be answered at this time. The defendants severally have denied under oath in their answer that they had anything to do with the murder. It is urged that the sworn answers are conclusive; that if they are false the parties may be prosecuted for perjury, but that in this proceeding they are to be tried, if they so elect, simply by their oaths. It has been suggested that the court is a party and therefore leaves the fact to be decided by the defendant. But this is a mere afterthought, to explain something not understood. The court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case. On this occasion we shall not go into the history of the notion. It may be that it was an intrusion or perversion of the canon law, as is suggested by the propounding of interrogatories and the very phrase, "purgation by oath" (*juramentum purgatorium*). If so, it is a fragment of a system of proof which does not prevail in theory or as a whole; and the reason why it has not disappeared perhaps may be found in the rarity with which contempts occur. It may be that even now, if the sole question were the intent of an ambiguous act, the proposition would apply. But in this case it is a question of personal presence and overt acts. If the presence and the acts should be proved there would be little room for the disavowal of intent. And when the acts alleged consist in taking part in a murder it cannot be admitted that a general denial and affidavit should dispose of the case. The outward facts *are matters known many and they will be ascertained by tes mony in the usual way. The question w left open in Re Savin, 131 U. S. 267, 33 ed. 150, 9 Sup. Ct. Rep. 699, with a visil leaning toward the conclusion to which w come, and that conclusion has been adopte by state courts in decisions entitled to re spect. Huntington v. McMahon, 48 Conn 174, 200, 201; State v. Matthews, 37 N. H 450, 455; Bates's Case, 55 N. H. 325, 327; Re Snyder, 103 N. Y. 178, 181, 8 N. E. 479; Crow v. State, 24 Tex. 12, 14; State ex rel Mason v. Harper's Ferry Bridge Co. 16 W Va. 864, 873. See Wartman v. Wartman, Taney, 362, 370, Fed. Cas. No. 17,210; Cartwright's Case, 114 Mass. 230; Eilenbecker v. District Court, 124 U. S. 31, 33 L. ed. 891, 10 Sup. Ct. Rep. 424. Whether or not Rev. Stat. § 725, U. S. Comp. Stat. 1901, p. 583, applies to this court, it embodies the law so far as it goes. We see no reason for emasculating the power given by that section, and making it so nearly futile as it would be if it were construed to mean that all contemners willing to run the slight risk of a conviction for perjury can escape.

The question was touched, in argument, whether the acts charged constitute a contempt. We are of opinion that they do, and that their character does not depend upon a nice inquiry whether, after the order made by this court, the sheriff was to be regarded as bailee of the United States or still held the prisoner in the name of the state alone. Either way, the order suspended further proceedings by the state against the prisoner, and required that he should be forthcoming to abide the further order of this court. It may be found that what created the mob and led to the crime was the unwillingness of its members to submit to the delay required for the trial of the appeal. From that to the intent to prevent that delay and the hearing of the appeal is a short step. If that step is taken the contempt is proved.

These preliminaries being settled the trial of the case will proceed.

Mr. Justice Moody took no part in the decision.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

TE: IN THE MATTER OF THE SEN-
ATION *et al., Petitioners.* [No. —,
l.]
for Leave to File Petition for a
Mandamus.
ester Howe for petitioners.
W. H. Robeson, J. J. Hemphill, A.
e, and *Alexander Britton* for re-
.
nt Attorney General Van Orsdel
nited States.
15, 1906. *Denied.*

). ZELL, *Plaintiff in Error, v.*
OF THE CIRCUIT COURT OF THE
STATES FOR THE EASTERN DIS-
F VIRGINIA. [No. 297.]
or to the United States Circuit
Appeals for the Fourth Circuit.
e case below, 75 C. C. A. 665, 144

C. L. Frailey, R. D. Brown,
Lloyd, Jr., Charles H. Burr, and
rthington for plaintiff in error.
D. Lawrence Grover, Tazewell
d Hampton L. Carson for defend-
ror.
15, 1906. *Order affirmed* with

& MORTON TRANSPORTATION COM-
ppellant, v. CRAIG SHIPBUILDING
Y. [No. 339.]
from the District Court of the
ates for the Northern District of

harles E. Kremer for the appellant.
Harvey D. Goulder, S. H. Holding,
k S. Masten for the appellee.
15, 1906. *Decree affirmed* with
he authority of *People's Ferry Co.*
20 How. 393, 15 L. ed. 961; *Roach*
an, 22 How. 129, 16 L. ed. 294;
v. Elliott, 21 Wall. 532, 22 L. ed.
Robert W. Parsons (*Perry* v.
91 U. S. 17, 48 L. ed. 73, 24 Sup.
8, and cases cited.
S.

JOSEPH J. WATERS, Administrator of Robert Jackson, Deceased, *Plaintiff in Error, v.* GEORGE E. EMMONS and J. PAUL SMITH. [No. 19.]

In Error to the Court of Appeals of the District of Columbia.

See same case below, 25 App. D. C. 146; on former appeal, 19 App. D. C. 250.

Mr. J. J. Waters for the plaintiff in error.

Mr. William F. Mattingly for the defendants in error.

October 22, 1906. *Judgment affirmed* with costs.

J. A. AXTELL *et al., Plaintiffs in Error, v.* CYRUS WEBBER. [No. 26.]

In Error to the Supreme Court of the State of Minnesota.

See same case below, 94 Minn. 375, 6 L.R.A.(N.S.) 194, 102 N. W. 915.

Messrs. Albert R. Allen, George E. Clarke, and *C. M. O'Neill* for the plaintiffs in error.

Messrs. F. J. Knox and *Andrew C. Dunn* for the defendant in error.

October 22, 1906. *Dismissed* for the want of jurisdiction. *Beaupre* v. *Noyes,* 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; *National L. Ins. Co.* v. *Scheffer,* 131 U. S. cciii, Appx. and 26 L. ed. 1110.

DANIEL SULLIVAN, *Plaintiff in Error, v.* ST. LOUIS, BROWNSVILLE, & MEXICO RAILWAY COMPANY. [No. 29.]

In Error to the Circuit Court of the United States for the Southern District of Texas.

Messrs. L. G. Denman and *Floyd McGown* for the plaintiff in error.

Messrs. A. W. Houston and **Reagan Hous-* **[579]** *ton* for the defendant in error.

October 22, 1906. *Judgment affirmed* with costs. *Rosenbaum* v. *Bauer,* 120 U. S. 450, 30 L. ed. 743, 7 Sup. Ct. Rep. 633; *Knapp* v. *Lake Shore & M. S. R. Co* (*United States ex rel. Knapp* v. *Lake Shore & M. S. R. Co.*) 197 U. S. 541, 49 L. ed. 871, 25 Sup. Ct. Rep. 538.

NORTH AMERICAN TRANSPORTATION & TRADING COMPANY, *Plaintiff in Error, v.* W. B. GILL. [No. 35.]

In Error to the Supreme Court of the State of Washington.

See same case below, 37 Wash. 694, 79 Pac. 778.

Mr. Frederick Bausman for the plaintiff in error.

No counsel appeared for the defendant in error.

October 22, 1906. *Judgment affirmed* with costs. *Leon* v. *Galceran*, 11 Wall. 185, 20 L. ed. 74; *American S. B. Co.* v. *Chase*, 16 Wall. 522, 21 L. ed. 369; *The Robert W. Parsons* (*Perry* v. *Haines*) 191 U. S. 17, 36, 48 L. ed. 73, 81, 24 Sup. Ct. Rep. 8.

W. J. LAFFOON, *Plaintiff in Error, v.* J. F. KERNER *et al.* [No. 38.]

In Error to the Supreme Court of the State of North Carolina.

See same case below, 138 N. C. 281, 50 S. E. 654.

Mr. Louis M. Swink for the plaintiff in error.

No counsel appeared for the defendant in error.

October 22, 1906. *Dismissed* for the want of jurisdiction. *California Consol. Min. Co.* v. *Manley*, 203 U. S. 579, (next case), 27 Sup. Ct. Rep. 779, and cases cited.

CALIFORNIA CONSOLIDATED MINING COMPANY, *Plaintiff in Error, v.* CHARLES MANLEY, Sheriff of Shoshone County, State of Idaho, *et al.* [No. 148.]

In Error to the Supreme Court of the State of Idaho.

See same case below, 10 Idaho, 786, 81 Pac. 50; on rehearing, 10 Idaho, 801, 81 Pac. 54.

Mr. J. H. Forney in support of the motion to dismiss.

Mr. M. A. Folsom in opposition thereto.

October 22, 1906. *Dismissed* for the want of jurisdiction. *Green* v. *Van Buskerk*, 3 Wall. 448, 18 L. ed. 245; *Union Mut. L. Ins. Co.* v. *Kirchoff*, 160 U. S. 374, 40 L. ed. 461, 16 Sup. Ct. Rep. 318; *Haseltine* v. *Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; *Schlosser* v. *Hemp-*
[580] *hill*, *198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654; *Clark* v. *Roller*, 199 U. S. 541-544, 50 L. ed. 300-302, 26 Sup. Ct. Rep. 141.

W. W. ROSE, *Plaintiff in Error,* OF KANSAS ON THE RELATION COLEMAN, Attorney General. [

In Error to the Supreme Cou State of Kansas.

See same case below, (Kan.) (N.S.) 843, 86 Pac. 296.

Mr. C. C. Coleman in support of

Mr. Frederic D. McKenney in o thereto.

October 22, 1906. *Dismissed* for of jurisdiction. *Smiley* v. *Kansa* S. 447, 49 L. ed. 546, 25 Sup. Ct. *Nonconnah Turnp. Co.* v. *Tenne* U. S. clviii, Appx. and 24 L. *Newport Light Co.* v. *Newport*, 1 527, 38 L. ed. 259, 14 Sup. Ct. *Harrison* v. *Morton*, 171 U. S. 38, 63, 18 Sup. Ct. Rep. 742.

FERDINAND EIDMAN, Collector, etc., *er, v.* FREDERICK B. TILGHMA Executors, etc. [No. 208.]

On Writ of Certiorari to th States Circuit Court of Appeals Second Circuit.

See same case below, 69 C. C. A Fed. 141.

Messrs. Assistant Attorney Ge Reynolds, Assistant Attorney Gen and *Solicitor General Hoyt* for tioner.

Mr. E. B. Whitney for the re

October 29, 1906. *Judgment* with costs by a divided court, remanded to the Circuit Court of t States for the Southern District York.

THOMAS F. WILSON (on Behalf of tory of Arizona), *Appellant,* MURPHY *et al.* [No. 6.]

Appeal from the Supreme Cou Territory of Arizona.

Mr. Eugene S. Ives for appella

Mr. C. F. Ainsworth for appell

October 29, 1906. **Decree aff* costs.

THOMAS F. WILSON (on Beh Territory of Arizona), App GEORGE W. VICKERS *et al.* [

Appeal from the Supreme Cou Territory of Arizona.

Mr. Eugene S. Ives for appell

Mr. C. F. Ainsworth for appel

October 29, 1906. *Decree aff* costs.

HAIGHT & FREESE COMPANY *et al., Plaintiffs in Error, v.* BEVERLY R. ROBINSON, Receiver, etc. [No. 241.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. Roger Foster in support of motion to dismiss.

Mr. Albert I. Sire for the plaintiffs in error in opposition thereto.

October 29, 1906. *Dismissed* for the want of jurisdiction. *Alexander* v. *United States*, 201 U. S. 117, 122, 50 L. ed. 686, 688, 26 Sup. Ct. Rep. 356; *Nelson* v. *United States*, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. Rep. 358; *Hardee* v. *Wilson*, 146 U. S. 179, 36 L. ed. 933, 13 Sup. Ct. Rep. 39; *Masterson* v. *Herndon* (*Masterson* v. *Howard*) 10 Wall. 416, 19 L. ed. 953; *Beardsley* v. *Arkansas & L. R. Co.* 158 U. S. 123, 39 L. ed. 919, 15 Sup. Ct. Rep. 786.

FREDERICK H. VOGT, *Appellant, v.* MATILDA S. VOGT by her Guardian *ad Litem*, Pauline Vogt. [No. 62.]

Appeal from the Court of Appeals of the District of Columbia.

See same case below, 26 App. D. C. 46.

582] *Mr. John C. Gittings* for the appellant.

Messrs. J. J. Darlington and *Leon Tobriner* for appellee.

October 29, 1906. *Dismissed* for the want of jurisdiction. *Schlosser* v. *Hemphill*, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654; *California Consol. Min. Co.* v. *Manley*, 203 U. S. 579, ante, 326, 27 Sup. Ct. Rep. 779 and cases cited.

HUGH P. STRONG *et al., Plaintiffs in Error, v.* BUFFALO LAND & EXPLORATION COMPANY. [No. 36.]

In Error to the Supreme Court of the State of Minnesota.

See same case below, 91 Minn. 84, 97 N. W. 575.

Messrs. J. M. Vale, John Brennan, Moses E. Clapp, and *Newell H. Clapp* for plaintiffs in error.

Mr. William C. White for the defendant in error.

October 29, 1906. *Judgment affirmed* with costs on the authority of *Midway Co.* v. *Eaton*, 183 U. S. 602, 46 L. ed. 347, 22 Sup. Ct. Rep. 261.

DAKOTA, WYOMING, & MISSOURI RIVER RAILROAD COMPANY *et al., Plaintiffs in Error, v.* CHARLES D. CROUCH *et al.*, Trustees. [Nos. 45 and 46.]

In Error to the Supreme Court of the State of South Dakota.

See same case below, 18 S. D. 540, 101 N. W. 722.

Mr. William T. Coad for the plaintiffs in error.

Mr. Frederick C. Bryan for the defendants in error.

October 29, 1906. *Dismissed* for the want of jurisdiction. *Hardee* v. *Wilson*, 146 U. S. 179, 36 L. ed. 933, 13 Sup. Ct. Rep. 39; *Sipperley* v. *Smith*, 155 U. S. 86, 39 L. ed. 79, 15 Sup. Ct. Rep. 15; *Mason* v. *United States*, 136 U. S. 581, 34 L. ed. 545, 10 Sup. Ct. Rep. 1062; *Grand Island & W. C. R. Co.* v. *Sweeney*, 43 C. C. A. 255, 103 Fed. 342, 37 C. C. A. 127, 95 Fed. 396; *Sweeney* v. *Grand Island & W. C. R. Co.* 61 Fed. 3; *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Speed* v. *McCarthy*, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613; *Pennsylvania R. Co.* v. *Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; *Telluride Power Transmission Co.* v. *Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245, 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178.

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*W. S. KEEL, JR., *et al., Appellants, v.* E. E. [583] DOUVILLE. [No. 68.]

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

Messrs. D. W. Harper, William R. Harper, and *E. M. Barber* for the appellants.

Messrs. E. J. Bowers and *Walter J. Gex* for the appellee.

November 5, 1906. *Dismissed* for the want of jurisdiction, on the authority of *Cornell* v. *Green*, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969, and cases cited.

J. G. RAWLINS, *Appellant, v.* J. F. PASSMORE, Sheriff of Lowndes County, Ga. [No. 392.]

Appeal from the District Court of the United States for the Southern District of Georgia.

Mr. John Randolph Cooper for the appellant.

Messrs. John C. Hart and *W. E. Thomas* for appellee.

November 5, 1906. Final order *affirmed* with costs. *Rawlins* v. *Georgia*, 201 U. S. 638, 50 L. ed. 899, 26 Sup. Ct. Rep. 560, 124 Ga. 31, 52 S. E. 1; *Craemer* v. *Washington*, 168 U. S. 124, 128, 129, 42 L. ed. 407-409, 18 Sup. Ct. Rep. 1.

KATIE MOESCHEN, *Plaintiff in Error, v.* TENEMENT HOUSE DEPARTMENT OF THE CITY OF NEW YORK. [No. 93.]

In Error to the Supreme Court of the State of New York.

See same case below in Appellate Division, 90 App. Div. 603, 85 N. Y. Supp. 1148; in Court of Appeals, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231.

Mr. Adolph Bloch for the plaintiff in error.

Mr. Theodore Connoly for the defendant in error.

November 12, 1906. Judgment *affirmed* with costs. *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 32, 24 L. ed. 989, 991; *Powell* v. *Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *United States* v. *Des Moines Nav. & R. Co.* 142 U. S. 510, 544, 35 L. ed. 1099, 1109, 12 Sup. Ct. Rep. 308; *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Atkin* v. *Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; *Jacobson* v. *Massachusetts*, 107 U. S. 11, 49 L. ed. 643. 25 Sup. Ct. Rep. 358; *Gardner* v. *Michigan*, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106. And see *Health Department* v. *Trinity Church*. 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; *Harrington* v. *Providence*, 20 R. I. 233, 38 [584] L.R.A. 305, 38 Atl. 1; **Com* v. *Roberts*, 155 Mass. 281, 16 L.R.A. 400, 29 N. E. 522.

THE JAMES MCCREERY REALTY CORPORATION, *Plaintiff in Error, v.* EQUITABLE NATIONAL BANK. [No. 109.]

In Error to the City Court of the City of New York.

Messrs. Eugene G. Kremer and *E. B. Whitney* for the plaintiff in error.

Messrs. Charles A. Hess and *F. D. McKenney* for the defendant in error.

November 19, 1906. Judgment *affirmed* with costs. *Dower* v. *Richards*. 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; *California Nat. Bank* v. *Kennedy*, 167 U. S. 367, 42 L. ed. 200, 17 Sup. Ct. Rep. 831.

DAVID LAMAR, *Plaintiff in Error, v.* ALBERT G. SPALDING. [No. 110.]

In Error to the Court of Errors and Appeals of the State of New Jersey.

See same case below, 68 N. J. Eq. 686, 60 Atl. 66, 63 Atl. 493.

Messrs. Edmund Wilson and *Thomas J. Kennedy* for the defendant in error.

Messrs. Alan H. Strong and *Harry Allen Mendelson* for the plaintiff in error.

November 19, 1906. Judgment *affirmed* with costs. *Louisville & N. R. Co.* v. *Schmidt*, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620.

CARL S. REYNOLDS, *Plaintiff in Error,* v. STATE OF CONNECTICUT. [No. 111.]

In Error to the Supreme Court of Errors of the State of Connecticut.

Mr. Clayton B. Smith for the plaintiff in error.

Mr. H. A. Hull for the defendant in error.

November 19, 1906. *Dismissed* for the want of jurisdiction. *Schlosser* v. *Hemphill*, 198 U. S. 173, 49 L. ed. 1001, 25 Sup. Ct. Rep. 654; **California Consol. Min. Co.* v. *Manley* (decided October 22), 203 U. S. 579, ante, 326, 27 Sup. Ct. Rep. 779, and cases cited.

GRANVILLE STUART, *Plaintiff in Error,* v. SAMUEL T. HAUSER *et al.* [No. 60.]

In Error to the Supreme Court of the State of Idaho.

See same case below, 9 Idaho, 53, 72 Pac. 719; on rehearing, 9 Idaho, 82, 72 Pac. 722.

Messrs. George B. Colby and *Charles W. Dayton* for the plaintiff in error.

Messrs. S. M. Stockslager and *W. E. Borah* for the defendants in error.

December 3, 1906. *Dismissed* for the want of jurisdiction. *Swafford* v. *Templeton*, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783; *Butler* v. *Gage*, 138 U. S. 52, 34 L. ed. 869, 11 Sup. Ct. Rep. 235; *Home for Incurables* v. *New York*, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *Ansbro* v. *United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Cornell* v. *Green*, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969; *Bausman* v. *Dixon*, 173 U. S. 113, 43 L. ed. 633, 19 Sup. Ct. Rep. 316; *Gablemen* v. *Peoria, D. & E. R. Co.* 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171; *New Orleans* v. *New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *Beals* v. *Cone*, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275; *Speed* v. *McCarthy*, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613.

ANNIE CAMP FIELD *et al., Plaintiffs in Error, v.* BARBER ASPHALT PAVING COMPANY. [No. 114.]

In Error to the Supreme Court of the State of Missouri.

See same case below, 188 Mo. 182, 86 S. W. 860.

ard H. Field for the plaintiffs in

V. C. Scarritt and *E. L. Scarritt* endant in error.

3, 1906. Judgment *affirmed* *Field* v. *Barber Asphalt Paving* S. 618, 48 L. ed. 1142, 24 Sup. 4; *Backus* v. *Fort Street Union* 169 U. S. 557, 42 L. ed. 853, 18 ep. 445.

KINNEY, *Plaintiff in Error*, *v.* MITCHELL. [No. 131.]

to the Circuit Court of the Unit- or the Eastern District of Penn-

case below, 138 Fed. 270.

rt D. Kinney pro se.

Marlin E. Olmsted and *Samuel* the defendant in error.

17, 1906. *Dismissed* for the risdiction.

IN THE MATTER OF FRANK D. *titioner.* [No. —, Original]

for Leave to File Petition for rohibition or Mandamus.

les L. Frailey for the petitioner.

17, 1906. *Denied.*

SMITH, *Appellant*, *v.* SAMUEL G. as State Auditor, etc. [No.

from the Circuit Court of the tes for the District of Minnesota.

J. H. Grace, John Brennan, and *en* for the appellant.

J. S. Wilson, Edward T. Young, Vashburn for the appellee.

17, 1906. *Dismissed* for the risdiction. *Hohorst* v. *Hamburg-Packet Co.* 148 U. S. 262, 37 L. Sup. Ct. Rep. 590; *Re Hohorst,* 353, 37 L. ed. 1211, 14 Sup. Ct. *McLish* v. *Roff,* 141 U. S. 661, 35 12 Sup. Ct. Rep. 118; *Bowker* v. *tes,* 186 U. S. 135, 138, 46 L. ed 22 Sup. Ct. Rep. 802.

CHAPMAN, *Plaintiff in Error*, *v.* ELLIOTT CHAPMAN. [No. 239.]

to the Supreme Court of the ebraska.

case below (Neb.) 104 N. W. 880.

J. F. Colladay, W. F. Gurley, and *lrough* in support of motions.

Villiam E. Gantt and *Herbert L.* pposition thereto.

17, 1906. *Dismissed* for the risdiction. *Haseltine* v. *Central* 183 U. S. 130, 46 L. ed. 117, 22 p. 49; *Schlosser* v. *Hemphill,* 198 49 L. ed. 1000, 25 Sup. Ct. Rep.

ATLANTIC TRUST COMPANY, *Petitioner*, *v.* EDGAR C. CHAPMAN, Receiver, etc., *et al.* [No. 413.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Edward B. Whitney and *Stanley W. Dexter* for petitioner.

Mr. Edgar C. Chapman for respondents.

October 15, 1906. *Granted.*

HENRY ARNOLD RICHARDSON, as Trustee, etc., *Petitioner*, *v.* JOHN M. SHAW *et al.* [No. 433.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. John Brooks Leavitt for petitioner.

Mr. E. S. Theall for respondents.

October 15, 1906. *Granted.*

EAGLE ORE SAMPLING COMPANY, *Petitioner*, *v.* DUNCAN CHISHOLM, Trustee. [No. 142.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 75 C. C. A. 472, 144 Fed. 670.

Mr. Henry M. Teller for the petitioner.

Messrs. C. A. Brandenburg, E. C. Brandenburg and *Joel F. Vaile* for respondent.

October 15, 1906. *Denied.*

---

*M. P. REEVE, *Petitioner*, *v.* NORTH CAROLINA LAND AND TIMBER COMPANY *et al.* [No. 298.] [588]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 72 C. C. A. 287, 141 Fed. 821.

Mr. Henry H. Ingersoll for the petitioner.

Mr. R. E. L. Mountcastle for the respondents.

October 15, 1906. *Denied.*

ARTHUR WEINREB *et al.*, *Petitioners*, *v.* JOSEPH H. FINK. [No. 305.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 76 C. C. A. 609, 146 Fed. 243.

Mr. F. M. Czaki for the petitioners.

Mr. Adolph Bloch for the respondent.

October 15, 1906. *Denied.*

CARMELO GRECO, *Petitioner*, *v.* THE STEAMSHIP SARNIA, etc. [No. 322.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 77 C. C. A. 332, 147 Fed. 106.

Mr. Wilford H. Smith for the petitioner.

Mr. Percy S. Dudley for the respondent.

October 15, 1906. *Denied.*

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Petitioner*, *v.* WILLIAM W. RUTTER *et al.*, Executors, etc. [No. 330.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 77 C. C. A. 315, 147 Fed. 51.

Messrs. William D. Guthrie and *Henry D. Hotchkiss* for the petitioner.

Mr. Augustus Van Wyck for the respondent.

October 15, 1906. *Denied.*

DAVID MACKENZIE, *Petitioner*, *v.* JAMES PEASE, Sheriff, etc. [No. 337.]

[589] Petition for a Writ of Certiorari *to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Robert G. Dyrenforth for the petitioner.

Mr. Harris F. Williams for the respondent.

October 15, 1906. *Denied.*

SAGINAW MATCH COMPANY, *Petitioner*, *v.* DIAMOND MATCH COMPANY. [No. 397.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 74 C. C. A. 59, 142 Fed. 727.

Messrs. R. A. Parker and *Charles F. Burton* for the petitioner.

Mr. John R. Nolan for the respondent.

October 15, 1906. *Denied.*

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, *Petitioner*, *v.* MAYOR AND CITY COUNCIL OF NASHVILLE, TENN. [No. 436.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 76 C. C. A. 297, 145 Fed. 607.

Mr. William L. Granbery for the petitioner.

No appearance for respondent.

October 15, 1906. *Denied.*

NEW YORK EVENING JOURNAL PU COMPANY, *Petitioner*, *v.* JOSEPI [No. 441.]

Petition for a Writ of Certiora United States Circuit Court of Ap the Second Circuit.

See same case below, 77 C. C. A. Fed. 224.

Messrs. Edward T. Fenwick and *J. Shearn* for the petitioner.

Mr. Edward K. Jones for the re

October 15, 1906. *Denied.*

ATLANTIC TRANSPORT COMPANY, (*etc.*, *Petitioner*, *v.* FRANCES M. [No. 442.]

Petition for a Writ of Certiora United States Circuit *Court of Ap the Second Circuit.

See same case below, 77 C. C. A. Fed. 509.

Mr. J. Parker Kirlin for the p

Mr. Louis H. Porter for the resp

October 15, 1906. *Denied.*

JAMES P. STEWART *et al.*, *Petition* S. WRIGHT. [No. 443.]

Petition for a Writ of Certiora United States Circuit Court of Ap the Eighth Circuit.

See same case below, 77 C. C. A. Fed. 321.

Mr. W. R. Robertson for the pe

Mr. John W. Halliburton for the ent.

October 15, 1906. *Denied.*

OLD DOMINION STEAMSHIP COMPA er, etc., *Petitioner*, *v.* PRIMUS Administrator, etc., *et al.* [N

Petition for a Writ of Certiora United States Circuit Court of Ap the Second Circuit.

Mr. Harrington Putnam for pet

Messrs. J. Parker Kirlin an *Whitfield Betts, Jr.*, for respond

October 22, 1906. *Granted.*

ELBERT R. ROBINSON, *Petitioner*, CAN CAR & FOUNDRY COMPAN 165.]

Petition for a Writ of Certiora United States Circuit Court of Ap the Seventh Circuit.

See same case below, 68 C. C. A. Fed. 693.

Mr. J. Gray Lucas for the petit

Messrs. Thomas A. Banning and *Banning* for the respondent.

October 22, 1906. *Denied.*

SOUTHERN RAILWAY COMPANY, *Petitioner*, *v.* MATTIE J. STUTTS, Administratrix, etc. [No. 318.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 75 C. C. A. 588, 144 Fed. 948.

Mr. Milton Humes for the petitioner.

Mr. Richard W. Walker for the respondent.

October 22, 1906. *Denied.*

591] *ABRAM ROSENBERGER, *Petitioner*, *v.* JOSEPH H. HARRIS. [No. 366.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 76 C. C. A. 225, 145 Fed. 449.

Messrs. J. J. Darlington and *James C. Jones* for the petitioner.

Messrs. Solicitor General Hoyt and *Assistant Attorney General Robb* for the respondent.

October 22, 1906. *Denied.*

MORITZ EISNER *et al.*, *Petitioners*, *v.* EMILIE SAXLEHNER. [No. 414.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 77 C. C. A. 417, 147 Fed. 189.

Messrs. Charles K. Allen, *Leopold Wallach*, and *Charles G. Coe* for the petitioners.

Mr. Antonio Knauth for the respondent.

October 22, 1906. *Denied.*

JAMES W. DONNELL, *Petitioner*, *v.* HERRING-HALL-MARVIN SAFE COMPANY *et al.* [No. 409.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. George Peck Merrick and *S. S. Gregory* for petitioner.

Messrs. Charles H. Aldrich and *Lawrence Maxwell, Jr.*, for respondents.

October 29, 1906. *Granted.*

HERRING-HALL-MARVIN SAFE COMPANY, *Petitioner*, *v.* HALL'S SAFE COMPANY *et al.* [No. 462.]

Petition and Cross-Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Lawrence Maxwell, Jr., and *Charles H. Aldrich* for petitioner.

Messrs. Judson Harmon and *William C. Cochran* for respondents.

October 29, 1906. *Granted.*

ALEXANDER D. SHAW *et al.*, *Petitioners*, *v.* UNITED STATES. [No. 460.]

Petition for a Writ *of Certiorari to the [592] United States Circuit Court of Appeals for the Second Circuit.

See same case below, 75 C. C. A. 291, 144 Fed. 329.

Mr. Edward S. Hatch for the petitioners.

Mr. Solicitor General Hoyt for the respondent.

October 29, 1906. *Denied.*

ROSA M. COLE, Executrix, etc., *Petitioner*, *v.* CITY OF INDIANAPOLIS *et al.* [No. 465.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 75 C. C. A. 442, 144 Fed. 640.

Messrs. Ferdinand Winter and *Alexander C. Ayres* for the petitioner.

Messrs. Frederick E. Matson, *Henry Warrum*, and *Merrill Moores* for the respondents.

October 29, 1906. *Denied.*

GEORGE R. FINCH *et al.*, *Petitioners*, *v.* MARYLAND CASUALTY COMPANY. [No. 423.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 77 C. C. A. 566, 147 Fed. 388.

Mr. P. J. McLaughlin for the petitioners.

Mr. Emerson Hadley for the respondent.

November 5, 1906. *Denied.*

C. H. SCOTT *et al.*, *Petitioners*, *v.* CHARLES P. GUICE, an Infant, etc. [No. 453.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Holmes Conrad and *C. H. Scott* for the petitioners.

No appearance for respondent.

November 5, 1906. *Denied.*

CHESAPEAKE & OHIO STEAMSHIP COMPANY, Limited, *Petitioner*, *v.* EDWARD MORRIS. [No. 483.]

Petition for a Writ of Certiorari to the United States *Circuit Court of Appeals for [593] the Second Circuit.

See same case below, 148 Fed. 11.

Mr. J. Parker Kirlin for the petitioner.

Mr. William S. Opdyke for the respondent.

November 19, 1906. *Denied.*

MERCANTILE TRUST COMPANY *et al., Petitioners, v.* SAMUEL P. WHEELER, Receiver, etc. [No. 490.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 147 Fed. 699.

Messrs. Philip Barton Warren and *Bluford Wilson* for the petitioners.

No appearance for respondent.

November 19, 1906. *Denied.*

GEORGE W. CRICHFIELD, *Petitioner, v.* JUAN P. JULIA. [No. 491.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 77 C. C. A. 297, 147 Fed. 65.

Mr. L. Laflin Kellogg for the petitioner.

Messrs. Henry W. Herbert and *W. Benton Crisp* for the respondent.

November 19, 1906. *Denied.*

MICHIGAN STEAMSHIP COMPANY, *Petitioner, v.* HUGH MCGILL *et al.* [No. 459.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 75 C. C. A. 518, 144 Fed. 788.

Messrs. A. B. Browne, J. Parker Kirlin, and *C. R. Hickox* for the petitioner.

Mr. William Denman for the respondent.

December 3, 1906. *Denied.*

OHIO TRANSPORTATION COMPANY *et al., Petitioners, v.* DAVIDSON STEAMSHIP COMPANY. [No. 486.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 148 Fed. 185.

[594] **Messrs. Harvey D. Goulder, S. H. Holding, F. S. Marten,* and *Wm. E. Church* for the petitioners.

Messrs. C. E. Kremer and *F. H. Canfield* for the respondent.

December 3, 1906. *Denied.*

WILLIAM SOBEY, *Petitioner, v.* WILFORD H. HOLSCLAW. [No. 466.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 28 App. D. C. 65.

Messrs. Melville Church, James H. Peirce, and *George P. Fisher, Jr.,* for the petitioner.

Messrs. *Edgar M. Kitchen* and *Edward T. Fenwick,* for the respondent.

Mr. Albert G. Davis as *amicus curiæ.*

December 10, 1906. *Denied.*

WILLIAM MCCOACH, Collector etc *titioner, v.* PHILADELPHIA TRUST. S POSIT, & INSURANCE COMPANY, Ex etc., *et al.* [Nos. 502, 503]; V MCCOACH, Collector, etc., *Petitio* GEORGE W. NORRIS *et al.,* Execut [No. 504.]

Petitions for Writs of Certiorari United States Circuit Court of App the Third Circuit.

See same case below, 73 C. C. A. (Fed. 120.

The Attorney General, Solicitor (and *Assistant Attorney General nolds* for petitioner.

Mr. H. Gordon McCouch for resp

December 10, 1906. *Granted.*

UNITED STATES, *Petitioner, v.* TRUST COMPANY, Trustee, etc. [N

Petition for a Writ of Certiorari United States Circuit Court of App the Seventh Circuit.

See same case below, 74 C. C. A. 4 Fed. 301.

Solicitor General Hoyt and *Assist torney General McReynolds* for peti

December 10, 1906. *Granted.*

---

*FIRST NATIONAL BANK OF VANDALI NOIS, *et al., Petitioners, v.* FLICKINGER. [No. 473.]

Petition for a Writ of Certiorari United States Circuit Court of App the Sixth Circuit.

See same case below, 76 C. C. A. 1 Fed. 162.

Mr. John W. Van Deman for th tioners.

Mr. T. E. Powell for the respondes

December 10, 1906. *Denied.*

DE WANE B. SMITH, *Petitioner, v.* G. LOOK *et al.* [No. 489.]

Petition for a Writ of Certiorari United States Circuit Court of App the Sixth Circuit.

See same case below, 148 Fed. 12.

Mr. Milton E. Robinson for th tioner.

Mr. Fred L. Chappell for the resp

December 10, 1906. *Denied.*

EDWARD B. LEIGH, *Petitioner, v.* K MANUFACTURING COMPANY. [No.

Petition for a Writ of Certiorari United States Circuit Court of App the Seventh Circuit.

See same case below, 147 Fed. 693.

Messrs. David S. Geer and *John P.* for the petitioner.

Messrs. Joseph H. Defrees and *V Brace* for the respondent.

December 10, 1906. *Denied.*

ATES, *Petitioner*, *v.* R. HOE & Co. .]

for a Writ of Certiorari to the tes Circuit Court of Appeals for Circuit.

case below, 77 C. C. A. 427, 147

Solicitor General Hoyt and *W. Smith* for the petitioner.

rt H. Washburn for the respond-

r 17, 1906. *Denied.*

TATES, *Petitioner*, *v.* JAMES C. . [No. 507.]

for a Writ of Certiorari *to the ates Circuit Court of Appeals for Circuit.

e case below, 148 Fed. 189.

icitor General Hoyt for the peti-

arance for respondent.

r 17, 1906. *Denied.*

GERSOLL, Administratrix, etc., *Pe-* *v.* JOSEPH A. CORAM *et al.* [No.

for a Writ of Certiorari to the ates Circuit Court of Appeals for Circuit.

E. N. Harwood, Hannis Taylor, Bailey, and *John H. Hazelton* for

Louis D. Brandeis and *William H.* r respondents.

er 24, 1906. *Granted.*

IAISON *et al., Petitioners*, *v.* LAW-IYDE *et al.* [No. 487.]

for a Writ of Certiorari to the ates Circuit Court of Appeals for Circuit.

e case below, 72 C. C. A. 655, 140

orge C. Greer for the petitioners.

William Hepburn Russell and *Beverly Winslow* for the respond-

er 24, 1906. *Denied.*

F. VIETOR *et al., Petitioners*, *v.* IIN LEVI *et al.* [No. 509.]

for a Writ of Certiorari to the ates Circuit Court of Appeals for d Circuit.

e case below, 74 C. C. A. 132, 142

ram I. Elkus for the petitioners.

pearance for respondent.

er 24, 1906. *Denied.*

MYRON W. ANDRUS, *Petitioner*, *v.* BERKSHIRE POWER COMPANY. [No. 511.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals *for [597] the Second Circuit.

See same case below, 77 C. C. A. 248, 147 Fed. 76.

Mr. C. Walter Artz for the petitioner.

Messrs. Arthur L. Shipman and *William Waldo Hyde* for the respondent.

December 24, 1906. *Denied.*

CHARLES THORLEY, *Petitioner*, *v.* PABST BREWING COMPANY. [No. 521.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 76 C. C. A. 87, 145 Fed. 117.

Messrs. Joseph Fettretch and *Wm. F. Sheehan* for the petitioner.

Mr. A. S. Gilbert for the respondent.

December 24, 1906. *Denied.*

ROBERT A. MILLER, as Special Master, *et al., Plaintiffs in Error*, *v.* NORTHERN ASSURANCE COMPANY. [No. 61.]

In Error to the District Court of the United States for the District of Porto Rico.

See same case below, 1 Porto Rico Fed. Rep. 420.

Mr. Fritz V. Briesen for plaintiffs in error.

Messrs. F. H. Dexter and *F. D. McKenney* for defendant in error.

October 9, 1906. *Dismissed*, per stipulation, on motion of *Mr. Frederic D. McKenney* for the defendant in error.

AMERICAN RAILROAD COMPANY OF PORTO RICO, *Plaintiff in Error*, *v.* JUAN MATIAS FERNANDEZ. [No. 95.]

In Error to the District Court of the United States for the District of Porto Rico.

Messrs. F. H. Dexter, F. D. McKenney, and *J. S. Flannery* for plaintiff in error.

*No appearance for defendant in error. [598]

October 9, 1906. *Dismissed* with costs, on motion of *Mr. Frederic D. McKenney* for the plaintiff in error.

ALLIANCE GAS & ELECTRIC COMPANY, *Appellant*, *v.* THE CITY ALLIANCE. [Nos. 161 and 162.]

Appeals from the Circuit Court of the United States for the Northern District of Ohio.

Mr. Wm. B. Sanders for appellant.

No appearance for appellee.

October 9, 1906. *Dismissed* with costs, on motion of counsel for the appellant.

NEWPORT NEWS & OLD POINT RAILWAY & ELECTRIC COMPANY, *Plaintiff in Error, v.* HAMPTON ROADS RAILWAY & ELECTRIC COMPANY *et al.* [No. 5.]

In Error to the Supreme Court of Appeals of the State of Virginia.

See same case below, 102 Va. 795, 47 S. E. 839.

Messrs. Fred Harper and *S. Gordon Cumming* for plaintiff in error.

Mr. R. G. Bickford for defendant in error.

October 9, 1906. *Dismissed* with costs, on motion of counsel for the plaintiff in error.

COVINGTON & CINCINNATI BRIDGE COMPANY, *Plaintiff in Error, v.* THE CITY OF COVINGTON. [No. 183.]

Mr. S. D. Rouse for plaintiff in error.

No appearance for defendant in error.

October 9, 1906. *Dismissed* with costs, on motion of counsel for plaintiff in error.

OKLAHOMA GAS & ELECTRIC COMPANY, *Plaintiff in Error, v.* MYRTLE LUKERT. [No. 203.]

In Error to the Supreme Court of the Territory of Oklahoma.

Messrs. D. T. Flynn and *C. B. Ames* for plaintiff in error.

Mr. Chester Howe for defendant in error.

[599] October 9, 1906. **Dismissed*, per stipulation.

UNION PACIFIC RAILROAD COMPANY, *Appellant, v.* ROBERT O. FINK, Treasurer, etc., *et al.* [No. 22.]

Appeal from the Circuit Court of the United States for the District of Nebraska.

Messrs. Maxwell Evarts and *John N. Baldwin* for the appellant.

Mr. Norris Brown for appellee.

October 9, 1906. *Dismissed* with costs, on motion of *Mr. Maxwell Evarts* for the appellant.

CHICAGO, BURLINGTON, & QUINCY RAILWAY COMPANY, *Appellant, v.* A. F. CARLSON *et al.* [No. 23.]

Appeal from the Circuit Court of the United States for the District of Nebraska.

Messrs. Charles J. Greene and *Ralph W. Breckenridge* for the appellant.

Mr. Norris Brown for appellee.

October 9, 1906. *Dismissed* with costs, on motion of *Mr. Maxwell Evarts* in behalf of counsel for the appellant.

GEORGE D. COLLINS, *Plaintiff in Error, v.* THOMAS F. O'NEIL, Sheriff of the City and County of San Francisco, Cal. [No. 452.]

In Error to the Superior Court of the City and County of San Francisco, State of California.

Mr. William Hoff Cook for the defendant in error.

October 9, 1906. Docketed and *dismissed* with costs, on motion of *Mr. William Hoff Cook* for the defendant in error.

C. W. BUSTER *et al.*, *Appellants, v.* J. GEORGE WRIGHT, United States Indian Inspector, *et al.* [No. 39.]

Appeal *from the United States Circuit [600] Court of Appeals for the Eighth Circuit.

Mr. Wm. F. Hutchings for appellants.

No appearance for appellees.

October 17, 1906. *Dismissed* with costs, pursuant to the Tenth Rule.

WILLIAM J. GALLAGHER, *Plaintiff in Error, v.* PEOPLE OF THE STATE OF ILLINOIS. [No. 20.]

In Error to the Supreme Court of the State of Illinois.

See same case below, 211 Ill. 158, 71 N. E. 842.

Mr. Charles H. Soelke for plaintiff in error.

Mr. E. O. Lindley for defendant in error.

October 22, 1906. *Dismissed* with costs, pursuant to the Tenth Rule.

JAMES VAN BUREN, *Appellant, v.* P. F. HENNESSEY, Testamentary Executor, etc., *et al.* [No. 65.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Branch K. Miller for appellant.

Mr. Wm. J. Hennessey for appellee.

October 24, 1906. *Dismissed* with costs, pursuant to the Tenth Rule.

JULIAN CASTILLO SLAUGHTER *et al.*, *Appellants, v.* CECILE R. LOEB, Executrix, etc. [No. 348.]

Appeal from the Court of Appeals of the District of Columbia.

Mr. Wilton J. Lambert for the appellants.

No appearance for appellee.

October 29, 1906. *Dismissed* with costs on motion of *Mr. Charles L. Frailey*, in behalf of counsel for the appellants.

WILLIAM F. HOLTZMAN *et al.*, *Appellants*, *v.* IRWIN B. LINTON, Executor, etc. [No. 274.]

Appeal from the Court of Appeals of the District of Columbia.

Messrs. A. S. Worthington and *E. Hilton Jackson* for appellants.

Messrs. Irwin B. Linton and *J. Altheus Johnson* for appellee.

[601] *November 5, 1906. *Dismissed* with costs, on motion of counsel for appellants.

UNITED STATES, *Complainant*, *v.* STATE OF MICHIGAN. [No. 4, Original.]

See same case on demurrer, 190 U. S. 379, 47 L. ed. 1103, 23 Sup. Ct. Rep. 742.

Mr. Solicitor General Hoyt for the complainant.

Messrs. John E. Bird, Horace M. Oren and *Charles A. Blair* for defendant.

November 19, 1906. *Dismissed*, on motion of *Mr. Solicitor General Hoyt* for the complainant.

STEPHEN R. WIGHTMAN, *Plaintiff in Error*, *v.* STATE OF CONNECTICUT. [No. 113.]

In Error to the Supreme Court of Errors of the State of Connecticut.

Mr. Samuel Park for plaintiff in error.

Mr. H. A. Hull for defendant in error.

December 3, 1906. *Dismissed* with costs, per stipulation.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, *Plaintiff in Error*, *v.* D. ROY MUMFORD. [No. 205.]

In Error to the Supreme Court of the State of Iowa.

Mr. Robert Mather for the plaintiff in error.

Messrs. N. D. Ely, Arthur G. Bush, and *Charles F. Wilson* for defendant in error.

December 3, 1906. *Dismissed* with costs, on authority of counsel for the plaintiff in error.

SAM LEE *et al.*, *Appellants*, *v.* HERBERT E. ELLIS. [No. 135.]

Appeal from the Supreme Court of the Territory of *Oklahoma. [602]

Mr. S. H. Harris for appellants.

Mr. Fred Beall for appellee.

December 10, 1906. *Dismissed* with costs, pursuant to the Tenth Rule.

ALBERT T. PATRICK, *Plaintiff in Error*, *v.* PEOPLE OF THE STATE OF NEW YORK. [No. 336.]

In Error to the Court of General Sessions for the Peace for the County of New York.

Mr. William Lindsay for the plaintiff in error.

No appearance for defendant in error.

December 13, 1906. *Dismissed* with costs, on motion of *Mr. William Lindsay* for the plaintiff in error.

PETRONA DEL CARMEN GONZALEZ RESTO, *Appellant*, *v.* PETRONA RESTO Y NEGRÓN *et al.* [No. 524.]

Appeal from the Supreme Court of Porto Rico.

Mr. Perry Allen for the appellees.

December 17, 1906. Docketed and *dismissed* with costs, on motion of *Mr. Perry Allen* for the appellees.

RICHARD HYNES, *Appellant*, *v.* LEO V. YOUNGWORTH, United States Marshal, etc. [No. 529]; A. H. HEDDERLY, *Appellant*, *v.* LEO V. YOUNGWORTH, United States Marshal, etc. [No. 530.]

Appeals from the Circuit Court of the United States for the Southern District of California.

Mr. Solicitor General Hoyt for the appellee.

December 24, 1906. Docketed and *dismissed* with costs, on motion of *Mr. Solicitor General Hoyt* for the appellee.

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UP

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1906.

Vol. 204.

U. S., Book 51. 22

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1906,

AND REPORTED HEREIN.

VOLUME 204,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 204 U. S.	Title.	Here in	Off. Rep. 204 U. S.	Title.	Here in
1-2	Jerome v. Cogswell	343	85-86	Elder v. Colorado ex rel. Badgley	382
3-7	" "	344		" "	384
7-8	" "	345	87-88	" "	385
9	Old Wayne Mut. L. Assn. v. McDonough	345	88-89	Newman v. Gates	385
9-14	" "	347	89-90	" "	386
14-16	" "	348	90-92	" "	387
16-19	" "	349	92-93	" "	388
19-21	" "	350	93-95	" "	389
21-23	" "	351	95	J. B. Orcutt Co. v. Green	390
24	Wilson v. Shaw	351	96-97	" "	391
24-25	" "	352	97-101	" "	392
26-31	" "	353	101-103	" "	393
31-32	" "	356	103	American Smelting & Ref. Co. v. Colorado ex rel. Lindsley	393
32-33	" "	357	103-105	" "	394
33	Bachtel v. Wilson	357	105-107	" "	395
33-39	" "	358	107	" "	397
39-41	" "	359	111-113	" "	398
41-42	" "	360	113-116	Cleveland Electric R. Co. v. Cleveland	
42	Bachtel v. Wilson Miller v. Wilson Davis v. Wilson Van Horn v. Wilson	360	116-117	Cleveland v. Cleveland Electric R. Co.	399
43	Kane v. King Webb v. King	360	117-119	" "	400
47	" "	362	119-122	" "	401
47-50	" "	363	122-124	" "	402
50-52	" "	364	124-127	" "	403
52-55	" "	365	127	" "	404
55-57	" "	366	129-130	" "	405
57-59	" "	367	130-133	" "	406
59-62	" "	368	133-135	" "	407
62-64	" "	369	135-137	" "	408
64	Garrod v. Dustas	369	137-140	" "	409
64-69	" "	374	140-142	" "	410
69-71	" "	375	142	" "	411
71-74	" "	376	143	United States v. G. Falk & Bro.	411
74-76	" "	377	145-147	" "	412
76-78	" "	378	147-149	" "	413
78-81	" "	379	149-152	" "	414
81-82	" "	380	152	" "	415
82-85	" "	381	153	New York ex rel. Hatch v. Reardon	415
85	Elder v. Colorado ex rel. Badgley	381	156-159	" "	421

Off. Rep. 20 U. S.	Title	Here in
159–161	New York ex rel. Hatch v. Reardon	426
161–162	" "	426
162–165	Ohio Valley Nat. Bank v. Dillist	427
165	" "	428
165–166	" "	428
166–167	" "	428
167–169	" "	428
169–170	" "	428
170–173	Zartarian v. Billings	429
173–174	" "	429
174–175	" "	430
175	Wesher v. National Enameling & S. Co.	430
177–180	" "	431
180–183	" "	431
183–185	" "	432
185–186	" "	432
186	Shropshire, Woodliff & Co. v. Bush	433
187–188	" "	433
188–189	" "	434
190	Northern Lumber Co. v. O'Brien	434
192–193	" "	435
193–196	" "	435
196–198	" "	436
198–200	" "	436
200–203	" "	437
203	" "	437
204–205	Montana Min. Co. v. Bk. Lands Min. & Mill Co.	438
206–207	" "	438
207–208	" "	438
212–214	" "	439
214–217	" "	439
217–219	" "	440
219–220	" "	440
220	Erie R. Co. v. Erie & W. Transp. Co.	440
223	" "	442
223–224	" "	442
226–228	" "	443
229	Crowe v. Tracey	444
229–230	" "	445
230–232	" "	446
233	" "	447
234–235	" "	448
235–237	" "	449
237–240	" "	449
240	" "	451
241	Crowe v. Harmon	451
241	Ballard v. Hunter	451
242	" "	452
242–245	" "	453
245–247	" "	454
247–250	" "	455
250–254	" "	456
254–255	" "	457
255–257	" "	458
257–259	" "	459
259–262	" "	460
262–265	" "	461
265	" "	462
266	East Central Eureka Min. Co. v. Central Eureka Min. Co.	462
267–268	" "	463
269–272	" "	464
272	" "	465
272–273	Armstrong v. Ashley	[illegible]
273–276	" "	[illegible]
276–278	" "	[illegible]
278–282	" "	[illegible]
282–284	" "	[illegible]
284–286	" "	[illegible]
286	Merchants Nat. B. A. (Inc.) v. Clows & Sons	[illegible]
288–289	" "	[illegible]
289–293	" "	[illegible]
293	Merchants Nat. Bank v. Rice	[illegible]
293–295	" "	[illegible]
295–296	" "	[illegible]
297	" "	[illegible]
297–299	" "	[illegible]
299–301	" "	[illegible]
302	Walker v. Midland	[illegible]
302–304	" "	[illegible]
304–306	" "	[illegible]
306–308	" "	[illegible]
308–311	" "	[illegible]
311	Harris v. Walker	[illegible]
312–314	"	[illegible]
314–316	" "	[illegible]
316–319	" "	[illegible]
319–320	" "	[illegible]
320	Brown v. Walker	[illegible]
320–321	" "	[illegible]
321	Chicago v. Ulrich	[illegible]
322	" "	[illegible]
322–323	" "	[illegible]
323–326	" "	[illegible]
326–331	" "	[illegible]
331	Kansas v. United States	[illegible]
337	" "	[illegible]
337–340	" "	[illegible]
340–342	" "	[illegible]
342–343	" "	[illegible]
343–345	United States v. Tyler	[illegible]
345–348	" "	[illegible]
348–349	" "	[illegible]
349	United States Telegraph Co. v. United States	[illegible]
349–350	" "	[illegible]
350–355	" "	[illegible]
355–357	" "	[illegible]
357–359	" "	[illegible]
359	Western Union Tel. Co. v. [illegible]	[illegible]
361	" "	[illegible]
361–364	" "	[illegible]
364	" "	[illegible]
364	United States v. [illegible] States	[illegible]
365–367	" "	[illegible]
367–370	" "	[illegible]
370–372	" "	[illegible]
372–375	" "	[illegible]
375–381	" "	[illegible]
381–384	" "	[illegible]
384–386	" "	[illegible]
386–389	" "	[illegible]
389–391	" "	[illegible]
391–394	" "	[illegible]
394–396	" "	[illegible]
396–399	" "	[illegible]
399–401	" "	[illegible]
401–402	" "	[illegible]
402	[illegible]	[illegible]

[illegible]	" "	[illegible]	[illegible]	" "	[illegible]
[illegible]	" "	502	559–563	" "	616
[illegible]	" "	503	569–581	" "	617
[illegible]	Texas & P. R. Co. v. Aldine Lumber Oil Co.		581	" "	618
[illegible]	" "	553	582–583	United States v. Keatley	618
[illegible]	" "	554	583–585	" "	619
[illegible]	" "	556	585	Osborne v. Clark	619
[illegible]	" "	557	587	" "	623
[illegible]	" "	558	587–589	" "	625
[illegible]	" "	559	588–590	" "	626
[illegible]	" "	560	589	" "	627
[illegible]	" "	561	590	Mason City & Ft. D. R. Co. v. Boynton	629
[illegible]	" "	562		" "	630
[illegible]	Texas & P. R. Co. v. Chico Oil Mill		570–573	" "	631
[illegible]	" "	562	573–575	" "	633
[illegible]	" "	563	578–580	" "	634
[illegible]	Southern R. Co. v. Cantrell	564	580	Allen v. United States	634
[illegible]	" "	564	581–582	" "	635
[illegible]	" "	565	583–584	" "	636
[illegible]	Wilder v. Kaplan	566	594	Chicago, R. & Q. R. Co. v. Babcock	
[illegible]	" "	567	600	Union P. R. Co. v. Fink	636
[illegible]	" "	568		" "	638
[illegible]	" "	569	601–603	" "	639
[illegible]	" "	570	603–609	" "	640
[illegible]	" "	571	606–608	" "	641
[illegible]	Grant v. Mudge	571	608	Doyle v. London Guarantee & Acci. Co.	641
[illegible]	" "	572	608	" "	642
[illegible]	" "	573		" "	643
[illegible]	" "	574	609–612	" "	644
[illegible]	" "	575	609–614	" "	645
[illegible]	Graham v. Schlaich	575	614–617	Computing Scale Co. v. Automatic Scale Co.	647
[illegible]	" "	576	617–620	" "	648
[illegible]	" "	579	620	" "	649
[illegible]	" "	580		" "	650
[illegible]	" "	581	620–623	" "	651
[illegible]	Chicago v. Keatley	581	623–624	Hoke v. Turner	652
[illegible]	" "	582	624–626	" "	653
[illegible]	" "	583	626–628	" "	654
[illegible]	" "	584	628–631		
[illegible]	" "	587	631–632		
[illegible]	" "	588	633		
[illegible]	" "	589	635–637		
[illegible]	Cook v. Lovelley	589	637–639		

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1906.

'FRANKLIN S. JEROME, Plff. in Err.,
v.
IARLES P. COGSWELL, the State Savings Bank, et al.

(See S. C. Reporter's ed. 1-8.)

tional banks—reduction of capital stock —distribution of charged-off assets.

The stockholders of record at the me of the reduction of the capital stock a national bank, and not those of record the expiration of its charter, are entiid to the proceeds of the bad or doubtful sets set apart at the time of such reducn in compliance with the requirement of e Comptroller of the Currency that such sets should be charged off or set aside r the benefit of those who were then ockholders, the bank, after such reduction, ing left with its capital stock, as reduced, iimpaired, and a surplus exclusive of the sets in question.

[No. 80.]

rgued November 2, 1906. Decided January 7, 1907.

N ERROR to the Supreme Court of Errors of the State of Connecticut to review a idgment which, reversing the judgment of e Superior Court of New London County, that state, adjudged that the stockolders of record of a national bank at the me of its reduction of its capital stock ere entitled to the charged-off assets, and rected distribution accordingly. Affirmed. See same case below, 78 Conn. 75, 60 Atl. 89.

Statement by Mr. Chief Justice Fuller:

The Second National Bank of Norwich, Connecticut, was a banking association, organized and existing under the laws of the United States, with a capital stock of $300,000.

As stated, in substance, by the supreme court of errors of Connecticut, the directors, having voted to recommend a reduction of the capital stock from $300,000 to $200,000, were advised by the Comptroller of the Currency that it would be approved, "provided so much of the amount as is necessary is used to charge off bad, doubtful, and unproductive assets, the difference only being paid to the shareholders in cash," *and [2] that "the shareholders of a national bank, upon a reduction in capital stock, are entitled to either receive the cash or the charged-off assets, and neither can be withheld without their consent." The Comptroller also informed the president of the bank: "The assets belong to the stockholders of record, and a trust fund must be created, so that those assets may be distributed among the stockholders of record when your capital is reduced." The stockholders, in May, 1900, voted to make the reduction, and the president first, and then the directors, filed with the Comptroller a written statement that "the whole amount of the reduction, *viz.*, $100,000, will be used for the purpose of charging off bad, doubtful, and unproductive assets, no money to be paid to the shareholders unless realized from said assets, which are to be set aside and collected for the benefit of the shareholders of record at date of the issuance of the Comptroller's certificate approving the reduction." The Comptroller gave his certificate, dated June 9, 1900, approving the reduction, without any qualifications.

"On June 27th a schedule of certain assets of the bank, each item being given a valuation, and the total valuations of all amounting to $100,307.86, was presented to the directors, who thereupon voted that the assets so scheduled, 'which assets are considered either bad or doubtful, and on account of which the capital stock of the bank has been reduced from $300,000 to $200,000, be set aside from the other assets of the bank, and be held by it in trust for the stockholders of record on the 9th day of June, 1900, and that whatever may be realized from said assets be distributed from time to time as may be reasonable among said stockholders in proportion to their respective holdings on said date.'

"Thereupon the account with capital stock on the books of the bank was credited with a reduction of $100,000, and the items named in the schedule above described were charged to the account of profit and loss at the valuation of $100,307.86. Some of the items were of real estate; the rest were not [3] well *secured; and all were those referred to in the directors' statement to the Comptroller, dated June 9th.

"This left the bank with good assets worth over $240,000.

"The bank thereafter, until its charter expired in 1903, kept a separate account relating to the assets included in the schedule, entitled 'Stockholders' Trust,' in which were credited all collections and charged all expenditures arising in connection with endeavors to realize upon them.

"Two of the scheduled items represented claims for a larger amount; the valuation affixed to each representing the estimated loss upon it. The same claims were also entered in the books of the bank, as part of its remaining capital, at a valuation for each equal to the difference between its face and the valuation assigned to it in the schedule.

"The receiver has received $20,240 on account of the scheduled assets. Some of them also remain uncollected, but have a value. To one of the items, entered as 'Demand loans, E. A. Packer, $15,647.50.' belonged certain railroad stock held as collateral security. A note for over $1,000, made by 'C. P. Cogswell, trustee,' and discounted by the bank to pay an assessment on this stock, was included in the reduced capital of $200,000, and in March, 1903, was paid off from the proceeds of sales of the stock; leaving a balance of such proceeds, which was included in the $20,240 above mentioned.

"All the certificates representing the shares in the original capital were, on or about July 1st, 1900, exchanged by the holders for certificates in favor of each for two thirds of the number of his original shares."

The charter of the bank expired by lapse of time February 24, 1903, and its affairs were being settled in the manner provided by law, when a complaint in equity was filed by a stockholder in the superior court of Connecticut, asking for the appointment of a receiver to wind up its affairs, because of alleged misappropriation, and a receiver was appointed. The receiver filed a petition with the court, stating that in May, 1900, the capital stock of the bank was reduced from $300,000 *to $200,000, and that thereupon assets of the face value of $100,000 were charged off and set aside, and that a question had arisen as to whether the proceeds of those assets be distributed to the stockholders of record at the time of the reduction or of the expiration of the charter.

Claims to the charged-off assets by virtue of ownership of original stock when capital was reduced; of such stock, although it had been surrendered and new stock issued; and of stock after the reduction,—were filed.

The superior court held that those assets belonged to the bank, and should be distributed to the stockholders of record at the expiration of its charter.

The supreme court of errors adjudged that the stockholders of record at time of reduction were entitled to the charged-off assets, and reversed the judgment of the superior court, with directions to distribute accordingly. 78 Conn. 75, 60 Atl. 1059.

Whereupon this writ of error was brought.

Mr. Donald G. Perkins argued the cause, and, with Mr. William H. Shields, filed a brief for plaintiff in error.

Mr. Frank T. Brown argued the cause, and, with Mr. Hadlai A. Hull, filed a brief for defendants in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

This is not a case involving the rights of creditors or of minority stockholders as such, but a case raising the bare question to whom assets remaining on a valid reduction of the capital stock of a national bank belong.

The national banking act (title 62, Rev. Stat.) provides:

"Sec. 5143 (U. S. Comp. Stat. 1901, 3463). Any association formed under this title may, by the vote of shareholders owning two thirds of its capital stock, reduce its capital to any sum not below the amount *required by this title to authorize

the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency, and his approval thereof obtained."

The reduction in this case was accomplished at a time when the bank was not being wound up, by the required vote of the stockholders, and with the approval of the Comptroller of the Currency, and the new shares on the basis of the reduction were accepted by all the stockholders.

The bank was left with good assets of more than $240,000, or, in other words, with an unimpaired capital stock of $200,000 and a surplus of 20 per cent,—that is, $40,000, exclusive of the assets, the distribution of which is the matter in controversy. These assets were set apart in compliance with the requirement of the Comptroller that certain bad, doubtful, and unproductive assets should be charged off or set aside for the benefit of those who were stockholders at the date of the approval. This requirement, though not stated in the certificate of approval, was evidently, on the facts, made a condition thereof, and presumably in accordance with the practice of the Comptroller's office, and was imposed to the end that justice might be done to the owners of the original shares.

It is said that the original capital of the bank of $300,000 was impaired prior to the reduction, say to the extent of $30,000, as shown by adding to the $240,000 the value of the scheduled assets, estimated at $30,000.

As a general rule, it may be admitted that where capital stock is impaired and a reduction is made merely to meet that impairment, there can be no distribution. But that is not this case, in which the stockholders of record June 9, 1900, had a right to require a distribution among them of an excess upon reduction in proportion to their respective holdings. In the language of the [8] Connecticut supreme court: "The *right to receive what might ultimately be realized from the fund thus set apart became, therefore, irrevocably vested in those who were shareholders on June 9th, 1900, and they or their assigns are now entitled to whatever is to be distributed from it." [78 Conn. 79, 60 Atl. 1060.]

It follows, as held, that the transfer of shares after the reduction of June 9, 1900, did not carry any right to an interest in the special trust fund, the proportionate interest therein having vested in the then shareholders as individuals. The result is unaffected by the fact that distribution in cash may have been contemplated as the assets set aside were realized upon.

The conclusion at which we have arrived dispenses with the necessity of discussing other questions suggested.

Judgment affirmed.

OLD WAYNE MUTUAL LIFE ASSOCIATION OF INDIANAPOLIS, INDIANA, Plff. in Err.,

v.

SARAH McDONOUGH, and John Herrity, Administrator of the Estate of Winnifred Herrity, Deceased.

(See S. C. Reporter's ed. 8-23.)

Constitutional law—due process of law—enforcing foreign judgment.

1. Due process of law is denied by the action of a state court in according full faith and credit to a judgment *in personam* rendered by a court of a sister state against a nonresident who was not personally served with process within the state, and who made no appearance in the action.

Judgment—of sister state—conclusiveness—jurisdiction.

2. The jurisdiction of the court rendering a judgment or decree is open to inquiry under proper averments, where its conclusiveness is questioned in a court of another state.

Burden of proof—in action on foreign judgment.

3. The burden of proof is on the plaintiffs in an action on a judgment of a sister state, where the answer contains a general denial, which, under the local procedure, is sufficient to put plaintiffs upon proof of every fact essential in establishing the cause of action, to show by what authority the court of such other state could legally enter the judgment sued upon, which was one *in personam* against a corporation, which, according to the complaint itself, was a corporation of another state, and was not alleged to have appeared in person, or by an attorney of its own selection, or to have been personally served with process within the state.

Evidence—presumption as to jurisdiction.

4. The presumption that a court of superior authority whose judgment is at-

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NOTE.—As to what service of process is sufficient to constitute due process of law—see notes to Pinney v. Providence Loan & Invest Co. 50 L.R.A. 577, and Moyer v. Buck, 16 L.R.A. 231.

On presumption as to jurisdiction—see note to Rand v. Hanson, 12 L.R.A. 574.

As to service of process on state officer as service on foreign corporation—see note to Mutual Reserve Fund Life Asso. v. Phelps, 47 L. ed. U. S. 987.

tacked collaterally for the want of jurisdiction acted within its jurisdiction when proceeding within the general scope of its powers cannot be indulged when it affirmatively appears from the pleadings or evidence that jurisdiction was wanting.

Writ and process—service on state officer as service on foreign corporation.

5. The implied assent of a foreign insurance company transacting business in Pennsylvania without complying with Pa. act of June 20, 1883, that service of process in a suit brought against it there in respect of business transacted in that state may be made upon the state insurance commissioner, as prescribed by that statute, does not extend to a suit brought by citizens of that state on a contract of insurance executed in another state.

[No. 57.]

Argued October 25, 1906. Decided January 7, 1907.

IN ERROR to the Supreme Court of the State of Indiana to review a judgment which affirmed a judgment of the Superior Court of Marion County, in that state, in favor of plaintiffs in an action on a Pennsylvania judgment. Reversed and remanded for further proceedings.

See same case below, 164 Ind. 321, 73 N. E. 703.

The facts are stated in the opinion.

Mr. A. S. Worthington argued the cause and filed a brief for plaintiff in error:

The Pennsylvania judgment is invalid, outside of that state, at least, because it does not appear that, when process was served on the insurance commissioner, the plaintiff in error was doing business in Pennsylvania.

Barrow S. S. Co. v. Kane, 170 U. S. 111, 42 L. ed. 968, 18 Sup. Ct. Rep. 526; St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; Fitzgerald & M. Constr. Co. v. Fitzgerald, 137 U. S. 98, 106, 34 L. ed. 608, 611, 11 Sup. Ct. Rep. 36; Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; Central Grain & Stock Exchange v. Board of Trade, 60 C. C. A. 299, 125 Fed. 467.

A single transaction does not constitute doing business in the state.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Ammons v. Brunswick-Balke-Collender Co. 72 C. C. A. 614, 141 Fed. 570; State use of Hart-Parr Co. v. Robb-Lawrence Co. (N. D.) 106 N. W. 406; Jameson v. Simonds Saw Co. 2 Cal. App. 582, 84 Pac. 289.

A state may, of course, exclude altogether a foreign corporation, or may, in general, allow it to do business within its terr upon such terms as it deems proper.

Bank of Augusta v. Earle, 13 Pet. 51 L. ed. 274; Paul v. Virginia, 8 Wall. 19 L. ed. 357; Baltimore & O. R. Co. v. ris, 12 Wall. 65, 20 L. ed. 354; Ex Schollenberger, 96 U. S. 369. 24 L. ed.

On the other hand, a judgment ren in a state court, without personal se on the defendant, may be a good judgm even *in personam*, against such defenda that state, but void everywhere else.

Goldey v. Morning News, 156 U. S. 39 L. ed. 517, 15 Sup. Ct. Rep. 559; Ba S. S. Co. v. Kane, supra; Grover & B. ing Mach Co. v. Radcliffe, 137 U. S. 28 L. ed. 670, 11 Sup. Ct. Rep. 92; Lafay Ins. Co. v. French, 18 How. 406, 15 L 452.

Due process of law requires notice an opportunity to be heard.

Lasere v. Rochereau, 17 Wall. 437, 2 ed. 694; Orchard v. Alexander, 157 U 372, 383, 39 L. ed. 737. 741, 15 Sup. Ct. 635; McVeigh v. United States, 11 W 259, 20 L. ed. 80.

And upon the very point of the righ a state to determine the conditions u which it will permit foreign corporat to carry on their business within its bor this court has repeatedly held that right may be affected by the Constitutio the United States.

Ducat v. Chicago, 10 Wall. 410, 415, L. ed. 972, 973; Lafayette Ins. Co. v. Fre 18 How. 406, 407, 15 L. ed. 452, 455; W. Cargill Co. v. Minnesota, 180 U. S. 45 L. ed. 619, 21 Sup. Ct. Rep. 423; Car v. Greenwich Ins. Co. 199 U. S. 409, 50 ed. 249, 26 Sup. Ct. Rep. 66; Dayton & I. Co. v. Barton, 183 U. S. 23, 46 L. 61, 22 Sup. Ct. Rep. 5; Hooper v. Califor 155 U. S. 648, 656, 39 L. ed. 297, 301 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. Home Ins. Co. v. Morse, 20 Wall. 451, 455, 22 L. ed. 365, 368, 369; Doyl Continental Ins. Co. 94 U. S. 535, 24 L. 148; Southern P. Co. v. Denton, 146 U. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. Barron v. Burnside, 121 U. S. 186, 30 L. 915, 1 Inters. Com. Rep. 295, 7 Sup. Rep. 931.

The fundamental objection to the Pe sylvania statute under consideration that it does not directly or indirectly quire, or even authorize, the insurance c missioner to notify foreign corporations the service of process upon him.

Kuntz v. Sumption, 117 Ind. 1, 2 L 655, 19 N. E. 474; Pinney v. Providence L & Invest. Co. 106 Wis. 402, 50 L.R.A. 80 Am. St. Rep. 41, 82 N. W. 308; Ba rock v. Dwelling-House Ins. Co. 161 M 425, 23 L.R.A. 863, 42 Am. St. Rep. 418,

)6; Carroll v. New York, N. H. & ., 65 N. J. L. 124, 46 Atl. 708.
h cases hold that service upon a ent by leaving the summons at a ffice is a good service when he has o accept such service, but is of no when the law declares that it shall d service, but he has not given his o that provision.
v. Dumergue, 4 Exch. 290; Copin son, L. R. 9 Exch. 345, Affirmed in Exch. Div. 17.
unsel for defendants in error.

ustice Harlan delivered the opinion ourt:
is an action in an Indiana court the plaintiff in error upon a judg- ainst it in a Pennsylvania court. sive questions in the case have ref- o the clause of the Constitution of ed States, requiring full faith and be given in each state to the pub- records, and judicial proceedings states, and, also, to the clause for- the deprivation by a state of life, or property without due process of ere was a judgment for the plain- ich was affirmed by the supreme the state.
uestions before us arise out of facts be stated.
e 22d day of February, 1900, the de- in error brought an action in the f common pleas of Susquehanna Pennsylvania, against the Old Mutual Life Association of Indian- n Indiana corporation, upon a cer- or policy of life insurance dated De- 3d, 1897, whereby that association to pay to Winnifred Herrity and IcDonough, of Scranton, Pennsylva- their legal representatives, the sum upon the condition, among others, the person whose life was insured— McNally, of Scranton, Pennsylva- uld die within one year from the the certificate, then Herrity and Mc- should not receive more than one f the above sum. McNally died on day of November, 1898.
nmons, addressed to the sheriff of anna county, Pennsylvania, was sued the following return thereof was "Served the Old Wayne Mutual Life ion *of Indianapolis, Indiana, an in- company incorporated under the the state of Indiana, by giving, Sep- 26th, 1900, a true and attested copy within writ to Israel W. Durham, e commissioner for the state of vania, and making known to him tents thereof, the said association no attorney in the state of Pennsylvania upon whom service could be made." It does not appear, if the fact be material, that any notice of this summons was given by the commissioner to the defendant.

Subsequently, the plaintiffs filed a declaration or statement in the Pennsylvania case, which contained, among other things, the following: "That the said the Old Wayne Mutual Life Association of Indianapolis, Indiana, defendant, is a mutual life insurance association, foreign to the state of Pennsylvania, to wit: of the state of Indiana, as aforesaid, and as such has been doing business of life insurance in the state of Pennsylvania, more particularly in the counties of Susquehanna and Lackawanna, in said state of Pennsylvania, issuing policies of life insurance to numerous and divers residents of said counties and state for many years, upon application therefor taken in said counties of Susquehanna and Lackawanna, and was transacting such business of life insurance in said state and counties on the 3d day of December, 1897, and before and since till July 5th, 1900, and after. That the said the Old Wayne Mutual Life Association has no duly appointed agent in said county of Susquehanna, state of Pennsylvania, for the acceptance of service of process other than the commissioner of insurance of the state of Pennsylvania. The writ of summons in this action, duly issued by the court of common pleas of Susquehanna county, directing the said defendant, the Old Wayne Mutual Life Association of Indianapolis, Indiana, to appear and answer, was legally and duly served on the commissioner of insurance of the state of Pennsylvania on the 26th day of September, 1900, the said commissioner of insurance for the state of Pennsylvania being the proper person for service in this case."

*This was followed by a notice in that case[14] addressed to the insurance commissioner, and stating that judgment would be taken if no appearance was entered or an affidavit of defense filed by the association within fifteen days after service of that notice. At a later date, the insurance commissioner not having appeared, and no affidavit of defense having been filed, judgment was taken against the life association, by default, April 16th, 1901.

The present action was brought on that judgment. The complaint in this case, filed June 21st, 1900, alleged that the defendant association was, on the 3d day of December, 1897, and long prior and subsequent thereto, engaged in the transaction of business in Pennsylvania. After setting out the provisions of the statute of Pennsylvania (to be presently referred to), the issuing of the policy, the death of McNally, and the

making of the requisite proofs of loss, the complaint alleged that process in the Pennsylvania case was served upon the insurance commissioner for Pennsylvania, "the said defendant having no other agent or attorney upon whom process could be served in said state of Pennsylvania."

The defendant demurred to the complaint as insufficient in law, but the demurrer was overruled. It then filed its answer, denying "each and every material allegation" in the complaint. In a separate paragraph it alleged that its only offices for the transaction of business were, and at all times had been, at Indianapolis, Indiana, where its officers had always resided; that it had never been admitted to do business in Pennsylvania, and never had an office or agency there for the transaction of business; that no one of its officers or agents was in that commonwealth at the date of the alleged suit, nor had been there since; that no summons was ever served upon it at any time, and that it did not appear in that action; that no one ever appeared for it there who had authority to do so; and that the first notice or knowledge it ever had of the alleged judgment against it was long after the day when it appears to have been rendered.

[15] *The plaintiffs replied, denying each and every material allegation of the answer.

The plaintiff in error insists that the Pennsylvania court had no jurisdiction to proceed against it; consequently the judgment it rendered was void for the want of the due process of law required by the 14th Amendment. If the defendant had no such actual, legal notice of the Pennsylvania suit as would bring it into court, or if it did not voluntarily appear therein by an authorized representative, then the Pennsylvania court was without jurisdiction, and the conclusion just stated would follow, even if the judgment would be deemed conclusive in the courts of that commonwealth. The constitutional requirement that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state is necessarily to be interpreted in connection with other provisions of the Constitution, and therefore no state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law. "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party." Scott v. McNeal, 154 U. S. 34, 46, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108. No state can, by any tribunal or representative, render nugatory a provision of the supreme law. And if the conclusiveness of a judgment or decree in a court of one state is questioned in a court of another government, Federal or state, it is open, under proper averments, to inquire whether the court rendering the decree or judgment had jurisdiction to render it.

Such is the settled doctrine of this court. In the leading case of Thompson v. Whitman, 18 Wall. 457, 468, 21 L. ed. 897, 901, the whole question was fully examined in the light of the authorities. Mr. Justice Bradley, speaking for the court and delivering its unanimous judgment, stated the conclusion to be clear that the jurisdiction of a court rendering judgment in one state may be questioned in a collateral proceeding in another state, *notwithstanding the[16] averments in the record of the judgment itself. The court, among other things, said that if it be once conceded that "the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent." This decision was in harmony with previous decisions. Chief Justice Marshall had long before observed in Rose v. Himely, 4 Cranch, 241, 269, 2 L. ed. 608, 617, that, upon principle, the operation of every judgment must depend on the power of the court to render that judgment. In Williamson v. Berry, 8 How. 495, 540, 12 L. ed. 1170, 1189, it was said to be well settled that the jurisdiction of any court exercising authority over a subject "may be inquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings," and that the rule prevails whether "the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of states." In his Commentaries on the Constitution, Story, § 1313, referring to Mills v. Duryee, 7 Cranch, 481, 484, 3 L. ed. 411, 413, and to the constitutional requirement as to the faith and cred-

t to be given to the records and judicial roceedings of a state, said: "'But this oes not prevent an inquiry into the juris-ction of the court in which the original dgment was given, to pronounce it; or e right of the state itself to exercise au-ority over the person or the subject-mat-r. The Constitution *did not mean to con-r [upon the states] a new power or ju-diction, but simply to regulate the effect the acknowledged jurisdiction over per-s and things within the territory.'" In e later case of Galpin v. Page, 18 Wall. 0, 365, 366, 368, 21 L. ed. 959, 962, 963,—cided after, but at the same term as, ompson v. Whitman,—the court, after ferring to the general rule as to the pre-mption of jurisdiction in superior courts general jurisdiction, said that such pre-mptions "only arise with respect to ju-dictional facts concerning which the rec-d is silent. Presumptions are only in-lged to supply the absence of evidence or erments respecting the facts presumed. ey have no place for consideration when e evidence is disclosed or the averment is ade. When, therefore, the record states e evidence or makes an averment with ference to a jurisdictional fact, it will understood to speak the truth on that oint, and it will not be presumed that ere was other or different evidence re-ecting the fact, or that the fact was other-ise than as averred." In the same case: It is a rule as old as the law, and never ore to be respected than now, that no one hall be personally bound until he has had is day in court; by which is meant until e has been duly cited to appear, *and has een afforded an opportunity to be heard.* udgment without such citation and oppor-unity wants all the attributes of a ju-dicial determination; it is judicial usurpa-ion and oppression, and never can be up-eld where justice is justly administered."

The question of the jurisdiction of the Pennsylvania court being, then, open, on this record, let us see what presumptions arise from the showing made by it.

The complaint in this case, as we have seen, alleged that on the 3d day of December, 1897,—the date of the insurance certificate,—as well as prior and subsequent thereto, the defendant association engaged in business in Pennsylvania, soliciting applications for insurance and issuing policies to residents of that commonwealth. The answer denied each and every material allegation in the complaint, and such a *denial under the Indiana Code of Civil Procedure was sufficient to put the plaintiffs upon proof of every fact that was essential in establishing their cause of action. Thornton's Code Ind. art. 10, § 47, title "Pleadings;" U. S. Rev. Stat. § 914, U. S. Comp. Stat. 1901, p. 684.

The burden of proof was therefore upon the plaintiffs to show by what authority the Pennsylvania court could legally enter a personal judgment against a corporation which, according to the complaint itself, was a corporation of another state, and was not alleged to have appeared in person or by an attorney of its own selection, or to have been personally served with process. This burden the plaintiffs met by introducing in evidence a complete transcript of the record of the action in the Pennsylvania court, from which it appeared: 1. That the defendant association was sued in the Pennsylvania court as a life insurance association of Indiana, was alleged to have been engaged in business in Pennsylvania, and was so engaged before and after the certificate of insurance in question was issued. 2. That the summons in that action was served on the commissioner of insurance for Pennsylvania, the defendant association not having appointed an agent in that commonwealth upon whom process could be served nor having appeared by an attorney or representative. 3. That, the insurance commissioner not having appeared in the action, judgment was taken against the defendant; and that is the judgment here in suit.

It was further made to appear in the present action that when the contract of insurance was executed, as well as before and since, it was provided by a statute of Pennsylvania, approved June 20th, 1883, amendatory of a previous statute of that commonwealth establishing an insurance department, as follows: "No insurance company not of this state, nor its agents, shall do business *in this state* until it has filed with the insurance commissioner of this state a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the insurance commissioner, or the party designated by *him, or the agent specified [19] by the company to receive service of process for said company, shall have the same effect as if served personally on the company within this state, and, if such company should cease to maintain such agent in this state so designated, such process may thereafter be served on the insurance commissioner; but, so long, as any liability of the stipulating company to any resident of this state continues, such stipulation cannot be revoked or modified, except that a new one may be substituted, so as to require or dispense with the service at the office of the said company within this state, and that such service of process according

to this stipulation shall be sufficient personal service on the company. The term 'process' shall be construed to mean and include any and every writ, rule, order, notice, or decree, including any process of execution that may issue in or upon any action, suit, or legal proceeding to which said company may be a party by themselves, or jointly with others, whether the same shall arise upon a policy of insurance or otherwise, by or in any other court of this commonwealth having jurisdiction of the subject-matter in controversy, . . . and, in default of an agent appointed by the company, as aforesaid, then the officer so charged with the service of said process shall, in like manner, deputize the sheriff, constable, or other officer aforesaid of the county where the agent, if any there be, named by the insurance commissioner, may reside, to serve the same on him, and, in default of such agent named by such commissioner, as aforesaid, then in like manner to deputize the sheriff, constable, or other officer, as aforesaid, of the county where the office of the insurance commissioner may be located, to serve the same on him; and each and every service so made shall have the same force and effect, to all intents and purposes, as personal service on said company in the county where said process issued; . . ."

The defendant association introduced no evidence. If, looking alone at the pleadings in the Pennsylvania suit, it be taken that, at the time of the contract in question, the *Indiana corporation was engaged [*20] in transacting, at least, *some* business in Pennsylvania, without having complied with the provisions of the above statute of that commonwealth,—that is, without having filed with the insurance commissioner the written stipulation required by that statute, —still, plaintiffs cannot claim, on the present record, the full benefit of the general rule that the judgment of a court of superior authority, when proceeding within the general scope of its powers, is presumed to act rightly within its jurisdiction; that nothing shall be "intended to be out of the jurisdiction of a superior court but that which specially appears to be so." Peacock v. Bell, 1 Wms' Saund. 74. When a judgment of a court of superior authority is attacked collaterally for the want of jurisdiction, such a presumption cannot be indulged when it affirmatively appears from the pleadings or evidence that jurisdiction was wanting. We make this observation in view of the fact, distinctly shown by the plaintiffs themselves, that the policy of insurance and contract in question was, in fact, executed in Indiana, and not in Pennsylvania. The policy sued on provided as one of its conditions that "for all purposes and in all cases this contract shall be deemed to have been made at the special office of this association in the state of Indiana, U. S. A., and all benefits and claims thereunder shall be payable at such office." Besides, to the complaint or petition in the Pennsylvania court was appended the following memorandum signed by the attorney for the plaintiffs: "The above contract of insurance is governed by the laws of the state of Indiana, the contract having been entered into at Indianapolis." And when the suit was brought in Pennsylvania the plaintiffs were confronted with the condition in the policy that "it is expressly understood and agreed that no action shall be maintained nor recovery had for any claims under or in virtue of this policy, after the lapse of six months from the death of said member,"—McNally. More than six months had elapsed after McNally's death before the suit was instituted in Pennsylvania. In order to obviate this difficulty the plaintiffs, in *their declaration or statement [*21] in assumpsit, in the Pennsylvania court, alleged that the contract of insurance was governed by the laws of Indiana, "the contract having been entered into at Indianapolis, Indiana;" also, that "said policy of insurance and the contract touching the issuing the same were executed in the state of Indiana, in which state all provisions limiting liability on policies where suit is not brought within a certain time are held void and of no account." The plaintiffs cannot, therefore, be heard now to say that the contract was not, in fact, made in Indiana. What they alleged in the Pennsylvania suit precluded the idea that the contract of insurance was made in that commonwealth. Indeed, if they had alleged that the business was transacted in Pennsylvania, their action on the contract would have been defeated by the condition in the policy that no suit thereon could be brought on it after the expiration of six months from the death of the person whose life was insured.

But even if it be assumed that the insurance company was engaged in *some* business in Pennsylvania at the time the contract in question was made, it cannot be held that the company agreed that service of process upon the insurance commissioner of that commonwealth would alone be sufficient to bring it into court in respect of all business transacted by it, no matter where, with, or for the benefit of, citizens of Pennsylvania. Undoubtedly, it was competent for Pennsylvania to declare that no insurance corporation should transact busi-

ness within its limits without filing the written stipulation specified in its statute. Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Hooper v. California, 155 U. S. 648, 653, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207, and authorities cited; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 45, 44 L. ed. 657, 664, 20 Sup. Ct. Rep. 518. It is equally true that, if an insurance corporation of another state transacts business in Pennsylvania without complying with its provisions, it will be deemed to have assented to any valid terms prescribed by that commonwealth as a condition of its right to do business there; and will be estopped to say that it had not done what it should *have done in order that it might lawfully enter that commonwealth and there exert its corporate powers. In Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. ed. 354, the question was as to the jurisdiction of the supreme court of the District of Columbia of a suit against a corporation in Maryland, whose railroad entered the District with the consent of Congress. This court said: "It [the corporation] cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented, and will be bound accordingly." This language was cited and approved in Chicago & N. W. R. Co. v. Whitton, 13 Wall. 270, 285, 20 L. ed. 571, 576. The same question was before the court in Ex parte Schollenberger, 96 U. S. 369, 376, 24 L. ed. 853, 854, and the principle announced in the Harris and Whitton Cases was approved. In the Schollenberger Case the Pennsylvania statute here in question was involved. To the same effect are the following cases: Ehrman v. Teutonia Ins. Co. 1 McCrary, 123, 129, 1 Fed. 471; Knapp, S. & Co. v. National Mut. F. Ins. Co. 30 Fed. 607; Berry v. Knights Templars' & M. Life Indemnity Co. 46 Fed. 439, 441, 442; Diamond Plate Glass Co. v. Minneapolis Mut. F. Ins. Co. 55 Fed. 27; Stewart v. Harmon, 98 Fed. 190, 192.

Conceding, then, that by going into Pennsylvania, without first complying with its statute, the defendant association may be held to have assented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. Indeed, the Pennsylvania statute, upon its face, is only directed against insurance companies who do business in that commonwealth,—"in this state." While the highest considerations of public policy demand that an insurance corporation, entering a state in defiance of a statute *which lawfully prescribes [23] the terms upon which it may exert its powers there, should be held to have assented to such terms as to business there transacted by it, it would be going very far to imply, and we do not imply, such assent as to business transacted in another state, although citizens of the former state may be interested in such business.

As the suit in the Pennsylvania court was upon a contract executed in Indiana; as the personal judgment in that court against the Indiana corporation was only upon notice to the insurance commissioner, without any legal notice to the defendant association, and without its having appeared in person or by attorney or by agent in the suit; and as the act of the Pennsylvania court in rendering the judgment must be deemed that of the state within the meaning of the 14th Amendment,†—we hold that the judgment in Pennsylvania was not entitled to the faith and credit which, by the Constitution, is required to be given to the public acts, records, and judicial proceedings of the several states, and was void as wanting in due process of law.

The judgment of the Supreme Court of Indiana must, therefore, be reversed, with directions for further proceedings not inconsistent with this opinion.

It is so ordered.

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*WARREN B. WILSON, Appt., [24]

v.

LESLIE M. SHAW, Secretary of the Treasury.

(See S. C. Reporter's ed. 24-35.)

Panama canal zone—title of United States.

1. Subsequent ratification by Congress is a sufficient answer to the contention that the title of the United States to the Isthmian or Panama canal zone was not acquired as provided in the act of June 28, 1902 (32 Stat. at L. 481, chap. 1302, U. S. Comp. Stat. Supp. 1905, p. 707), by treaty with the Republic of Colombia.

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†Ex parte Virginia, 100 U. S. 339, 346, 347, 25 L. ed. 676-680; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 234, 41 L. ed. 979, 983, 984, 17 Sup. Ct. Rep. 581.

Treaty—acquisition of territory by.

2. The United States may acquire territory by treaty.

Panama canal zone—title of United States.

3. The title of the United States to the Isthmian or Panama canal zone under the treaty of November 18, 1903 (33 Stat. at L. 2234), with the Republic of Panama, is no less perfect because of the omission from that treaty of some of the technical terms used in ordinary conveyances of real estate.

Panama canal zone—title of United States.

4. Failure to define the exact boundary of the Isthmian or Panama canal zone in the treaty of November 18, 1903, with the Republic of Panama, does not affect the title of the United States, where the description is sufficient for identification, and the boundaries have been practically identified by the concurrent action of the two nations alone interested.

Panama canal—power of Congress to construct.

5. Congress has power to construct the Panama canal in the territory acquired by the treaty of November 18, 1903, with the Republic of Panama.

[No. 43.]

Argued and submitted October 19, 1906. Decided January 7, 1907.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of that District, sustaining a demurrer to, and dismissing, a bill to restrain the Secretary of the Treasury from paying out money for the construction of the Panama canal, from borrowing money for that purpose, and from issuing bonds of the United States therefor. Affirmed.

See same case below, 25 App. D. C. 510.

Statement by Mr. Justice Brewer:

In a general way it may be said that this is a suit brought in the supreme court of the District of Columbia by the appellant, alleging himself to be a citizen of Illinois and the owner of property subject [25] to taxation by the United States, *to restrain the Secretary of the Treasury from paying out money in the purchase of property for the construction of a canal at Panama, from borrowing money on the credit of the United States, from issuing bonds or making any payments under the act of Congress, June 28, 1902 (32 Stat. at L. 481, chap. 1302, U. S. Comp. Stat. Supp. 1905, p. 707), providing for the acquisition of property and rights from Colombia and the canal company, and the construction and operation of the canal and the Panama railroad. The Republic of Panama and the New Panama Canal Company of France were named parties defendant, but they were not served with process and made no appearance. A demurrer to the bill was sustained, and the bill dismissed. This decree was affirmed by the court of appeals, from whose decision this appeal was taken.

Mr. Warren B. Wilson, *in propria persona*, argued the cause and filed a brief for appellant:

A deed describing property in terms, equally applicable to two or more pieces of property, carries a patent ambiguity, and even when affecting only property rights is absolutely void for uncertainty.

Boardman v. Reed, 6 Pet. 345, 8 L. ed. 422; Deery v. Cray, 10 Wall. 269, 19 L. ed. 888; United States v. King, 3 How. 773, 11 L. ed. 824; Shackleford v. Bailey, 35 Ill. 387; Hill v. Mowry, 6 Gray, 551.

But the case is much stronger when, as here, the grant is by the public; and includes, if valid, not merely property rights, but portions of the lawmaking power of the grantor, an independent nation. In the case of grants of property between individuals, courts, in construing the language of conveyances, construe the language, if doubtful, with the presumption against the grantor.

Douglass v. Lewis, 131 U. S. 75, 33 L. ed. 53, 9 Sup. Ct. Rep. 634.

In the case of grants by the public, especially carrying such power, this presumption is reversed, and all intendments are against the grantee. Everything not clearly shown to have been granted is held not to be granted.

Charles River Bridge v. Warren Bridge, 11 Pet. 544, 9 L. ed. 822; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 588, 41 L. ed. 563, 17 Sup. Ct. Rep. 196; Providence Bank v. Billings, 4 Pet. 514, 7 L. ed. 939.

Questions similar to this have arisen as to municipal corporations, and in every instance it has been held that, unless the boundaries are clearly established, no person is subject to their laws. Corporations have boundaries, or they have no existence.

Little Rock v. Parish, 36 Ark. 172; Gray v. Sheldon, 8 Vt. 403; Pierce v. Carpenter, 10 Vt. 480; Dill. Mun. Corp. §§ 482, 483; Enterprise v. State, 29 Fla. 128, 10 So. 749; Cutting v. Stone, 7 Vt. 471; Plantation No. 9 v. Bean, 40 Me. 218; Howell v. Kinney, 99 Ga. 544, 27 S. E. 204; State ex rel. Holcomb v. Pocatello, 3 Idaho, 174, 28 Pac. 411.

Even if treaties, according to the laws of Panama, are, as here, the supreme law of the land, such laws may be repealed at the pleasure of the legislature.

The Cherokee Tobacco (207 Half Pound

Papers of Smoking Tobacco v. United States) 11 Wall. 616, 20 L. ed. 227; Whitney v. Robertson, 124 U. S. 194, 31 L. ed. 388, 8 Sup. Ct. Rep. 456.

Before the legislature, in enacting a statute, or the treaty-making power in creating a law under its lawmaking power, can be held to have attempted to do or to have promised the unlawful thing of perpetually binding their respective successors not to exercise their lawful powers in perpetuity, that meaning must affirmatively appear in the clearest terms.

Charles River Bridge v. Warren Bridge, supra.

Any such attempted making of irrepealable laws, or any such irrevocable grant to any agent, foreign or domestic, is *ultra vires* of the people themselves.

Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079.

The treaty-making power of Panama does and can include no constitutional power to give or sell such authority to a stranger. It is entirely elementary that legislative power cannot be delegated.

Ibid.

The only even apparent exception to this universal rule that legislative power cannot be delegated is the case of subordinate local municipal or quasi-public corporations. As to them it has been held that they may be given the power of local self-government.

Stoutenburgh v. Hennick, 129 U. S. 141, 147, 32 L. ed. 637, 638, 9 Sup. Ct. Rep. 256.

The invalidity of such an attempted grant by treaty was declared by the Supreme Court in Pollard v. Hagan, 3 How. 212, 11 L. ed. 565.

The United States has no constitutional power to buy such a grant or exercise such authority.

Ibid.

There was no constitutional power in Congress to enact such legislation as the canal act.

This measure can derive no support from the power to regulate commerce among the several states, with foreign states, and with the Indian tribes.

The power is to regulate, not to carry on, commerce. The power to regulate commerce is the power to prescribe the rule according to which it shall be carried on or governed.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Cooley v. Board of Port Wardens, 12 How. 299, 13 L. ed. 996; Welton v. Missouri, 91 U. S. 279, 23 L. ed. 349; Tiernan v. Rinker, 102 U. S. 123, 26 L. ed. 103; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Interstate Commerce Commission v Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

There is a manifest distinction between the ordinary public highway which was all anyone ever claimed power to make till now, and what is attempted to be provided for by the present legislation.

The construction and operation of such "highways," as has been repeatedly adjudged, is carrying on commerce, and is regulated as such.

United States v. Trans-Missouri Freight Asso. 166 U. S. 312, 41 L. ed. 1017, 17 Sup. Ct. Rep. 540; State Freight Tax Case, 15 Wall. 232, 275, 21 L. ed. 146, 161; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 464, 26 L. ed. 1067, 1068; United States v. Joint Traffic Asso. 171 U. S. 515, 43 L. ed. 265, 19 Sup. Ct. Rep. 25; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; Luxton v. North River Bridge Co. 153 U. S. 525, 38 L. ed. 808, 14 Sup. Ct. Rep. 891.

The power to carry on commerce cannot be implied from the power to regulate it.

United States v. E. C. Knight Co. supra; M'Culloch v. Maryland, 4 Wheat. 401, 4 L. ed. 600.

Even if, instead of providing that the United States should carry on the commerce described in the bill, the act had attempted to prescribe the rule by which it should be carried on, it would be invalid because the commerce affected by the legislation is not the commerce the Constitution subjects to the control of Congress. The commerce Congress is authorized to regulate is commerce among the several states and with foreign nations and the Indian tribes.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23.

Even if Panama were made a county of Louisiana this commerce would not be interstate commerce. The fact that one party to a trade completely carried out in a state is a foreigner does not change the character of the commerce; it is still local, not interstate or international.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357.

Congress has power to regulate the classes of commerce described, throughout the length and breadth of the land (Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96), not throughout the length and breadth of the whole world.

Carrying on commerce is not government at all.

Rippe v. Becker, 56 Minn. 100, 22 L.R.A. 857, 57 N. W. 331; State ex rel. Coleman v. Kelly, 71 Kan. 811, 70 L.R.A. 450, 81 Pac. 450.

The commerce clause gave to Congress all the authority it was designed Congress should have in the entire field of commerce, and nothing can be done in that field under any other power.

Gibbons v. Ogden, 9 Wheat, 201, 6 L. ed. 71; Wheeling, P. & C. Transp. Co. v. Wheeling, 99 U. S. 273, 25 L. ed. 412; Hamilton v. Dillin, 21 Wall. 73, 22 L. ed. 528; Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281.

The measure can derive no support from the power to establish postoffices and post-roads.

No attempt is made to establish this as a post-road, and if it were, it would be manifestly a covert attempt to legislate upon another subject under the appearance of legislating on this one, and, therefore, void.

M'Culloch v. Maryland, 4 Wheat. 316, 423, 4 L. ed. 579, 605.

The measure can derive no support from the power to declare war.

This, as construed in M'Culloch v. Maryland, 4 Wheat. 407, 4 L. ed. 601 and Miller v. United States (Page v. United States) 11 Wall. 268, 20 L. ed. 135, means the power to declare and carry on war. That means, of course, the whole power of the United States,—both the power of the President and Congress.

The power is to carry on war, not to carry on commerce. This is commerce; transportation is commerce.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; United States v. Joint Traffic Asso. supra.

No power in the field of taxation can be implied from the commerce or war powers; all the authority intended to be given in the field of taxation is in the taxing clause. Gibbons v. Ogden, 9 Wheat. 201, 6 L. ed. 71; Wheeling, P. & C. Transp. Co. v. Wheeling, supra; Hamilton v. Dillin, 21 Wall. 73, 22 L. ed. 528.

The first two are commerce cases and the last a war case. So, nothing in the judicial field can be implied from the war power.

Ex parte Milligan, supra; Ex parte Vallandigham, 1 Wall. 243, 17 L. ed. 589.

If the convention that framed and the people that adopted the Constitution, by this grant of power to declare war meant to include a general power in time of peace to prepare for war, broad enough for the present purpose, it is hard to see why it was thought necessary to specifically provide for power to raise and support armies, to provide and maintain a navy.

Brown v. United States, 8 Cranch, 110, 125, 3 L. ed. 506, 509.

A railroad is not a public highway.

Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91.

A highway or public road only as any other property employed by its owner in a business affected with a public interest is public property.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857.

The fact that eminent domain laws are employed in the construction of any road or the industrial plant of any corporation is not sufficient to establish that a road is a public highway or the plant a public plant.

Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301.

The general governing powers of a state, as understood in 1789, did not include the power to carry on any kind of commerce, even the kind affected in the highest degree with a public interest.

South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110.

Solicitor General Hoyt, Assistant Attorney General Russell, and Mr. Glenn R. Husted submitted the cause for appellee:

When the lawmakers pass a law to accomplish a certain object, the courts are to keep in mind the object to be accomplished, and so read the act as not to defeat, but to further, the accomplishment of the object in view.

United States v. Kirby, 7 Wall. 482, 486, 487, 19 L. ed. 278, 280; Blake v. National City Bank, 23 Wall. 307, 320, 23 L. ed. 119, 121; Lau Ow Bew v. United States, 144 U. S. 47, 59, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; Re Chapman, 166 U. S. 661, 667, 41 L. ed. 1154, 1158, 17 Sup. Ct. Rep. 677; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 37, 39 L. ed. 601, 611, 15 Sup. Ct. Rep. 508; Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 245, 46 L. ed. 1147, 22 Sup. Ct. Rep. 881; Collins v. New Hampshire, 171 U. S. 30, 34, 43 L. ed. 60, 61, 18 Sup. Ct. Rep. 768; Knowlton v. Moore, 178 U. S. 41, 77, 44 L. ed. 969, 984, 20 Sup. Ct. Rep. 747; Interstate Commerce Commission v. Baird, 194 U. S. 38, 48 L. ed. 866, 24 Sup. Ct. Rep. 563.

The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.

United States v. Moore, 95 U. S. 760, 63, 24 L. ed. 588, 589; Heath v. Wallace, 38 U. S. 573, 582, 34 L. ed. 1063, 1067, 1 Sup. Ct. Rep. 380; Pennoyer v. McConaughy, 140 U. S. 1, 23, 35 L. ed. 363, 370, 1 Sup. Ct. Rep. 699; Orchard v. Alexander, 57 U. S. 372, 383, 39 L. ed. 737, 741, 15 Sup. Ct. Rep. 635.

Grants of land to be thereafter identified and made certain have frequently been upheld.

Rutherford v. Greene, 2 Wheat. 196, 4 L. ed. 218; Lessieur v. Price, 12 How. 59, 13 L. ed. 893.

Treaties may make changes in statutory laws as statutes may abrogate treaties.

The Cherokee Tobacco (207 Half Pound papers of Smoking Tobacco v. United States) 11 Wall. 616, 621, 20 L. ed. 227, 229.

Within the territories of the United States Congress exercises the combined powers of the general and state governments. That the people of a state might construct a highway or canal will not be denied.

Monogahela Nav. Co. v. United States, 148 U. S. 312, 334, 37 L. ed. 463, 470, 13 Sup. Ct. Rep. 622.

Congress may, in exercising its power to regulate interstate commerce, construct, or authorize individuals or corporations to construct, railroads across the states and territories of the United States (California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073), and may, directly or through a corporation created for that purpose, construct bridges for the accommodation of interstate commerce by land (Luxton v. North River Bridge Co. 153 U. S. 525, 530, 38 L. ed. 808, 810, 14 Sup. Ct. Rep. 891). The canal when constructed will be an important roadway for both interstate and foreign commerce.

Under the commerce clause Congress has power over navigation (2 Story, Const. §§ 1061, 1063), and removes obstructions to navigation.

Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96.

The construction of this canal will be a very effective and important removal of such an obstruction.

The canal will also be a post-road.

It is not necessary that the construction of the canal should be authorized by the Constitution in express language.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Legal Tender Cases, 110 U. S. 421, 439, 28 L. ed. 204, 211, 4 Sup. Ct. Rep. 122.

Mr. Justice Brewer delivered the opinion of the court:

If the bill was only to restrain the Secretary of the Treasury from paying the specific sums named therein, to wit, $40,000,000 to the Panama Canal Company, and $10,000,000 to the Republic of Panama, it would be sufficient to note the fact, of which we may take judicial notice, that those payments have been made, and that whether they were rightfully made or not is, so far as this suit is concerned, a moot question. Cheong Ah Moy v. United States, 113 U. S. 216, 28 L. ed. 983, 5 Sup. Ct. Rep. 431; Mills v. Green, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; American Book Co. v. Kansas, 193 U. S. 49, 48 L. ed. 613, 24 Sup. Ct. Rep. 394; Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611.

But the bill goes further and seeks to restrain the Secretary from paying out money for the construction of the canal, from borrowing money for that purpose and issuing bonds of the United States therefor. In other words, the plaintiff invokes the aid of the courts to stop the government of the United States from carrying into execution its declared purpose of constructing the Panama canal. The magnitude of the plaintiff's demand is somewhat startling. The construction of a canal between the Atlantic and Pacific somewhere across the narrow strip of land which unites the two continents of America has engaged the attention, not only of the United States, but of other countries, for many years. Two routes, the Nicaraugua and the Panama, have been the special objects of consideration. A company chartered under the laws of France undertook the construction of a canal at Panama. This was done under the superintendence and guidance of the famous Ferdinand de Lesseps, to whom the world owes the Suez canal. To tell the story of all that was done in respect *to the construc- [31] tion of this canal, prior to the active intervention of the United States, would take volumes. It is enough to say that the efforts of De Lesseps failed. Since then Panama has seceded from the Republic of Colombia and established a new republic, which has been recognized by other nations. This new republic has by treaty granted to the United States rights, territorial and otherwise. Acts of Congress have been passed providing for the construction of a canal, and in many ways the executive and legislative departments of the government have committed the United States to this work, and it is now progressing. For the courts to interfere, and, at the instance of a citizen, who does not disclose the amount of his interest, stay the work of construction by stopping the payment of money from the Treasury of the United States therefor, would be an exercise of judicial power which, to say the least, is novel and extraordinary.

Many objections may be raised to the bill. Among them are these: Does plaintiff show sufficient pecuniary interest in the subject-matter? Is not the suit really one against the government, which has not consented to be sued? Is it any more than an appeal to the courts for the exercise of governmental powers which belong exclusively to Congress? We do not stop to consider these or kindred objections; yet, passing them in silence must not be taken as even an implied ruling against their sufficiency. We prefer to rest our decision on the general scope of the bill.

Clearly there is no merit in plaintiff's contentions. That, generally speaking, a citizen may be protected against wrongful acts of the government affecting him or his property may be conceded. That his remedy is by injunction does not follow. A suit for an injunction is an equitable proceeding, and the interests of the defendant are to be considered as well as those of the plaintiff. Ordinarily it will not be granted when there is adequate protection at law. In the case at bar it is clear not only that plaintiff is not entitled to an injunction, but also that he presents no ground for any relief.

[32] *He contends that whatever title the government has was not acquired as provided in the act of June 28, 1902, by treaty with the Republic of Colombia. A short but sufficient answer is that subsequent ratification is equivalent to original authority. The title to what may be called the Isthmian or canal zone, which, at the date of the act, was in the Republic of Colombia, passed by an act of secession to the newly formed Republic of Panama. The latter was recognized as a nation by the President. A treaty with it, ceding the canal zone, was duly ratified. 33 Stat. at L. 2234. Congress has passed several acts based upon the title of the United States, among them one to provide a temporary government (33 Stat. at L. 429, chap. 1758, U. S. Comp. Stat. Supp. 1905, p. 711); another, fixing the status of merchandise coming into the United States from the canal zone (33 Stat. at L. 843, chap. 1311, U. S. Comp. Stat. Supp. 1905, p. 394); another, prescribing the type of canal (34 Stat. at L. 611, chap. 3597). These show a full ratification by Congress of what has been done by the Executive. Their concurrent action is conclusive upon the courts. We have no supervising control over the political branch of the government in its action within the limits of the Constitution. Jones v. United States, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80, and cases cited in the opinion; Re Cooper, 143 U. S. 472, 499, 503, 36 L. ed. 232, 240, 242, 12 Sup. Ct. Rep. 453.

It is too late in the history of the United States to question the right of acquiring territory by treaty. Other objections are made to the validity of the right and title obtained from Panama by the treaty, but we find nothing in them deserving special notice.

Another contention, in support of which plaintiff has presented a voluminous argument, is that the United States has no power to engage in the work of digging this canal. His first proposition is that the canal zone is no part of the territory of the United States, and that, therefore, the government is powerless to do anything of the kind therein. Article 2 of the treaty, heretofore referred to, "grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the construction, maintenance, operation, sanitation, and protection of said *canal." By article 3, Panama "grants to the United States all the rights, power, and authority within the zone mentioned and described in article 2 of this agreement, . . . which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority."

Other provisions of the treaty add to the grants named in these two articles further guaranties of exclusive rights of the United States in the construction and maintenance of this canal. It is hypercritical to contend that the title of the United States is imperfect, and that the territory described does not belong to this nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate.

Further, it is said that the boundaries of the zone are not described in the treaty; but the description is sufficient for identification, and it has been practically identified by the concurrent action of the two nations alone interested in the matter. The fact that there may possibly be in the future some dispute as to the exact boundary on either side is immaterial. Such disputes not infrequently attend conveyances of real estate or cessions of territory. Alaska was ceded to us forty years ago, but the boundary between it and the English possessions east was not settled until within the last two or three years. Yet no one ever doubted the title of this Republic to Alaska.

Again, plaintiff contends that the government has no power to engage anywhere in the work of constructing a railroad or ca-

nal. The decisions of this court are adverse to this contention. In California v. Central P. R. Co. 127 U. S. 1, 39, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 160, 8 Sup. Ct. Rep. 1073, 1080, it was said:

"It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several states, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing states as well as territories, and employing the agency of state as well as Federal corporations. See Pacific Railroad Removal Cases, 115 U. S. 1, 14, 18, 29 L. ed. 319, 323, 325, 5 Sup. Ct. Rep. 1113."

In Luxton v. North River Bridge Co. 153 U. S. 525, 529, 38 L. ed. 808, 810, 14 Sup. Ct. Rep. 891, 892, Mr. Justice Gray, speaking for the court, says:

"Congress, therefore, may create corporations as appropriate means of executing the powers of government; as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the states. M'Culloch v. Maryland, 4 Wheat. 316, 411, 422, 4 L. ed. 579, 602, 605; Osborn v. Bank of United States, 9 Wheat. 738, 861, 873, 6 L. ed. 204, 233, 236; Pacific Railroad Removal Cases, *115 U. S. 1, 18, 29 L. ed. 319, 325, 5 [35] Sup. Ct. Rep. 1113; California v. Central P. R. Co. 127 U. S. 1, 39, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073. Congress has likewise the power, exercised early in this century by successive acts in case of the Cumberland or National road, from the Potomac across the Alleghenies to the Ohio, to authorize the construction of a public highway connecting several states. See Indiana v. United States, 148 U. S. 148, 37 L. ed. 401, 13 Sup. Ct. Rep. 564."

See also Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

These authorities recognize the power of Congress to construct interstate highways. *A fortiori*, Congress would have like power within the territories and outside of state lines, for there the legislative power of Congress is limited only by the provisions of the Constitution, and cannot conflict with the reserved power of the states. Plaintiff, recognizing the force of these decisions, seeks to obviate it by saying that the expressions were *obiter dicta;* but plainly they were not. They announce distinctly the opinion of this court on the questions presented, and would have to be overruled if a different doctrine were now announced. Congress has acted in reliance upon these decisions in many ways, and any change would disturb a vast volume of rights supposed to be fixed; but we see no reason to doubt the conclusions expressed in those opinions, and adhere to them. The Court of Appeals was right, and its decision is affirmed.

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*CORWIN D. BACHTEL, Plff. in Err., [36]

v.

R. FRANK WILSON, Sheriff of Stark County, Ohio.

(See S. C. Reporter's ed. 36-42.)

Error to state court—Federal question—decision on non-Federal ground.

The judgment of the Ohio supreme court upholding the validity of the provisions of the free banking act of March 21, 1851, § 30, as amended April 24, 1879, under which an indictment had been found against the cashier of a bank incorporated under that act, in the face of the objection that such section, by subjecting officers of institutions so incorporated to criminal liability, when officers of other banking institutions guilty of similar acts are not so subjected, denies the equal protection of the laws,

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin

cannot be reviewed by the Federal Supreme Court, where the failure of the state court to file an opinion leaves it doubtful whether that court may not have held that the words "any banking company," as used in the section in question, embrace all banking institutions in the state, whether incorporated under the free banking act or not.

[No. 446.]

Argued November 14, 15, 1906. Decided January 7, 1907.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Circuit Court of Stark County, in that state, dismissing a writ of habeas corpus sued out by the cashier of a bank incorporated under the free banking act, who had been indicted for a violation of such act. Dismissed for want of jurisdiction.

Statement by Mr. Justice Brewer:

The sole question in this case, as stated by counsel for plaintiff in error, is whether the following section of the statutes of Ohio contravenes § 1 of the 14th Amendment of the Constitution of the United States:

"Every president, director, cashier, teller, clerk, or agent of any banking company who shall embezzle, abstract, or wilfully misapply any of the moneys, funds, or credits of such company, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any notes, bonds, drafts, or bills of exchange, mortgage, judgment, or decree, or shall make any false entry in any book, report, or statement of the company, with intent in either case to injure or defraud the company, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the company, or any agent appointed to inspect the affairs of any banking company in this state, shall be guilty of an offense, and, upon conviction thereof, shall be confined [37] in the penitentiary, 'at hard labor, not less than one year nor more than ten years.' Section 30, act of March 21, 1851, entitled, "An Act to Authorize Free Banking," as amended April 24, 1870, 76 Ohio Laws, 74; 2 Bates's Anno. Stat. (Ohio) 6th ed. §§ 3821–3885.

Plaintiff in error, who was cashier of the Canton State Bank, a bank incorporated under the above "free banking" act, was indicted in the court of common pleas of Stark county for a violation of this section. A demurrer to the indictment having been overruled, he, before arraignment, sued out a writ of habeas corpus in the circuit court of that county. Thereafter, the final judgment of the supreme court of the state in that proceeding having been adverse, he brought the case here on this writ of error.

Mr. William A. Lynch argued the cause and filed a brief for plaintiff in error.

Messrs. Charles C. Upham and John W. Craine argued the cause and filed a brief for defendant in error.

Mr. Justice Brewer delivered the opinion of the court:

Counsel predicate the unconstitutionality of this statute, not on its provisions standing by themselves, but on its relation to other statutes.

On February 26, 1873 (70 Ohio Laws, 40), an act was passed in terms incorporating savings and loan associations, but with powers such as in fact authorized the carrying on of ordinary commercial banking. Under this statute a few institutions were organized. In 1880 a general incorporation law was enacted (Rev. Stat. Ohio 1880, § 3235 and following), and under it many banks were formed. In addition the banking statistics of the state show that there are several banks owned by unincorporated stockholders, copartnerships, or individuals. Now, in no statute, save the free banking act, is there any section with provisions kindred to those in § 30, above quoted, and the contention is that the plaintiff in error was denied the "equal protection of the laws" guaranteed by the 14th Amendment, in that he was subject to prosecution and punishment for matters and things which, if done by a cashier of any similar institution, whether unincorporated or incorporated under the statutes of Ohio other than the free banking act, would not subject him to punishment. The cashiers of such other institutions are charged with duties substantially the same as those of this plaintiff in error, and yet the one may be punished for a violation of those duties and the others not. Can the state single out a few

v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States, of a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

men and punish them for acts, when for like acts others are free from liability?

No opinion was filed by the supreme court of the state, and we, therefore, are not advised of the grounds upon which that court held § 30 valid; yet that court did hold it valid, and in the face of the same objections that are made to it here. If "any banking company," as found in the free banking act, is applicable to every banking institution, no matter under what statute organized, there is no violation of the equal protection of the laws. Counsel for plaintiff in error contend that the supreme court could not have given so broad a meaning to those words, because they are in a section treating of crimes, and the rule of strict construction, which is universal in respect to criminal statutes, forbids its extension to institutions other than those incorporated under the act of which it is a part; because the title of the original act, "An Act to Authorize Free Banking," limits the scope of the statute, and therefore the applicability of every section therein; and, further, that, as the free banking act, as originally passed, was only to be in force until the year 1872, it is improbable that a criminal provision of general application should be inserted in an act so limited in the matter of time. On the other hand, it is contended by the defendant in error that the words in § 30, "any banking company," embrace *all banking institutions in the state of Ohio, whether incorporated under the free banking act or not, and this because the words themselves are broad and comprehensive, because there is no other provision in the statutes for punishing those who commit the offenses named in said section, and it cannot be supposed that the legislature intended that other like officials should be immune from punishment, and also because § 30, both in the original act and also in the Revised Statutes, has no apparent connection with, in no way modifies or affects, any other sections, and might as well have been placed in the criminal code or by itself in the statutes.

But we are not called upon to decide which is the correct interpretation. The supreme court of a state is the ultimate tribunal to determine the meaning of its local statutes. We are not to assume that that which seems more reasonable to us also seemed more reasonable to and was adopted by it. Before we can pronounce its judgment in conflict with the Federal Constitution it must be made to appear that its decision was one necessarily in conflict therewith, and not that possibly, or even probably, it was. It surely is not unworthy of consideration that the legislature, having before it the question of punishment for offenses committed by banking officers, having made provision therefor by one section in which it used the term "any banking company," may have believed that thereby it had included in its punitive provisions all banking institutions, and that a repetition of that section in other statutes was unnecessary. We do not decide that this was so, but we do hold that, in view of the silence of the supreme court, we are not justified in assuming that it held that it was not so.

Further, if we assume that the supreme court was of the opinion that § 30 was limited in its applicability to institutions incorporated under the free banking act, a question will then be whether the selection of officers of those institutions and subjecting them to punishment, when the officers of all other banking institutions, guilty of similar offenses, are *not so subject, is a[41] denial of the equal protection of the laws. The power of a state legislature to select certain individuals for the operation of a statute is not an arbitrary power, one that it can exercise without regard to any principle of classification. And yet there is a power of selection. The 14th Amendment was not designed to prevent all exercise of judgment by a state legislature of what the interests of the state require, and to compel it to run all its laws in the channels of general legislation. It may deem that social and business conditions, without penal legislation, afford ample protection to the public against wrongdoing by certain officials, while such legislation may be deemed necessary for like protection against wrongdoing by other officials charged with substantially similar duties. The duties of a county or city treasurer may be very like those of the treasurer of a charitable or business corporation, and yet if the legislature prescribed penalties for misconduct of the former, and none for similar misconduct of the latter, it would be giving the Amendment extreme force to make it efficient to overthrow the statute and thus relieve all treasurers from punishment. In short, the selection, in order to become obnoxious to the 14th Amendment, must be arbitrary and unreasonable; not merely possibly, but clearly and actually so. Carroll v. Greenwich Ins. Co. 199 U. S. 401, 411, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66. Would the singling out for punishment of the officers of the free banks be an arbitrary selection? The free banks, though they may be like other banking institutions, are not in all respects the same.

But here, too, we are not called upon for an absolute decision, nor do we deem it necessary to determine whether there be such differences as will sustain the imposi-

tion of punishment of their officers, when none is cast upon the like officers of other banks. We only refer to these matters to indicate that there were at least two questions before the supreme court involving the validity of § 30, one of which, at least, presents no matter of a Federal nature, and in respect to each of which something may [42] be said one way *and the other, and until it is shown what the supreme court did, in fact, decide, it is impossible to hold that the section, as construed by it, is in conflict with the Federal Constitution.

Under those circumstances it is clear that we have no jurisdiction (Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111, and cases cited in opinion), and the writ of error is dismissed.

CORWIN D. BACHTEL, Plff. in Err.,
v.
R. FRANK WILSON, Sheriff of Stark County, Ohio. (No. 447.)

HARVEY H. MILLER, Plff. in Err.,
v.
R. FRANK WILSON, Sheriff of Stark County, Ohio. (No. 448.)

WILLIAM L. DAVIS, Plff. in Err.,
v.
R. FRANK WILSON, Sheriff of Stark County, Ohio. (No. 449.)

CHARLES H. VAN HORN, Plff. in Err.,
v.
R. FRANK WILSON, Sheriff of Stark County, Ohio. (No. 450.)

(See S. C. Reporter's ed. 42.)

These cases are governed by the decision in Bachtel v. Wilson, ante, p. 357.

[Nos. 447, 448, 449, 450.]

Argued November 14, 15, 1906. Decided January 7, 1907.

IN ERROR to the Supreme Court of the State of Ohio to review four separate judgments which affirmed judgments of the Circuit Court of Stark County, in that state, dismissing writs of habeas corpus sued out by officers of a bank incorporated under the free banking act of that state, who had been indicted for violations of such act. Dismissed.

Mr. William A. Lynch argued the cause and filed a brief for plaintiff in error.

Messrs. Charles C. Upham and John W. Craine argued the cause and filed a brief for defendant in error.

Mr. Justice Brewer delivered th of the court:

The same question controls thes the one just decided, and, for th given in the foregoing opinion, the missed.

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*LOUIS KANN, Sigmund Kann, a Cohen, Appts.,
v.
CAROLINE KING.

HENRY RANDALL WEBB, Execu Appts.,
v.
CAROLINE KING.

(See S. C. Reporter's ed. 43-

Landlord and tenant—forfeiture o equitable relief.

1. A court of equity cannot, exercise of its general power to rel a forfeiture, endow a tenant with to create, at the risk of the owne test involving the validity of an able tax sale, for the purpose of gi tenant the right, if the tax title b valid, to pay the taxes and thus b of a forfeiture for his breach of his to pay such taxes.

Landlord and tenant—forfeiture o equitable relief—accident or mis

2. Equity will not relieve f forfeiture of a lease for the bre tenant of his covenant to pay the any theory that his default was d misleading conduct of the landlord own temporary oversight, where t mony conclusively demonstrates ant's gross negligence.

Landlord and tenant—forfeiture o equitable relief—accident or mi

3. Relief from a forfeiture of incurred by a tenant because of h of his covenant to pay the taxes, c given by a court of equity on th of accident or mistake, where t sought cannot be afforded without ing the lessor to the peril of conte validity of an outstanding prima redeemable tax title.

Landlord and tenant—forfeiture o equitable relief—fraud.

4. The purchase of an irredee title with a view to securing a lea property is not such a fraud on th in possession as entitles him to equity from a forfeiture of the le breach of his covenant to pay the

Landlord and tenant—forfeiture o equitable relief—fraud.

5. The act of the landlord in as a new tenant the purchaser o redeemable tax title to the proper

NOTE.—On equitable relief aga feiture of estate—see note to Ma Knickerbocker Ice Co. 69 L.R.A. 1

such a fraud on the tenant in possession as entitles him to relief in equity from a forfeiture of the lease for his breach of his covenant to pay the taxes,—especially where the landlord offered to condone the forfeiture if the tenant would commence proceedings to have the outstanding tax title declared invalid, and would secure the landlord from loss in the event that such title should be sustained, which offer the tenant declined.

[Nos. 16, 17.]

Argued March 8, 9, 1906. Decided January 7, 1907.

APPEALS from the Court of Appeals for the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District adjudging a tax sale to be void and relieving the tenant from a forfeiture of the lease for his breach of his covenant to pay the taxes. Reversed with directions to dismiss the bill for want of equity.

See same case below, 25 App. D. C. 182.

The facts are stated in the opinion.

Mr. **William G. Johnson** argued the cause and filed a brief for appellants in No. 16:

The forfeiture for breach of covenant to pay taxes, after a tax sale, though the tax sale be still redeemable, is not relievable in equity.

Gordon v. Richardson, 185 Mass. 492, 69 L.R.A. 867, 70 N. E. 1027.

Mr. **R. Ross Perry** argued the cause, and, with Messrs. R. Ross Perry, Jr., and E. S. Theall, filed a brief for appellants in No. 17:

A court of equity will not relieve a tenant from a forfeiture incurred by breach of a covenant to pay taxes, in consequence of which breach a third party has acquired a deed to the demised premises, unless the breach was the result of fraud, accident, mistake, or surprise.

2 Platt, Leases, p. 475; Rolfe v. Harris, 2 Price, 206, note; White v. Warner, 2 Meriv. 459; Green v. Bridges, 4 Sim. 96; Reynolds v. Pitt, 19 Ves. Jr. 134; Gregory v. Wilson, 9 Hare, 683; Nokes v. Gibbon, 26 L. J. Ch. N. S. 433; Job v. Banister, 2 Kay & J. 374; Wafer v. Mocato, 9 Mod. 112; Wadman v. Calcraft, 10 Ves. Jr. 67; Hill v. Barclay, 18 Ves. Jr. 63; Lovat v. Ranelagh, 3 Ves. & B. 31; Bracebridge v. Buckley, 2 Price, 200; Macher v. Foundling Hospital, 1 Ves. & B. 188; Woodfall, Land. & T. 13th ed. p. 328; Sheets v. Selden, 7 Wall. 416–422, 19 L. ed. 166–168; Story, Eq. Jur. §§ 1314, 1323; 1 Pom. Eq. Jur. § 453; Smith v. Mariner, 68 Am. Dec. 73, note, 5 Wis. 551; Bacon v. Park, 19 Utah, 246, 57 Pac. 28; Maginnis v. Knickerbocker Ice Co. 69 L.R.A. 833, note, 112 Wis. 385, 88 N. W. 300; Gordon v. Richardson, 185 Mass. 492, 69 L.R.A. 867, 70 N. E. 1027; Baldwin v. Rees, 6 Ohio Dec. Reprint, 869; Clark v. Barnard, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878; Klein v. New York L. Ins. Co. 104 U. S. 88, 90, 26 L. ed. 662, 663; Thompson v. Knickerbocker L. Ins. Co. 104 U. S. 252, 257, 26 L. ed. 765, 767; Nederland L. Ins. Co. v. Meinert, 199 U. S. 171, 50 L. ed. 139, 26 Sup. Ct. Rep. 15; Skinner v. Dayton, 2 Johns. Ch. 526; Baxter v. Lansing, 7 Paige, 350; Dunklee v. Adams, 20 Vt. 415, 50 Am. Dec. 44; Ottawa Northern Pl. Road Co. v. Murray, 15 Ill. 336; Noonan v. Lee (Noonan v. Braley) 2 Black, 499, 509, 17 L. ed. 278, 281; Hukill v. Guffey, 37 W. Va. 425, 16 S. E. 544; People's Bank v. Mitchell, 73 N. Y. 406; Parsons v. Smilie, 97 Cal. 647, 32 Pac. 702; South Carolina & G. R. Co. v. Augusta Southern R. Co. 111 Ga. 420, 36 S. E. 593.

Such breach is not one that can be compensated to a landlord.

Hand v. Suravitz, 148 Pa. 202, 23 Atl. 1117; Trinity Church v. Higgins, 48 N. Y. 532; Noyes v. Anderson, 124 N. Y. 175, 21 Am. St. Rep. 657, 26 N. E. 316; Fry, Spec. Perf. of Contracts, § 41; Hill v. Barclay, Rolfe v. Harris, Green v. Bridges, Reynolds v. Pitt, and Bracebridge v. Buckley,—supra.

A tenant who agrees to pay taxes thereby makes these taxes a personal debt of his own as between himself and his landlord.

Trinity Church v. Higgins, supra; Hand v. Suravitz, 148 Pa. 207, 23 Atl. 1117; McFarlane v. Williams, 107 Ill. 42; Ricou v. Hart, 47 La. Ann. 1373, 17 So. 878; Allen v. Dent, 4 Lea, 680.

Do the acts of the landlord in herself paying these taxes (she collecting them from the tenant) down to a certain date, relieve the tenant from her covenant to pay taxes subsequently accruing?

Thompson v. Knickerbocker L. Ins. Co. 104 U. S. 252, 26 L. ed. 765; Oldewurtel v. Wiesenfeld, 97 Md. 165, 54 Atl. 969; Times Co. v. Siebrecht, 15 Phila. 235, 11 W. N. C. 283.

What diligence must a complainant show who applies to a court of equity for relief against a forfeiture declared by the landlord on account of such a breach?

1 Pom. Eq. Jur. pt. 2, chap. 1, section VIII., § 418; Smith v. Clay, 3 Bro. Ch. 639, note.

Where the tenant has not only allowed the demised premises to be sold for taxes, but has continued his breach until a tax deed for the demised premises has issued to an assignee of the purchaser, can the tenant litigate the question of the validity of that tax sale with the holder of the tax title at the risk of the landlord?

Bacon v. Park, supra.

Negligence or forgetfulness is not mistake.

Story, Eq. Jur. §§ 78, 146, 147; Pom. Eq. Jur. 3d ed. §§ 452, 823, 828, 856; Parsons v. Smilie, supra; South Penn Oil Co. v. Edgell, 48 W. Va. 348, 86 Am. St. Rep. 43, 37 S. E. 596; Beaufort v. Neeld, 12 Clark & F. 248; Barrow v. Isaacs [1891] 1 Q. B. 417; Eastern Teleg. Co. v. Dent [1899] 1 Q. B. 835; Grymes v. Sanders, 93 U. S. 55, 23 L. ed. 798; Seton v. Slade, 7 Ves. Jr. 269, 2 Kent, Com. 485; Attwood v. Small, 6 Clark & F. 338; Jennings v. Broughton, 17 Beav. 234; Campbell v. Ingilby, 1 DeG. & J. 405; Garrett v. Burleson, 25 Tex. Supp. 44; Warner v. Daniels, 1 Woodb. & M. 91, Fed. Cas. No. 17,181; Ferson v. Sanger, 1 Woodb. & M. 139, Fed. Cas. No. 4,752; Lamb v. Harris, 8 Ga. 546; Trigg v. Read, 5 Humph. 529, 42 Am. Dec. 447; Haywood v. Cope, 25 Beav. 143; Kinney v. Consolidated Virginia Min. Co. 4 Sawy. 382, Fed. Cas. No. 7,827; Hunt v. Hardwick, 68 Ga. 100; Churchill Twp. v. Cummings Twp. 51 Mich. 446, 16 N. W. 805; Persinger v. Chapman, 93 Va. 349, 25 S. E. 5.

Inasmuch as the charge against the defendants is that of actual fraud, recovery must be had upon that ground or not at all.

Price v. Berrington, 7 Eng. L. & Eq. 254; Eyre v. Potter, 15 How. 42, 56, 14 L. ed. 592, 598; Warner v. Godfrey, 186 U. S. 365, 46 L. ed. 1203, 22 Sup. Ct. Rep. 852.

The lessor's motive in declaring forfeiture is immaterial.

Fitzroy v. Cave, 21 Times L. R. 612; 18 Harvard Law Rev. 411; Brothers v. Morris, 49 Vt. 460; South Royalton Bank v. Suffolk Bank, 27 Vt. 505; Jacobson v. Van Boening, 48 Neb. 80, 32 L.R.A. 229, 58 Am. St. Rep. 684, 66 N. W. 993; Bragg v. Raymond, 11 Cush. 274; Morris v. Tuthill, 72 N. Y. 575; Bloxam v. Metropolitan R. Co. L. R. 3 Ch. 337.

In any case, can a defaulting tenant have relief from a forfeiture save on the condition of paying all costs and reasonable counsel fees to the landlord, incurred in resisting such relief?

Eichenlaub v. Neil, 3 Ohio Dec. 365.

To give relief in the case at bar is to do violence to the law.

Bracebridge v. Buckley, 2 Price, 200; Beaufort v. Neeld, Eastern Teleg. Co. v. Dent, and Barrow v. Isaacs,—supra.

Mr. J. J. Darlington argued the cause, and, with Mr. Leon Tobriner, filed a brief for appellee:

This court cannot be called upon to review or reverse the findings of fact of the lower courts, unless there is a clear showing of error.

Dravo v. Fabel, 132 U. S. 487, 33 L. ed. 421, 10 Sup. Ct. Rep. 170; Stuart v. Hayden, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274; Shappirio v. Goldberg, 192 U. S. 232, 240, 48 L. ed. 419, 424, 24 Sup. Ct. Rep. 259.

To sum up the authorities upon the question of the jurisdiction to relieve against forfeiture for breach of a covenant to pay taxes, those denying it are three in number only; namely, Bacon v. Park, 19 Utah, 246, 57 Pac. 28; Baldwin v. Rees, 6 Ohio Dec. Reprint, 869; Gordon v. Richardson, 185 Mass. 492, 69 L.R.A. 867, 70 N. E. 1027,—the first two being cases of wilful default, and it not appearing in the last of them whether the default was or was not the result of inadvertence, misadventure, or wilfulness. Of them, Baldwin v. Rees is expressly overruled in Eichenlaub v. Neil, 3 Ohio Dec. 365, while Gordon v. Richardson is based upon the fact only that, the tax sale in that case being valid, and the tax already paid, it was impossible for the lessee to perform, so that the very thing the lessee contracted to do can no longer be done, as in the case of rent and as in the case at bar.

On the other hand, sustaining the jurisdiction, besides Eichenlaub v. Neil, supra, and Gordon v. Richardson, where the tax may still be paid, are Garner v. Hannah, 6 Duer, 262; Giles v. Austin, 62 N. Y. 493; McClartey v. Gokey, 31 Iowa, 505; Noyes v. Anderson, 124 N. Y. 175, 21 Am. St. Rep. 657, 26 N. E. 316; Tibbetts v. Cate, 66 N. H. 550, 22 Atl. 559; Planters' Ins. Co. v. Diggs, 8 Baxt. 563; Muller v. Earle, 3 Jones & S. 461; Maginnis v. Knickerbocker Ice Co. 112 Wis. 385, 69 L.R.A. 833, 88 N. W. 300.

Analogous to these, and repudiating the doctrine that breach of collateral covenants to repair, insure, or the like, cannot be relieved against, are Mactier v. Osborn, 146 Mass. 399, 4 Am. St. Rep. 323, 15 N. E. 641, to insure; Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933, to repair; Hand v. Suravitz, 148 Pa. 207, 23 Atl. 1117, to pay water rents; Fernwood Masonic Hall Assn. v. Jones, 102 Pa. 307, to pay gas bills; Sanborn v. Woodman, 5 Cush. 41, to pay interest on a mortgage, etc.

Mr. Justice White delivered the opinion of the court:

These appeals are from a decree of the court of appeals of the District of Columbia, which adjudged that a tax sale of certain real estate in the District was void, and which relieved the lessee of the premises from a threatened forfeiture of the lease, asserted to have resulted from the failure of the tenant to pay the taxes to enforce which the tax sale was made. The complainant in the original bill was Caroline

King, the lessee of the premises, and the defendants were Marianne A. B. Kennedy (the lessor) and Louis Kann, Sigmund Kann, and Myer Cohen, whom it was alleged claimed to be either the equitable or legal owners of the tax title in question. The defendant Kennedy died the day the bill was filed, and Henry Randall Webb, as her executor, and Maria G. Dewey, as her heir at law, were substituted as defendants.

The lessor prosecuted an appeal from an order granting an injunction *pendente lite*, restraining him, among other things, from prosecuting landlord and tenant proceedings, based upon a right of re-entry arising from the alleged forfeiture caused by the nonpayment of taxes and tax sale referred to in the bill. The court of appeals, on the face of the bill, sustained the order of injunction. 21 D. C. App. 141. The cause, having been put at issue by separate answers asserting the right of the lessor to forfeit and the right of the holders of the tax title, was tried on the merits and was decided in favor of the complainant. It was taken to the court of appeals on behalf of all the defendants except Mrs. Dewey, and the decree of the lower court, adjudging the tax sale to be void and relieving from the alleged forfeiture, was affirmed. 25 D. C. App. 182.

The origin of the controversy and the facts, as to which there is no dispute, are as follows:

The property in controversy, No. 715 Market space, in the city of Washington, was owned by and assessed for taxation in the name of Maria T. Gillis at the time of her death, intestate, in 1871. Marianne A. B. Kennedy, as the heir at law of Mrs. Gillis, took possession of the property as owner, without any administration upon the estate of Mrs. Gillis. After the death of Mrs. Gillis, continuously up to the making of the tax sale hereafter referred to, the property remained on the public records and continued to be assessed in the name of Mrs. Gillis, except that a small portion of the rear end of the premises was, at a time not shown, but prior to the tax sale before referred to, assessed for taxation in the name of Mrs. Kennedy and her husband.

[49] *In 1890, Mrs. Kennedy leased in writing the premises to Henry King, Jr., the husband of complainant, for use as a fancy dry goods store, and by several extensions the period of expiration of this lease came to be October 1, 1908. By the lease the lessee, his executors and administrators or assigns, were bound, "during the continuance and until the end and determination of the said term for which the said premises are demised, to pay or cause to be paid in each and every year thereof the taxes, general and special, of every character and description, assessed against and levied upon the said premises by the authorities of the general or local government." The right to terminate the lease and to re-enter upon the breach of any of the conditions was stipulated. When the lease was made, King, the lessee, was engaged in the dry goods business in a store on Seventh street, not far from the Market space store. Under the lease he entered into possession of the Market space store and carried on, in addition, business there until his death on August 18, 1897. Sanctioned by an order of the probate court, an assignment of the lease covering the store on Market space was made to Caroline King, the widow. The business was thereafter conducted for a time solely in her name. She did not, however, actively supervise it. Her elder son, Harry King, who had been, during the latter years of his father's life, in general charge of the business for his father, remained in that capacity, after the death of the father, as the representative of his mother, assisted at the Market space store, in a subordinate capacity, by a brother, Joseph King, who, during the father's life, had also, in a subordinate capacity, been engaged in business at that place. From the making of the lease in 1890 to the death of King in 1897 it was the habit of Mrs. Kennedy, when the tax on the Market space store was about to become payable, to request the lessee to send her a check for the amount of the tax, and on the receipt thereof the tax was paid either by Mrs. Kennedy or her agent. This course was not, however, followed, after the death of King. The first instalment of taxes which fell due in November, 1897, soon after the *death of King, was directly discharged by [50] Mrs. King, who took and retained the receipt. This was done at the request of Mrs. Kennedy, who called at the Market space store about Christmas, 1897, and asked that the tax be paid. From that time no request was made by the lessor to the tenant, as the taxes fell due, to send her the money to enable her to pay them, nor is it shown that any express demands were made that the tenant pay the taxes directly. From the time of the payment, by the tenant, near the close of 1897, of the first instalment of taxes which fell due after the death of her husband, until the summer of 1900, a period of more than two and a-half years, no taxes whatever were paid upon the leased premises. In the interval the following taxes became overdue:

Second instalment of tax for 1898, due in May, 1898;

First instalment of tax for 1899, due in November, 1898;

Second instalment of tax for 1899, due in May, 1899;

First instalment of tax for 1900, due in November, 1899; and,

Second instalment of tax for 1900, due in May, 1900.

On July 24, 1900, the two instalments of the tax for 1900, due in November, 1899, and May, 1900, with accrued penalties, were paid by the tenant under the following circumstances: As testified by Harry King, he being concerned over past-due taxes owing on a large number of tracts of real estate owned by the estate of his father, it "occurred" to him to have the "bookkeeper go down to the tax office and inquire for the tax bills of 715 Market space." The bookkeeper went and subsequently reported that the two instalments for 1900 were due, and Harry King paid them. The nature of the inquiry made by the bookkeeper at the tax office, and what occurred, is the subject of controversy, and we pretermit its consideration. Nearly a year after, in May, 1901, the two instalments of taxes for 1899, due in November, 1898, and May, 1899, with interest and penalties, along with the taxes for 1901, were paid by the tenant. The payment of the 1899 taxes was by way of redemption of a sale of the property for [51] such taxes made on April 12, *1900. There is no doubt that the payment of the arrears for 1899 was a result of the visit by the bookkeeper to the tax office. It will be observed that the payments which were made in 1900 and 1901, of taxes which were in arrears, did not embrace the second instalment of the tax of 1898, due in May, 1898. To enforce that instalment a sale had been made in April, 1899, and a certificate was issued to the purchaser a few days thereafter, which was subject to a right of redemption during a period of two years. In other words, when the instalments of taxes which were in arrears were paid on July 24, 1900, the property had been sold for the last half of the tax of 1898, and when the payment was made in 1901 of the arrears for 1899 the period for redemption had elapsed.

On July 25, 1901, Mrs. King received a letter sent from Rochester, New York, by one Wiltsie, stating that he had bought the property in April, 1899, at a tax sale to enforce the tax for the second half of the year 1898, and that he was entitled to a deed of the property, but would surrender the tax certificate if immediate payment was made of the amount of his, Wiltsie's, advance, *viz.*, $143.93, together with the statutory interest at the rate of 15 per cent and a charge for releasing, to be agreed upon. Harry King, Jr., replied to this letter on July 30, 1901, and asked to be informed of the charge for redemption. Wiltsie answered on August 1, 1901, calculating the statutory interest at $50.38, and naming $100 as his fee or charge for releasing. To this letter reply was made that Harry King was out of town, and that on his return the letter of Wiltsie would be laid before him. On September 17, 1901, Wiltsie wrote King, and called attention to the fact that he had not heard from him, and requested to be informed by return mail when the matter would have attention. To this King replied, objecting to the charge of $100 for releasing, and stated that in his opinion $50 would be an equitable charge. The letter concluded as follows:

"Unfortunately we have paid you quite a considerable amount of money in the past for tax sales. We are not interested in this piece of property in any way except as tenant, as we are not the owners or the mortgagees. If it should meet with your approval send us a bill and we will send check."

It was replied on September 24, 1901, that if the matter was attended to promptly $75 would be accepted for the release certificate, and that the papers had been sent to the Central National Bank of Washington, where, on payment of $272.90, they would be delivered up.

Neither Mrs. King nor her representatives, after learning in July of the sale of the property and of the outstanding tax title, gave any notice of that fact to the lessor, nor did they apparently concern themselves further about the matter until the purchase of the certificate from Wiltsie, as hereafter stated, by Cohen, one of the defendants.

Both the Kann defendants carried on business on Market space, having stores on each side of the property leased to King, and the situation was therefore such that the possession of that property was particularly advantageous to the Kanns. Indeed, they had at some previous time stated to Webb, the attorney of the lessor, that if they could obtain a long lease of the premises they would be willing to pay a rent much in advance of that paid by Mrs. King. Some time in September, 1901, one Knight called upon the Kanns and informed them that the property at 715 Market space had been sold for taxes. They referred him to Webb, the attorney of the lessor. Knight called upon Webb, said to him that Wiltsie had bought the property at the tax sale

licited employment to set aside the Webb on the next day made inquiry, covered the fact of the sale and the ding certificate and the lapse of the of redemption. He informed the les- the fact and of her right to forfeit se. Mrs. Kennedy, who was ad- in age, being nearly eighty years s perturbed, and, in a letter to Webb, ed solicitude as to obtaining a new in case the lease of Mrs. King was d. As a result of the conferences e correspondence between Mrs. Ken- nd her counsel, the latter called on *another defendant, who was the at- of the Kanns, and desired to know r the Kanns were yet willing to lease ncreased rent, and was informed they Shortly after Cohen advised the to purchase the Wiltsie tax certifi- nd upon their giving him authority his discretion in the matter he de- d to go at once to Rochester to ac- h that purpose. He communicated ntions to Webb, who endeavored to e him. Cohen went to Rochester. pers which had been sent to Wash- in consequence of the correspondence Wiltsie and King were returned ester. Cohen bought the certificate, assignment of the same in Octo- 01, and, returning to Washington, d a tax deed for the property from nmissioners of the District, which ly recorded. Thereafter Mrs. Ken- otified Mrs. King of her intention to because of the forfeiture of the sulting from the sale of the property nonpayment of taxes. Harry King lled at the bank to take up the cer- and found that it had been returned tsie. Negotiations ensued between ing and Mrs. Kennedy, looking to a mise of the matter, and a letter was by the counsel of Mrs. King to Mrs. y, asking to be permitted to use her proceedings to be brought to can- tax sale. This was declined. At s Mrs. King insisted upon her right inue in possession under the lease the default. The Kanns notified nnedy that they were the real hold- the tax title, and would attempt to their rights under it unless a lease property was made to them at the sly suggested increased rental. The of Mrs. Kennedy, Webb, advised such a lease. Placed between the ted assertion by the Kanns of the e, unless they obtained a lease, and stance of Mrs. King that she was en- retain the property under her lease, nnedy wavered. The result was a letter addressed by Webb, the counsel for Mrs. Kennedy, to the counsel for Mrs. King, submitting a proposition of compromise, which was in substance *that Mrs. Kennedy [54] would waive the forfeiture upon condition that Mrs. King promptly commenced and prosecuted proceedings to have the tax deed to Cohen declared a nullity or defend against any claim under the tax title, and upon the further condition that Mrs. King furnish a bond with sufficient surety to pay the sum of $70,000 in the event that the tax title was held to be valid. Counsel for Mrs. King in writing declined this offer. The letter doing this made no counter proposition, but referred to and did not expressly withdraw the previous offer of Mrs. King, if she were allowed the use of Mrs. Kennedy's name, to conduct proceedings to vacate the tax title. In addition the letter, which was quite lengthy, expressly stated the opinion of the counsel of Mrs. King to be that the tax title was void and could be set aside. It insisted that Mrs. King would be relieved by a court of equity from the forfeiture alleged to have resulted from her inadvertent omission to pay the tax, and besides stated various grounds which, it was deemed, placed Mrs. Kennedy in a position where she could not, as against Mrs. King, ask to be protected against the risk, if any, of the outstanding tax title held by the Kanns. These grounds were, in substance, that the tax certificate had been bought by the Kanns at the instance of the counsel of Mrs. Kennedy, for the purpose of making sure of a forfeiture of Mrs. King's rights, and with the knowledge that negotiations were pending between Mrs. King and Wiltsie, and for the purpose of forestalling the acquisition by Mrs. King of the tax certificate.

The negotiations having failed, Mrs. Kennedy commenced landlord and tenant proceedings to recover possession. Before the time set for the trial of the proceedings Mrs. King commenced this suit, which, as we at the outset stated, sought to have the tax title declared void, to have complainant relieved from the forfeiture, and for an injunction restraining the prosecution of a landlord and tenant proceeding.

That a court of equity, even in the absence of special circumstances of fraud, accident, or mistake, may relieve against a *forfeiture incurred by the breach of a cove- [55] nant to pay rent, on the payment or tender of all arrears of rent and interest by a defaulting lessee, is elementary. Sheets v. Selden, 7 Wall. 416, 19 L. ed. 166. But that principle cannot control this case, even if it be conceded, for the sake of argument, that it applies to collateral covenants in leases,

such as the obligation to repair, to insure, and even to pay taxes, said in the Sheets case to be settled in England adversely to such right, but to be an open question in this country, and as to which there may be differences of opinion in state courts of last resort. Noyes v. Anderson, 124 N. Y. 175, 21 Am. St. Rep. 657, 26 N. E. 316; Giles v. Austin, 62 N. Y. 491; Gordon v. Richardson, 185 Mass. 492, 69 L. R. A. 867, 70 N. E. 1027; Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933; Mactier v. Osborn, 146 Mass. 399, 4 Am. St. Rep. 323, 15 N. E. 641; Tibbetts v. Cate, 66 N. H. 550, 22 Atl. 559; Bacon v. Park, 19 Utah, 246, 57 Pac. 28. We say this, because the general principle, as declared in the Sheets Case, rests upon the ground that "the rent is the object of the parties and the forfeiture only an incident intended to secure its payment; that the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete." When the foundation upon which the doctrine is based is borne in mind it becomes apparent that it affords no ground for the contention that it is applicable to a case where the failure to perform a covenant to pay taxes has led to a tax sale, ripening into a prima facie irredeemable title held adversely to the lessor. In other words, the doctrine lends no support to the proposition that a court of equity can require an owner to risk the loss of his property by compelling him to engage in a contest involving the validity of an irredeemable tax sale, for the purpose of endowing the tenant with the right, if the tax title be held invalid, to pay the taxes and thus be relieved of a forfeiture. To extend the principle to such a degree would be destructive of rights of property, since it would subject everyone who made a lease of his property, containing a covenant by the lessee to pay taxes, to the hazard of the loss of his title, if only the tenant chose to violate the covenant, and thus give rise to the coming [366] into existence of a tax title prima *facie valid and irredeemable in character. And the force of these considerations is not avoided by the reasoning which led the court below to its conclusion, or by the arguments at bar advanced to support that conclusion.

Thus, the court, in its opinion, considering the paramount issue to be the validity of the tax sale, first disposed of that question, and, concluding that the sale was void, proceeded to determine its power to grant relief from the forfeiture, upon the hypothesis that there never had been a tax sale, that the taxes were still due, and could be paid, and that the tenant was willing to pay them. But thus to contemplate the controversy was to assume the very question for decision; that is, the power of a court of equity, in order to relieve from a forfeiture, to endow a tenant with the right to create, at the risk of the owner, a primary controversy, *viz.*, to compel the owner against his will to jeopardize his title by testing the validity of the irredeemable tax sale,—a hazard which the owner was desirous of avoiding. The paramount issue was not, as assumed, the invalidity of the tax sale as a mere abstract question, but, we repeat, was the right of the tenant to invoke at the hands of the court a determination of that question at the risk of the owner. And this view is not changed by saying that the decision at the instance of the tenant as to the validity of an irredeemable tax title, held by a third person, was an incident to the right of the tenant to be relieved from the forfeiture, for to so say is but to destroy the foundation upon which the right to relief from the forfeiture rested; that is, the ability of the tenant, when applying for relief, to make complete compensation. And the misconception of the general doctrine just pointed out pervades the argument at bar of the appellee. Thus, while no authority is referred to sustaining the right of a tenant to test the validity of an outstanding prima facie irredeemable tax deed, caused to exist by the default of the tenant, the ultimate result of the contentions is to assume that principle as established and to predicate rights upon that hypothesis. In other words, in substance, by a *petitio principii*, the propositions *urged treat the outstanding tax title [367] as void and proceeded to demonstrate the right to relief under that assumption.

There being, then, no foundation for the contention that it was within the ordinary power of a court of equity to relieve from the forfeiture, we come to consider whether the case as made by the record is brought within the general authority of a court of equity to relieve in cases of fraud, accident, or mistake. We put out of view, for ulterior consideration, the question of fraud, and therefore presently examine only the contentions as to the existence of the elements of accident or mistake. In considering this subject two propositions are obvious: First, where the forfeiture from which relief is sought has been occasioned by the gross negligence of the person claiming to be relieved the default so occasioned is not one brought about by accident or mistake; and, second, that even where accident or mistake has been shown, especially in the absence of culpability or fraud on the part of the other party, a court of equity will not grant re-

lief from the forfeiture, unless it can be done with justice to that party.

Referring to its opinion on the appeal from the order granting an injunction *pendente lite*, and in effect reiterating the view therein expressed, that the averments of the bill justified the relief prayed, the court, in its opinion on the final hearing, said:

"But the testimony makes it more plain than even the allegations of the bill of complaint did, that she is entitled to the relief which she asks. The testimony shows quite conclusively that, while the lease required the annual taxes on the property to be paid by the lessee, yet the invariable custom of the lessor down to the time of the default had been to demand and receive the amount of the taxes from the lessee, and to pay the taxes herself by her own agents. For the taxes of the second half of the year 1898, in connection with which the default occurred, the lessor failed for some reason to make the usual demand for the money wherewith to pay the taxes; and the lessee was in the midst of financial trouble and distress caused by the recent death of her husband, who had been the lessee down to the *time of his death. The record shows to us quite plainly that the default of the lessee was excusable under the circumstances; and that no harm would be done to anyone by her relief from the nominal forfeiture which she has incurred."

By this reasoning it was assumed the case was brought within the grounds of relief for accident or mistake upon two inferences, both treated as alleged in the bill and established by the testimony; first, the prior practice of the lessor in calling upon the tenant to hand her the money to pay the taxes and then herself paying them; and second, the failure of the lessee, after this practice was discontinued, to call to mind that the tax was due and payable, owing to her disturbed state of mind at that particular time. In the argument at bar reliance is principally rested upon the first of these grounds, and indeed it is insisted that the testimony goes much further than implied by the court below, and demonstrates that the conduct of the lessor was such as to mislead the lessee, and thereby estop the former from asserting the forfeiture.

Let us consider separately the two grounds: First, accident or mistake as engendered by the course of dealing of the lessor, and, second, accident or mistake arising from oversight, the alleged result of the particular circumstances surrounding the tenant at the time of the failure to pay the taxes. As to the first ground it would seem to be an afterthought, since it was not suggested in the correspondence between the parties immediately preceding the litigation that Mrs. Kennedy by her conduct had in anywise led to the default of the tenant. To the contrary, that view was excluded, for in the letter written to Mrs. Kennedy, dated October 8, 1901, asking authority to use her name in proceedings to be brought by the tenant to cancel the tax sale, the attorneys of Mrs. King said:

"We assume that you are aware that your tenant has always paid the taxes upon the demised premises, and the failure to pay the one made the basis of the notice was an oversight, caused by the death of Mr. Henry King, Jr., which was being remedied at the time your notice was received."

*And although it would seem that the [59] court below assumed to the contrary, the fact is the bill contained no averment justifying the default in paying, upon the theory that it had been induced by the conduct of the lessor. To the reverse it was specifically stated in the fifth paragraph of the bill that the alleged single default in the payment of taxes arose "wholly through oversight and inadvertence," without in anywise charging that the conduct of Mrs. Kennedy was in whole or in part the cause of the oversight or inadvertence. Besides, in the eleventh paragraph of the bill, explicit reference was made to the letter to which we have just above referred, and it was alleged that by its terms Mrs. Kennedy was notified "that the failure to pay the taxes was simply an oversight, which was being remedied at the time the notice of refusal to accept the rent was received." True it is that the testimony shows that prior to the death of Henry King, Jr., in August, 1897, the lessor was in the habit of calling upon the tenant for the amount required to pay the tax then due or about to become due, in order that she might herself pay them. True also is it that Harry King, in testifying, made statements from which the inference can be deduced that in conducting the business for his mother, after the assignment of the lease subsequent to the death of his father, he relied upon a continuance of this practice. But it must be borne in mind these statements were made after the death of Mrs. Kennedy, who died on the day the bill was filed, and their inaccuracy is, we think, conclusively shown by the mode of dealing following the assignment of the lease and the conduct of the tenant in respect to the matter of taxes. The very first payment of taxes made after the death of Henry King was made by the tenant herself, paying the

taxes at the request of Mrs. Kennedy, and retaining the receipt. Nearly three years of default followed, without any payment of taxes by the tenant whatever and without any inquiry being made by the tenant on the subject. When in July, 1900, the two defaulting instalments of the tax for 1900 were paid by the tenant they were not paid at the instance of Mrs. Kennedy, or be-
[60] cause *of any request upon her part, but because it "occurred" to the tenant to do so. When they were paid the payment embraced interest and penalties, for which the tenant could not have deemed herself responsible if the course of dealing asserted had been relied upon. Despite this fact, no proof whatever was made of any notice to Mrs. Kennedy of the fact or of any claim being made against her in the premises. And the same thing is true as to the payments made in May, 1901, of the current taxes and some of the overdue instalments. Besides, when these payments were made the property had been sold for the overdue instalments, but was yet subject to redemption, and the statutory interest of 15 per cent was paid by the tenant without any intimation of a claim of any character against the lessor. Indeed, the conduct of the tenant in respect to the very tax for which a forfeiture was asserted is absolutely inconsistent with the theory that she deemed that her landlord was the cause of the default, for, when notice was received by the tenant from the purchaser at the tax sale of the outstanding irredeemable tax certificate, more than two months and a half elapsed before the purchase of the certificate by Cohen, and no complaint was made to the landlord that she had neglected to demand payment of the tax, and that in consequence the default and loss was occasioned, but a negotiation was opened to purchase the outstanding title for the account of the tenant alone. When this line of conduct is considered in connection with the fact, already stated, the conclusion is inevitable that the suggestion that the conduct of the landlord had induced the failure to pay, first made after the death of Mrs. Kennedy, is without foundation.

And the facts which we have just stated also render it impossible to conclude that the nonpayment of the tax was due to a mere temporary oversight, and not to gross negligence. How can an inference of temporary oversight be possible when the long period of the failure by the tenant to pay any tax whatever is borne in mind, and when we also consider the delay of more than two months and a half which took
[61] place after *knowledge was conveyed, by the letter of Wiltsie, of the outstanding irredeemable tax certificate?

The fact that the tenant was a merchant, and of necessity kept mercantile books, is significant. The mind cannot conceive of adequate entries being made of the taxes which were belatedly paid, which would not have at once suggested those which were unpaid. The inference fairly deducible from the letter to Wiltsie—"Unfortunately we have paid you quite a considerable amount of money in the past for tax sales"—adds cogency to the irresistible inferences as to negligence.

And even if the foregoing considerations which establish the absence of accident or mistake and demonstrate the presence of gross negligence are put out of mind, and accident or mistake be assumed, for the sake of the argument, nevertheless, under the circumstances of the case, a court of equity could not give relief. This follows since the relief sought could not be afforded without subjecting the lessor to the peril of contesting the validity of the outstanding prima facie irredeemable tax title.

We come to the question which we hitherto put aside for final consideration; viz, the alleged fraud. It, in any event, only involves a consideration of what took place with regard to the purchase of the tax certificate by Cohen as the agent of the Kanns, and the circumstances surrounding and connected with that purchase, and the use made of the certificate. Concerning these matters the court below said:

"We find no evidence whatever in the record of any fraud or wrongdoing perpetrated by anyone concerned. We only find the evidence of a situation created by a keen commercial rivalry and shrewd management, wholly untainted by wrongdoing, but still a situation from which injury is threatened to the complainant's rights of property, and against which she is entitled to be relieved. For that there was an arrangement between the defendants whereby the tax certificate was to be used to oust the complainant from the property, we think is too plain to be reasonably questioned. There was, undoubtedly, a concurrence of effort for that purpose; perhaps no formal combination *or preconcerted action. But it matters not what we call it. The undoubted fact is there was co-operation between the defendants to use the tax certificate to the detriment of the complainant's rights; and there being such co-operation, the defense of multifariousness cannot prevail. The one purpose of the bill is to relieve the complainant from the effect of this tax certificate and of the tax title based upon it."

For the reason that we agree with the finding that there is no evidence whatever of any fraud or wrongdoing by anyone concerned, we are constrained to disagree with the conclusion that the complainant was entitled to relief. We say this, because we are of opinion that the relief awarded could only have been justified upon the finding that there was fraud and wrongdoing. We so conclude, because if it be accepted that there was an agreement and combination as to the certificate, entirely free from every element of fraud or wrongdoing, we fail to perceive how an agreement of that character afforded ground for granting the relief which was given. But, disregarding mere forms of expression, and assuming that the general finding that there was no fraud or wrongdoing was intended to be limited to intentional as distinguished from constructive fraud or wrongdoing, let us briefly review the facts concerning the acquisition and use made of the certificate, in order to fix whether such a finding is at all sustained by the record. Although we think it immaterial, as there was no evidence whatever tending to show that the lessor or her attorney procured the purchase of the certificate by Cohen, that subject may be put out of view. The irredeemable tax certificate was in the hands of and belonged to Wiltsie. He notified the tenant that he held it more than two months and a half before the purchase by Cohen, and proffered his willingness to assign it to the tenant. As shown by the undisputed facts which we have stated, with indifference both to her own interest and the interest of the landlord, the tenant neither acted for herself by accepting the offer, nor gave any notification whatever to the landlord on the subject. Cohen, as the agent of the Kanns, learned of the existence of the *irredeemable tax sale and of the person who held the certificate. He purchased it by the authority of and for the benefit of his principals, the Kanns. By the express terms of the statute under which the certificate was issued it was assignable. Granting that the purchase was made in order to aid the Kanns in obtaining a lease of the property, in the absence of any legal duty owing by them to the tenant, we fail to perceive how the motive of Cohen or his principals could operate to make the otherwise lawful action constructively wrongful. The tenant, by whose negligent default the sale of the property had been occasioned, certainly had no exclusive pre-emptive right to the purchase of the certificate, which would operate to render its purchase by anyone else in his own interest void. After the purchase of the certificate by Cohen, what was the position of the landlord? On the one hand confronted by the assertion of the tenant that the outstanding tax title was void, that she had a right to be relieved from the forfeiture caused by the nonpayment of the tax, and was entitled to continue in possession under the lease, and, on the other, with an offer on the part of the holder of the tax title to quitclaim the same, and thus avoid testing its validity, if only a lease was made which would be advantageous. When it is again borne in mind that this situation was brought about by the neglect of the tenant to perform his covenant to pay the taxes, and by his procrastination in respect to acquiring the tax certificate which had been previously offered to him, we can conceive of no principle of equity preventing the landlord from taking a course not forbidden by law, which was not only most conducive to her own interest, but which besides obviated the danger of submitting her title to a contest concerning the validity of a tax sale. But, if an equitable principle could be conceived of which prevented the landlord from so acting under the circumstances stated, that principle would be inapplicable to the case before us, when one of the undisputed facts to which we have already called attention is considered. That fact is this: Before the landlord irrevocably determined to avail of the forfeiture and thus avoid *the risk to [64] herself concerning the outstanding tax title, she offered to condone the forfeiture, provided the tenant commenced proceedings to have the outstanding tax title declared invalid, and also secured the landlord from loss in the event that such tax title should be sustained, which offer was declined, on grounds substantially asserting that the risk resulting from the default of the tenant should be borne by the owner, and not by the tenant.

The decree of the court below is reversed and the cause remanded with instructions to dismiss the bill for want of equity.

Reversed.

The CHIEF JUSTICE and Mr. Justice Harlan dissent.

TOMAS GARROZI, Juana Maria Gonzalez, and Domingo Piazzi, Appts.,
v.
JUANA DASTAS.

(See S. C. Reporter's ed. 64–85.)

NOTE.—Appellate jurisdiction of Federal Supreme Court over Porto Rican courts.

Writs of error from and appeals to the

Appeal—from district court for Porto Rico.

1. An appeal lies to the Supreme Court of the United States from a decree of the district court for the district of Porto Rico in a suit brought by a wife to obtain liquidation of the community, in which the matter in dispute exceeds the sum of $5,000.

Removal of causes—from Porto Rican court—objection by party causing removal.

2. The party who has wrongfully procured a removal from the local Porto Rican court to the Federal district court of a case within the original jurisdiction conferred upon the latter court by the act of March 2, 1901 (31 Stat. at L. 953, chap. 812), § 3, cannot be heard, after judgment against him, to assert that the Federal court had no jurisdiction, because of the irregularity of the removal, although, by the act of April 12, 1900 (31 Stat. at. L. 84, chap. 191), § 34, it is provided that the laws of the United States relating to the removal of causes shall govern as between the district court of the United States for Porto Rico and the courts of Porto Rico.

Husband and wife,—community property—rights of divorced wife.

3. A rule of limited forfeiture in lieu of the rigorous rule of the Spanish law that the wife against whom a divorce for adultery was decreed forfeited all right to her share in the community property was adopted for Porto Rico by the provisions of Civil Code 1889, art. 73, ¶ 3, Civil Code 1902, tit. 5, chap. 5, § 174, to the effect that the guilty spouse shall forfeit all gifts from the innocent party, who shall retain everything which has been acquired from the other.

Husband and wife—community property—rights of divorced wife.

4. The rule of the Spanish law that the wife against whom a judgment of divorce for adultery has been decreed forfeits all right to her share in the community property does not obtain in Porto Rico because of the provision of Civil Code 1889, art. 1417, Civil Code 1902, § 1330, that the spouse who, by bad faith, has been the cause of the nullity of the marriage, shall not have a share in the common property, since this provision relates, not to the dissolution of a marriage by a decree of divorce, but to the recognition of the nullity of a seeming marriage for causes which have operated to prevent it from ever having existed.

Husband and wife—community property—liquidation—accounting for reckless expenditures.

5. The power of the husband as the head and master and administrator of the community property, under Porto Rico Civil

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Federal Supreme Court to review final decisions of the supreme court of Porto Rico and the district court of the United States for the district of Porto Rico are, by the express provisions of the act of April 12, 1900, § 35, authorized in the same cases as will sustain the exercise of this appellate jurisdiction to review decisions of the territorial supreme courts, and in all cases where the Constitution of the United States or a treaty thereof or an act of Congress is brought in question and the right claimed thereunder is denied. J. Ribas y Hijo v. United States, 194 U. S. 315, 48 L. ed. 994, 24 Sup. Ct. Rep. 727.

The review in the Federal Supreme Court of final judgments of the district court of the United States for the district of Porto Rico is not necessarily confined by this section to the class of cases therein described as those "where the Constitution of the United States or a treaty thereof or an act of Congress is brought in question and the right claimed thereunder is denied," in view of the prior clause of that section, authorizing such review if the case be one which, if determined in a territorial supreme court, may be carried up to the Federal Supreme Court. Amado v. United States, 195 U. S. 172, 49 L. ed. 145, 25 Sup. Ct. Rep. 13.

A direct review in the Supreme Court of the United States of a judgment of the district court for the district of Porto Rico in an action on a policy of insurance issued by a foreign corporation in which the matter in dispute exceeds the sum of $5,000 may be had on writ of error to the latter court under this statute, since the judgment, if rendered by a territorial supreme court, would not have been reviewable in the circuit court of appeals under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 554), § 15, on the theory that the case was one of the class in which the judgments of the latter court are made final by § 6 of that act. Royal Ins. Co. v. Martin, 192 U. S. 149, 48 L. ed. 385, 24 Sup. Ct. Rep. 247.

The question is not affected by any statutory provisions relating to the re-examination in certain designated circuit courts of appeals of judgments of the highest courts of the Indian territory, Hawaii, and Alaska. Ibid.

A case in which "an act of Congress is brought in question, and the right claimed thereunder is denied," within the meaning of the statute under discussion, is presented by an unsuccessful contention by an accused that, pursuant to the act of April 12, 1900, the trial court, in the matter of the qualifications of grand jurors, should have been controlled by the provisions of the local law relating to jurors, in connection with statutes of the United States relating to the organization of grand juries, and the trial and disposition of criminal causes. Crowley v. United States, 194 U. S. 461, 48 L. ed. 1075, 24 Sup. Ct. Rep. 731.

The overruling of a motion in arrest of judgment, in which the accused asserted that the grand jurors were not selected or drawn as required by the Federal statutes, also presents such a case. Rodriquez v. United States, 198 U. S. 156, 49 L. ed. 994, 25 Sup. Ct. Rep. 617.

This provision also covers a judgment of

Code 1889, arts. 1412, 1413, Civil Code 1902, §§ 1327, 1328, is such that, in the absence of express limitation, he cannot, after the dissolution of the community, be required to account for money which he may have recklessly and extravagantly expended during the existence of the community.

Husband and wife—community property—right of divorced wife to liquidation.

6. A divorced wife is entitled to obtain the liquidation of the community and the payment to her of her share, under Porto Rico Civil Code, 1902, § 173, providing that a divorce carries with it a complete dissolution of all the matrimonial ties, and the division of all property and effects between the parties to the marriage.

Judgment — community property — liquidation—money judgment.

7. The objection that the district court of the United States for the district of Porto Rico should not have given a money decree in a suit by the wife to obtain the liquidation of the community is not a valid one, where the rights of the wife arise simply from an increased value of property or assets brought by the husband to the marriage, or as a result of the falling into the community of the revenues of the property of the husband.

Husband and wife—community property—liquidation—allowance of alimony and expenses of divorce.

8. The amount of alimony *pendente lite* and the expenses incurred by the wife in a divorce suit in a Porto Rico court, which were sanctioned by that court, are properly allowed to the divorced wife in her suit to obtain a liquidation of the community and a decree for the payment of her share.

Husband and wife—community property—liquidation—allowance of counsel fees.

9. Counsel fees cannot be allowed by the district court of the United States for the district of Porto Rico to a wife in her suit to obtain a liquidation of the community and a decree for the payment of her share.

[No. 72.]

Argued October 31 and November 1, 1906.
Decided January 7, 1907.

APPEAL from the District Court of the United States for the District of Porto Rico to review a decree in favor of the wife in a suit by her for the liquidation of the community and the payment to her of her share. Reversed and remanded with directions to disallow an award of counsel fees and a credit to the community property of

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the supreme court of Porto Rico requiring an indebtedness to be liquidated in United States currency at the rate of 100 cents for each peso of indebtedness, on the ground that the act of April 12, 1900 (31 Stat. at L. 77, 80, chap. 191), § 11, under which the debtor claimed the right to pay in such currency at the rate of 60 cents for each peso of indebtedness, had no application to the case. Serralles v. Esbri, 200 U. S. 103, 50 L. ed. 391, 26 Sup. Ct. Rep. 176.

But the ruling of the district court of the United States for the district of Porto Rico that the recovery for the breach of a promise to marry was not limited to the expense incurred in reliance on the promised marriage, as provided by Porto Rico Civ. Code, art. 44, is not the equivalent, for the purpose of sustaining a writ of error from the Supreme Court of the United States, of a denial of a right claimed under a law of the United States, on the theory that this article became a law of the United States by reason of the act of April 12, 1900 (31 Stat. at L. 77, chap. 191) § 8, continuing local laws in force. Ortega v. Lara, 202 U. S. 339, 50 L. ed. 1055, 26 Sup. Ct. Rep. 707.

The claim in a written motion in arrest of judgment or sentence that the indictment did not set forth "an offense under the statutes of the United States" is too indefinite to give the Federal Supreme Court jurisdiction of a writ of error to the district court of the United States for the district of Porto Rico, under the act of April 12, 1900 (31 Stat. at L. 77, 85, chap. 191), § 35, as of a case where the Constitution of the United States or a treaty thereof or an act of Congress was brought in question and the right claimed thereunder denied. Amado v. United States, 195 U. S. 172, 49 L. ed. 145, 25 Sup. Ct. Rep. 13.

The rule which governs the appellate jurisdiction of the Federal Supreme Court over state courts, *viz.*, that the Federal question must be real, and not fictitious or without color of merit (See note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513), is applicable here. Applying this rule, the court, in American R. Co. v. Castro, 204 U. S. 453, post, 564, 27 Sup. Ct. Rep. 466, in view of the substantially uniform requirement of U. S. Rev. Stat. §§ 664–669, U. S. Comp. Stat. 1901, pp. 543–545, that special terms of the circuit courts are to be held at the same places as the regular sessions, held that a writ of error to the district court of the United States for the district of Porto Rico was not supported by the unsuccessful contention that because such court is required, by the act of April 12, 1900 (31 Stat. at L. 77, chap. 191), § 34, to proceed in the same manner as a Federal circuit court, a term of that court held at Mayaguez, under the authority of the further provision of that section that regular terms of such court shall be held at stated times in San Juan and Ponce, and special terms at Mayaguez at such other times as the judge may deem expedient, is a "special," as contradistinguished from a "regular," term, within the meaning of U. S. Rev. Stat. § 670, U. S. Comp. Stat. 1901, p. 545, forbidding jury trials at special terms of the circuit courts except in certain specified districts.

the amount of reckless and extravagant expenditures by the husband.

The facts are stated in the opinion.

Mr. Charles M. Boerman argued the cause and filed a brief for appellants:

This court has jurisdiction of this case on appeal.

Royal Ins. Co. v. Martin, 192 U. S. 150, 48 L. ed. 385, 24 Sup. Ct. Rep. 247.

It has been repeatedly held that the Supreme Court will reverse the judgment of the lower court in case that court had no jurisdiction in a case removed to it from a state court, although it was the party appellant that had petitioned for the removal. It has been held that it is the duty of the Supreme Court, even of its own motion, to note critically the record upon which a case comes before it, in order to test the jurisdiction of the court below.

Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; Capron v. Van Noorden, 2 Cranch, 126, 2 L. ed. 229; Brown v. Keene, 8 Pet. 112, 8 L. ed. 885; Jackson v. Ashton, 8 Pet. 148, 8 L. ed. 898; Scott v. Sandford, 19 How. 393-400, 15 L. ed. 691-698; Börs v. Preston, 111 U. S. 252, 28 L. ed. 419, 4 Sup. Ct. Rep. 407; Piquignot v. Pennsylvania R. Co. 16 How. 104, 14 L. ed. 863; Cutler v. Rae, 7 How. 729, 12 L. ed. 890; Continental L. Ins. Co. v. Rhoads, 119 U. S. 237, 30 L. ed. 380, 7 Sup. Ct. Rep. 193; Torrence v. Shedd, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 726; Hanrick v. Hanrick, 153 U. S. 192-198, 38 L. ed. 685-687, 14 Sup. Ct. Rep. 835; Neel v. Pennsylvania Co. 157 U. S. 153, 39 L. ed. 654, 15 Sup. Ct. Rep. 589.

To entitle a party to removal the jurisdiction of the United States court must appear affirmatively and unequivocally.

Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 38 L. ed. 462, 4 Sup. Ct. Rep. 510; Gibson v. Bruce, 108 U. S. 561, 27 L. ed. 825, 2 Sup. Ct. Rep. 873; Grace v. American Cent. Ins. Co. 109 U. S. 278-283, 27 L. ed. 932-934, 3 Sup. Ct. Rep. 207; Robertson v. Cease, 97 U. S. 646, 24 L. ed. 1057; New Orleans v. Winter, 1 Wheat. 91, 4 L. ed. 44; Williams v. Nottawa, 104 U. S. 209, 26 L. ed. 719.

A defect to show positively the requisite diverse citizenship of each party at the time of the commencement of the suit cannot be cured by amendment of the bill.

Stevens v. Nichols, 130 U. S. 230, 32 L. ed. 914, 9 Sup. Ct. Rep. 518; Crehore v. Ohio & M. R. Co. 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; Jackson v. Allen, 132 U. S. 27, 33 L. ed. 249, 10 Sup. Ct. Rep. 9; Graves v. Corbin, 132 U. S. 571, 33 L. ed. 462, 10 Sup. Ct. Rep. 196.

All the defendants must be nonresidents.

Martin v. Snyder, 148 U. S. 663, 37 L. ed. 602, 13 Sup. Ct. Rep. 706; Parkinson v. Barr, 105 Fed. 83; Cudahy v. McGeoch, 37 Fed. 1; Walker v. O'Neill, 38 Fed. 374; Scott v. Texas Land & Cattle Co. 41 Fed. 225; Purcell v. British Land & Mortg. Co. 42 Fed. 465; Tracy v. Morel, 88 Fed. 801.

If the removal right is urged on the ground of a separable controversy, then the case at bar is not removable, because that clause in the third subdivision speaks only of cases pending between citizens of different states. And it was uniformly held that only citizens of any of the states can take advantage of that clause. Even a state cannot take advantage of it, and aliens surely not.

Arkansas v. Kansas & T. Coal Co. 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47; Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 151 U. S. 368, 38 L. ed. 195, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; Postal Teleg. Cable Co. v. United States (Postal Teleg. Cable Co. v. Alabama) 155 U. S. 482, 39 L. ed. 231, 15 Sup. Ct. Rep. 192; King v. Cornell, 106 U. S. 395, 27 L. ed. 60, 1 Sup. Ct. Rep. 312.

In removals on the ground of a separable controversy all the parties on one side must differ in citizenship from all the parties on the other side.

Removal Cases, 100 U. S. 457, 25 L. ed. 593; Blake v. McKim, 103 U. S. 336, 26 L. ed. 563.

Besides, it appears from the examination of the allegations of the complaint as well as of the whole record, that there was no separable controversy, as conspiracy between all the defendants to defraud the complainant was charged, and the annulment of deeds between the three defendants was prayed for, and no judgment separately could be given in the case which would not affect all the defendants alike. It was held that, in conspiracy cases, defendant cannot remove on separate counts.

Little v. Giles, 118 U. S. 596, 30 L. ed. 268, 7 Sup. Ct. Rep. 32; Louisville & N. R. Co. v. Ide, 114 U. S. 52, 29 L. ed. 63, 5 Sup. Ct. Rep. 735; Farmington v. Pillsbury, 114 U. S. 138, 29 L. ed. 114, 5 Sup. Ct. Rep. 807; Pirie v. Tvedt, 115 U. S. 41, 29 L. ed. 331, 5 Sup. Ct. Rep. 1034, 1161; Crump v. Thurber, 115 U. S. 56, 29 L. ed. 328, 5 Sup. Ct. Rep. 1154; Starin v. New York, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 26; Sloane v. Anderson, 117 U. S. 278, 29 L. ed. 900, 6 Sup. Ct. Rep. 730; Fidelity Ins. Trust & S. D. Co. v. Huntington, 117 U. S. 280, 29 L. ed. 898, 6 Sup. Ct. Rep. 733; Core v. Vinal, 117 U. S. 347, 29 L. ed. 912, 6 Sup. Ct. Rep. 769; Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co. 118 U. S. 264, 30 L. ed. 232, 6 Sup. Ct. Rep. 1034; Hyde

v. Roble, 104 U. S. 407, 26 L. ed. 823; Ayres v. Wiswall, 112 U. S. 187–192, 28 L. ed. 693–95, 5 Sup. Ct. Rep. 90.

Under the civil law a woman divorced for er adultery has no right of action for any hare in the marriage community assets.

Ballinger, Community Property, § 5, p. ; Schmidt, Civil Law, art. 68, L. 5 & 11, t. , I. 5 Rec. I. 5 & 11, t. 4, I. 10, Nov. Rec.

In the liquidation of the marriage co-artnership assets the legitimate expenses ade by the husband during the duration f the marriage, no matter how large they ere, cannot be charged against his share.

Spreckels v. Spreckels, 116 Cal. 339, 36 L. .A. 497, 58 Am. St. Rep. 170, 48 Pac. 228; an Maren v. Johnson, 15 Cal. 308; Guice . Lawrence, 2 La. Ann. 226; Packard v. rellanes, 17 Cal. 525; Ballinger, Commu-ity Property, § 79; 22 Mucius Scaevola, om. on Civ. Code, pp. 313, 319, 320.

Counsel fee and suit money cannot be iven in a suit for liquidation of her share f property by a divorced wife after di-orce; and in the courts of the United tates counsel fee can never exceed the sum f $20.

Ballinger, Community Property, § 119; rais v. Hogan, 50 Cal. 121; Celluloid Mfg. o. v. Chandler, 27 Fed. 9; Troy Iron & ail Factory v. Corning, 7 Blatchf. 16, Fed. as. No. 14,197; Goodyear v. Sawyer, 17 ed. 12; Williams v. Morrison, 32 Fed. 683; eaver v. Traders' Ins. Co. 40 Fed. 864; arks v. Booth, 102 U. S. 96, 26 L. ed. 54; arber v. Barber, 21 How. 582, 16 L. ed. 226.

Fraud will never be presumed, and the act that the husband, two years before the ivorce, and long before the divorce proceed-ngs were commenced by him, sold property o the value of $77,000, while the share f his wife amounts to the paltry sum of 2,750, cannot warrant a conclusion that the ales were fraudulently made in order to eprive the wife of her share.

Hager v. Thomson, 1 Black, 80, 17 L. ed. 1; Clark v. Hackett, 1 Black, 77, 17 L. ed. 9; Collins v. Thompson, 22 How. 246, 16 . ed. 280; Connor v. Featherstone, 12 Wheat. 99, 6 L. ed. 601; Gaines v. Nicholson, 9 How. 56, 13 L. ed. 172; Graham v. La Crosse & . R. Co. 102 U. S. 148, 26 L. ed. 106; Moore . Page, 111 U. S. 117, 28 L. ed. 373, 4 Sup. t. Rep. 388; Schreyer v. Scott, 134 U. S. 05, 33 L. ed. 955, 10 Sup. Ct. Rep. 579; exton v. Wheaton, 8 Wheat. 229, 5 L. ed. 03; Mattingly v. Nye, 8 Wall. 370, 19 L. . 380; Hinde v. Longworth, 11 Wheat. 99, 6 L. ed. 454; Kehr v. Smith, 20 Wall. , 22 L. ed. 313; Smith v. Vodges, 92 U. S. 3, 23 L. ed. 481; Jones v. Clifton, 101 U. 225, 25 L. ed. 908; Clark v. Killian, 103 S. 766, 26 L. ed. 607; Horbach v. Hill, 112 S. 144, 28 L. ed. 670, 5 Sup. Ct. Rep. 81.

Mr. Fritz von Briesen also argued the cause and filed a brief for appellants:

In order that the United States district court should have had jurisdiction in this case, it was necessary to show not merely that the court might have had jurisdiction if the action had been begun by its own process, but that the law authorized the removal of the case.

18 Enc. Pl. & Pr. title "Removal of Causes," pp. 159, 366; Black's Dill. Removal of Causes, §§ 13, 220; Martin v. Snyder, 148 U. S. 663, 37 L. ed. 602, 13 Sup. Ct. Rep. 706.

All the defendants must be nonresidents in order to remove.

Parkinson v. Barr, 105 Fed. 81.

While the court below might have had jurisdiction of this suit if it had originally been brought therein, it had no jurisdiction on removal. Such a construction of the act of 1891 cannot be presumed, as it is not warranted by the express words of the statute or by necessary implication.

26 Am. & Eng. Enc. Law, title, "Statutes," p. 615, note; Ex parte Story, L. R. 3 Q. B. Div. 166; Kite's Case, 1 Barn. & C. 107.

The fact that the defendants-appellants themselves removed the case to the United States district court did not give that court jurisdiction.

18 Enc. Pl. & Pr. title, "Removal of Causes," pp. 369, 375; Martin v. Snyder, 148 U. S. 663, 37 L. ed. 602, 13 Sup. Ct. Rep. 706.

The separation of property, even after a divorce has been granted, cannot be decreed except upon the petition of the innocent spouse.

9 Manresa, Codigo Civil Español, p. 769.

Mr. Frederic D. McKenney argued the cause, and, with Messrs. Francis H. Dexter and John Spalding Flannery, filed a brief for appellee:

In view of the fact that at least three out of the four persons, parties to the cause, are admittedly citizens of the Republic of France, can it be doubted that the United States district court of the district of Porto Rico also had original jurisdiction of the controversy concurrent with the insular district court?

Ortega v. Lara, 202 U. S. 339, 344, 50 L. ed. 1055, 1057, 26 Sup. Ct. Rep. 707.

As the amount of the judgment appealed from, exclusive of interest and costs, exceeds $5,000, it is certain that this court has jurisdiction to entertain this appeal.

Royal Ins. Co. v. Martin, 192 U. S. 150, 48 L. ed. 385, 24 Sup. Ct. Rep. 247.

It appearing that the lower court had jurisdiction of the cause by reason of the fact that one or more of the parties to the

controversy were citizens or subjects of a state foreign to both Porto Rico and the United States, the party who, over the objection of his adversary, successfully invoked that jurisdiction, will not now be heard to complain of its exercise.

Cowley v. Northern P. R. Co. 159 U. S. 569. 583, 40 L. ed. 263, 267, 16 Sup. Ct. Rep. 127.

The effect of the divorce for the adultery of the wife is simply to stop the further participation of the wife in the future conjugal profits which may be earned by the husband, and gives rise to the obligation of separating the interest of the husband and wife in the community property.

22 Mucius Scaevola, Com. on Civ. Code, pp. 374–377.

While costs in actions at law are governed by fixed and arbitrary rules, in equity the award or denial of costs is always in the discretion of the court (Riddle v. Mandeville, 6 Cranch, 86, 3 L. ed. 161), and courts of chancery in general follow the rule of the civil law,—*victus victori in expensis condemnatus est*,—and they decree the payment of costs by the unsuccessful to the successful party.

The provision of U. S. Rev. Stat. § 824, U. S. Comp. Stat. 1901, p. 632, declaring that, "on a final hearing in equity," a docket fee of $20 may be allowed to the solicitor of the prevailing party, is not necessarily exclusive of other allowance by the court, —*e. g.*, in cases of costs paid out of a fund in court.

Internal Improv. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Central R. & Bkg. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915, 5 Sup. Ct. Rep. 387.

Mr. Justice White delivered the opinion of the court:

In the district court of Ponce, in October, 1891, through a representative (next friend), Juana Dastas, alleged to be a resident of Porto Rico and a married woman, commenced this suit against her husband, Tomas Garrozi y Pietri, as also against Juana Maria Gonzalez and Domingo Piazzi y Pietri, all three of whom were alleged to be residents of Porto Rico. We shall hereafter speak of the plaintiff as the wife and the principal defendant, Garrozi, as the husband.

As far as essential to be considered, the facts alleged, the cause of action relied on, and the proceedings had, up to the pleading by the defendants, are summarized as follows: The marriage took place in May, 1886, and as no antenuptial contract was made, their property relations were governed by the community system under the Code of Porto Rico. They lived together until November, 1898, when they separat and the wife, under the direction of the hu band, resided in a house provided by hi There she lived until December, 1899, wh owing to the failure of the husband to su port her, she removed to Ponce.

The husband in 1901 sued for a divorce the ground of "the wife's adultery and a by a reconventional demand (cross bill prayed for a divorce on the same grou and because of cruel treatment. In th suit the court awarded the wife $75 month alimony *pendente lite*. This m having been paid, the wife issued executi and realized from a sale of certain fur ture one month's alimony. The remaind of the alimony up to the commencement this suit, aggregating $225 and 598 pes Porto Rican currency, the amount of leg expenses incurred by the wife in defendi the divorce suit, and which had been a lowed by the court, were yet unpaid. Th amounts were uncollected because of th apparent insolvency of the husband. Th insolvency was, however, only apparent, b cause there was a large amount of real an personal property belonging separately t the husband, or to the community, whi the husband had, with the object of defraud ing the wife, apparently disposed of b simulated transfers to the defendant Maria Gonzalez and Domingo Piazzi. Th character and extent of this property wa detailed as well as the various allege simulated contracts, which it was avern had been made concerning the same. Th prayer was that the contracts in question b set aside as mere fraudulent simulations, a as to enable the wife to exert her righ therein or thereagainst. The court admi ted the petition to be filed and authori the suit by the wife in the name of h representative or next friend. Before th day for pleading, the husband, alleging hi self to be a citizen and subject of Fran and that by operation of law the wife wa of the same nationality, obtained an ord for removal to the court below. Subs quently the two other defendants al prayed and were allowed a removal. O the filing of the record a motion to remand was made, based upon the fact that the hu band's petition for removal contained n averment of residence. The court refus to remand and allowed an amendment al leging the residence of the husband to b in France.

Without attempting to state the ma pleadings which followed, the ultimate i sues and the action of the court may b thus summari : The petition of the wi was amended : ormed, authority bei given by the co for the prosecution

the suit on her behalf by her representative or next friend. The petition in its final form was less prolix, and the allegation was added that the divorce proceeding between the husband and wife, referred to in the original petition, had gone to the supreme court of Porto Rico, and had by that court been finally decided, decreeing a divorce in favor of the husband. The prayer for relief was amended to conform to this situation; that is, it was prayed not only that the simulated contracts be set aside, but, further, that the community be liquidated, and the wife be awarded her share. The defense, as finally made on the part of the husband, as well as the other defendants, was an averment of the good faith and reality of all the contracts alleged to have been simulated. Moreover, the husband denied that there was community property, because nothing had been acquired during marriage which fell into the community, and because all the property which he possessed, even assuming that the assailed contracts were simulated, was separate property, either owned at the date of the marriage or thereafter acquired as a reinvestment of separate funds. It was, moreover, specially alleged that, as the divorce had been decreed against the wife on account of her adultery, she had forfeited all her interest in the community if any community property existed. Besides, the right of the wife to compel the liquidation of the community, even if she had not forfeited her right to a participation in the community assets, if any, was specially challenged.

The court appointed an examiner, who took and reported the testimony. Under a stipulation and order the cause was referred for report to a special master upon the facts and law. Before the master reported the wife prayed a receiver and an injunction, upon averments that the two defendants, to whom it was charged the property of the husband had been seemingly transferred or encumbered by simulated contracts, were dealing with the same so as to dissipate the estate and frustrate the relief prayed. A receiver was appointed, and the defendants were enjoined as prayed. The report of the special master, as to both the facts and law, substantially sustained the claims of the wife. Exceptions taken to the report were overruled and the report was confirmed. The court below adopted the facts found by the master and reiterated them in the findings in the nature of a special verdict, made for the purposes of the present appeal. By those findings all the charges of fraudulent simulation relied upon by the wife were found to be true, and, as a legal conclusion, all the property and assets to which the simulated contracts related were held to belong to the husband. Concerning the community and its liquidation, it was found, as a matter of fact, that the wife, at the time of the marriage, had no property, and subsequently acquired none, whilst the husband, at the time of the marriage, was the owner of various assets and described property, which was found to have been of the value, at the time of the marriage, of $71,500. The net property of the husband at the date of the dissolution of the marriage, including all reinvestments or avails of his separate property existing at the time of the marriage, and, allowing for community debts, was found by the court to be $77,000, thus leaving $5,500 as the *acquêt* or gain of the community, which was subject to be divided equally between the husband and wife. In addition, the court found that during the marriage the husband had spent, out of the revenues of his property, which revenues fell into the community, the sum of $47,000, during various trips made by him to Europe, and that these expenditures by the husband, from revenue which belonged to the community, were unreasonable to the extent of $22,000. From the facts thus found, as a matter of law, it was concluded that the $22,000 should be treated as an existing *acquêt* of the community, subject to be equally divided between the parties. The sum, therefore, of the community property for distribution, was *fixed at $27,500, the wife's [71] share, therefore, being $13,750. The court in its final decree annulled the simulated contracts, and decreed the property to which such contracts related to belong to the husband, and, fixing the sum of the community as above stated, a money decree was entered in favor of the wife for her share thereof,—$13,750. The decree reserved the right of the court to make such further orders as might be necessary, the receiver was directed to make full report, and a special master was appointed with power to sell the property in the custody of the receiver, if necessary, to pay the decree in favor of the wife. On the day after the entry of the final decree, on motion of the wife, the court passed a further decree in her favor, directing the payment to her, first, of the sum of $598, awarded to her by the district court of Ponce as her expenses in the divorce litigation, and the sum of $133.50, interest thereon to the date of the decree; second, the sum of $885, due for alimony awarded by the district court of Ponce to the date of the decree of divorce; and, third, the sum of $1,500, on account of solicitors' fees in the pending litigation,—a total of $3,116.50.

The receiver was directed to pay these several sums out of any money in his hands, and, in default of sufficient funds, execution to enforce against the husband was authorized.

The court, in its findings, has stated the rulings which were excepted to with respect to the admission or rejection of evidence, accompanied with such portions of the evidence as it deemed adequate to enable a review of such rulings.

Before coming to the merits we must dispose of three preliminary questions. First. The suggestion of a want of jurisdiction in this court is without merit. Royal Ins. Co. v. Martin, 192 U. S. 149, 48 L. ed. 385, 24 Sup. Ct. Rep. 247. Second. The contention that the court below was without jurisdiction, and that the cause, therefore, should not be passed upon on the merits, but should be remanded to the court below, with directions to remand to the local court from which it was removed, is also without merit. That the case was within the [72] original jurisdiction of *the United States district court of Porto Rico clearly results from the broad grant of jurisdiction conferred by the 3d section of the act of March 2, 1901 (31 Stat. at L. 953, chap. 812), reading as follows:

"That the jurisdiction of the district court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the act of April twelfth, nineteen hundred [31 Stat. at L. 77, chap. 191], extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign state or states, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

The assertion of the want of jurisdiction in the court below rests, however, not upon a denial of power in that court to have entertained the controversy if the suit had been originally brought there, but upon the contention that, as a defendant other than the husband was a resident and citizen of Porto Rico, the cause was improperly removed from the local court. And the proposition goes to the extent of insisting that such want of jurisdiction may be asserted by the person who procured the removal, who resisted the effort to remand, and when the want of jurisdiction is only suggested after trial and final decree. The premise upon which these contentions are based is a portion of the text of the 34th section of what is known as the Foraker act (act of April 12, 1900, 31 Stat. at L. 84, chap. 191) which provides that—

"The laws of the United States relating to appeals, writs of error and certiorari, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several states, shall govern in such matters and proceedings as between the district court of the United States [for Porto Rico] and the courts of Porto Rico."

Without so deciding, we concede, for the sake of the argument, that where the power to remove from a state court to a court of the United States is restricted by statute to a certain class of cases, a removal operated contrary to the statute *does not divest* the state court of jurisdiction, and, therefore, does not confer jurisdiction on the court to which the cause has been wrongfully removed, even although the cause may have been one of which such court might have taken jurisdiction originally. So, also, we concede for argument sake that in such a case the party wrongfully procuring the removal may escape the effect of a judgment rendered against him in the forum to which he voluntarily resorted, by suggesting after judgment the want of power to remove. But these concessions are not decisive of the case at bar, because of the extent of the jurisdiction conferred upon the United States court in Porto Rico by the act of 1901; that is to say, in consequence of the enlarged character of the jurisdiction conferred by that act, and the obvious departure which it manifests from the principles controlling the jurisdiction of a United States court as contradistinguished from a state court, we do not think the rule which demarks the line between the courts of the United States and state courts within the removal act should be held applicable to Porto Rico to the extent which might have obtained had the act of 1901 not been enacted. We conclude, therefore, that where a case is removed from the local Porto Rican court to the United States court, over which case the latter court would have had jurisdiction as to all the parties impleaded if the case had been there originally brought, even though the removal was irregular, the party who caused the removal cannot be heard, after judgment against him, to assert that the United States court was wanting in jurisdiction solely on the ground that the case was erroneously removed.

3. The objections to rulings made by the court in admitting and rejecting evidence are numerous. We shall not undertake to review them in detail or state at length our conclusions concerning them, contenting ourselves with saying that, after examining them all, we think they are without foundation, either because fundamentally unsound or because the objections concerned not the admissibility but the mere weight of the

evidence offered or rejected, or because the record is not in such a condition as to enable us to overcome the strong impression we form that no prejudicial error resulted from the rulings complained of.

The conclusive effect of the facts found below narrows the issues. Thus the finding that the contracts were fraudulent simulations sustains the legal conclusion that the property to which the contracts related belonged to the husband, and therefore that subject is put out of view. Again, as the facts found concerning the sum of the property owned by the husband at the date of the marriage and the amount owned by him at the date of the dissolution of the community by the divorce sustain the conclusion that the difference between the two was an *acquêt* or gain of the community, to be divided equally, that question need not be further considered. In order, therefore, to dispose of the entire controversy, it will be necessary to decide only four questions: First, whether the wife, as a consequence of the judgment of divorce rendered against her, had forfeited her interest in the community, if there was any such interest. Second, whether error of law was committed in crediting the community with $22,000, the amount expended by the husband for traveling and medical expenses during the years 1889 and 1890, and during the years 1895 to 1898, both inclusive, upon the ground that such expenditures were unreasonable and extravagant, and therefore created an obligation on his part to return the amount to the community as an *acquêt* or gain thereof. Third, if there was due the wife any amount on account of her interest in the community, and such interest had not been forfeited, was she entitled, as a divorced wife, to provoke a liquidation of the community, and to a decree in her favor for the amount, if any, of her interest in such community? Fourth, did the court below err as a matter of law, in addition to giving the wife a decree for her interest in the community, in allowing her the sum of the alimoney *pendente lite* decreed in her favor by the local court up to the date of the divorce, the sum of her *expenses in the divorce suit which had been approved by the local court, and an additional sum of $1,500 for the services of the counsel of the wife in the cause.

I. It may be conceded that, by the law of Spain, prior to the adoption of the Spanish Civil Code, the wife against whom a judgment of divorce for adultery was decreed forfeited all right to her share in the community existing between herself and husband. But that rigorous rule was not incorporated into the Spanish Civil Code, which was in force in the island of Porto Rico when the territory was acquired. Spanish Code of 1889, War Department translation, title 4, § 5, articles 67 et seq. Such forfeiture, moreover, did not obtain in the Porto Rican Civil Code, adopted after the acquisition of the island by the United States, and which was in force in that island when the decree of divorce which was here involved was rendered. Porto Rico, Civil Code 1902, title 5, chap. 5, §§ 173, 174. To the contrary, the Code of 1889 provided that, in case of a divorce for adultery, the guilty spouse should forfeit or lose, not his or her interest in the community, but "all that may have been given or promised him or her by the innocent one, or by any other person, in consideration for the latter." Code of 1889, art. 73, ¶ 3. And a similar provision was incorporated in the Code of 1902, as follows:

"The party against whom the judgment is rendered (of divorce) shall forfeit to the party obtaining the divorce all gifts which the other party may have conferred upon such party during the marriage, or when the same was contracted, and the innocent party shall retain everything which has been acquired from the other." Sec. 174.

Both these provisions were plainly intended to depart from the rule of forfeiture prevailing in the more ancient Spanish law and to incorporate the rule of limited forfeiture, as existing in the Louisiana (article 156) and Napoleon (article 299) Codes; a similar provision to which has been enacted in the codes of some other countries, which have modeled their *codes on the Code Napoleon [76] 1 De Saint-Joseph, Concordance, pp. 24 et seq. This conclusion is reinforced by the consideration that, at the time of the adoption of the Spanish and Porto Rican Codes, the provision of the Napoleon Code on that subject had been conclusively determined not to operate a forfeiture of the community property. See authorities collected in note to article 299 in the Fuzier-Herman edition of the Code Napoleon, Paris, 1896.

The argument advanced in the brief of one of the counsel, that, despite the change in the Code to which we have referred, the old rule of forfeiture should be held to obtain, because of the provision of article 1417 of the Code of 1889 and § 1330 of the Code of 1902, saying: "The spouse who, by bad faith, has been the cause of the nullity (of the marriage), shall not have a share in the common property," rests upon a mere misconception. The provision relied on in both the Codes relates not to the dissolution of a marriage by a decree of divorce or for any other cause, but to the recognition of the nullity of a seeming marriage

for causes which have operated to prevent the marriage from having ever existed. In other words, the distinction between the article relied upon and the other articles to which we have previously referred is that which obtains between a decree of a court dissolving a marriage which has existed and a decree establishing that there never had been a marriage to dissolve. The pertinency of this distinction again becomes manifest when it is observed that a similar distinction and consequence exists in the Code Napoleon.

2. Owing to an apparent ambiguity in the finding of fact concerning the liability of the husband to the community for $22,000 it becomes necessary, before reviewing the legal conclusion of the court below on that subject, to fix the exact meaning of the facts found upon which that legal conclusion was based. As a preliminary to so doing we reproduce in the margin† the finding of fact on the subject, as well as the legal conclusion drawn by the court therefrom.

[77] *Whilst there are expressions in the finding referred to which, isolatedly considered, might lead to the inference that it was the intention of the court to find that the husband had not expended the money, but had concealed it or yet had it in his possession, we think the context of the finding and the result of the other findings establish that the court intended to and did find that the money was expended, and that the legal conclusion as to the liability of the husband to the community was arrived at because it was deemed that the expenditure of the money by the husband was unreasonable and extravagant. We say this results from the context, because, taking the whole finding, it seems to us clear that the purpose of the court was as stated. We say also it results from the other findings, because the facts found as to the sum of the property owned by the husband at the time of the marriage *and the sum possessed b him at the time of the divorce exclude, b necessary implication, the possession by th husband of the $22,000.

It is provided in both the Code of 18 (article 1412) and the Code of 1902 (§ 132 the husband "is the administrator of th conjugal partnership." By the first of the Codes (article 1413) this power of the ha band was so complete as to endow him wit authority to sell and encumber, not on all the movable, but also the immovabl property of the community. In the secon Code, however (§ 1328), the power of th husband to sell or encumber the immovabl property is not given, except a contract t that effect is made with the consent of th wife. And by both Codes all contracts the husband in violation of definite provisio of the Code or in fraud of the rights of th wife are made null and void against th wife or her heirs. Code of 1889, art. 141 Code of 1902, § 1328. The provisions in bot Codes making the husband the administra tor of the community are here again lik unto those obtaining in other countri where the community system prevail Code Napoleon, art. 1421; Louisiana Cod art. 2404. The question, therefore, is this Is the power of the husband, as the hea and master and administrator of the com munity, in its nature so restricted that, i the absence of express limitation, he can after the dissolution of the community, b called to account and compelled to retur to the community money which he has ac tually expended during the existence of th community, because, in the judgment of court, such expenses may be deemed to hav been not suitable to his situation in life, ex travagant, or even reckless? To answer thi question in the affirmative would be to de stroy the whole fabric of the communit system as prevailing, not only under th Spanish and Porto Rican Code, but as ob

†That said defendant Garrozi made several trips to Europe during the continuance of his marital partnership, and spent large sums of money by reason thereof, which were, as near as can be determined from his testimony, the following amounts:

In 1889	$10,000.00
In 1890	7,000.00
In 1895	5,000.00
In 1896-98	25,000.00
Total	$47,000.00

Said defendant claims in his testimony that these trips to Europe and the expenditure of these large sums of money was rendered necessary by reason of his serious and continued illness. But said testimony is not substantiated by that of any other credible witness, while, if true, it could have been easily proven by the testimony of some of the physicians who attended hi and who must have had full knowledge o his condition during these times. But eve granting that the journeys were necessar to defendant's health, the court is forc to the conclusion, either that said defend ant has exaggerated the amounts expend or that such extravagant expenditures wer not either necessary or reasonable, an hence not a proper charge against the pro erty of the marital partnership.

It seems that twenty-five thousand do lars ($25,000.00) would have been a libe expenditure under the circumstances for man in defendant Garrozi's condition o life.

The court therefore concludes that tw ty-two thousand dollars ($22,000.00) of th amount should be charged against the se arate property of defendant Garrozi.

taining in those countries of the continent of Europe and here where that system prevails. We need not consider whether the community was derived from the Roman law, from an express provision of the early Saxon law, or from *the ancient customary law of the continent. For, however derived, the very foundation of the community and its efficacious existence depends on the power of the husband, during the marriage, over the community, and his right, in the absence of fraud or express legislative restriction, to deal with the community and its assets as the owner thereof. The purpose of the community, as expounded from the earliest times, whilst securing to the wife, on the dissolution of the marriage, an equal portion of the net results of the common industry, common economy, and common sacrifice, was yet, as a matter of necessity, during the existence of the community, not to render the community inept and valueless to both parties by weakening the marital power of the husband as to his expenditures and contracts, so as to cause him to be a mere limited and consequently inefficient agent. See a very full citation of authority in Journal du Palais Repertoire, verbo, "Communauté," pp. 739, 741 et seq.

In determining the authority of the husband as to the common property two considerations are essential: The character of the right of the wife to the common property during the existence of the marriage, and the scope of the power of the husband during the same period. In speaking on the nature of the right of the wife, Troplong says:

"The rights of the wife are dormant during the marriage, because the husband is charged to watch over and conduct the affairs of the conjugal society. But this right, which is inert as long as the husband is at the head of the affairs of the community, becomes active when the marital authority ceases to exist. The wife is like a silent partner, whose rights arise and reveal themselves when the partnership ceases." 2 Troplong, Contrat de Mariage, p. 136, No. 855.

Under the law of France prior to the Napoleon Code the extent of the power of the husband as to the community property was so great that it was considered in theory that the rights of the wife in or to the community were not merely dormant during the marriage, but had no existence whatever. *In other words, the doctrine was upheld that the wife, during the existence of the community, had but a mere hope or expectancy, and hence no interest whatever in the property or goods of the community until the community was dissolved. Dumoulin, Sur Part. 25, Cout. de Paris. And from this arose the expression that the community was a partnership which only commenced on its termination. As the result, however, of the right conferred upon the wife by some of the customs of France before the Code Napoleon, and also expressly given by that Code (Code Napoleon, 1443 et seq.), to procure a decree dissolving the community when the affairs of the husband were in such disorder as to entail risk upon the wife, it is the generally accepted doctrine under the Napoleon Code that the wife's interest in the community prior to the dissolution is subsisting, though dormant. But this implies no limit on the power of the husband whilst the community exists. In other words, although the right to a separation of property arises from the reckless conduct of the husband, thus affording a means of guarding against the consequences of such conduct in the future, the right to ask a separation does not give rise to the inference that the husband, after the dissolution of the community, may be held to account for money expended by him during the community because of reckless or extravagant conduct. Speaking on this subject, Rodiere and Pont (Traité du Contrat de Mariage) say (p. 596, No. 657):

"The husband can then sell [the immovable property of the community] by onerous title; he has in this respect an absolute power, and if, in disregard of the confidence which the law reposes in him, the husband, in disposing of the property, is impelled by the wish to indulge extravagant tastes or to provide for reckless dissipation, and not by the purpose of protecting the rights of the wife, the latter, even under these circumstances, has no recourse but to obtain a judicial termination of the community."

Referring to the power of the husband over the community, Troplong says:

*"This power of the husband, which ef- [81] faces the personality of the wife, and which is manifested by the name of lord and master of the community, given to the husband, —this power, which seems like unto an absolute sovereignty,—exists as well in the relations of the spouses between themselves as in their dealings between third parties. In effect, the husband can dissipate the goods of the community; he can lose, destroy, break, and dilapidate. *Maritus potest perdere, dissipare, abuti;* this is an elementary axiom of the Palace (of Justice). The wife has no right to call the husband to account, no damage to obtain for his acts. Hence it is true, indeed, that the husband is more than an administrator: he is an administrator *com libera.*" Ibid. p. 138, No. 158.

See, to the same effect, the copious collection of authority found under article 1421 of the Code Napoleon, in the Fuzier-Herman edition of that Code, supra.

That there is a substantial similarity between the law of the community under the Napoleon Code and the law on the same subject of Spain, prior to the Civil Code, and as now existing under that and the Code of Porto Rico, was conceded in the argument of the appellee. Indeed, that argument refers to and rests on some of the provisions of the Napoleon Code. Besides, when it is considered that the ancient Spanish law, and that law as formulated in the Code of 1889 or in the Porto Rican Code of 1902, confers no authority upon the wife to obtain a judicial dissolution of the community merely because of the disorder of the husband's affairs, it follows that the power of the husband under the Spanish system is in principle more extensive than it is under the Code Napoleon and the law of the countries which have followed that Code. The practical identity of the husband's general authority, as head and master of the community, under the law of Louisiana, the Code Napoleon, and the Spanish law, was clearly expounded by the supreme court of Louisiana, in Guice v. Lawrence, 2 La. Ann. 226, as follows:

"The laws of Louisiana have never rec-
[82] ognized a title in the *wife during marriage to one half of the *acquêts* and gains. The rule of the Spanish law on that subject is laid down by Febrero with his usual precision. The ownership of the wife, says that author, is revocable and fictitious during marriage. As long as the husband lives and the marriage is not dissolved, the wife must not say that she has *gananciales*, nor is she to prevent the husband from using them, under the pretext that the law gives her one half. But, *soluto matrimonio*, she became irrevocably the owner of one undivided half, in the manner provided by law for ordinary joint ownership. The husband is, during marriage, *real y verdadero dueño de todos, y tiene en el efecto de su dominio irrevocable*. Febrero, Adic. tomo 1 y 4, pt. 2d, bk. 1st, chap. 4, ¶ 1, nos. 29 and 30; Pothier, Communauté, p. 35 and following; 12 Toullier, chap. 2, nos. 22 to 31; 14 Duranton, Droit Français, p. 281 and following; 10 Dalloz, Jurisp. p. 198 and following.

"The provisions of our Code on the same subject are the embodiment of those of the Spanish law, without any change. The husband is head and master of the community, and has power to alienate the immovables which compose it by an encumbered title, without the consent or permission of his wife. Civil Code, art. 2373."

True it is that in the Porto Rican Code of 1902 there was inserted a provision, previously commented on (§ 1328), limiting the power of the husband to dispose of the immovable property of the community without the consent of the wife. But this express limitation as to one particular class of property, by inverse reasoning, is a reaffirmance of the power of the husband as head and master of the community in all other respects. The contention that because both by the Code of 1889 and of 1902 acts done by the husband as head and master of the community in fraud of the wife shall be void, therefore the expenses of the husband made during the community are subject to be reviewed on the dissolution of the community because of their unreasonable character, is without merit. The fraud referred to of necessity relates to acts done by the *husband beyond his lawful authority, or which, if within his authority, have been done for the purpose of enriching himself or his separate estate or some third person, and which, therefore, whilst seemingly acts of community administration, are really not of that character.

3. The contention that the wife, even after the dissolution of the marriage, was without power to obtain the liquidation of the community and a payment to her of her share thereof, is based upon what is asserted to be the correct interpretation of articles 73, 1733, 1434, and 1435 of the Code of 1889. By these articles, it is insisted, where the dissolution of the marriage has been decreed because of the fault of one of the parties, the separation of property does not follow as a legal right in favor of the party for whose wrong conduct the divorce has been decreed, and may only be allowed by a court at the request or option of the one in whose favor the decree was rendered. And it is, moreover, insisted that if the divorce has been rendered in favor of a husband and against a wife for her fault, and a separation of property has been thereafter decreed at the instance of the husband, the power of the husband to administer the wife's share of the community remains whilst her interest in future acquêts or gains disappears. But this reduces itself to the contention that in the case stated the community is dissolved, yet continued. But whilst this reduction may point to the want of coherency in the proposition, it is no reason why the Code should not be enforced, if so it is plainly written. We do not stop to analyze the texts of the Code of 1889, relied on, for we think they are not controlling, even if they have the peculiar meaning contended for. We so conclude because of a change made by the Code of 1902. As we have already said, we are of the

that that Code was in effect at the the rendering of the divorce decree. at Code not only eliminated the pro- of article 73 of the Code of 1889, re- but substituted a wholly different n, directly repugnant to the con- we are considering. The provision to is § 173 of the Code *of 1902, "A divorce carries with it a com- issolution of all matrimonial ties division of all property and effects the parties to the marriage." The at made in the brief of one of the that, even although the wife was en- o a liquidation of the community a decree for her share, the court be- ed in giving a money judgment in or, because in any event it could re lawfully awarded an aliquot share community property subject to be ently realized by a partition in kind *icitation* (sale), is unsound. As to rit of the contention, if any, as a proposition, we are not called upon case to express an opinion. We say cause, as a necessary result of the below, all the property either be- to the husband at the date of the e or was afterwards acquired by him investment of funds derived from operty owned by him at the mar- It follows, therefore, that the rights wife arose simply either from an in- value of property or assets brought husband into marriage, or as a re- the falling into the community of enues of the property of the hus- Under these circumstances we think ree below was right.

e amount of the decree for alimony *e lite* and for expenses incurred by e in the divorce suit had been sanc- by the local court and were binding e husband. We see no reason, there- by the court below should not have those items. So far as the sum of or counsel fees in the pending liti- which the court allowed as a charge the husband, we have been referred uthority sustaining the right to al- and our own researches have enabled discover no sanction for such an

llows that whilst the court below ht in allowing the wife the sum of s her share of the *acquêts* and gains ommunity as established by the find- fact, the court was wrong in al- he $22,000, and the $1,500 *attorney's e decree below must therefore be and the cause be remanded with s to enter a decree for the $2,750 alimony and expenses incurred in the divorce suit with the approval of the court as previously allowed, but rejecting the claim for $22,000 and $1,500, the costs of this court to be borne by the appellee and those of the court below by the appellants.

Reversed and remanded.

CHARLES S. ELDER, Plff. in Err.,

v.

PEOPLE OF THE STATE OF COLORADO ON THE INFORMATION OF GEORGE STIDGER, the District Attorney of the Second Judicial District of the State of Colorado, ON THE RELATION OF CHARLES W. BADGLEY.

(See S. C. Reporter's ed. 85-89.)

Error to state court—Federal question.

A contest over a state office, dependent for its solution exclusively upon the application of the Constitution of the state or upon a mere construction of a provision of a state law, involves no possible Federal question which will sustain a writ of error from the Supreme Court of the United States to a state court.

[No. 132.]

Argued December 13, 14, 1906. Decided January 7, 1907.

IN ERROR to the Supreme Court of the State of Colorado to review a judgment in favor of the relator in a proceeding in the nature of quo warranto to test the title to a state office, entered by that court after reversing the judgment of the District Court of the City and County of Denver in that State, which sustained a demurrer to the complaint and entered judgment for the defendant. Dismissed for want of jurisdiction.

See same case below, 34 Colo. 197, 86 Pac. 250.

Statement by Mr. Justice White:

This was a proceeding, in the nature of quo warranto, brought in a district (state) court of Colorado, to test, as between conflicting claimants (Charles W. Badgley and Charles S. Elder), the title to the office of

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NOTE.—On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and Re Buchanan, 39 L. ed. U. S. 884.

county treasurer of the city and county of Denver. The relator (Badgley) relied upon a general election held pursuant to the general statutes of Colorado on November 8, 1904, while the defendant (Elder) claimed to be the legal incumbent of the office by virtue of his election to the office of treasurer of the city and county of Denver in May, 1904, under authority of the charter of said city and county of Denver. The question presented for decision was whether the election held in May, 1904, [86] under the charter, of officers to perform *the duties required of county officers in the city and county of Denver, was lawful, or whether such officers should have been voted for under the general statutes of the state at the election held in November, 1904. A determination of this question made necessary a consideration of certain provisions of article 20 of the state Constitution, providing for the creation, from the old county of Arapahoe and the old city of Denver and other municipalities, of a new entity to be known as the city and county of Denver, and conferring authority to provide in the charter for the appointment or election of officers of such city and county. In particular, a construction was required of a clause providing that "every charter shall designate the officers who shall respectively perform the acts and duties required of county officers to be done by the Constitution or the general laws, as far as applicable." The district court sustained a demurrer to the complaint and entered judgment for the defendant. This judgment was reversed by the supreme court of the state, upon the authority of People ex rel. Miller v. Johnson (86 Pac. 233) and judgment was entered in that court in favor of the relator (86 Pac. 250), deciding in effect that the charter provision under which defendant claimed was repugnant to the Constitution of Colorado. The case was then brought here.

Messrs. Charles R. Brock and Robert H. Elder argued the cause, and, with Mr. Milton Smith, filed a brief for plaintiff in error:

Colorado, in amending her Constitution, exercised an authority under the United States.

1 Burgess, Political Science & Comparative Const. Law, p. 89; 1 Wilson's Works, 321-325; M'Culloch v. Maryland, 4 Wheat. 403, 404, 4 L. ed. 600, 601; Davis, International Law, 32, 33; Black, Const. Law, 16-26; Farrar, Const. 37; 2 Curtis, History of U. S. Const. 71-74, 520, 521; Bliss, Sovereignty, 73, 74; Martin v. Hunter, 1 Wheat. 304, 324, 4 L. ed. 97, 102; Van Holst, Const. Law, pp. 39-44; Miller, Const. pp. 38-58; Abbott, Judge & Jury, pp. 4-7; Luther v. Borden, How. 1, 12 L. ed. 581; Woolsey, International Law, §§ 36, 37.

In this case (a) the validity of that a th y exercised was actually drawn question; (b) it was decisive of the case a there was no other matter adjudged by t court below broad enough to sustain t judgment; and (c) the decision below w against the validity of that authority.

Terre Haute & I. R. Co. v. Indiana, 194 U S. 579, 48 L. ed. 1124, 24 Sup. Ct. Rep. 767

The question here is a judicial questio it is not one for the political departme of government, but is properly in this cou for decision.

Luther v. Borden, 7 How. 34, 12 L. ed. 581, 595; Taylor v. Beckham, 178 U. S. 571, 572, 44 L. ed. 1198, 20 Sup. Ct. Rep. 890, 1009; Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375; Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; In re Duncan (Duncan v. McCall) 139 U. S. 449, 33 L. ed. 219, 11 Sup. Ct. Rep. 573; Texas v. White, 7 Wall. 700, 19 L. ed. 227; Gross v. Barry, 15 Wall. 610, 21 L. ed. 212.

The real lesson of the Civil War is that the people of the United States are sovereign; that their power is absolute and supreme, and that the states are merely local government, operating under and by the authority of the United States.

1 Burgess, Political Science & Comparative Const. Law, pp. 67, 98-108; McClain, Const. Law, pp. 32, 33; Flanders, Const. pp. 34-36; Farrar, Const. chap. 39, §§ 500 et seq; Luther v. Borden, 7 How. 1, 12 L. ed. 581; Walker, Making of Nation, pp. 20-30, 37, 38; Burgess, Reconstruction & the Const. (discussing the state in the Federal system), chap. I. et seq; 1 Curtis History of U. S. Const, pp. 364, 365, 367; M'Culloch v. Maryland, 4 Wheat. 316, 404, 4 L. ed. 579, 601; Gibbons v. Ogden, 9 Wheat. 1, 187, 6 L. ed. 23, 68; Scott v. Sandford, 19 How. 393, 441, 15 L. ed. 691, 715.

The whole of the above view is also justified by an examination of the Constitution of the United States. It is the only view that is justified by the Constitution. On no other theory can all of the provisions of the Constitution be rationally construed.

Chisholm v. Georgia, 2 Dall. 419, 449, 457, 470, 471, 1 L. ed. 440, 453, 458, 462, 463; Ware v. Hylton, 3 Dall. 236, 237, 1 L. ed. 584, 585; 1 Davis, Rise & Fall of Confederate Government, p. 155; 2 Webster, Speeches, 8th ed. pp. 174-176.

Mr. Henry J. Hersey argued the cause and filed a brief for defendant in error:

Counsel for plaintiff in error are utterly unable to point out where any Federal question was necessarily involved in the case be

he only part of the opinion that they is the argumentative portion, which the fallacy of both their position ument. This is of no more effect in ng jurisdiction on this court than its of counsel, which this court has held could not be resorted to for the of showing that a question of Fed- nizance was decided by the state

1 v. Chouteau, 8 Wall. 314, 19 L. Sayward v. Denny, 158 U. S. 180, 941, 15 Sup. Ct. Rep. 777.

pinion of the supreme court of Colo- ws conclusively that the questions below were those relating to the between the provisions of the char- he city and county of Denver, a l corporation, and the state Con- . Such questions and the decisions are not reviewable by this court.

v. Illinois, 170 U. S. 182, 42 L. ed. Sup. Ct. Rep. 550; Missouri v. Dock- U. S. 165, 48 L. ed. 133, 63 L.R.A. Sup. Ct. Rep. 53.

are many Federal questions, even, ich the state courts can pass, and ch the Federal courts have no right w; such, for example, as the mere tion either of Federal or state laws. County v. Calumet & C. Canal & 138 U. S. 635, 34 L. ed. 1110, 11 Rep. 435; Osborne v. Florida, 164 0, 41 L. ed. 586, 17 Sup. Ct. Rep. nnard v. Nebraska, 186 U. S. 304, 1175, 22 Sup. Ct. Rep. 879.

were a Federal question involved led by the state court, yet the deci- inst the plaintiff in error was also on independent grounds, not involv- ederal question, which were broad to sustain the judgment. Under umstances this court has uniformly l the writ of error without consid- e Federal question, because it has iction.

ec & P. R. Co. v. Portland & K. Wall. 23, 20 L. ed. 850; Eustis v. 50 U. S. 361, 37 L. ed. 1111, 14 Sup. 131; Giles v. Teasley, 193 U. S. ed. 655, 24 Sup. Ct. Rep. 359.

f we should accept the proposition el for plaintiff in error that the f the state court, holding that the provisions relied on were uncon- l, was in effect a decision that e repugnant to the Constitution s of the United States, yet that t give this court jurisdiction to re- ause not only is the charter in nce not a state statute, but, if it decision was against its validity. when the decision is in favor of ity of a state statute which is s.

claimed to deprive a party of his rights under the Federal Constitution and laws that this court has jurisdiction.

Commonwealth Bank v. Griffith, 14 Pet. 56, 10 L. ed. 352; Phœnix Ins. Co. v. The Treasurer (Phœnix Ins. Co. v. Gardiner) 11 Wall. 204, 20 L. ed. 112; Missouri ex rel. Carey v. Andriano, 138 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385; Whitten v. Tomlinson, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297.

Nor is a Federal question sufficiently shown by the fact that a state court, while declaring a statute to be in violation of the Federal Constitution, yet, by its judgment, gave effect to it, when the decision of the Federal question was not an essential element in determining the right adjudicated.

Rutland R. Co. v. Central Vermont R. Co. 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113.

It is well settled that, in order to raise a Federal question, general references to the Federal Constitution or even to specific articles of the Constitution are not sufficient. It is only by the most general references that plaintiff in error attempts to point out the alleged violation of the Federal Constitution.

Chapin v. Fye, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; Clarke v. McDade, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284.

Moreover, we shall search the record in vain in an endeavor to find anything showing that any Federal question was raised and decided below. The fact that plaintiff in error in his assignment of errors has sought to raise Federal questions cannot help him. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised, and properly raised, in the court below, and rulings asked thereon, so as to give this court jurisdiction.

Cornell v. Green, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969; Fowler v. Lamson, 164 U. S. 252, 41 L. ed. 424, 17 Sup. Ct. Rep. 112.

It would seem that this case is either one of those in which, under the settled rule in this court, the writ of error must be dismissed because the Federal question asserted is manifestly lacking all color of merit (Wabash R. Co. v. Flannigan, 192 U. S. 29, 38, 48 L. ed. 328, 331, 24 Sup. Ct. Rep. 224), or one in which the Federal question asserted was not, in the sense which would give this court jurisdiction, raised or involved below.

New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142.

Authorities are not required to support

the general proposition that, in the consideration of the Constitution or laws of a state, this court follows the construction given to those instruments by the highest court of the state.

Wilson v. North Carolina, 169 U. S. 586, 592, 42 L. ed. 865, 870, 18 Sup. Ct. Rep. 435.

Even though, in the opinion of this court, the court below erred in its construction of the state Constitution and of the charter of Denver, and moreover, even though the views expressed by our supreme court should be in conflict with views expressed by this court in other cases (which we deny), yet neither of those facts, nor both of them, would give this court jurisdiction.

Bank of West Tennessee v. Citizens' Bank, 13 Wall. 432, 20 L. ed. 514; Commercial Bank v. Buckingham, 5 How. 317, 342, 343, 12 L. ed. 169, 181; Smiley v. Kansas, 196 U. S. 447, 455, 49 L. ed. 546, 550, 25 Sup. Ct. Rep. 289; Newport Light Co. v. Newport, 151 U. S. 527, 538, 38 L. ed. 259, 262, 14 Sup. Ct. Rep. 429; Claiborne County v. Brooks, 111 U. S. 400, 410, 28 L. ed. 470, 474, 4 Sup. Ct. Rep. 489; Forsyth v. Hammond, 166 U. S. 506, 518, 519, 41 L. ed. 1095, 1100, 17 Sup. Ct. Rep. 665.

The Federal questions must not only have been actually raised and presented to the court below, but must also have been necessarily involved.

New York L. Ins. Co. v. Hendren, 92 U. S. 286, 287, 23 L. ed. 709; United States v. Lynch, 137 U. S. 280, 285, 286, 34 L. ed. 700, 702, 703, 11 Sup. Ct. Rep. 114.

The validity of an authority under the United States is not drawn in question, but, at most, if anything, only the construction and application of regulations of the exercise of such authority. This has been held by this court not to give it jurisdiction.

United States v. Lynch, supra; South Carolina v. Seymour (United States ex rel. South Carolina v. Seymour) 153 U. S. 353, 38 L. ed. 742, 14 Sup. Ct. Rep. 871.

Very similar questions, at least, so far as the jurisdiction of this court is concerned, were involved in two recent cases, in which the writs of error were dismissed for lack of jurisdiction.

Rose v. Kansas, 203 U. S. 580, ante, 326, 27 Sup. Ct. Rep. 779; United States ex rel. Taylor v. Taft, 203 U. S. 461, ante, 269, 27 Sup. Ct. Rep. 148.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

The assignments of error are twenty-one in number. All of them rest upon the assumption that the supreme court of Colorado held that article 20 of the state Constitution, particularly §§ 2 and 3, were repugnant to the provision of the Constitution the United States guaranteeing to every state a republican form of government and to the act of Congress known as the Colorado enabling act, and that by such ruling rights possessed by the people of the state of Colorado and rights vested in the people of the city and county of Denver were invaded. And upon the assumption that such rulings were made all the Federal questions relied on are based.

On behalf of the defendant in error it is insisted that the supreme court of Colorado did not decide any question under the Constitution of the United States, but merely disposed of the case before it upon its construction of the meaning of the provision of the state Constitution which was involved and upon the authority of a previous decision rendered by the Colorado court. It is not denied that in the course of the opinion of the supreme court of Colorado it was said that if the article of the state Constitution in question was susceptible of a contrary construction to that affixed to it by the court, it would be repugnant to the guaranty of a republican form of government, etc. This, it is said, was mere *obiter*, as the court considered and held the provision valid.

If we were to indulge in the hypothesis that the assumptions upon which the assignments of error rest were sustained by the record, and were besides to assume that, at the proper time and in the proper manner, it had been asserted that to hold article 20 invalid would be repugnant to the Constitution of the United States, the case would yet not be within the purview of § 709, Revised Statutes (U. S. Comp. Stat. 1901, p. 575). Under this section the power to review the judgment of a state court exists only in the following classes of cases: a. Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity: b. Where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; c. "Where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

It is plain that the case is not embraced within subdivision a. Nor can it be said to be embraced within subdivision b, for if we consider that the court below, instead of construing and upholding the constitutional provision in question, actually held it to

d because repugnant to the Consti- f the United States, such decision *inst*, and not in favor of, the of the article. Nor is the case em- ithin subdivision c, for nowhere in d does it appear that the plaintiff specially or otherwise, set up or n the courts of Colorado any title, ivilege, or immunity under the ion of the United States.

under the circumstances disclosed, had been an assertion of a right, vilege, or immunity under the ion of the United States it would so frivolous *as not to afford a jurisdiction, since it is foreclosed ere contest over a state office, de- for its solution exclusively upon cation of the Constitution of a upon a mere construction of a pro- a state law, involves no possible uestion. Taylor v. Beckham, 178 , 44 L. ed. 1187, 20 Sup. Ct. Rep. . Whilst, when a state court has d a Federal question, that fact e to elucidate whether a Federal perly arises for consideration by t, that doctrine has no application where the controversy presented itly not Federal, and incapable of g a Federal question for decision. f error dismissed.

EWMAN and Salmon O. Levinson, ng Partners of the Firm of New- orthrup, & Levinson, Plffs. in Err.,

v.

HARRY B. GATES.

S. C. Reporter's ed. 89-95.)

state court—decision of Federal n by highest state court.

ere has been no decision of the uestion in the highest court of the which a decision in the suit could hich is essential to sustain a writ from the Supreme Court of the ates, where the highest state court an appeal in the suit because of a the parties to such appeal.

[No. 137.]

December 14, 17, 1906. Decided January 7, 1907.

IN ERROR to the Supreme Court of the State of Indiana to review a judgment dismissing, for a defect in parties, an appeal from a judgment of the Marion County Superior Court in favor of defendant in an action on a foreign judgment, such action having been removed into the Supreme Court for decision after the Appellate Court of that state had reversed the judgment below and ordered the cause remanded for a new trial. Dismissed for want of jurisdiction.

See same case below, 165 Ind. 171, 72 N. E. 638.

Statement by Mr. Justice White:

Jacob Newman, George Northrup, Jr., and S. O. Levinson commenced this action in the superior court of Marion county, Indiana, against the defendant in error, Harry B. Gates. Recovery of the sum of $1,400, was sought upon a judgment obtained by Newman and his coplaintiffs against Gates in the circuit court of Cook county, Illinois. The defendant filed an answer in two paragraphs, but, as the defenses therein *asserted [90] were ultimately abandoned, they need not be detailed. A counterclaim was also filed, in which it was alleged that the plaintiffs were, and for more than two years had been, attorneys at law engaged in the practice of their profession at Chicago, Illinois, under the firm name of Newman & Northrup; that the Illinois judgment sued upon was founded upon a claim for legal services rendered to the defendant; that the services had been rendered in advising the defendant, as trustee, in and about the management of the property and assets of a corporation known as the American Motor Company while in course of administration in insolvency proceedings, and that the defendant had sustained damage to the extent of $2,000 by reason of a breach of duty alleged to have been committed by the plaintiffs in the course of their employment in failing to obtain an order of the court in the insolvency proceedings relieving the defendant from personal liability for attorney's fees, and providing for payment of his compensation, etc. It was also charged that the plaintiffs had been guilty of a breach or neglect of duty in connection with a sale of the trust property in the insolvency proceedings, whereby defendant

On what adjudications of state n be brought up for review in the Court of the United States by writ o those courts—see note to Apex o. v. Garbade, 62 L.R.A. 513.

When writ of error may run to inte court—see note to Kentucky v. 0 L. ed. U. S. 633.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998, and Re Buchanan, 39 L. ed. U. S. 884.

had sustained damages in the sum of $2,500. A reply was filed to the counterclaim, in two paragraphs, one embracing a general denial and the other setting up the Illinois judgment as *res judicata* as to all the matters embraced in the counterclaim.

In due course the case came on for trial and the plaintiffs recovered a judgment for the amount of their claim. The case was taken to the appellate court of Indiana. That court reversed the judgment and remanded the case for a new trial (18 Ind. App. 392, 46 N. E. 654), and for want of authority a petition for a writ of certiorari was denied by the supreme court of Indiana (150 Ind. 59, 49 N. E. 826). In the opinion of the appellate court, as also in a dissenting opinion, the character of the counterclaim and the question whether, as respects the matters therein set forth, the Illinois judgment was *res judicata*, were considered [91] at great length. Following an inspection *of the record of the Illinois action the court held that the counterclaim stated matters which constituted something more than a mere defense to the claim asserted in the Illinois action, that it could not be said that, under the plea of the general issue, interposed by the defendant in that action, the matters averred in the counterclaim were necessarily adjudicated, and that it was a question to be determined upon the trial whether *in fact* such matters had been theretofore litigated and determined. On the new trial the court held that certain of the issues made by the counterclaim and reply had been litigated in the Illinois action and that the Illinois judgment was *res judicata* as to such issues, but submitted to the jury the question of the alleged neglect of plaintiffs in failing in the insolvency proceedings to procure an order charging the trust estate with the fees in question and the compensation earned by defendant as trustee. And the court left it to the jury to determine, upon a preponderance of evidence, whether or not it was the law of Illinois that the failure of plaintiffs to procure such an order—if they did so fail—was a matter which was adjudicated in the Illinois action, whether evidence was introduced on such point or not, and the jury was instructed that, if such was the law of Illinois, recovery could not be had upon the counterclaim.

The second trial resulted in a verdict of $181.74 for the defendant Gates, that being the sum found to be due him in excess of the amount of the judgment sued upon. After the entry of judgment and before the taking of an appeal, George W. Northrup, Jr., one of the original plaintiffs, died. An appeal, however, was taken to the appellate court of Indiana by Jacob Newman and S. O. Levinson, describing themselves surviving partners of the firm of Newman, Northrup, & Levinson. The personal representative of the deceased partner was not made a party to the appeal. The appellate court of Indiana overruled an objection to the sufficiency of the appeal and on the merits reversed the judgment and ordered the cause remanded for a new trial. On the petition of the *defendant Gates the supreme court of Indiana removed the cause into that court for decision and subsequently dismissed the appeal, holding that, on account of the omission to make the personal representative of George W. Northrup, Jr., a coappellant, the appeal could not be determined upon the merits. 165 Ind. 171, 73 N. E. 638. A petition for a rehearing having been denied, the cause was brought here.

Messrs. Charles Martindale and S. S. Gregory argued the cause and filed a brief for plaintiffs in error:

If the Federal right of immunity set up would require that judgment should have been rendered for the plaintiffs in error, that result could not be avoided merely by silence on the Federal question, and by placing the judgment on some principle of the local law. The constitutional grounds relied on must, if sustained, displace or supersede any principle of general or local law which, but for such grounds, might be sufficient for the complete determination of the rights of the parties.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518; Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 48 L. ed. 1124, 24 Sup. Ct. Rep. 767; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 31 L. ed. 234, 8 Sup. Ct. Rep. 211; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1064, 5 Sup. Ct. Rep. 681.

Where the Federal question was properly set up and relied upon and was necessarily involved in the decision of the cause, as though the state court was silent on the Federal question, and placed its judgment upon a point of local law, the necessary effect of which was to deny the Federal right and immunity specially set up and claimed, this court will not sustain a motion to dismiss or affirm, unless such Federal question is (1) wholly formal, or (2) absolutely devoid of merit as to be frivolous or (3) has been so explicitly foreclosed by

a decision of this court as to leave no room for real controversy.

Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123.

The jurisdiction of this court is not defeated because it may appear upon examination of the Federal question that the decision upon the merits should be adverse to the plaintiffs in error.

Chicago L. Ins. Co. v. Needles, Chicago, B. & Q. R. Co. v. Illinois, and West Chicago Street R. Co. v. Illinois, supra.

No particular form of words or phrases has ever been declared necessary in which the claim of Federal right must be asserted. It is sufficient if it appears from the record that such rights were specially set up and claimed in the state court in such manner as to bring them to the attention of that court. If, from the whole record, this court is able to see clearly that the title, right, privilege, and immunity under article 4, § 1, of the Constitution of the United States, requiring that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, was set up and claimed in the state court and relied upon by the plaintiffs in error, and that the necessary effect of the decision of the state court was to deny that right, the Federal question is sufficiently presented.

Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; National Mut. Bldg. & L. Asso. v. Braham, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532; Jacobs v. Marks, 182 U. S. 583, 46 L. ed. 1241, 21 Sup. Ct. Rep. 865; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565.

It is plain that, if Gates's counterclaim is not valid, but is sham and frivolous, as is most obvious, Northrup's personal representative is not a necessary party to the appeal. It is also obvious, we think, that if full faith and credit be given the judgment of the circuit court of Cook county, Illinois, between the parties, Gates had no counterclaim. Hence, the decision of the court below necessarily involved the denial of the Federal right. Whether due faith and credit were denied by the state court to the judgment of the circuit court of Cook county, Illinois, is a Federal question which this court has jurisdiction on writ of error to examine.

Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; Harris v. Hardeman, 14 How. 334, 14 L. ed. 444; Jacobs v. Marks, and Huntington v. Attrill, supra; Jaster v. Currie, 198 U. S. 144, 49 L. ed. 988, 25 Sup. Ct. Rep. 614; Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 48 L. ed. 1124, 24 Sup. Ct. Rep. 767; National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111.

This court is not bound by the decision of the state court as to its (the state court's) own jurisdiction, if the ultimate determination of that inquiry involves a Federal right or immunity set up and relied on in the state court, merely because the state court has the power to decide as to its own jurisdiction.

D'Arcy v. Ketchum, 11 How. 165, 13 L. ed. 648; Knowles v. Logansport Gaslight & Coke Co. 19 Wall. 58, 22 L. ed. 70; Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Wilson v. Seligman, 144 U. S. 41, 36 L. ed. 338, 12 Sup. Ct. Rep. 541; Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; Carson v. Dunham, 121 U. S. 421, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030; Burlington, C. R. & N. R. Co. v. Dunn, 122 U. S. 513, 30 L. ed. 1159, 7 Sup. Ct. Rep. 1262; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; Central Nat. Bank v. Stevens, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403.

Plaintiffs in error ask that this court shall examine Gates's counterclaim and, looking into the whole record, say that after the conclusion of the trial between the parties in the circuit court of Cook county, Illinois, Gates had no vestige of a cause of action left unmerged in the judgment of that court, and nothing upon which to base a counterclaim when sued upon the Illinois judgment in the courts of Indiana; that the "full faith and credit" clause requires this conclusion, and that this conclusion destroys the foundation upon which the decision of the jurisdictional question by the supreme court of Indiana rests.

Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544; Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; Finney v. Guy, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558.

The court below, for the purpose of determining its jurisdiction, and to that end to ascertain who were the necessary parties to the appeal, had the power to look behind the mere paper case made by the pleading of a counterclaim by defendant in error. Pleadings must be bona fide; and if, from

the record before it, the fact appeared that the counterclaim was a sham defense, entitled to no consideration, it could not affect the jurisdiction of that court founded upon the cause of action set up in the complaint to which the surviving partners of Newman, Northrup, & Levinson alone were necessary parties appellant. The allegations of the counterclaim did not preclude the court from examining as to whether it pleaded a valid cross demand to which the personal representative of Northrup was a necessary party.

M'Elmoyle v. Cohen, 13 Pet. 312, 325, 10 L. ed. 177, 183; Thompson v. Whitman, and Atherton v. Atherton, supra; Bell v. Bell, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551; Streitwolf v. Streitwolf, 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. Rep. 553; Andrews v. Andrews, Finney v. Guy, and Jaster v. Currie, supra.

The question of the force and effect of a judgment in the state wherein it was rendered as an adjudication between the parties, when raised in a foreign jurisdiction, is not a question of fact, upon which the verdict of a jury is conclusive.

Finney v. Guy, supra; Eastern Bldg. & L. Asso. v. Williamson, 189 U. S. 122, 47 L. ed. 735, 23 Sup. Ct. Rep. 527; Laing v. Rigney, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366.

Mr. Edward E. Gates argued the cause, and, with Messrs. Albert Baker, Edward Daniels, and Lewis C. Walker, filed a brief for defendant in error:

Questions of practice and proceeding in state courts are for the exclusive determination of the tribunals of the state where they may arise.

Tripp v. Santa Rosa Street R. Co. 144 U. S. 130, 36 L. ed. 373, 12 Sup. Ct. Rep. 655; Mills v. St. Clair County, 8 How. 569, 586, 12 L. ed. 1201, 1208.

Where the opinion of the state court is confined to the construction or interpretation of a state statute, and there is no contention that such statute conflicts with any right, privilege, or immunity preserved by the Federal Constitution, the opinion of the state supreme court is final, and the Supreme Court of the United States has no jurisdiction to revise such opinion, whether it be erroneous or not.

M'Bride v. Hoey, 11 Pet. 167, 9 L. ed. 673; Nesmith v. Sheldon, 7 How. 812, 12 L. ed. 925; Grand Gulf R. & Bkg. Co. v. Marshall, 12 How. 165, 13 L. ed. 938.

This court has refused, in cases in which questions of a similar nature have arisen, to review the decision of the state tribunal.

Tripp v. Santa Rosa Street R. Co. 144 U. S. 130, 36 L. ed. 373, 12 Sup. Ct. Rep. 655; Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. 172 U. S. 473, 43 L. ed. 520, 19 Sup. Ct. Rep. 268.

In this case the supreme court of Indiana in its decision proceeded upon the general principles of the jurisprudence of the state, and all the matters in the issue decided were questions of general law, without reference to any Federal question. That being so the Supreme Court of the United States has no jurisdiction to review the decision of the supreme court of Indiana even upon the suggestion made that, if the state court erred, it thereby deprived the plaintiffs in error of some safeguard insured by the Federal Constitution.

Sevier v. Haskell, 14 Wall. 15, 20 L. ed. 827; Palmer v. Marston (Worthy v. Marston) 14 Wall. 10-12, 20 L. ed. 826, 827; Hoyt v. Shelden (Hoyt v. Thompson) 1 Black, 521, 17 L. ed. 66.

The supreme court of Indiana in no way questioned the judgment of the Illinois court, and full faith and credit was not denied it.

Lloyd v. Matthews, 155 U. S. 222, 224, 39 L. ed. 128, 129, 15 Sup. Ct. Rep. 70; Glenn v. Garth, 147 U. S. 360, 368, 37 L. ed. 203, 206, 13 Sup. Ct. Rep. 350; Finney v. Guy, 189 U. S. 335, 339, 47 L. ed. 839, 841, 23 Sup. Ct. Rep. 558.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

A motion has been filed to dismiss the writ of error or to affirm, and we proceed at once to its consideration. Several grounds are urged in argument in support of the motion, but we do not find it necessary to do more than consider an objection based upon the absence of a Federal question.

The errors assigned are as follows:

"The supreme court of Indiana erred in holding and deciding:

"1. That the counterclaim set up by appellee Gates, the defendant in the trial court, based upon a breach of the same contract of hiring, which was the basis of the action of the appellants against the appellee Gates in the circuit court of Cook county, Illinois, was not adjudicated by the judgment in the circuit court of Cook county, Illinois, and by so deciding denied to the judgment of the circuit court of Cook county, Illinois, the force and effect which it has between the parties in the state of Illinois, wherein it was rendered, and denies full faith and credit to said judgment, contrary to and in *violation of article 4. § 1, of the Constitution of the United States.

"2. That the appellee's counterclaim being valid, and not merged and adjudicated by the judgment of the circuit court of Cook county, Illinois, it was of a nature which

against the personal representa-
a member of the partnership of
, Northrup, & Levinson, and that
nal representatives of the deceased
were necessary parties to the ap-
l, not having been made parties,
her the appellate court of the state
a, nor the supreme court of the
Indiana, has jurisdiction to de-
he appeal, and the same must be
, and judgment of dismissal was
ed. Which final judgment of the
court necessarily involved the ad-
of the claim of the appellants to
ction of article 4, § 1, of the
ion of the United States, "that full
credit shall be given in each state
blic acts, records, and judicial pro-
of every other state,' which ad-
was adverse to appellants' claim
d provision of the Constitution of
ed States."

assignments plainly import that
me court of Indiana, on dismissing
l, considered and decided a ques-
h had been submitted to the jury
ial; *viz.*, whether the matters al-
the counterclaim as the basis for
y over against the plaintiffs had
ot been concluded by the Illinois
sued upon by the plaintiffs. We
construe the opinion and decision
rt.

pellate court of Indiana had held
st appeal that the action of the
t, in refusing to admit evidence in
f the counterclaim, because the
dgment constituted *res judicata*,
. It had further decided that the
im was "based upon a breach of
and constituted an independent,
e cause of action in favor of the
, and that whether the questions
volved were in fact adjudicated in
is action *was a question for the
a result of this ruling evidence
duced at the subsequent trial to
what were the questions litigated
mined in the Illinois action and
t to which, by the laws of Illinois,
nent in that case possessed con-
rce.

n the opinion delivered by the
court of Indiana, on dismissing the
e court did not discuss or in any
to the scope and conclusive effect
inois judgment. Undoubtedly, the
view of the law of the case as de-
the first appeal, treated the
im as containing allegations of
breaches of duty which might
ed the subject of an independent
d it is likewise evident that the
court was of opinion that the plaintiffs were bound to perfect their appeal from the judgment upon the counterclaim, upon the hypothesis that the counterclaim set forth a valid cause of action against three individuals, *viz.*, the plaintiffs in the main action. But substantially the court only considered and disposed of a preliminary question as to its authority to pass upon the controverted questions contained in the record before it. It found that there were in the counterclaim averments which it had been held early in the litigation required to be submitted to a jury, that the record exhibited a recovery upon the counterclaim against three persons, and that one of such persons had died after the rendition of judgment against him and his associates. Construing the statutes of Indiana, the court held that the cause of action asserted in the counterclaim survived the death of the party deceased, against whom a recovery had been had, that such cause of action could have been revived against the personal representative of the deceased, and that the personal representative was a necessary party appellant, and, not having been made a coappellant and served with notice of the appeal, the court was without jurisdiction to pass upon the errors assigned upon the appeal. To give effect to the assignments of error we should be obliged to make the impossible ruling that, despite the overruling of a demurrer *to the counter- [95]
claim by the trial court, and the decision in respect to that pleading made by the appellate court on the first appeal, a mere inspection of the counterclaim so plainly demonstrates that the pleading is destitute of merit that it should be held to have been the duty of the state court of last resort to have treated the pleading as a sham and to have disposed of the appeal upon the hypothesis that the counterclaim was nonexistent.

The removal of the cause from the appellate court into the supreme court of Indiana vacated the decision of the former tribunal, and after transfer the case stood in the highest court of Indiana as though it had been appealed to that court directly from the trial court. Oster v. Broe, 161 Ind. 114, 64 N. E. 918. Had the appeal been properly taken it would have been the duty of the supreme court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by

the trial court. As the jurisdiction of this court to review the judgments or decree of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a state in which a decision in the suit could be had, and as, for the want of a proper appeal, no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.

Writ of error dismissed.

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[96]*J. B. ORCUTT COMPANY, Charles Duncan, Charles H. Dauchy Company, and Charles Duncan, Trustee, Petitioners,

v.

CHARLES H. GREEN et al.

(See S. C. Reporter's ed. 96-103.)

Bankruptcy—validity of general order—filing claim.

1. The Supreme Court of the United States was empowered by the provision of the bankrupt act of July 1, 1898 (30 Stat. at L. 554, chap. 541, U. S. Comp. Stat. 1901, p. 3434), § 30, that all necessary rules, forms, and orders as to procedure and for carrying the act into force and effect shall be prescribed, and may be amended from time to time, by that court, to provide by general orders in bankruptcy No. 21, that proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

Bankruptcy—filing claim with trustee.

2. The presentation and delivery of proof of claim to the trustee in bankruptcy within a year after the adjudication is a sufficient filing within the meaning of the bankrupt act of July 1, 1898 (30 Stat. at L. 561, chap. 541, U. S. Comp. Stat. 1901, p. 3443), § 57, when read in connection with general orders in bankruptcy No. 21, providing that proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

Bankruptcy — filing claim — trustee's own claim.

3. A trustee in bankruptcy cannot file with himself his proof of his own claim against the bankrupt estate, nor will the delivery of such claim to his attorney, to be filed with the referee, be deemed the equivalent of a delivery to such referee.

[No. 116.]

Argued December 6, 1906. Decided January 7, 1907.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review an order reversing an order of the District Court for the Northern District of New York, which, reversing the determination of a referee in bankruptcy, directed that certain claims against the bankrupt estate should be filed as of the date when delivered to the trustee. Order of the Circuit Court of Appeals reversed and that of the District Court modified by refusing the filing of the proof of claim of the trustee himself, and as so modified affirmed.

See same case below, 70 C. C. A. 101, 137 Fed. 517.

Statement by Mr. Justice Peckham:

This case comes here upon return to a writ of certiorari, issued by this court to the circuit court of appeals of the second circuit. It is a proceeding in bankruptcy, and the question involved is one in regard to the sufficiency of the filing of certain proofs of claims against the bankrupts' estate.

The facts are these: Messrs. Ingalls Brothers were adjudicated bankrupts in proceedings in the district court of the United States for the northern district of New York on the 3d day of December, 1902. Soon thereafter one Charles Duncan was appointed trustee, and on the 19th day of December, 1902, he duly verified a proof of claim in his own behalf for $4,171, admitting an offset of $327. On the 1st of April, 1903, the J. B. Orcutt Company duly verified a proof of claim against the bankrupts' estate for $893.68, and in a short time delivered it to the trustee. At the first meeting of creditors Charles H. Dauchy Company presented to the referee a defective proof of claim against said bankrupts for $3,335.67, which was returned by the referee to said company *for correction. Prior to January 23, 1903, the Dauchy Company duly verified another proof of claim in the same amount, prepared by Henry W. Smith, the attorney for the trustee, who had volunteered to prepare the same so as to comply with the rules, and on or about March 16, 1903, the Dauchy Company delivered this proof of claim to the trustee. Prior to June 1, 1903, the trustee delivered all three claims to said Henry W. Smith, with directions to file the same with the referee, which the attorney promised to do. In this he failed. When the attorney Smith received these claims from the trustee he handed them to a clerk in his office, directing him to put them with the papers in this proceeding, and shortly after told the clerk to file the proofs of the claim with the referee. The clerk neglected to do so, and some time afterwards, upon being asked in regard to it, said that he would do so im-

mediately. This was before the expiration of the year after the adjudication. But he again failed to make the filing. The Dauchy proof, which had been left with the attorney, is lost and cannot be found, after diligent search made by the attorney for it in his office. The other two claims, the Orcutt Company and Duncan's own claim, were found in a package of papers relating to another bankruptcy proceeding. Another proof of claim, for the same amount, was made by the Dauchy Company April 2, 1904, and, with the Duncan and Orcutt proofs, was presented to the referee for filing, each proof being accompanied by a petition, dated April 2, 1904, for leave to file each of said claims *nunc pro tunc* as of a date prior to December 3, 1903, or for such other or further relief as might be just and proper. Smith was not the attorney for any of the claimants, and his failure to file with the referee was not by virtue of any instructions to withhold such claims from filing, nor was it known on the part of any of the claimants that he had failed to file them until more than a year after the adjudication.

Upon the presentation of these claims with the petition, other creditors of the bankrupts objected to the granting of the relief asked in the petition, upon the ground that the claims *had not been seasonably presented to the court, and were barred under the provisions of § 57n of the bankruptcy act. [30 Stat. at L. 561, chap. 541, U. S. Comp. Stat. 1901, p. 3444.]

Upon the hearing of the petition for leave to file these proofs of claim, the referee to whom the case had been referred denied the petition, under the objection of other creditors, on the ground that, one year having expired subsequent to the adjudication of bankruptcy and prior to the filing of the several petitions and the presentation therewith to the referee, the referee had no power to permit the filing of said proofs of claims, and that neither the referee nor the court had any discretionary power to permit either of said proofs of claims to be filed, either *nunc pro tunc* or otherwise. An order denying the relief asked was duly entered.

The referee then certified for review by the district court the question whether his decision was correct in refusing the relief stated by the claimants.

The district court directed that the claims of the petitioning creditors should be filed as of the date when delivered to the trustee.

Charles H. Green, one of the creditors of the bankrupts, thereupon appealed from the order of the district court reversing the determination made by the referee, to the United States circuit court of appeals for the second circuit, and in his appeal, in view of the position of the trustee and his refusal himself to act in the matter, Green asked that he might be permitted to prosecute the appeal for himself and the other creditors. The district court thereupon allowed the appeal and cited the respondents to appear in the circuit court of appeals. That court, having heard the case argued, reversed the decision of the district court, and affirmed that of the referee. A brief memorandum was filed by the court, in which it was stated that the referee had given a very full examination of the question of law involved, and that the court concurred in his interpretation of the statute, and that his opinion might be printed as a supplement to the memorandum of the court.

Messrs. **Reginald S. Huidekoper** and **Charles Cowles Tucker** argued the cause, and, with Mr. J. Miller Kenyon, filed a brief for petitioners.

Mr. **Herbert D. Bailey** argued the cause, and, with Mr. Frank H. Deal, filed a brief for respondents.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The question in this case resolves itself into one of the sufficiency of the presentation of proofs of claims of the creditors named in the foregoing statement. They were, in reality, presented and delivered to the trustee in bankruptcy before the expiration of one year after adjudication, but there was no actual filing of the claims with the referee until after the expiration of that time, when the attempt to file them with the petition was made as above stated.

The question turns upon the construction of some of the subdivisions of the 57th section of the bankruptcy act, together with the 21st general order in bankruptcy, the last part of which reads: "Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred."

Subsection a of § 57 provides that "proof of claims shall consist of a statement under oath, in writing, signed by a creditor, setting forth the claim, the consideration therefor, and whether any, and, if so, what, securities are held therefor; and whether any, and, if so, what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

Subsection c provides that "claims, after being proved, may, *for the purpose of al- [101]

lowance, be filed by the claimants in the court where the proceedings are pending, or before the referee if the case has been referred."

Subsection d provides that "claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."

Subsection n provides that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication."

If the presentation and delivery of these proofs of claim in the case before us with the trustee was sufficient within the meaning of the bankruptcy act, then the referee should have proceeded to determine the question of their allowance, when presented to him, the same as if they had been filed with him personally within the year subsequent to adjudication.

We have been referred to no case in this court deciding the exact question, nor is there cited any case in the lower courts wherein it has been decided, with the exception of that of Re Seff, district court of United States, southern district of New York (not reported), where the question before us seems to have been directly before that court, and the decision was in favor of the sufficiency of the filing with the trustee. The parties hereto have cited a great many cases in the lower courts deciding questions somewhat analogous to the one now before us, but none in which this question has been decided. We, therefore, think it unnecessary to refer to them.

We are of opinion, taking into consideration the various provisions of the 57th section of the bankruptcy act, in connection with No. 21 of the general orders in bankruptcy, adopted by this court, that the presentation and delivery of proofs of claim to the trustee in bankruptcy within the year after the adjudication is a filing within the statute and the general order above mentioned.

The general orders of this court are pro-
[102] vided for by § *30 of the bankruptcy act, which enacts that "all necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States." Under that section this court had the power to provide, as it has done in order 21, that "proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred." There is nothing in that provision inconsistent with, or opposed to, anyth stated in the bankruptcy law upon the s ject, and we must, therefore, take statute and the order and read them gether, the order being simply somewhat an amplification of the law with respect procedure, but nothing which can be c strued as beyond the powers granted to t court by virtue of the law itself. The qu tion is not whether anyone but the cou or referee can pass upon a claim and allo it or disallow it. That must be done by t court or referee; but it is simply wheth a delivery of a claim, properly proved, the trustee, is a sufficient filing. The la provides (subsection c of § 57) that t claims, after being proved, may, for t purpose of allowance, be filed by the clai ants in the court where the proceedings a pending, or before the referee, if the ca has been referred; but that does not pr hibit their being filed somewhere else pri to their allowance, and the order in ban ruptcy in substance provides that they m be filed, after being proved, with the tru tee. Such order is equivalent to sayi that proofs of debt (or claim) may be r ceived by the trustee. When they are r received by him they are in legal effect r ceived by the court, whose officer the tru tee is. Having been received by t trustee, under authority of law, the proo of debt are thereby sufficiently filed so f as the creditors are concerned, and it the duty of the trustee to deliver them the referee. If the trustee inadvertent neglects to perform that duty it is t neglect of an officer of the court, and t creditors are in no way responsible the for. The presentation and filing have be made within the time provided for and wi one of the proper *officers, his failure to d liver to the referee cannot be held to be failure on the part of the creditor to prop ly file his proofs.

Not much benefit can be derived from examination of the bankruptcy act of 18 [14 Stat. at L. 517, chap. 176], in refere to the provisions therein contained, grant power to the justices of the Supreme Co to frame general orders for the purp named. See § 10, bankruptcy act of 18 We think it plain that, so far as this m ter is concerned, the Supreme Court h full power to make the general order it d

Different considerations, however, ap to the one claim made by the trustee h self. We do not think that in any ev a trustee could file with himself his pr of his own claim against the estate of bankrupt. General principles of law fo that he should so act in his own case. his delivery of his own claim to his

torney could not make such delivery stand in the place of a delivery to the referee.

These views lead to a reversal of the order of the Circuit Court of Appeals, and the affirmance of the order made by the District Court, with the modification, refusing the filing of the proof of claim of the trustee himself.

And it is so ordered.

AMERICAN SMELTING & REFINING COMPANY, Plff. in Err.,
v.
PEOPLE OF THE STATE OF COLORADO EX REL. HENRY A. LINDSLEY, District Attorney of the Second Judicial District of the State of Colorado, Deft. in Err.

(See S. C. Reporter's ed. 103-116.)

Constitutional law—impairing contract obligations—taxation of foreign corporation.

A contract right to do business in the state during the corporate lifetime of domestic corporations without being subject to any greater liabilities than then were or might be imposed upon domestic corporations was acquired by a foreign corporation by virtue of its admission into the state of Colorado with the right to do business therein under the then-existing laws of that state, which, *inter alia*, subjected foreign corporations coming into the state to the liabilities, restrictions, and duties which then were or might thereafter be imposed upon domestic corporations of like character, and such right was unconstitutionally impaired by Colo. act of March 22, 1902, § 65, exacting from such corporation an annual tax or license fee in double the amount of that imposed by § 64 upon domestic corporations.

[No. 143.]

Argued December 20, 21, 1906. Decided January 7, 1907.

IN ERROR to the Supreme Court of the State of Colorado to review a judgment which affirmed a judgment of the District Court for the County of Denver, in that state, forfeiting the right of a foreign corporation to do business in the state until a certain tax shall be paid. Reversed and remanded for further proceedings.

See same case below, 34 Colo. 240, 82 Pac. 531.

Statement by Mr. Justice Peckham:

The writ of error in this case brings up for review the judgment of the supreme court of Colorado, which affirmed the judgment of the trial court, forfeiting the right of the plaintiff in error, hereinafter called the corporation, to do business as a foreign corporation within the state until a certain tax therein adjudged to be due should be paid. The corporation refused to pay the tax, and thereupon, at the instance of the district attorney and the attorney general of the state, a proceeding in the nature of quo warranto against the corporation was commenced for the purpose of obtaining a forfeiture of the franchise of the corporation for its failure to pay the "annual state corporation license tax." The defense set up that the tax was a violation of the Federal Constitution as impairing the obligation of a contract, and in other particulars named. Upon the trial the court found that there was due to the state of Colorado the sum of $4,000, being the amount of the annual tax due by reason of the statute, which was held valid. A decree was thereupon entered, forfeiting the right of the corporation to do business within the limits of the state of Colorado until the tax was paid, and it was "absolutely and wholly deprived of all rights and privileges within the state of Colorado until such tax is paid." Upon appeal to the supreme court of the state this judgment was affirmed, and the corporation then sued out this writ of error.

The corporation was incorporated April 4, 1899, in New Jersey, and it is permitted by its articles of incorporation to do business in other states, and to carry on a general ore reduction, milling, mining, and other business mentioned in such *articles. On [105] April 28, 1899, it duly made application to the proper state authorities of Colorado for permission to enter and transact business in that state, under the laws thereof. At this time its capital stock was $65,000,000, divided into shares of the par value of $100 each. Subsequently, and on April 8, 1901, its capital stock was increased to $100,000,000, and the certificate of such increase was duly filed in Colorado. Section 499 (Mills' Annotated Statutes of Colorado), after making provision for the performance of certain conditions by a foreign corporation entering the state, continued: "And such

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NOTE.—On corporate taxation as affected by the contract clause in the Federal Constitution—see note to Adams v. Yazoo & M. Valley R. Co. 60 L.R.A. 33.

As to impairing the obligation of a contract for exemption from taxation—see note to Wicomico County v. Bancroft, 70 C. C. A. 294.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20, and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

corporation shall be subjected to all the liabilities, restrictions, and duties which are or may be imposed upon such corporations of like character organized under the general laws of this state, and shall have no other or greater powers." Section 500 of the same statute provided that a foreign corporation must file in the office of the secretary of state a copy of its charter, or, if incorporated under a general corporation law, a copy of such certificate of incorporation, and such general corporation law, duly certified. Section 1 of chapter 51 of the Session Laws of Colorado for 1897 provided that every foreign corporation should pay to the secretary of state, for the use of the state, a fee of $10 if the capital stock did not exceed $50,000. If in excess of that sum the corporation was to pay "the further sum of 15 cents on each and every thousand dollars of such excess, and a like fee of 15 cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of certificate of incorporation, articles of association, or charter of said incorporation, joint stock company, or association, in the office of the secretary of state; and no such corporation, joint stock company, or association shall have or exercise any corporate powers or be permitted to do any business in this state until the said fee shall have been paid; and the secretary of state shall not file any certificate of incorporation, articles of association, charter, or certificate of the increase of capital stock, or certify or [106] give any certificate to *any such corporation, joint stock company, or association, until said fee shall have been paid to him." By § 10 of chapter 52 of the Session Laws of Colorado for 1901 it was provided that no foreign corporation could "exercise any corporate power or acquire or hold any real or personal property, franchises, rights, or privileges, or do any business or prosecute or defend in any suit, in this state, until it shall have received from the secretary of this state a certificate setting forth that full payment has been made by such corporation, joint stock company, or association of all fees and taxes prescribed by law to be paid to the secretary of state, and every such corporation, joint stock company, or association shall pay to the secretary of state for each such certificate a fee of $5."

In accordance with the provisions of § 1 of the Laws of 1897, above mentioned, the corporation paid, upon filing its certificate, April 28, 1899, to the secretary of state, for the use of the state, $9,792.50 on its original capitalization; and on May 17, 1901, the further sum of $5,250 upon its increase of capital stock to $100,000,000. Thereupon the secretary of state issued a certificate, stating the filing of the proper papers with him, and further stating that "pursuant to the provisions of § 10 of said act (1901) I hereby certify that the said company has made full payment of all fees prescribed by law to be paid to the secretary of state and due at the time of the issuing of this certificate, and is hereby authorized to exercise any corporate powers provided for by law." This was given under the hand and official seal of the secretary of state, and was dated on the 21st day of May, 1901. There were at this time no other statutes providing for the payment of any charges, fees, or taxes for coming into and doing business in the state of Colorado.

The corporation, upon entering the state in 1899 under its permission to enter and transact business therein, immediately commenced to erect a plant for the purpose of carrying on its business as a corporation, and before the commencement of these proceedings it had invested for that purpose in the state sums amounting to more than $5,000,000. At the time the corporation was permitted to enter and carry on its business in the state the statute of Colorado provided that the term of life of corporations formed under the laws of that state should be twenty years. After the corporation had been doing business for some three years, and on March 22, 1902, the legislature of Colorado passed an act in relation to taxes. Colo. Sess. Laws 1902, pp. 43, 160, etc.

Section 64 of that act provided that all domestic corporations should thereafter and on or before the 1st day of May of each year, or at the time of obtaining such charter or certificate of incorporation, pay "an annual state corporation license tax," to the auditor of the state, of 2 cents upon each $1,000 of its capital stock.

Section 65 provides that every foreign corporation which had theretofore obtained "the right and privilege to transact and carry on business within the limits of the state of Colorado shall, in addition to the fees and taxes now provided for by law, and as a condition precedent to its right to do any business within the limits of this state, pay annually . . ." a state license tax of 4 cents upon each $1,000 of its capital stock.

Section 66 provided that every corporation which should fail to pay the tax provided for in §§ 64 and 65 (supra) should forfeit its right to do business within the state until the tax was paid, and should be deprived of all rights and privileges, and the fact of such failure might be pleaded as an absolute defense to any and all actions, suits, or proceedings, in law or in

equity, brought or maintained by or on behalf of such corporations, in any court of competent jurisdiction within the limits of the state, until such tax was paid.

This corporation refused to pay, and the state, through its district attorney and attorney general, commenced this suit for the purpose of forfeiting its right to remain in that state unless and until it paid the money under the statute of 1902.

Mr. **Thomas Thacher** argued the cause and filed a brief for plaintiff in error:

The intention of the Colorado law was to create substantial uniformity as to corporations, whether originally incorporated in or out of the state, which have complied with its conditions for acquiring the right of incorporation within its boundaries.

Iron Silver Min. Co. v. Cowie, 31 Colo. 450, 72 Pac. 1067; Stevens v. Pratt, 101 Ill. 208.

It is not necessary to consider whether investments made upon the faith of such a franchise are sufficient consideration, so that thereafter the grant of the franchise must be deemed a binding contract (Powers v. Detroit, G. H. & M. R. Co. 201 U. S. 543, 50 L. ed. 860, 26 Sup. Ct. Rep. 556), for in this case not only was such investment made up to millions, but a substantial sum was required to be paid and was paid at the time of the grant. Here there can be no question as to the consideration.

What the corporation got in this case was not a mere revocable license.

Home for the Friendless v. Rouse, 8 Wall. 430, 19 L. ed. 495; Powers v. Detroit, G. H. & M. R. Co. supra.

There is a wide distinction between the power to alter or annul, here reserved, and the unrestricted reserved power in the laws and Constitutions of many states.

Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660.

Foreign corporations are not outside of the protection of the Constitution for the reason that the states may impose conditions as to their admission.

Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 332, 46 L. ed. 922, 935, 22 Sup. Ct. Rep. 662.

Mr. **Charles W. Waterman** also argued the cause, and, with Messrs. Joel F. Vaile and William W. Field, filed a brief for plaintiff in error:

The period for which a foreign corporation has the right to do business in this state—whatever the life of that corporation under the laws of the state of its origin,—is limited to the statutory life of corporations created under the laws of Colorado, to-wit: fifty years.

Iron Silver Min. Co. v. Cowie, 31 Colo. 450, 72 Pac. 1067.

The plaintiff in error obtained the right, by grant from the state, made for valuable consideration, to do business in this state for a period of twenty years; subject, of course, to the ordinary rules as to taxation of its property equally with that of any other person within the jurisdiction of the state. The right, so granted, cannot be taken away by the imposition of a subsequent additional burden, as a condition to the "doing of business" in this state. Relying upon the grant made to it under the laws of the state, and for which it had paid the sum of $15,000, it invests capital, acquires property, has established a business, and has definite vested rights which cannot thereafter be taken away by the imposition of new conditions.

County Comrs. v. Colorado Seminary, 12 Colo. 497, 21 Pac. 490; 15 Am. & Eng. Enc. Law, 2d ed. p. 1049; Com. v. New Bedford Bridge, 2 Gray, 339; Washington Bridge Co. v. State, 18 Conn. 53; Monongahela Nav Co. v. Coon, 6 Pa. 379, 47 Am. Dec. 474; Walker v. Whitehead, 16 Wall. 314, 21 L. ed. 357; State Tax on Foreign-held Bonds, 15 Wall. 300, 320, 21 L. ed. 179, 187; Miller v. New York, 15 Wall. 478, 488, 21 L. ed. 98, 101; Gordon v. Appeal Tax Court, 3 How. 133, 11 L. ed. 529; Wendover v. Lexington, 15 B. Mon. 258; Atty. Gen. v. Bank of Charlotte, 57 N. C. (4 Jones, Eq.) 287.

The constitutional reserved power as to corporations will not support this legislation.

Miller v. New York, 15 Wall. 478, 497, 498, 21 L. ed. 98, 104; Coast-Line R. Co. v. Savannah, 30 Fed. 646; New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952.

The obligation of a contract consists of the duty imposed by the law on the parties to perform their agreement.

15 Am. & Eng. Enc. Law, 2d ed. p. 1040; Sturges v. Crowninshield, 4 Wheat. 122, 197, 4 L. ed. 529, 549; Green v. Biddle, 8 Wheat. 1, 75, 76, 5 L. ed. 547, 565; Ogden v. Saunders, 12 Wheat. 213, 256, 257, 6 L. ed. 606, 620, 621; Bronson v. Kinzie, 1 How. 311, 315, 11 L. ed. 143, 144; McCracken v. Hayward, 2 How. 608, 612, 11 L. ed. 397, 399; Edwards v. Kearzey, 96 U. S. 595, 600, 24 L. ed. 793, 796; Lapsley v. Brashears, 4 Litt. (Ky.) 47.

This obligation the law enforces through its remedies.

15 Am. & Eng. Enc. Law, 2d ed. p. 1040.

The validity, construction, and remedy are part of the obligation.

Green v. Biddle, 8 Wheat. 1, 75, 76, 5 L. ed. 547, 565, 566; Ogden v. Saunders, 12 Wheat. 213, 256, 257, 6 L. ed. 606, 620,

621; Bronson v. Kinzie, 1 How. 311, 315, 11 L. ed. 143; McCracken v. Hayward, 2 How. 608, 612, 11 L. ed. 397, 399; Von Hoffman v. Quincy (United States ex rel. Von Hoffman v. Quincy) 4 Wall. 535, 550, 18 L. ed. 403, 408; People ex rel. McLane v. Bond, 10 Cal. 563; Story v. Furman, 25 N. Y. 214; Walker v. Whitehead, 16 Wall. 314, 317, 318, 21 L. ed. 357, 358.

The legislature may modify, but cannot take away all remedy from a contract.

Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Wood v. Child, 20 Ill. 209; Templeton v. Horne, 82 Ill. 491; 1 Cooley, Taxn. 3d ed. 128; Cooley, Const. Lim. 6th ed. 350; Call v. Hagger, 8 Mass. 423; Osborn v. Nicholson, 13 Wall. 654, 662, 20 L. ed. 689, 695; United States v. Conway, Hempst. 313, Fed. Cas. No. 14,849; Johnson v. Bond, Hempst. 533, Fed. Cas. No. 7,374; West v. Sansom, 44 Ga. 295; Penrose v. Erie Canal Co. 56 Pa. 46, 93 Am. Dec. 778; Thompson v. Com. 81 Pa. 314.

Impairing the validity of a contract includes acts taking away remedies upon contract.

Von Hoffman v. Quincy (United States ex rel. Von Hoffman v. Quincy) 4 Wall. 535, 552, 18 L. ed. 403, 409; Antoni v. Greenhow, 107 U. S. 769, 774, 27 L. ed. 468, 471, 2 Sup. Ct. Rep. 91; White v. Greenhow, 114 U. S. 307, 29 L. ed. 199, 5 Sup. Ct. Rep. 923, 962; Poindexter v. Greenhow, 114 U. S. 270, 303, 29 L. ed. 185, 197, 5 Sup. Ct. Rep. 903, 962; Chaffin v. Taylor, 114 U. S. 309, 29 L. ed. 198, 5 Sup. Ct. Rep. 924, 962; Allen v. Baltimore & O. R. Co. 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 925, 962; Tax Assessors v. State, 44 N. J. L. 395; Morton v. Comptroller General, 4 S. C. N. S. 430; Tracy v. Reed, 2 L.R.A. 773, 13 Sawy. 622, 38 Fed. 69; Collins v. Collins, 79 Ky. 88; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 294, 30 L. ed. 1161, 1165, 7 Sup. Ct. Rep. 1190; Moore v. Greenhow, 114 U. S. 338, 27 L. ed. 240, 5 Sup. Ct. Rep. 1020; Oatman v. Bond, 15 Wis. 22; McCracken v. Hayward, 2 How. 608, 612, 11 L. ed. 397, 399; Sturges v. Crowninshield, 4 Wheat. 122, 197, 4 L. ed. 529, 549; Ogden v. Saunders, 12 Wheat. 213, 256, 257, 6 L. ed. 606, 620, 621; Robinson v. Magee, 9 Cal. 81, 70 Am. Dec. 638; Smith v. Cleveland, 17 Wis. 573; Scarborough v. Dugan, 10 Cal. 305; Patterson, Federal Restraints on State Action, 1888, pp. 152, 153, 181, § 77; 15 Am. & Eng. Enc. Law, 2d ed. pp. 1049, 1052; Memphis v. United States, 97 U. S. 293, 24 L. ed. 920; Lockett v. Usry, 28 Ga. 345; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Fullerton v. Bank of United States, 1 Pet. 604, 614, 615, 7 L. ed. 280, 284, 285; Walker v. Whitehead, 16 Wall. 314, 317, 21 L. ed. 357.

Mr. N. C. Miller argued the cause filed a brief for defendant in error:

The charter may constitute a contract tween the state granting it and the co pany. Even if it contain a clause exem ing it from taxation in the parent state, t filing of a certified copy in another sta would not constitute a contract of exem tion. The fact that an additional tax imposed on a person or corporation is n a change or alteration of the contra Among the laws most likely to be enact after its creation were those changing a altering the revenue laws, adding new su jects of taxation, or changing the burden existing revenue laws. The general sta ute reserving the right in the legislatu to amend or repeal the laws pertaining corporations is constitutional. But the rig to change the revenue laws exists regar less of this statute or constitutional pr vision.

Griffin v. Kentucky Ins. Co. 3 Bush, 5 96 Am. Dec. 259; Tomlinson v. Branch, Wall. 460, 21 L. ed. 189.

A corporation claiming to be exempt fr any form of taxation must show a cle and unequivocal provision to that effe either in its charter or under the gener law under which it is incorporated.

Ohio Life Ins. & T. Co. v. Debolt, 16 Ho 416, 14 L. ed. 997; Delaware Railroad Ta 18 Wall. 206, 21 L. ed. 888; North Missou R. Co. v. Maguire, 20 Wall. 46, 22 L. ed. 25 New York ex rel. Metropolitan Street R Co. v. New York, 199 U. S. 1, 50 L. ed 65, 25 Sup. Ct. Rep. 705; Wells v. Savanna 181 U. S. 531, 45 L. ed. 986, 21 Sup. C Rep. 697; Providence Bank v. Billings, Pet. 514, 7 L. ed. 939; Memphis Gaslight Co. v. Taxing District, 109 U. S. 398, 3 L. ed. 976, 3 Sup. Ct. Rep. 205.

There is an obvious distinction betwee the charter of a corporation or the gener statutes under which corporations file thei articles, which are legislative in charact and subject to alteration, amendment, o repeal in pursuance of the Constitution an statutory provisions, and business contract or franchises, entered into between corpora tions and the state or municipality. Th latter is protected by all the provision of the Federal Constitution, the same as contract between two natural persons. Bu articles of incorporation filed under the con stitutional provisions and statutes in Colo rado are legislative in character, and a subject to change from time to time.

Walla Walla v. Walla Walla Water C 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Re 77; Joplin v. Southwest Missouri Light C 191 U. S. 150, 48 L. ed. 127, 24 Sup. C Rep. 43.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

It is conceded that the corporation has paid all its indebtedness for taxes or otherwise to the state of Colorado, except the amount demanded under the above-mentioned law of 1902, and that it has obeyed all the laws of the state with that exception. It is urged, however, upon the part of the corporation, that, by its admission into the state, with its right to do business therein by the payment of the amount of money required for such purpose under the then-existing law, a contract between the state and itself was thereby made that it should be permitted to remain therein during the term of life which the state by law allowed to corporations created by it (which was twenty years), without being again subjected to further exactions of money for what it had once paid for, *viz.*, the right to remain and transact business in that state. Undoubtedly, if the corporation violated the laws of the state properly applicable to it, or if otherwise it gave just cause for its expulsion, it could not insist upon such a contract as a defense.

It is also conceded on behalf of the corporation that it is not entitled to any exemption from taxes which the state of Colorado can properly impose upon persons or corporations within her borders.

Having obtained permission to enter the state and do business as above mentioned, [112] the question, aside from that of the *extent of the term, is whether any contract between the state and the corporation arose under these laws and the facts above mentioned.

In 1899, when this (foreign) corporation applied for a permit to enter and do business in the state, the laws of Colorado only granted such application on the payment of a certain fee named in the statute of 1897, which was payable upon filing its certificate of incorporation in the office of the secretary of state of Colorado, and until that payment was made and the certificate filed no such corporation was permitted to have or exercise any corporate powers, nor was it permitted to do any business in the state. Section 30 of the act of 1901 provided that, upon payment of all taxes, etc., due under the law, the secretary of state was to issue a certificate acknowledging the fact, for which the corporation was to pay a stated fee; and until the certificate was received from the secretary of state by the corporation it should not exercise any corporate powers or do any business in the state, as provided for by the act of 1897.

The result of these statutes was that the foreign corporation, upon filing the proper papers and paying the statutory fees and obtaining the certificate to that effect from the secretary of state, obtained the right to enter and do business in Colorado. The act of 1901 did not increase the amount of the exaction for entering and doing business in the state, but simply provided for a certificate, acknowledging payment, from the secretary, and it imposed the payment of a small fee for such certificate. The right obtained was a right to enter the state and do business therein as a corporation. It was also subject by statute to the liabilities, restrictions, and duties which were or might thereafter be imposed upon domestic corporations of like character. Domestic corporations at that time had the right to a corporate existence of twenty years.

These provisions of law, existing when the corporation applied for leave to enter the state, made the payment required, *and [113] received its permit, amounted to a contract that the foreign corporation so permitted to come in the state and do business therein, while subjected to all, should not be subjected to any greater, liabilities, restrictions, or duties than then were or thereafter might be imposed upon domestic corporations of like character.

A provision in a statute of this nature subjecting a foreign corporation to all the liabilities, etc., of a domestic one of like character must mean that it shall not be subjected to any greater liabilities than are imposed upon such domestic corporation. The power to impose different liabilities was with the state at the outset. It could make them greater or less than in case of a domestic corporation, or it could make them the same. Having the general power to do as it pleased, when it enacted that the foreign corporation, upon coming in the state, should be subjected to all the liabilities of domestic corporations, it amounted to the same thing as if the statute had said the foreign corporations should be subjected to the same liabilities. In other words the liabilities, restrictions, and duties imposed upon domestic corporations constitute the measure and limit of the liabilities, restrictions, and duties which might thereafter be imposed upon the corporation thus admitted to do business in the state. It was not a mere license to come in the state and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the state, without further limitation. It was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign, it

could only be done by increasing those of the domestic, corporation at the same time and to the same extent.

Such being the contract, how long was it to last? Only until the state chose to alter it? Or was it to last for some definite time, capable of being ascertained from the terms of the statutes as they then existed? [114]It seems to us that the *only limitation imposed is the term for which the corporation would have the right to continue in the state as a corporation. One of the restrictions as to domestic corporations is that which limits their corporate life to twenty years, unless extended as provided by law. The same restriction applies to the foreign corporation. Iron Silver Min. Co. v. Cowie, 31 Colo. 450, 72 Pac. 1067. Counsel for the state concedes that the corporation was admitted for a period of twenty years, but subject to the power of the state to tax. During that time, therefore, the contract lasts. This is the only legitimate, and we think it is the necessary, implication arising from the statute.

This is not an exemption from taxation, it is simply a limitation of the power to tax beyond the rate of taxation imposed upon a domestic corporation. Instead of such a limitation the act of 1902, already referred to, imposes a tax or fee upon or exacts from the foreign corporation double the amount which is imposed upon or exacted from the domestic one. The latter is granted the right to continue to do business upon the annual payment of 2 cents upon each $1,000 of its capital stock, while the former must pay 4 cents for the same right. This cannot be done while the right to remain exists. It is a violation of the obligation of an existing valid contract. Home of the Friendless v. Rouse, 8 Wall. 430, 19 L. ed. 495.

Nor is this a case where the power given by the state Constitution to the general assembly to alter, amend, or annul a charter is applicable. The act does not alter the charter or annul or amend it. It simply increases the taxation which, up to the time of its enactment, had been imposed on all foreign corporations doing business in the state.

A discussion as to the name or nature of the tax imposed by the act of 1902, or the former acts, is wholly unimportant with reference to the view we take of this case. After the payment of the money and the receipt of the permit to enter and do business in the state the corporation could not, [115]as we *have said, be thereafter further taxed than was the domestic one. The tax on the latter under that act is the same in substance and effect as that upon the foreign corporation, but it is for only one half thereof in amount. The domestic must pay "an annual state corporation license tax," while the foreign corporation must pay "a state license tax" annually. The means of enforcing payment are not different, and such means are stated in § 66 of the act of 1902.

Whatever be the name or nature of the tax, it must be measured in amount by the same rate as is provided for the domestic institution, and, if the latter is not taxed in that way, neither can the state thus tax the foreign corporation.

It is unnecessary to refer to the many cases cited by both parties hereto. Some of them refer to the question as to the nature of such a tax, while others decide, upon the facts appearing in them, whether there was a contract or not. As already stated, the name of the tax or its kind is not important so long as it is plain that the act of 1902 increases the liabilities of the foreign corporation over those which obtain in that of the domestic. And in regard to the cases of contract, while the principle that a contract may arise from a legislative enactment has been reiterated times without number, it must always rest for its support in the particular case upon the construction to be given the act, and in this case we are not greatly aided by the former cases regarding taxation and legislative contract. We may, however, refer to the following out of many cases regarding contracts as to taxation: Miller v. New York, 15 Wall. 478, 21 L. ed. 98; New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952; Powers v. Detroit, G. H. & M. R. Co. 201 U. S. 543, 50 L. ed. 860, 26 Sup. Ct. Rep. 556.

Holding that the act of 1902 impaired the obligation of the contract existing between the corporation and the state, and is therefore void as to the corporation, it becomes unnecessary to decide the other questions discussed at the bar.

The judgment of the Supreme Court of Colorado is reversed *and the case remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

The CHIEF JUSTICE, Mr. Justice Harlan, Mr. Justice Holmes, and Mr. Justice Moody dissented.

D ELECTRIC RAILWAY COMPANY, Appt.,
v.
LEVELAND and Forest City lway Company. (197.)

LEVELAND and Forest City lway Company, Appts.,
v.
D ELECTRIC RAILWAY COMPANY. (321.)

C. Reporter's ed. 116-142.)

ay—franchise—construction.
ipal grants of street railway ust be strictly construed.

ays—franchise—term.
ipal ordinances extending the anchise of the Euclid avenue or the Cleveland street railway not be construed as applicable ith a separate route and a dif- of life, known as the Garden , on the theory that the latter a part of the main line because itted to run in connection with ne, and to use a portion of that a public square.

ays—franchise—term.
words "main line" in municipal anting respectively the right to small extension to the Garden of the Cleveland street rail- and the right to lay a second portion of that branch, to ith the expiration of the grant line, must be deemed to refer f the Garden street branch, and uclid avenue line.

ys—franchise—term.
eet railway franchise made to ith the grant to the main line sured by the grant as it then not by any subsequent exten- erm which may be granted.

y—franchise—term.
nt of a street railway franchise eland common council, to be he expiration of the grants for 's tracks on said Quincy street oln avenue, to wit: July 13, t a grant extending to that the Quincy street grants were to terminate at an earlier date.

y—franchise—term.
tension of the time for the termination of the franchise of the Garden street branch of the Cleveland street railway system to the date set for the termination of the Euclid avenue or main line was not effected by a municipal ordinance consenting to a consolidation of several street railroads, including the Euclid avenue and Garden street lines, on condition that but one fare should be charged for a continuous ride.

Street railway—title to property after expiration of franchise.

7. The title to the rails, poles, and other appliances for operating the Garden street branch of the Cleveland street railway system remaining in the various streets at the expiration of its franchise is in the railway company which has been operating the road.

Constitutional law—due process of law.

8. The right to take possession of the property of a street railway company remaining in the streets at the expiration of its franchise cannot, consistently with due process of law, be conferred by municipal ordinance upon another street railway company.

[Nos. 197, 321.]

Argued November 12, 13, 1906. Decided January 7, 1907.

CROSS APPEALS from the Circuit Court of the United States for the Northern District of Ohio to review a decree adjudging that a street railway franchise has expired and enjoining the municipality from attempting to put another street railway company in possession of the rails, poles, and other appliances remaining in the city streets. Affirmed.

See same case below, 137 Fed. 111.

Statement by Mr. Justice Peckham:

This bill was filed in the United States circuit court for the northern district of Ohio on the 21st of March, 1905, against the city of Cleveland and the Forest City Railway Company, for the purpose of obtaining an injunction to restrain the city from carrying out a certain ordinance relating to the Garden street branch of complainant's railroad, passed by the city council January 11, 1904, on the ground that it was null and void, because it impaired the obligations of various contracts which the complainant alleged had been entered into between the complainant and the city, providing for the use until either July 13, 1913, or July 1, 1914, of certain streets by the railroad owned by the complainant, and known as the Garden street or Central avenue branch, and hereafter called the Garden street branch. The ordinance granted to the Forest City Railway Company (a stranger to the original grants) the renewal right to

to rights of street railways in ets—see note to Detroit Citi- R. Co. v. Detroit R. Co. 43 L.

constitutes due process of law o People v. O'Brien, 2 L.R.A. . Sumption, 2 L.R.A. 655; Re R.A. 359; Ulman v. Baltimore, ; Gilman v. Tucker, 13 L.R.A. v. Yewdall, 24 L. ed. U. S. lson v. North Carolina, 42 L.

maintain and operate the existing street railroads through the streets named therein, which were the same streets theretofore granted to the Garden street railroad. The right was granted upon condition that the grantee should pay to the owners of the poles and other property being in the streets an amount to be agreed upon therefor, or such sum as should be finally adjudicated upon by a court. A temporary restraining order was granted. The defendants made separate answers, denying the existence of any contract between the complainant and the city upon the subject of the Garden street branch subsequent to March 22, 1905, and the Forest City Railway Company claimed under the ordinance of January, 1904, the right to take possession of such Garden street branch after March, 1905, and to use the tracks of the complainant's railroad. The case was heard upon the pleadings and various ordinances and resolutions of the council of the city.

[118] *After hearing, a decree was made by the circuit court (137 Fed. 111) which decreed that the right claimed by the complainant to operate its Garden street branch railroad in the streets named in the bill expired on the 22d day of March, 1905. It was also decreed that the ordinance of January 11, 1904, was inoperative, so far as it assumed to confer upon the defendant the Forest City Railway Company any legal right to take the tracks, poles, wires, and appliances erected and maintained by the complainant in the streets, because such ordinance authorized the taking of the property of complainant without due process of law. The railroad company, therefore, was enjoined from interfering with the complainant in the peaceable possession of the property mentioned, and the city was enjoined from attempting in any manner, by virtue of the ordinance, to put the defendant the Forest City Railway Company into possession of the same. From the decree the complainant and both of the defendants appealed directly to this court, as involving questions arising under the Constitution of the United States. The complainant's appeal is No. 197, and is from that portion of the decree which adjudges that the right of the complainant to maintain and operate its Garden street branch railroad expired on the 22d of March, 1905. The cross appeal of the defendants is from that portion of the decree which enjoins the Forest City Railway Company from taking possession of the property described, and which also enjoins the city from in any manner attempting to put that company into possession thereof. It thus appears that the whole controversy turns upon the question whether the right of the Garden street railroad terminated March 22, 1905, or lasts until July 1, 1914, or possibly only until July 13, 1913.

The record shows that there are, among others, two lines of railroad belonging to the complainant, one of which is known as the Euclid avenue, sometimes called the "main" line, and the other the Garden street branch. Both lines run from east to west through the city in different, though generally parallel, streets up to the point of their intersection at Erie street and *Euclid avenue (or Prospect street) from which point west, for a short distance, to the public square and Water street, the Garden street branch is authorized to use the Euclid avenue tracks.

The following (among many other) ordinances and resolutions of the council of the city were put in evidence on the trial, together with the various resolutions of complainant, in which it accepted such ordinances and resolutions. These constitute the case between the parties, and there is no contradictory evidence. Complainant contends that the Garden street grant must be measured in time by that provided for the termination of the Euclid avenue grant.

The ordinances and resolutions relating to the Euclid avenue line will be first stated. The first is a resolution which granted to the East Cleveland Railroad Company, a corporation incorporated February 28, 1859, for that purpose, the right to construct and operate a railroad from a point on Prospect street at its intersection with Erie street, to the eastern terminus of Prospect street, which grant was for the term of twenty years from September 20, 1859. The company, having obtained the necessary consents of the property owners along the line, duly located, constructed, and operated the road under that resolution and within a short time after it was authorized so to do.

This was the commencement of what is known as the Euclid avenue, or sometimes (after 1868) the main line of one of the roads owned now by the complainant.

By ordinance, April 15, 1862, the company was authorized to extend its line from the intersection of Erie and Euclid streets west to the public square.

September 15, 1879, an ordinance was passed which granted a renewal of the franchise to the East Cleveland Railroad Company to maintain and operate its whole Euclid avenue street railroad as far as Willson avenue, on the east, for a period of twenty-five years from September 20, 1879 (September 20, 1904). This ordinance makes no reference to the Garden street line, which had then been built and was

in operation, and does not mention any of the streets through which that line passed, [120] *although the Garden street line had the right, under the ordinance of 1868, hereinafter mentioned, to use the tracks of the Euclid avenue line from the point of junction therewith westerly to its terminus.

On the 4th of April, 1883, another ordinance was passed, granting to the East Cleveland Railroad Company the right to extend, lay, and operate its double track on Euclid avenue from the west line of Willson avenue easterly to the east line of Fairmount street, the right granted to terminate on the 20th of September, 1904, "with the said renewal of that part of said company's line lying west of Willson avenue." Ordinance of September 15, 1879, above referred to.

By ordinance of March 15, 1886, another grant was made to the Euclid avenue line east of Fairmount street, which grant was to cease and terminate upon the 20th of September, 1904, "as provided for said company's tracks in Euclid avenue, west of Fairmount street."

In order to change from animal power to electricity an ordinance was passed July 13, 1888, granting to the East Cleveland Street Railway Company the right to construct and operate an electric street railway on Euclid avenue from Willson avenue easterly to the city limits, and on Cedar avenue from a point near the Cleveland & Pittsburg Railway Company's right of way in that avenue, easterly to a point about 1,500 feet east of Fairmount street. The permission was given on the condition that the grant was to be exercised within six months from the passage of the ordinance. The grant was also upon condition that if the company, from any cause, should fail to extend the electric system over its entire main and Cedar avenue lines within eighteen months from the date of the passage of the ordinance, then the ordinance should be void. Nothing in the ordinance was to be construed as authorizing any increase in the fare for transportation over any portion of the company's line. The 6th section of the ordinance stated that the privilege of constructing the electric system, as provided in the ordinance, was granted "in consideration of the improved [121] facilities *hereby contemplated and the large expenditures necessary to secure the same, and shall be in force for the period of twenty-five years from and after the date of the passage of this ordinance, upon its main and Cedar avenue lines." The right to change to electric power, as given by the foregoing ordinance, was confined, it will be observed, to that portion of the Euclid avenue line east of Willson avenue, and on Cedar avenue to that part lying between the Cleveland & Pittsburg Railway Company's right of way and a point 1,500 feet east of Fairmount street. Nothing west of Willson avenue is included in that grant.

On May 13, 1889, a resolution was adopted, which authorized and required the railroad company, "as soon as practicable, to extend the use of such motive power over its main and Cedar avenue lines to the westerly termini thereof." This included those lines west of Willson avenue, and under the ordinance and resolution the Euclid avenue line was changed to an electric street railroad within the times mentioned in the ordinance and resolution.

There was no extension of time granted by the resolution of 1889 for the termination of the grant on any portion of the Euclid avenue line.

On July 17, 1893, the right was given to the company to extend its road at the intersection of Prospect and Erie streets to the intersection of Prospect and Ontario streets, and also at the intersection of Superior and Seneca streets, thence along Seneca, Lake, and Ontario streets, and the council imposed upon it the duty, if required by the council, of operating its cars over the entire length of any of the lines. Other duties were imposed upon it. Complainant contends that some part of this ordinance refers to a portion of the Garden street extension, and that it requires the operation of all the Garden street cars over these tracks, and the grant is to terminate at the time mentioned in the 1888 ordinance,—July 13, 1913.

The above list includes the material ordinances and resolutions pertaining particularly to Euclid avenue.

[122] *After the Euclid avenue line had been built the council, on the 14th of January, 1868, passed a resolution granting its consent to the East Cleveland Street Railroad Company to lay down its tracks from the intersection of Prospect and Brownell streets, "to connect with the main line of its railroad," running thence through Garden and other streets to and across Willson avenue, to the eastern boundary of the city, during the period of twenty years. Willson avenue was then the eastern boundary of the city. The road could continue to use and occupy the streets, avenues, and public grounds over which its main line was then constructed and operated westerly from the junction (at Brownell and Prospect streets) of said road with the main line to its westerly terminus, for the same length of time.

This Garden street line was thereafter

built, and it is asserted that it was the inception of a new and separate street railroad. It has been extended at various times since, and forms, with its various extensions, what is called the Garden street branch, and is the railroad in question.

On the 30th of March, 1868, the railroad company was permitted by ordinance of the village of East Cleveland to construct a branch railroad on Garden street, which would form an extension, in fact, of the Garden street line easterly through the village to the line of Wade street. The grant was for twenty years from the time of the completion of the work, which was to be completed within five years from the date of the passage of the resolution granting the right. March 30, 1868.

On the 23th of March, 1873, the council passed a resolution, in the preamble of which it was stated that the East Cleveland Railroad Company desired and proposed to connect their Garden street branch with the main line of their road at the intersection of Fire and Prospect streets, and thereupon the council granted to the railroad company the right to lay down a double track street railroad in Ohio street from their present track in Brownell street

[123] to Fire street, and in Fire street from Ohio street to Prospect street, to connect with their main track at this point. This made a junction at Fire and Prospect streets with the Euclid Avenue Railroad, instead of at Brownell and Prospect streets, a small difference as to length of road.

On the 29th of May, 1876, the council authorized the East Cleveland Railroad Company to extend the Garden street branch of its road, at the easterly end, thence along Garden street to Baden avenue, thence to Quincy, along Quincy to New, and along New street to Garden street, there to connect with the Garden street tracks. The ordinance provided that the right thereby granted should continue for twenty years from that date.

This extension placed a track in Quincy street, from Baden to New street, which was a very short distance. It did make a different date to the termination of the grant that was provided for the rest of the branch, and it was to be operated, "in connection with said branch and its main line." No increased fare was to be charged, by the company or any part of its branch or of its main line, or extension, by reason of the extension.

In the year 1880, on the 22d of March, the council passed an ordinance authorizing the East Cleveland Railroad Company to extend the Garden street branch of its railway from the then-existing track at the intersection of Baden avenue an street, on and along said Quincy an easterly direction to the inter Quincy street and Lincoln avenu equip and operate the said exte *its Garden street branch* for the twenty-five years from and after sage of the ordinance." When t nance was passed the eastern limi city of Cleveland had been ext that the territory covered by the the Garden street line was at that cluded in the city of Cleveland.

In 1883, February 9, the council ordinance permitting the East Railroad Company "to extend its street branch from the intersection cy street and Lincoln avenue, in a ly direction, to Woodland Hill . and equip and operate sa sion as a single track railroad, wi essary switches, turnouts, and tr in connection with said branch and line, and terminating with the gra main line, but with the express that "no increase of fare shall b by said company on any part of line, or on said extension, by reas extension."

On the 17th of June, 1887, t granted another extension to th street branch on Garden street fr avenue easterly to Lincoln avenue to terminate "with the grant for t street main line," and no extra

On the 10th of March, 1890, t passed an ordinance which "gr right to operate its Garden stre by electricity" from and to t named in the ordinance, and this "to operate by electric power the den street branch during the te present grant for said Gard branch." Both roads were there ated as electric street railroads.

On the 30th day of March, 18 ordinance was passed, authorizin road company "to operate a sec ditional track in and upon Cent Garden street from the east li sin avenue to the Cleveland & Railroad tracks." It was provid "right herein granted shall be the expiration of the grants fr company's main line."

On the 20th of April, 1891, an was passed which authorized t company to "operate a second o track in and upon Quincy street street to Woodland Hills aven was part of the Garden street tion 2 of the ordinance contain vision that the "right herein gr

be valid until the expiration of the grants for said company's tracks on said Quincy street east of Lincoln avenue; to wit, July 13, 1913."

*These are the material ordinances which particularly relate to the Garden street railroad.

During March and April, 1893, the complainant herein was organized as a consolidation of several street railroads, which, it is enough to say, included, among others, the Euclid avenue and the Garden street lines, and on the 22d day of May, 1893, the consolidated railroad company (this complainant), through its vice president, addressed a communication to the council, stating that the various consolidations had been made under advice of counsel, but inasmuch as some question seemed to have arisen as to the intention of the company, it was stated that the company did not claim any rights greater than the constituent companies forming the organization; that it intended to obey all ordinances to which each and all the constituent companies were subject, and that it had, since the consolidation had been effected, issued transfer checks to all persons desiring them, to enable such persons to have a continuous ride from any East Side line to any South Side or West Side line, and from any South or West Side line of the company to any East Side line, for one fare, and would continue such system of transfers where it could not better accommodate its patrons by such through lines as it might establish; and that it disclaimed all intention of charging more than one fare for any such continuous ride; "and that its aim has been and will be to give its patrons vastly improved service and accommodations by reason of such consolidation."

The council thereupon, by resolution, consented to the consolidation of the various railroad companies named in the resolution under the name of the Cleveland Electric Railway Company, upon the condition that "only one fare shall be charged for a continuous ride on or over any line of railway formerly owned by any other of said constituent companies within the limits of the city of Cleveland; and passengers on any of such lines paying one fare shall be entitled, without extra or additional charge, to be transferred to any other of said lines and have a continuous ride thereon for said single fare." The conditions *contained in the resolution were thereafter accepted by the complainant in writing.

On the 19th day of February, 1894, the council adopted "an ordinance granting permission to the Cleveland Electric Railway and the Cleveland City Railway Company to extend their tracks in Willson avenue." This avenue runs north and south and crosses many of the avenues in which some of the constituent companies of the consolidated road had laid their tracks.

The ordinance granted each railroad company the right to extend its double track railroad along Willson avenue from and to the various points named in the ordinance, and the road was to be constructed and operated in connection with the existing tracks in Willson avenue as a double track street railroad. The two companies named in the ordinance were to jointly construct and maintain the road, and each was to have the right to occupy and use the track, wires, etc., of the other company then in Willson avenue, on such terms and conditions as the council might deem just and reasonable, unless the companies should otherwise agree. Provision was then made for the running of through cars on Willson avenue between certain points, and night cars were to be operated by the companies throughout the entire length of Willson avenue. A passenger on any car operated on any part of said Willson avenue was to have the right, on the payment of one fare, without additional or extra charge, to be transferred to any other line of either of said companies intersecting or coming to said Willson avenue, and was to have a continuous ride thereon, with the right, without additional charge, to be transferred from said second line to a car on any other line of either of these companies intersecting or coming to Willson avenue, and was to be entitled, without additional or extra charge, to be transferred to the Willson avenue line and to have a continuous ride thereon. Regulations were made for the paving of certain portions of the street by the company under the direction of the city authorities, and provision was made for widening the roadway on Willson avenue *between certain points named, and for set- [127] ting back curbs, hydrants, etc., all of which was to be done at the expense of the companies, which were also to comply with and perform all the general ordinances of the city relating to street railroads, then or thereafter in force. By § 10 it was provided that the grant should be in force until the 1st day of July, 1914.

On the 25th of June, 1894, the council passed "An Ordinance Granting the Cleveland Electric Railway the Right to Extend and Operate Its Double Track Street Railroad in Quincy Street from New Street to Willson Avenue." This ordinance provided for the extension and operation by the Cleveland Electric Railway Company of a

double track street railroad on and along Quincy street, from its then present tracks thereon, westerly to Willson avenue, connecting by curves with its Willson avenue tracks. The 6th section provided that "this grant shall terminate with the grant for said company's present line in Quincy street."

These ordinances and resolutions are those which particularly relate to the extent of the grants to the railroad company for the Euclid avenue and for the Garden street lines. Other ordinances and resolutions were passed, showing, in connection with those already in evidence, as insisted upon by the complainant, the existence of a general system for the operation of the roads owned by the complainant, including the Euclid avenue and Garden street lines, as a unit, and the necessity existing for operating all of the lines in connection with each other for the life of the longest grant. And it is insisted that this was the obvious intention of the council, to be gathered from the various ordinances, among them those especially above adverted to.

Messrs. William B. Sanders and John W. Warrington, argued the cause, and, with Mr. Andrew Squire, filed briefs for the Cleveland Electric Railway Company.

All questions necessary to the solution of this difference as to date ultimately fixed for grants in question to expire, that is, whether March, 1905, on the one hand, or July, 1913 or 1914, on the other, were involved and decided in the cases of Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; Cleveland v. Cleveland Electric R. Co. 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. Rep. 513.

The holding of the court below and the contention of counsel are in the teeth of the decision of the supreme court of Ohio in State ex rel. Hadden v. East Cleveland R. Co. 27 Ohio L. J. 64, Affirming 6 Ohio C. C. 318.

See also Belle v. Glenville, 27 Ohio C. C. 181, Affirmed in 73 Ohio St. 392, 78 N. E. 1117.

That the tracks, poles, wires and appliances in use by the appellant upon Garden street constitute private property, protected by the same guaranty of the Constitution against being taken without due process of law as is the property of an individual, is settled.

Hamilton, G. & C. Traction Co. v. Hamilton & L. Electric Transit Co. 69 Ohio St. 402, 69 N. E. 991; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Salt Creek Valley Turnp. Co. v. Parks, 50 Ohio St. 568, 28 L.R.A. 769, 35 N. E. 304; Risser v. Hoyt, 53 Mich. 185, 18 N. W. 611; Kinsman Street R. Co. v. Broadway & N. Street R. Co. 36 Ohio St. 239; Toledo Consol. Street R. Co. v. Toledo Electric Street R. Co. 50 Ohio St. 603, 36 N. E. 312.

Mr. Newton D. Baker argued the cause and filed a brief for the city of Cleveland:

The rule of strict construction applies with unimpaired force alike to legislative enactments, properly so called, and to contracts affecting the public interest, made by municipal corporations.

Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; Cleveland v. Cleveland Electric R. Co. 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. Rep. 513; 2 Lewis's Sutherland, Stat. Constr. § 548; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Minturn v. Larue, 23 How. 435, 16 L. ed. 574; Thomas v. Richmond, 12 Wall. 353, 20 L. ed. 455; Detroit v. Detroit City R. Co. 61 Fed. 161; Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; Grand Rapids Electric Light & P. Co. v. Grand Rapids Edison Electric Light & Fuel Gas Co. 33 Fed. 659; Freeport Water Co. v. Freeport, 180 U. S. 598, 45 L. ed. 688, 21 Sup. Ct. Rep. 493; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224; Booth, Street Railways, § 33; New Orleans & C. R. Co. v. New Orleans, 34 La. Ann. 429; Cooley, Const. Lim. p. 488; Bank of Toledo v. Toledo, 1 Ohio St. 622; Straus v. Eagle Ins. Co. 5 Ohio St. 59; State v. Vanderbilt, 37 Ohio St. 590; Zanesville v. Zanesville Gaslight Co. 47 Ohio St. 31, 23 N. E. 55; State ex rel. Kidder v. Eagle Ins. Co. 50 Ohio St. 252, 33 N. E. 1056.

Mr. D. C. Westenhaver argued the cause, and, with Messrs. Garfield, Howe, & Westenhaver, filed a brief for the Forest City Railway Company:

The rules of construction so vigorously announced by the learned judge who decided the case below are sound.

Blair v. Chicago, 201 U. S. 400, 471, 50 L. ed. 801, 830, 26 Sup. Ct. Rep. 427; Knoxville Water Co. v. Knoxville, 200 U. S. 34, 50 L. ed. 359, 26 Sup. Ct. Rep. 224.

There is no foundation for the assertion that a unified system has been created, with a uniform date of expiration for all its franchises, and that such date is that of the longest continuing franchise.

Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296.

The misrecital after the *videlicit* cannot

trol the fact which is made the primary as to the date of expiration of the right conferred by the ordinance last tioned. The uniform rule of construc-, when there is a conflict between the edent matter and that which follows a licit, is well known. The former con- s and the latter is disregarded.

ullivan v. State, 67 Miss. 346, 7 So. 275; ison v. M'Vickar, 7 Cow. 42; Com. v. nlan, 153 Mass. 483, 27 N. E. 8; Buck v. ris, 9 Minn. 314, Gil. 298; Stukeley v. ler, Hobart, 178; Cotton v. Ward, 3 T. Mon. 310.

n Ohio the municipalities are the owners the fee in the streets.

Iamilton, G. & C. Traction Co. v. Parish, Ohio St. 181, 60 L.R.A. 531, 65 N. E. 1011.

Iails, ties, poles, when laid and construct- on an ordinary right of way of a rail- d company, become a part of the realty, h for the purpose of taxation and as be- en the mortgagee of the realty and the rtgagee of the chattel, given before it was exed to the realty.

Cleveland v. C. & N. R. Co. 1 Cleveland L. . 304; Northern Indiana R. Co. v. Con- ly, 10 Ohio St. 160; Meriam v. Brown, Mass. 391; Hunt v. Bay State Iron Co. Mass. 279; Clemens Electrical Mfg. Co. v. lton, 173 Mass. 286, 52 N. E. 132, 53 N. 820; Providence & W. R. Co. v. Wright, I. 459.

Even in those cases of landlord and ten- t in which the right of removal exists, must be exercised at or before the expira- n of the lease. In this case, at the time e decree was made, the right of the com- inant in the streets had expired. It stood the same situation as a tenant for a ed term, who, if he wishes to exercise his ht of removal, must do so before the ex- ation of his term. The law with respect landlord and tenant may be found in the llowing authorities:

2 Taylor, Land. & T. 8th ed. § 55; Watriss. First Nat. Bank, 124 Mass. 571, 26 Am. p. 694; Stokoe v. Upton, 40 Mich. 581, Am. Rep. 560; Ex parte Brook, L. R. Ch. Div. 100; Merritt v. Judd, 14 Cal. ; Loughran v. Ross, 45 N. Y. 792, 6 Am. p. 173; Carlin v. Ritter, 68 Md. 478, 6 m. St. Rep. 467, 13 Atl. 370, 16 Atl. 301; aflick v. Stober, 11 Ohio St. 482.

Mr. Justice **Peckham**, after making the regoing statement, delivered the opinion the court:

Out of these various ordinances and res- tions arise the difficulties suggested in case. The facts are somewhat compli- d by reason of their number, and the rences to be drawn from them are not always perfectly plain and certain. The complainant contends that, by reason of the action of the city council and the acceptance by the complainant of the various ordinances and resolutions adopted by that council, a valid contract has been entered into between the city and the complainant, by which the right to use the streets named in the ordinances by the Garden street branch has been granted to complainant up to July 1, 1914; or, if it is mistaken as to that time, that then the contract terminates on the 13th of July, 1913. The city contends that neither date is right, but that the contract, so far as it related to the Garden street branch, terminated on the 22d of March, 1905.

The rules of construction which have been adopted by courts in cases of public grants of this nature by the authorities of cities are of long standing. It has been held that such grants should be in plain language, that they should be certain and *def- [130] inite in their nature, and should contain no ambiguity in their terms. The legislative mind must be distinctly impressed with the unequivocal form of expression contained in the grant, "in order that the privileges may be intelligently granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislatures with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed." Blair v. Chicago, 201 U. S. 400, 471, 50 L. ed. 801, 830, 26 Sup. Ct. Rep. 427. In the case cited this court has had occasion to state the principle of construction and to cite some of the authorities upon which it is based. This has been so lately done that it is unnecessary to more than refer to that case as authority for the doctrine above stated.

Before proceeding with an examination of the various ordinances and resolutions referred to in the foregoing statement, it is well to say that we do so upon the assumption that the legislature has heretofore granted to the city council of Cleveland most comprehensive power to contract with street railroads within its limits, with regard to the use of its streets, and the length of time for which such use may be granted, not longer than twenty-five years. Cleveland v. Cleveland City R. Co. 194 U. S. 517, 533, 48 L. ed. 1102, 1107, 24 Sup. Ct. Rep. 756; Cleveland v. Cleveland Electric R. Co. 201 U. S. 529, 541, 50 L. ed. 854, 859, 26 Sup. Ct. Rep. 513. Therefore, in deciding this case, we assume the validity of the

contract, whatever it is, that was made. The only question involved herein is one of construction and intent.

The most important of the many ordinances and resolutions relating to the Euclid avenue line, commencing in 1859, have been referred to in the foregoing statement of facts because of the contention of complainant that the Garden street branch is nothing but an extension and, in reality, as in law, a component part of the Euclid avenue line, and that the Garden street grant is limited and governed by the time of the expiration of the Euclid avenue grant. In [131] other words, that the grant *of 1888 to the Euclid avenue line of the right to change its motive power, and extending the termination of the grant until twenty-five years from that date, thereby extended the termination of the grant to the Garden street branch to the same time, although the whole branch road had been separately and otherwise provided for, and had never before had the same termination as the Euclid avenue line. The grant is to be implied which is to work such a change in a grant then existing in specific and direct language. The same argument is also set forth in regard to the ordinance of July 17, 1893, which will be again referred to.

Under these circumstances it is important to direct special attention to the Garden street branch.

The East Cleveland Railroad Company, having built and operated its road through the various streets mentioned in the ordinance of 1859, granting it leave so to do, became desirous of building another road in connection with the one it was then operating, but there was no statute at that time in Ohio permitting the extension of a road then built, and the company, therefore, in 1867 and the early part of 1868, took the same proceedings to acquire the right to build the new road that it had taken to build the former, although it did not seek a new incorporation. As a railroad company already existing, it applied to the council of the city of Cleveland for leave to construct a street railroad from the intersection of Prospect and Brownell streets, to connect with the main line of its road, and thence through various streets and along the center of Garden street, to and across Willson avenue, to the easterly boundary of the city. It procured the consents of the property owners along the line; notice for the reception of bids was published by the city as provided for in the statute, and the railroad company made a formal bid for the privilege of laying down its tracks through the various streets, and named the rates of fare which would be charged. That bid was the lo not the only one, made, and it w accepted, and the privilege was gra build a railroad in Garden street, operate *it for twenty years from t of the adoption of the ordinance, J 14, 1868, and the company was to c to use the western end of the Euclid road as stated in the ordinance. Th nance was accepted and the road bu this time the grant to the Euclid line expired September 20, 1879.

Referring to the procedure under the Garden street branch was creat the permission of the city council t the road obtained, it is plain th branch thus built was not a mere ex or part of the Euclid avenue line, a grant to the latter necessarily the other as an inseparable part of was a distinct line, with a separate with the exception of a short dist the west end, where it was permi use the tracks of the Euclid aven The termination of the right was a ferent time from that provided f Euclid avenue line. This use of the avenue tracks for a short distance make the Garden street branch a m tension of the former road. Whet thorized by its charter to build the street road is not important. It and its right to do it was given by dinance of the council which has be ognized as valid ever since. Beca some occasions it has been called a does not alter the weight to be gi facts stated, or turn the branch mere extension where it has been wise uniformly treated.

It is contended that by the re of March 25, 1873, which granted East Cleveland Railway Company t to lay a double track street railroad secting with its main line at Eri and Prospect street, and thence other streets mentioned in the re the Garden street line thereby bec extension of the main line, or wa nized as a mere extension. The p to that resolution recites that the company desires to connect the street branch with the main line road at the intersection of Erie a pect streets, and to remove the oth from Brownell street, between O Prospect streets, *and therefore pe is granted to the company so to do resolution provided simply for chang connection of the Garden street bra the Euclid avenue line from Brown to Erie street, and for the taking u track on Brownell street, between O

Prospect streets. It did not make the Garden street branch any more of an extension of the main line than it had been before. The branch road certainly did not become a part of the main road simply because it ran in connection with it, or because it ran over a small portion of the tracks of that road. It remained what it started out as, a road with a separate route and a different term of life.

The grant made in 1876 to the company to extend its Garden street tracks from its then terminus at Baden street, to and along other streets towards the east, with the right to equip and operate said extension for twenty years, in connection with the said Garden street branch and its main line, had no effect upon the question we are discussing. That extension of the tracks of the Garden street branch spoken of in the ordinance was also a short one, and was to terminate at a different time from that then existing in regard to the other portion of the Garden street branch. That it was to be operated in connection with its Garden street branch and the main line did not make the branch as extended a part of the main line, or alter the fact that the branch was a separate road, although operated in connection with the main line. It is quite difficult to see why the right to operate this particular extension should have been granted for twenty years or until 1896, instead of being limited to terminate with the branch, but, at any rate, the grant is in unambiguous terms, and states in so many words the length of time it is to last. Its importance is not very great, and is entirely effaced by the subsequent ordinance of 1880, which provided for the termination of the whole Garden street branch at the time specified,—1905.

By that ordinance (March 22, 1880) the question of the termination of the grant for the whole Garden street branch was distinctly settled. By it the right to extend that branch of its *railroad in an easterly direction, on and along Quincy street, was given to the company, and the right "to equip and operate the said extension and its Garden street branch" was given for the period of twenty-five years from the passage of the ordinance, but without increase of fare on any portion. This, of course, placed the termination of the whole grant to the Garden street branch on March 22, 1905. There is no ambiguity as to this grant, and the termination of the grants to the two roads was kept apart, one being September 20, 1904, the other March 22, 1905.

Much stress is laid by the complainant in the ordinance of the 9th of February, 1885, which was entitled "An Ordinance to Permit the East Cleveland Railroad Company to Extend the Garden Street Branch of Its Railway." The company was thereby authorized to extend the Garden street branch from the intersection of Quincy street and Lincoln avenue in an easterly direction, to Woodland Hills avenue. It was to be operated in connection "with said branch and its main line and terminating with the grant for the main line," but with no increase of fare. It is contended that the particular grant mentioned in this ordinance was to terminate with the grant for the main line, which would make it terminate September 20, 1904, instead of March 22, 1905. If this were the only question, of course, the complainant would not insist that the grant to it should be shortened six months. But it is cited for the purpose of showing an intention of the council to limit the termination of the Garden street branch by the limitation then existing in regard to the Euclid avenue line. It is contended that from the time of the passage of this ordinance by the council and its acceptance by the complainant the parties thereby agreed that the extension should be operated with the main line, and that its grant for such operation should expire with the grant for the main or Euclid avenue line, and that this was in pursuance of the plan by the city to have the grants to the two roads expire at the same time. And the claim is that the subsequent ordinances must be construed in the same manner *and for the purpose of carrying out [135] the same scheme. There is here undoubtedly some room for the contention of complainant, but we think, upon looking at all the facts in connection with this question, that the intention of the council was not that way. The Garden street branch, running from the intersection of Erie and Prospects streets, towards the east, terminated, at the time of this grant, at Lincoln avenue. This made a long line of road. By the ordinance it was lengthened from Lincoln avenue to Woodland Hills avenue,—a comparatively short extension of track. The right granted to the whole branch line as far east as Lincoln avenue then terminated on the 22d of March, 1905, and yet, by this construction of the ordinance of 1885, this small extension of track from Lincoln avenue to Woodland Hills avenue was to expire September 20, 1904. Why this difference? The ordinance did not assume in any way to alter the time of the termination of the then-existing grant to the rest of the Garden street branch, but it simply limited the time of the termination of the grant for the extension then given. Hence

it is difficult to see how any agreement can be found to arise from the ordinance for the simultaneous termination of all the grants to both the main line and the Garden street branch. Nor can any general scheme to have the grants of both roads terminate together be evolved from anything done by the parties up to and including 1885.

There is nothing in Cleveland v. Cleveland Electric R. Co. 201 U. S. 529, 539, 50 L. ed. 854, 858, 26 Sup. Ct. Rep. 513, that covers this case. The language of the ordinance adverted to in that case is to be applied to very different facts from those existing here. We assume the ability of the council to make such a contract as complainant contends for herein, but we think none such was made in fact.

So far as can be determined from this record, there was absolutely no reason for terminating the right to use this small extension of track in September, 1904, while the rest of the branch then existing was not to terminate until six months later. It cut up the branch line in a way which it is impossible from this record to give any rea-[136]son for, and accordingly, under *the then-existing circumstances, it might be argued that the words, "terminate with the grant for the main line," did not mean the Euclid avenue line, but it referred to the Garden street branch, which was, as a matter of fact, the main line so far as concerned the small extension of the track from Lincoln avenue to Woodland Hills avenue. To terminate the grant for the extension at the same time with the grant for the line thereby extended would be the most obvious and natural course to pursue. It is true the ordinance itself recognizes the "branch and its main line" as constituting two different lines, and provides that the grant is to terminate with the grant for the main line. And yet the real meaning of the ordinance, when regarded in the light of the facts then existing, becomes, to say the least, ambiguous. The general provision for the termination of the grant for the whole Garden street branch, as made in 1880, ought not to be expunged by an implication arising out of such doubtful language as is found in this 1885 ordinance. But if otherwise, it results only that the particular extension expired in September, 1904, with the grant to the Euclid avenue line, which, at that period, expired on that date.

In 1887, June 17, an extension of the Garden street branch was granted, which, by the terms of the ordinance, was to terminate "with the grant for the Garden street main line," without increase of fare being charged. Here the council, it will be observed, expressly referred to the Garden street branch as the main line, and it is undoubtedly plain that it was properly so referred to. In extending the branch, and with reference to the extension, the branch would naturally be regarded and spoken of as the main line. If not done in all cases it is somewhat difficult to find any reason for it.

Again, by an ordinance passed March 10, 1890, granting leave to change the motive power on the Garden street branch, the right was given to operate that branch by electric power "during the term of its present grant of said Garden street branch." The "present grant" for the Garden street branch *was that which was granted in[137] March, 1880, which was to terminate in twenty-five years, or March 22, 1905. Here was a clear recognition of the time when that grant expired, and there had been no ordinance or resolution of the council, since 1880, which, in our opinion, changed the termination of that grant. It is an entire mistake to say that at this time the right to operate the Garden street tracks terminated at the same time with the right of the company to operate the Euclid avenue line, or that the Garden street branch was but an extension of that line.

On the 30th of March, 1891, the right was granted to construct and operate a second or additional track upon Central avenue (Garden street) from the east line of Willson avenue to the Cleveland & Pittsburg Railroad tracks. It was provided in that ordinance that the right therein granted should be for and until the expiration of the grants for the said company's main line. Here again the question arises, What was the meaning of the expression "main line" as used in this connection? The ordinance allowed a second or additional track in a street in which the company then had the right to use, and was using, a single track. So far as that extended grant was concerned, the main line was the rest of the Garden street branch, and the same observations that we have made heretofore in regard to the main line are operative here.

It cannot be possible that it was intended to limit the right to use the second or additional track, in the portion of the street mentioned, to a different time than that which existed with relation to the first track laid down by the company in the same street. Of course, the two grants were meant to terminate at the same time.

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hat it did not expire until July 13, 1913. an it be supposed that the council intended that this short length of road, in which a second or additional track was to e laid, was to be operated with two track until 1905 and after that with one track until 1913? We think such a construction is not permissible, and that what is meant by the language, "main line," in that ordinance, means the line which is the main line with reference to the extension herein granted; namely, the Garden street branch, and not the Euclid avenue line.

The ordinance of the 20th of April, 1891, s somewhat important. It granted the East Cleveland Railroad Company permission to lay an additional or second track in Quincy street, from New street to Woodland Hills avenue. That street at the point indicated is part of the Garden street branch, and, as compared with the rest of the Garden street branch, is a very small portion thereof, and the ordinance only grants the right to lay an additional track. The right granted was, by the terms of § 3, to "be valid until the expiration of the grants for said company's tracks on said Quincy street, east of Lincoln avenue, to wit, July 13, 1913."

It is said that the council, in such ordinance, expressly authorizes the continuation of the operation of this Central avenue (Garden street) extension until July 13, 1913, the date of the expiration of the Euclid avenue line of the company. But the language used in this ordinance as to the time of the expiration of the grant for the company's tracks on Quincy street, east of Lincoln avenue, is a clear mistake of fact. The grant, it will be observed, is not in terms an extension to July 13, 1913. The reference to that date is but the expression of an opinion that the date named is the true time of the termination of the Quincy street grants. It is not a grant extending to that date, unless the previous grants are limited to that time. Now, on April 20, 1891, the grants on Quincy street, east of Lincoln avenue, in fact terminated either in 1904 or 1905, depending upon the construction of the language of the original grant in Quincy street, made in February, 1885. That was a grant which was to expire with the termination of the grant for the main line. For the reasons already given we think that that language meant the Garden street branch, which was the main line as to that extension, and that it, therefore, expired *in 1905, March 22. There was no subsequent legislation which extended that grant beyond that time.

But if it be assumed that the grant for the company's tracks on Quincy street, east of Lincoln avenue, was to terminate with the grant for the Euclid avenue line as the main line, it must be recollected that that grant on Quincy street was made February 9, 1885, to the Garden street branch, and at that time the grant to the Euclid avenue line terminated in September, 1904. The grant of 1885 was not made to terminate with the grant for the main line, *as that main line might thereafter be extended*, but it referred to that grant as it then existed, and it was to be measured by such existing grant, and not by any subsequent extension which might be granted to the Euclid avenue line.

Nor do we think the time for the termination of the Garden street branch was in any degree affected by the consolidation of the various roads in 1893. The communication from the railway company, through its vice president, May 22, 1893, states distinctly that it "does not claim any rights greater than the constituent companies forming the organization, and that it intends to obey all ordinances to which each and all of the constituent companies were subject." Its intention to issue transfer checks, so as to have a continuous ride for one fare, gave no greater rights to the company than it theretofore had, nor did the resolution of the council, consenting to the consolidation on condition that but one fare should be charged for a continuous ride, give any greater rights to the consolidated company than each of the constituent companies had theretofore enjoyed. The consolidation does not require, in order to comply with the conditions specified in the resolution consenting to the consolidation, that the consolidated companies should be permitted to operate until the expiration of the longest grant to any of the companies. At the expiration of the grant to the Garden street branch the operation of that road might terminate, while the operation of the rest of the consolidated roads could go on perfectly well. To hold that, by virtue *of the consolidation, upon the conditions [140] stated, there was an implied extension of the grant to the Garden street branch of at least eight years, is to violate the rules of construction above referred to in regard to grants of this nature.

It is also strongly urged by the complainant that the ordinance passed soon after the consolidation ordinance, *viz.*, the ordinance of July 17, 1893, not only imposed additional burdens on the consolidated company, but that the ordinance relates to a

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Again, by an ordinance passed March 16, 1890, granting leave to change the motive power on the Garden street branch, the right was given to operate that branch by electric power "during the term of its present grant of said Garden street branch." The "present grant" for the Garden street branch *was that which was granted in March, 1880, which was to terminate in twenty-five years, or March 22, 1905. Here was a clear recognition of the time when that grant expired, and there had been no ordinance or resolution of the council since 1880, which, in our opinion, changed the termination of that grant. It is an entire mistake to say that at this time the right to operate the Garden street tracks terminated at the same time with the right of the company to operate the Euclid avenue line, or that the Garden street branch was but an extension of that line.

On the 30th of March, 1891, the right was granted to construct and operate a second or additional track upon Central avenue (Garden street) from the east line of Willson avenue to the Cleveland & Pittsburg Railroad tracks. It was provided in that ordinance that the right therein granted should be for and until the expiration of the grants for the said company's main line. Here again the question arises, What was the meaning of the expression "main line" as used in this connection? The ordinance allowed a second or additional track in a street in which the company then had the right to use, and was using, a single track. So far as that extended grant was concerned, the main line was the rest of the Garden street branch, and the same observations that we have made heretofore in regard to the main line are operative here.

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But if it be assumed that the grant for the company's tracks on Quincy street, east of Lincoln avenue, was to terminate with the grant for the Euclid avenue line as the main line, it must be recollected that that grant on Quincy street was made February 9, 1885, to the Garden street branch, and at that time the grant to the Euclid avenue line terminated in September, 1904. The grant of 1885 was not made to terminate with the grant for the main line, *as that main line might thereafter be extended*, but it referred to that grant as it then existed, and it was to be measured by such existing grant, and not by any subsequent extension which might be granted to the Euclid avenue line.

Nor do we think the time for the termination of the Garden street branch was in any degree affected by the consolidation of the various roads in 1893. The communication from the railway company, through its vice president, May 22, 1893, states distinctly that it "does not claim any rights greater than the constituent companies forming the organization, and that it intends to obey all ordinances to which each and all of the constituent companies were subject." Its intention to issue transfer checks, so as to have a continuous ride for one fare, gave no greater rights to the company than it theretofore had, nor did the resolution of the council, consenting to the consolidation on condition that but one fare should be charged for a continuous ride, give any greater rights to the consolidated company than each of the constituent companies had theretofore enjoyed. The consolidation does not require, in order to comply with the conditions specified in the resolution consenting to the consolidation, that the consolidated companies should be permitted to operate until the expiration of the longest grant to any of the companies. At the expiration of the grant to the Garden street branch the operation of that road might terminate, while the operation of the rest of the consolidated roads could go on perfectly well. To hold that, by virtue *of the consolidation, upon the conditions [140] stated, there was an implied extension of the grant to the Garden street branch of at least eight years, is to violate the rules of construction above referred to in regard to grants of this nature.

It is also strongly urged by the complainant that the ordinance passed soon after the consolidation ordinance, *viz.*, the ordinance of July 17, 1893, not only imposed additional burdens on the consolidated company, but that the ordinance relates to a

it is difficult to see how any agreement can be found to arise from the ordinance for the simultaneous termination of all the grants to both the main line and the Garden street branch. Nor can any general scheme to have the grants of both roads terminate together be evolved from anything done by the parties up to and including 1885.

There is nothing in Cleveland v. Cleveland Electric R. Co. 201 U. S. 529, 539, 50 L. ed. 854, 858, 26 Sup. Ct. Rep. 513, that covers this case. The language of the ordinance adverted to in that case is to be applied to very different facts from those existing here. We assume the ability of the council to make such a contract as complainant contends for herein, but we think none such was made in fact.

So far as can be determined from this record, there was absolutely no reason for terminating the right to use this small extension of track in September, 1904, while the rest of the branch then existing was not to terminate until six months later. It cut up the branch line in a way which it is impossible from this record to give any rea-
[136] son for, and accordingly, under *the then-existing circumstances, it might be argued that the words, "terminate with the grant for the main line," did not mean the Euclid avenue line, but it referred to the Garden street branch, which was, as a matter of fact, the main line so far as concerned the small extension of the track from Lincoln avenue to Woodland Hills avenue. To terminate the grant for the extension at the same time with the grant for the line thereby extended would be the most obvious and natural course to pursue. It is true the ordinance itself recognizes the "branch and its main line" as constituting two different lines, and provides that the grant is to terminate with the grant for the main line. And yet the real meaning of the ordinance, when regarded in the light of the facts then existing, becomes, to say the least, ambiguous. The general provision for the termination of the grant for the whole Garden street branch, as made in 1880, ought not to be expunged by an implication arising out of such doubtful language as is found in this 1885 ordinance. But if otherwise, it results only that the particular extension expired in September, 1904, with the grant to the Euclid avenue line, which, at that period, expired on that date.

In 1887, June 17, an extension of the Garden street branch was granted, which, by the terms of the ordinance, was to terminate "with the grant for the Garden street main line," without increase of fare being charged. Here the council, it will be observed, expressly referred to the Garden street branch as the main line, and it is undoubtedly plain that it was properly so referred to. In extending the branch, and with reference to the extension, the branch would naturally be regarded and spoken of as the main line. If not done in all cases it is somewhat difficult to find any reason for it.

Again, by an ordinance passed March 10, 1890, granting leave to change the motive power on the Garden street branch, the right was given to operate that branch by electric power "during the term of its present grant of said Garden street branch." The "present grant" for the Garden street branch *was that which was granted in [137] March, 1880, which was to terminate in twenty-five years, or March 22, 1905. Here was a clear recognition of the time when that grant expired, and there had been no ordinance or resolution of the council, since 1880, which, in our opinion, changed the termination of that grant. It is an entire mistake to say that at this time the right to operate the Garden street tracks terminated at the same time with the right of the company to operate the Euclid avenue line, or that the Garden street branch was but an extension of that line.

On the 30th of March, 1891, the right was granted to construct and operate a second or additional track upon Central avenue (Garden street) from the east line of Willson avenue to the Cleveland & Pittsburg Railroad tracks. It was provided in that ordinance that the right therein granted should be for and until the expiration of the grants for the said company's main line. Here again the question arises, What was the meaning of the expression "main line" as used in this connection? The ordinance allowed a second or additional track in a street in which the company then had the right to use, and was using, a single track. So far as that extended grant was concerned, the main line was the rest of the Garden street branch, and the same observations that we have made heretofore in regard to the main line are operative here.

It cannot be possible that it was intended to limit the right to use the second or additional track, in the portion of the street mentioned, to a different time than that which existed with relation to the first track laid down by the company in the same street. Of course, the two grants were meant to terminate at the same time.

At this time the grant to the company's Euclid avenue line had been extended so

at it did not expire until July 13, 1913. n it be supposed that the council in-nded that this short length of road, in ich a second or additional track was to laid, was to be operated with two track til 1905 and after that with one track til 1913? We think such a construction s not permissible, and that what is ant by the language, "main line," in at ordinance, means the line which is the in line with reference to the extension erein granted; namely, the Garden street anch, and not the Euclid avenue line.

The ordinance of the 20th of April, 1891, somewhat important. It granted the st Cleveland Railroad Company permis-n to lay an additional or second track in incy street, from New street to Woodland lls avenue. That street at the point in-ated is part of the Garden street branch, d, as compared with the rest of the Gar-n street branch, is a very small portion reof, and the ordinance only grants the ht to lay an additional track. The right nted was, by the terms of § 3, to "be lid until the expiration of the grants for d company's tracks on said Quincy street, st of Lincoln avenue, to wit, July 13, 13."

It is said that the council, in such ordi-nce, expressly authorizes the continua-n of the operation of this Central avenue Garden street) extension until July 13, 13, the date of the expiration of the Eu-id avenue line of the company. But the nguage used in this ordinance as to the me of the expiration of the grant for the mpany's tracks on Quincy street, east of incoln avenue, is a clear mistake of fact. he grant, it will be observed, is not in rms an extension to July 13, 1913. The eference to that date is but the expression f an opinion that the date named is the rue time of the termination of the Quincy treet grants. It is not a grant extending o that date, unless the previous grants are imited to that time. Now, on April 20, 891, the grants on Quincy street, east of incoln avenue, in fact terminated either n 1904 or 1905, depending upon the con-truction of the language of the original rant in Quincy street, made in February, 885. That was a grant which was to ex-ire with the termination of the grant for he main line. For the reasons already giv-n we think that that language meant the Garden street branch, which was the main ne as to that extension, and that it, there-re, expired *in 1905, March 22. There was subsequent legislation which extended at grant beyond that time.

But if it be assumed that the grant for the company's tracks on Quincy street, east of Lincoln avenue, was to terminate with the grant for the Euclid avenue line as the main line, it must be recollected that that grant on Quincy street was made February 9, 1885, to the Garden street branch, and at that time the grant to the Euclid avenue line terminated in September, 1904. The grant of 1885 was not made to terminate with the grant for the main line, *as that main line might thereafter be extended*, but it referred to that grant as it then existed, and it was to be measured by such existing grant, and not by any subsequent extension which might be granted to the Euclid avenue line.

Nor do we think the time for the termination of the Garden street branch was in any degree affected by the consolidation of the various roads in 1893. The communication from the railway company, through its vice president, May 22, 1893, states distinctly that it "does not claim any rights greater than the constituent companies forming the organization, and that it intends to obey all ordinances to which each and all of the constituent companies were subject." Its intention to issue transfer checks, so as to have a continuous ride for one fare, gave no greater rights to the company than it theretofore had, nor did the resolution of the council, consenting to the consolidation on condition that but one fare should be charged for a continuous ride, give any greater rights to the consolidated company than each of the constituent companies had theretofore enjoyed. The consolidation does not require, in order to comply with the conditions specified in the resolution consenting to the consolidation, that the consolidated companies should be permitted to operate until the expiration of the longest grant to any of the companies. At the expiration of the grant to the Garden street branch the operation of that road might terminate, while the operation of the rest of the consolidated roads could go on perfectly well. To hold that, by virtue *of the consolidation, upon the conditions [140] stated, there was an implied extension of the grant to the Garden street branch of at least eight years, is to violate the rules of construction above referred to in regard to grants of this nature.

It is also strongly urged by the complainant that the ordinance passed soon after the consolidation ordinance, *viz.*, the ordinance of July 17, 1893, not only imposed additional burdens on the consolidated company, but that the ordinance relates to a

portion of the line originally constructed as part of the Garden street branch, and that it also required the operation of all the Garden street cars over these tracks, so that the council legislated as to the operation of the tracks upon Garden street and provided that such operation should continue until July 13, 1913. It is true the ordinance provided that the grant therein made should be limited to the above date, and there were certain conditions attached to the making of the grant, but it is quite plain to us that the ordinance could not be read as thereby extending the time for the termination of the Garden street branch without a most violent implication, based upon a very small foundation. This is made clear when it is seen that the streets through which the ordinance provides for extending the double track railroad formed no part of the line originally constructed as part of the Garden street branch. The latter road was permitted to use, for a short distance, the tracks of the Euclid avenue line from a point at the junction of Brownell street (subsequently made Erie street) with Prospect street, west to the public square. But that portion of the track of the Euclid avenue line was never part of the line originally constructed for the Garden street branch, nor did it become such because subsequently the branch road was permitted to use it for the passage of its cars to the public square. It is quite clear, therefore, that the limitation of the time for the termination of the grant provided for in the 6th section of the ordinance was not also an extension of the time for the termination of the separate grant to the Garden street branch from 1905 to 1913.

The same may be said of the ordinance of [141] February 19, 1894, *extending the tracks in Willson avenue. While the council consented to the extension by the complainant and the Cleveland City Railroad Company of the line of railway in Willson avenue, and also to the operation of that line in connection with other lines of the consolidated company, which included the Garden street branch, yet it cannot be held that there arose from that ordinance, when accepted by the company, a contract which should extend the time on all of the roads until the expiration of the grant contained in that ordinance, July 1, 1914. By such means an implied extension of time, affecting over 200 miles of track, as is stated, would be accomplished by making these conditions in regard to the Willson avenue grant a substitute for a grant, in plain language, affecting the Garden street branch. On the contrary, we think that the effect of that ordinance was simply to make it necessary for the Garden street branch and the other roads also, to comply with the conditions set forth in the ordinance until the expiration of their respective and existing grants, but that ordinance did not thereby extend the various other railroad grants by implication. There is no such connection between the various roads as to make it necessary, in order to operate one, that all the others should be in operation as a unit, and as comprehending one indivisible system. There is nothing in this record which shows any difficulty whatever in operating the Garden street branch as separate from the rest of the so-called system, or in operating that system separate from the branch. If the council had intended to extend the time of the termination of the various grants to these railroads it surely would have said so, and not left it to such vague and uncertain presumptions.

The chief importance of the various ordinances and resolutions for the extension of the Garden street branch, coupled with the user of the tracks of the Euclid avenue line by the branch road from Erie street west to the public square, and providing for but one fare over the whole road, is to strengthen, if possible, the contention of complainant that such branch has always been treated by the city and the company as a mere extension of the Euclid avenue line, and to be operated in connection with it, so that a grant extending the time of the termination of the latter line included thereby the Garden street branch. We think the contention is not justified by the facts. The whole history of the branch line shows differently. Even in the important matter of a change of motive power, the Euclid avenue line was provided for in 1888 and 1889, while there was a separate and distinct provision made for the Garden street branch in 1890, and a statement therein made that the permission was granted to the Garden street branch during the term of the present grant to said branch.

A careful examination of the whole record leads us to the opinion that there is no error therein so far as the complainant's appeal is concerned, and the decree upon its appeal is affirmed.

Upon the appeal of the defendants, we think little need be said. The defendants insist that, upon the termination of the grant to the Garden street branch, the rail poles, and other appliances for operating that road, and then remaining on the various streets, became the property of the

city; or, at least, that the city had the right to take possession of the streets and of the rails, tracks, etc., therein existing. We agree with the court below in the opinion that the title to the property remains in the railroad company which had been operating the road, and we are of opinion that the Forest City Railway Company had no rights in the streets, so far as to affect the right of the complainant to its property then existing in such streets. How that property may be disposed of is not now a matter before this court. We only hold that the defendant company cannot avail itself of the provisions of the ordinance of January 11, 1904, so far as taking possession of the property of the complainant is concerned.

The decree upon the defendants' appeal is also affirmed.

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[3] *UNITED STATES, Petitioner,

v.

G. FALK & BROTHER.

(See S. C. Reporter's ed. 143-152.)

Duties—on withdrawals from bonded warehouses.

1. The duty upon leaf tobacco which, when withdrawn from a bonded warehouse, has lost in weight through evaporation of moisture, must be assessed on the basis of weight at the time of the original entry, as prescribed by the proviso to the act of July 24, 1897 (30 Stat. at L. 213, chap. 11, U. S. Comp. Stat. 1901, p. 1701), § 33, which is general in its application, and not restricted to merchandise imported before the act took effect.

Duties—on withdrawals from bonded warehouses.

2. The duty on imports withdrawn from bonded warehouses must be assessed on the basis of weight at the time of original entry, as prescribed by the proviso to act of July 24, 1897, § 33, notwithstanding the addition by the act of Dec. 15, 1902 (32 Stat. at L. 753, chap. 1, U. S. Comp. Stat. Supp. 1905, p. 419), of a proviso to § 20 of the customs administrative act of June 10, 1890 (26 Stat. at L. 140, chap. 407), that the same rate of duty shall be collected upon such merchandise as may be imposed by law upon like articles imported at the time of withdrawal, since this provision refers to the rate of duty, and not to the date at which the weight is to be taken as the basis of such duty.

Statutes—provisos—adoption of official construction by re-enactment.

3. Congress, by enacting the proviso to the act of July 24, 1897, § 33, which differs from the proviso to the act of October 1, 1890 (26 Stat. at L. 624, chap. 1244), § 50, only in substituting the word "entry" for the word "withdrawal" as the date when the weight of merchandise withdrawn from bonded warehouses is to be taken as the basis of the duty, must be deemed to have adopted the construction given to the earlier proviso by the Attorney General and followed by the executive officers charged with the administration of the law, *viz.*, that such proviso was general in its application, and not restricted to merchandise imported before the act took effect.

[No. 259.]

Argued December 4, 1906. Decided January 7, 1907.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which reversed a judgment of the Circuit Court for the Southern District of New York sustaining the decision of the board of general appraisers, which had affirmed the ruling of the collector that the duty on imports withdrawn from bonded warehouses must be assessed on the basis of the weight at the time of the original entry. Judgment of the Circuit Court of Appeals reversed and that of the Circuit Court affirmed.

See same case below, 77 C. C. A. 40, 146 Fed. 484.

The facts are stated in the opinion.

Assistant Attorney General **McReynolds** argued the cause and filed a brief for petitioner:

A construction accepted and acted on for sixteen years by the executive departments should not be rejected except for cogent and persuasive reasons.

Robertson v. Downing, 127 U. S. 607, 32 L. ed. 269, 8 Sup. Ct. Rep. 1328; United States v. Healey, 160 U. S. 136, 40 L. ed. 369, 16 Sup. Ct. Rep. 247.

To give this proviso general application conforms to the principles of statutory construction.

United States v. Whitridge, 197 U. S. 135, 143, 49 L. ed. 696, 698, 25 Sup. Ct. Rep. 406; United States v. Downing, 76 C. C. A. 376, 146 Fed. 56.

Mr. John G. Carlisle argued the cause, and, with Messrs. Edward S. Hatch, J. Stuart Tompkins, and Hatch, Keener, & Clute, filed a brief for respondents:

A proviso refers only to the provision of a statute to which it is appended.

Minis v. United States, 15 Pet. 423, 10 L. ed. 791; United States v. Dickson, 15 Pet. 141, 10 L. ed. 689; United States v. Slazenger, 113 Fed. 525; Endlich, Interpretation of Statutes, § 186.

It is, of course, the intent of the statute that must prevail, but that intent must be gathered from the language used.

Bate Refrigerating Co. v. Sulzberger, 157

U. S. 1, 36, 37, 39 L. ed. 601, 611, 15 Sup. Ct. Rep. 508.

The meaning of the statute may not be looked for in the opinions of individual legislators.

Re Schilling, 3 C. C. A. 440, 11 U. S. App. 603, 53 Fed. 81; United States v. Downing, 5 C. C. A. 575, 14 U. S. App. 434, 56 Fed. 474; American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; United States v. Union P. R. Co. 91 U. S. 72, 79, 23 L. ed. 224, 228.

Mr. Justice **McKenna** delivered the opinion of the court:

This case involves the question whether, upon withdrawal of imports from a bonded warehouse, duties should be collected according to their weight then or upon their greater weight when entered and imported into the country, the loss having been occasioned by evaporation of moisture.

The merchandise in question was leaf tobacco imported into the port of New York, a part before and a part after July 24, 1897. It was entered under bond for warehousing without the payment of duty, and withdrawn from warehouse after the present tariff act went into effect, and was assessed by the collector for duty on the basis of weight at the time of its entry. The importers, Falk & Brother, protested and appealed from the decision of the collector to the board of general appraisers. The board affirmed the ruling of the collector on its opinion in Re Schmidt (G. A. 4214, T. D. 19715). Falk & Brother then instituted proceedings for review before the circuit court for the southern district of New York, and that court sustained the decision of the board of appraisers. 145 Fed. 574. The circuit court of appeals reversed the circuit court. 146 Fed. 484.

The contention of the importers is that the merchandise is subject to duty under the provisions of Schedule F of the act of July 24, 1897, based upon weight at the time of *withdrawal* from bond for consumption, under the provisions of § 50 of the act of October 1, 1890. It is contended that the proviso of the latter act has not been repealed but is in full force and effect, and is applicable to merchandise entered in bond subsequent to the passage of the act of July 24, 1897. The board of appraisers held that the proviso of § 50 of the act of 1890 was repealed by § 33 of the act of 1897.

Those sections are, respectively, as follows:

[146] *"Sec. 50. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty upon the entry or the withdrawal thereof than if the same were imported, respectively, after that day: *Provided*, that any imported merchandise deposited in bond in any public or private bonded warehouse, having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and ninety-one, upon the payment of duties at the rates in force prior to the passage of this act: *Provided, further*, That, when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its *withdrawal*." 26 Stat. at L. 624, chap. 1244.

"Sec. 33. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty, and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof: *Provided*, That, when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its *entry*." 30 Stat. at L. 213, chap. 11, U. S. Comp. Stat. 1901, p. 1701.

The circuit court held that those sections were not repugnant. The court said: "Neither is general in its application, but is restricted to merchandise previously imported for which 'no entry has been made.'" The court, however, sustained the decision of the board on the ground that § 2983 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1958) was applicable. That section is as follows: "In no case shall there be any abatement of the duties or allowance for any injury, damage, deterioration, loss, or leakage sustained by any merchandise while deposited in any public or private bonded warehouse."

The importers denied the application of that section, and contended that under the law, and particularly under § 20 of the customs administrative act of June 10, 1

amended December 15, 1902 (presently to be stated), they were authorized to withdraw the merchandise from warehouse upon the payment of duties and charges based upon its weight at the time of withdrawal. The court ruled against the contention, and said: "It seems too plain for discussion that the word 'loss' [referring to § 2983], coupled as it is in the disjunctive with 'leakage,' applies precisely to such a case as the one before us. I cannot find any sound reason for believing that the Congress did not have § 2983 in mind when it enacted said § 20, as amended. It is obvious that § 20, especially as amended, refers exclusively to rate rather than weight." The circuit court of appeals differed from the circuit court in the application of § 2983. It held that the loss there provided for related solely to the loss of merchandise subject to duty, and such loss had not occurred. The court further held that the other terms of the section referred to actual reduction in the value or quantity of the merchandise itself. "It is clear," it was said, "that evaporation of moisture is not 'loss' . . . sustained by . . . merchandise." The case of Seeberger v. Wright & L. Oil & Lead Mfg. Co. 157 U. S. 183, 39 L. ed. 665, 15 Sup. Ct. Rep. 583, was referred to as analogous. The court also disagreed with the construction of the circuit court of § 20 of the customs administrative act, and held that by virtue of the proviso added to that section December 15, 1902 (stated later), duties should have been assessed according to the weight of the tobacco at the time of its withdrawal.

[] *This history of the case exhibits the contentions of the parties and the elements of the contentions, and, it will be seen, the case is one of statutory construction.

First, as to Seeberger v. Wright & L. Oil & Lead Mfg. Co. supra, which is urged as controlling. The importation there was flaxseed. The proof showed that the seed contained dust composed of clay, sand, and gravel to an average of 4 per cent. The case turned upon the meaning of the word "draught" in § 2898 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1919). It was assumed that the word did not apply to impurities, and it was said that the lower court was correct in assuming that the flaxseed in question which was made dutiable, under the act of 1883 [22 Stat at L. 513, chap. 121], at 20 cents per bushel of 56 pounds, less tare, meant 56 pounds of clean seed, or, at least, seed free from any impurities, such as the clay, sand, and gravel in question.

The moisture which the tobacco in the case at bar absorbed cannot be said to be an impurity within the meaning of that decision, even though moisture in tobacco is a variable quantity and its amount can be estimated by weighing the tobacco at different times. Nor can it be considered as an independent, nontaxable substance, even though, as conceded in this case, it was absorbed on the ocean voyage. The statutes contemplate and apply to merchandise which may change in weight, and if the moisture in the tobacco in this case can be regarded as an independent substance,—so much "sea water," to use counsel's graphic phrase,—a question of the application of §§ 50 or 33 could not arise. One or other of those sections was considered applicable from the beginning, and the importations regarded as controlled by it, as merchandise subject to duty by weight, and necessarily there was involved the question at what time the weight should be estimated,—at the time of entry or at the time of withdrawal from warehouse. To that question, then, we shall address ourselves.

It is said by counsel for the United States that, prior to October 1, 1890, duties were uniformly demanded and collected according to the weight of merchandise at original entry, citing *in support of the assertion the custom regulations of 1884 and 1899. Upon that date (October 1, 1890) the tariff act of 1890 took effect. Section 50 provided, as we have seen, that goods previously imported, for which no entry had been made, and goods warehoused, for which no permit of delivery had been issued, should be subject to no other duty than if the goods were imported after the day the act took effect. It was also provided that, when duties were based upon the weight of warehoused merchandise, the duty should "be levied and collected upon the weight of such merchandise at the time of its *withdrawal*" (italics ours). A question arose as to the scope of the proviso,—whether it was restricted to the matter immediately preceding, that is, merchandise imported before the act took effect, or was of general application, applying as well to merchandise imported after as before the act took effect. The Attorney General decided that the latter was its effect. He said (20 Ops. Atty. Gen. 81, 82): "I am aware that under former tariff acts the rule has been to levy duties upon weighable merchandise according to the weight at the date of importation, but this proviso seems to be intended to change that rule, and there seems to be sufficient reason for such change."

[149]

The executive officers of the government followed this construction until the act of July 24, 1897, known as the Dingley act, was passed. The construction made by the

Attorney General is disputed as applicable to § 33 of the act of 1897, and it is urged that the whole scope and meaning of that section, when reduced to its simplest terms, make goods theretofore entered under bond for warehouse subject to the duties imposed by the act upon the withdrawal thereof, when the section is construed in accordance with the rule that a proviso refers only to the provision of a statute to which it is appended. This may be conceded to be the primary purpose of a proviso, but a presumption of such purpose cannot prevail to determine the intention of the legislature against other tests of meaning more demonstrative. We said in United States v. Whitridge, 197 U. S. at page 143, 49 L. ed. at page 698, 25 Sup. Ct. Rep. at page 408: "While no doubt the grammatical and [150] *logical scope of a proviso is confined to the subject-matter of the principal clause, we cannot forget that in practice no such limit is observed." And the Attorney General's opinion cannot be overlooked. The proviso which he construed in § 50 of the act of 1890 was re-enacted in § 33 of the act of 1897. It would be extreme to hold that Congress by doing so intended to set up the technical rule relating to provisos against the construction of the Attorney General, and to change that construction by repeating the very words construed. And there could have been no oversight. The practice of the executive officers for years gave emphasis and materiality to the construction. A change was made, however,—a change of one word,—a change recommended by the Treasury Department to increase the revenues and give greater convenience to the administration of the customs laws. The word "entry" was substituted for the word "withdrawal," and necessarily thereafter duties upon merchandise there provided for were to be based upon weight at the time of *entry*. Nor do we see that there is any contradiction of this in other provisions of the statute. Certain provisions of the customs administrative act are, however, relied upon. The provisions of that act, hereafter quoted, originated in § 1 of the act of March 14, 1866 (14 Stat. at L. 8, chap. 17), and were carried into the Revised Statutes as § 2970 (U. S. Comp. Stat. 1901, p. 1950), which provided that merchandise deposited in warehouse might be withdrawn for consumption within one year from the date of importation, upon payment of the duties and charges to which it might be subject by law at the time of withdrawal. At the expiration of one year, and until the expiration of three years, it might be withdrawn for consumption on payment of the duties assessed on the original entry and

charges, and an additional duty of 10 p centum on the amount of such duties. was decided in Merritt v. Cameron, 137 U S. 542, 550, 551, 34 L. ed. 772, 775, 11 Su Ct. Rep. 174, that that section "was inten ed to provide for cases in which a change rate of duty had been made by statu while the merchandise was in bonded war house."

*Then came § 20 of the customs a ministrative act of June 10, 1890 (26 St at L. 140, chap. 407), as amended by act October 1, 1890 (26 Stat. at L. 624, ch 1244, U. S. Comp. Stat. 1901, p. 1950), pr viding that warehouse merchandise mig be withdrawn for consumption within th years from the date of the original imp tation, on payment of the duties a charges to which it might be subject law at the time of such withdrawal. T section was amended in 1902 (32 Stat. at 753, chap. 1, U. S. Comp. Stat. Supp. 19 p. 419) by the addition of the following p viso: "*Provided*, That the same rate of du shall be collected thereon as may be impo by law upon like articles of merchandise i ported at the time of the withdrawal." T circuit court of appeals gave controlling fo to the proviso as fixing the meaning of section. The court said that it had held Mosle v. Bidwell, 65 C. C. A. 533, 130 F 334, "that the amendment of 1902 declaratory of the meaning of the sect prior to said amendment, and that its me ing as thus declared was that no greater different duties could be imposed than th to which other like goods imported at time of withdrawal would be subject." I garding this decision as conclusive t court said: "If other like goods had be imported at the time when these goods (t tobacco in question) were withdrawn, du would have been assessed thereon accordi to their weight at such time." But t question in Mosle v. Bidwell was not t same as in the case at bar. The questi now is not what rate of duty merchandi is subject to, or whether it is exempt fr duty, but at what date its weight is to taken as a basis of duty. And weight a fact independent of the rate of du The proviso of § 20 of the customs a ministrative act, therefore, cannot be m paramount to the proviso in § 33 of t tariff act of 1897. Nor was that the purp of its enactment. It was enacted to m fy the effect of the decision of the circ court in Mosle v. Bidwell, by which § 20 w construed to require the payment of du which had accrued at the time of impor tion, notwithstanding a change of rate that the goods had become exempt fr duty before *their withdrawal from w

house. This construction was contrary to the general understanding of the section and the practice of the Department. This, then, is our view: The Attorney General having construed the proviso of § 50 of the act of 1890 as not restricted to the matter which immediately preceded it, but as of general application, and this construction having been followed by the executive officers charged with the administration of the law, Congress adopted the construction by the enactment of § 33 of the act of 1897 and intended to make no other change than to require, as the basis of duty, the weight of the merchandise at the time of entry, instead of its weight at the time of its withdrawal from warehouse.

Judgment of the Circuit Court of Appeals is therefore reversed and that of the Circuit Court is affirmed and the case remanded to the latter court.

Mr. Justice **Moody** took no part in the decision of this case.

PEOPLE OF THE STATE OF NEW YORK EX REL. ALBERT J. HATCH, Plff. in Err.,

v.

EDWARD REARDON, A Peace Officer of the County of New York.

(See S. C. Reporter's ed. 152-162.)

Constitutional law—equal protection of the laws—discrimination—validity of stock transfer tax.

1. The tax on transfers of corporate stock imposed by N. Y. Laws 1905, chap. 241, is not invalid under U. S. Const. 14th Amend. as making an arbitrary discrimination in favor of sales of other kinds of personal property, such as corporate bonds.

Constitutional law—due process of law—validity of stock transfer tax.

2. Even as applied to shares of a foreign corporation owned by nonresidents, the tax on transfers of corporate stock imposed by N. Y. Laws 1905, chap. 241, is not invalid under U. S. Const. 14th Amend. as taking property without due process of law.

Constitutional law—due process of law—validity of stock transfer tax.

3. The adoption of the face value of the shares as the basis of the tax on transfers of corporate stock, imposed by N. Y. Laws 1905, chap. 241, does not deprive the owners of their property without due process of law.

Interstate commerce—state regulation—stock transfer tax.

4. An unconstitutional interference with interstate commerce is not made by the tax on transfers of corporate stock imposed by N. Y. Laws 1905, chap. 241, as applied to a sale in New York, between two nonresidents, of the stock of foreign railway corporations.

[No. 310.]

Argued December 11, 12, 1906. Decided January 7, 1907.

IN ERROR to the Supreme Court of the State of New York in and for the City and County of New York to review an order denying relief by habeas corpus to one charged with a violation of the New York stock transfer tax law, which order was affirmed successively by the Appellate Division of the Supreme Court, First Department, and by the Court of Appeals of the state. Affirmed.

See same case below in Appellate Division, 110 App. Div. 821, 97 N. Y. Supp. 535; in Court of Appeals, 184 N. Y. 431, 77 N. E. 970.

The facts are stated in the opinion.

Messrs. **John G. Milburn, John F. Dillon,** and **John G. Johnson** argued the cause and filed a brief for plaintiff in error:

The general rule of equality is that all persons subject to legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the limitations imposed.

Hayes v. Missouri, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350; Duncan v. Missouri, 152 U. S. 377, 382, 38 L. ed. 485,

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NOTE.—As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon. 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On state licenses or taxes as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

487, 14 Sup. Ct. Rep. 570; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 188, 31 L. ed. 650, 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 560, 561, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 159, 160, 165, 41 L. ed. 666, 668–671, 17 Sup. Ct. Rep. 255.

Classification for the purpose of taxation is subject to this rule of equality.

Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 385; State, Central R. Co. Prosecutor, v. State Assessors, 48 N. J. L. 1, 57 Am. Rep. 516, 2 Atl. 789; Re Pell, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; Connolly v. Union Sewer Pipe Co. 184 U. S. 562, 563, 46 L. ed. 690, 691, 22 Sup. Ct. Rep. 431; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Kentucky Railroad Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Nicol v. Ames, 173 U. S. 509, 521, 522, 43 L. ed. 786, 793, 794, 19 Sup. Ct. Rep. 522; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 352, 353, 35 L. ed. 1035, 1039, 1040, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Kidd v. Alabama, 188 U. S. 730, 732, 47 L. ed. 669, 672, 23 Sup. Ct. Rep. 401; Armour Packing Co. v. Lacy, 200 U. S. 226, 235, 50 L. ed. 451, 456, 26 Sup. Ct. Rep. 232; Cook v. Marshall County, 196 U. S. 261, 274, 275, 49 L. ed. 471, 476, 477, 25 Sup. Ct. Rep. 233; Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 397, 398, 49 L. ed. 1097, 1099, 1100, 25 Sup. Ct. Rep. 690; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 299, 300, 42 L. ed. 1037, 1044, 1045, 18 Sup. Ct. Rep. 594.

There is no basis for the separation of sales of shares of corporate stock from sales of all other species of personal property for the purposes of taxation.

Hayes v. Missouri, supra; Cooley, Taxn. 3d ed. p. 382.

The objection of inequality and arbitrary discrimination was not and could not have been raised against the provisions of the Federal war revenue act in Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305, and was not discussed by this court. That case decided only that the tax on sales of shares of stock imposed by the war revenue act was not a direct tax, but fell within the category of "duties, imposts, and excises," as those terms are used in the Federal Constitution.

Moreover, the equality clause of the 14th Amendment is confined to state legislation. The limitations on the taxing powers of Congress are those respecting the apportionment of direct taxes, the uniformity of duties, and the nontaxability of the exports.

License Tax Cases, 5 Wall. 462, 471, 18 L. ed. 497, 500.

A tax on a sale of property is virtually a tax on the property itself.

Cook v. Pennsylvania, 97 U. S. 566, 573, 24 L. ed. 1015, 1017; Nicol v. Ames, 173 U. S. 509, 521, 43 L. ed. 786, 793, 19 Sup. Ct. Rep. 522; Brown v. Maryland, 12 Wheat. 419, 444, 6 L. ed. 678, 687; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 581, 582, 39 L. ed. 759, 819, 820, 15 Sup. Ct. Rep. 673; Almy v. California, 24 How. 169, 16 L. ed. 644; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648.

A sale of property is an exercise of one of the rights of ownership, and no distinction can be drawn between a tax on the exercise of a right of ownership and a tax on the property itself. Property is, in its final analysis, simply a complex mass of rights over a tangible or intangible thing, the main one of which is the right of alienation. To deprive a man of that right would largely destroy the value of any article of property. Wynehamer v. People, 13 N. Y. 378; Wright v. Hart, 182 N. Y. 330, 3 L.R.A.(N.S.) 338, 75 N. E. 404. To tax its exercise is, therefore, to tax a main element in the value of the property, and consequently the property itself.

A tax on sales of shares of a corporation is, on this theory, either (a) tax on the property of the corporation represented by the shares (People ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433, 12 L.R.A. 762, 27 N. E. 818; Re Bronson, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707; Flynn v. Brooklyn City R. Co. 158 N. Y. 493, 53 N. E. 520; Jellenik v. Huron Copper Min. Co. 177 U. S. 13, 44 L. ed. 651, 20 Sup. Ct. Rep. 559; Mechanics' Bank v. New York & N. H. R. Co. 13 N. Y. 599; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; Delaware Railroad Tax, 18 Wall. 206, 21 L. ed. 888; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36; People v. Equitable Trust Co. 96 N. Y. 387), or (b) on the shares themselves, treated and regarded as a distinct species of property (State Assessors v. Comptoir Nat. d'Escompte, 191 U. S. 388, 402–404, 48 L. ed. 232, 238, 239, 24 Sup. Ct. Rep. 169; New York ex rel. New York C. & H. R. R. Co. v. Miller, 202 U. S. 584, 597, 50 L. ed. 1155, 1160, 26 Sup. Ct. Rep. 714; Re Easton, [People v. Sherwood] 113 N. Y. 174, 3 L.R.A. 464, 21 N. E. 87; Re James, 144 N. Y.

6, 43 Am. St. Rep. 725, 38 N. E. 961; People ex rel. Hoyt v. Tax & A. Comrs. 23 N. Y. 224).

The situs of the property owned by a shareholder in a corporation is either where the corporation exists, or at the domicil of the shareholder.

Re Enston, supra; Plimpton v. Bigelow, 93 N. Y. 592; Jermain v. Lake Shore & M. S. R. Co. 91 N. Y. 483; Re Bronson, Re James, State Tax on Foreign-held Bonds, Delaware Railroad Tax, Jellenik v. Huron Copper Min. Co. and Union Refrigerator Transit Co. v. Kentucky,—supra.

The tax created by this stamp act is a tax upon the transaction of buying and selling shares of stock, and if buying and selling are not commerce, nothing is commerce. And if the thing sold is not within the state levying the tax, and the vendor is a citizen of another state, then such a sale or transaction is interstate commerce, and not subject to the state's taxing power in any form or to any extent.

Robbins v. Taxing District, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Corson v. Maryland, 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50, 7 Sup. Ct. Rep. 655; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Muskogee Nat. Teleph. Co. v. Hall, 55 C. C. A. 208, 118 Fed. 382; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Hopkins v. United States, 171 U. S. 578, 597, 43 L. ed. 290, 297, 19 Sup. Ct. Rep. 40; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 356, 30 L. ed. 1187, 1188, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Judson, Taxn. § 146; Miller, Const. 80; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 465, 48 L. ed. 518, 523, 24 Sup. Ct. Rep. 300.

The New York stamp act is not valid as a tax on the right or privilege to make a sale or transfer.

Lyng v. Michigan, 135 U. S. 161, 166, 34 L. ed. 150, 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 51.

If the transaction set forth in the criminal complaint in this case is an interstate commerce transaction, then it inevitably follows that, applied to this transaction, the New York stamp act is an interference with interstate commerce and therefore void.

Lyng v. Michigan and Crutcher v. Kentucky, supra; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817.

And it is immaterial that the state lays the same taxes on domestic commerce that it attempts to lay on interstate commerce.

Robbins v. Taxing District, 120 U. S. 489, 497, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

The act is an interference with commerce with foreign nations.

Brown v. Maryland, supra.

The act is a unit, and void *in toto*.

Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 275, 23 L. ed. 543, 550; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Crutcher v. Kentucky, 141 U. S. 47, 62, 35 L. ed. 649, 654, 11 Sup. Ct. Rep. 851.

Even if the mere certificates of stock sent or brought to New York for sale were to be deemed property within this state, this tax law is void under the commerce clause of the Federal Constitution.

Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678.

Mr. **Julius M. Mayer** argued the cause, and, with Messrs. Horace McGuire and James C. Graham, filed a brief for defendant in error:

The Congress of the United States is a body with limited powers: it possesses none which are not to be found in the Constitution. The legislature of New York, on the other hand, has absolute and unlimited powers, except where expressly restrained by the Constitution of the United States. None of the restrictions contained in the latter instrument cover this field of taxation.

Thomas v. United States, 192 U. S. 363, 369, 48 L. ed. 481, 483, 24 Sup. Ct. Rep. 305, is a direct precedent in this court.

The tax is an excise or stamp tax.

United States v. Thomas, 115 Fed. 207, Affirmed in 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305; 11 Am. & Eng. Enc. Law, 2d ed. p. 579; Pacific Ins. Co. v. Soule, 7 Wall. 445, 19 L. ed. 99; Pollock v. Farmers Loan & T. Co. 157 U. S. 576, 39 L. ed. 817, 15 Sup. Ct. Rep. 673; Oliver v. Washington Mills, 11 Allen, 274.

The act neither creates discrimination

nor produces confiscation of property, under the Constitution of the United States.

Henderson Bridge Co. v. Henderson, 173 U. S. 592, 43 L. ed. 823, 19 Sup. Ct. Rep. 553; Nicol v. Ames, 173 U. S. 518, 522, 43 L. ed. 792, 794, 19 Sup. Ct. Rep. 522; Re Whiting, 150 N. Y. 30, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715; Travellers' Ins. Co. v. Connecticut, 185 U. S. 371, 46 L. ed. 954, 22 Sup. Ct. Rep. 673; Re McPherson, 104 N. Y. 316, 58 Am. Rep. 502, 10 N. E. 685; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 293, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; People v. Home Ins. Co. 92 N. Y. 337; Howe Mach. Co. v. Gage, 100 U. S. 676, 679, 25 L. ed. 754, 755; Tinsley v. Anderson, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233.

When the state may tax at all, the manner in which the tax shall be assessed, and the rate of taxation, however arbitrary or capricious, are matters of legislative discretion. It is not for the Federal court to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed. The only concern of that court is with the validity of the tax; all else is beyond its jurisdiction.

Delaware Railroad Tax, 18 Wall. 206, 231, 21 L. ed. 888, 896; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326–336, 30 L. ed. 1200, 1201, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Vermont & C. R. Co. v. Vermont C. R. Co. 63 Vt. 19, 10 L.R.A. 562, 3 Inters. Com. Rep. 488, 21 Atl. 262, 731.

The certificate of stock, if in the state, is liable to taxation, to attachment and execution. It is tangible property, having an existence absolutely complete and separate from the capital stock of the company, its assets, its property.

People ex rel. Commercial Cable Co. v. Morgan, 178 N. Y. 439, 67 L.R.A. 960, 70 N. E. 967; People ex rel. Consolidated Ginseng Co. v. Kelsey, 105 App. Div. 175, 93 N. Y. Supp. 369; New York v. Tax & A. Comrs. 4 Wall. 258, 18 L. ed. 350; Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229; Cleveland Trust Co. v. Lander, 184 U. S. 114, 46 L. ed. 458, 22 Sup. Ct. Rep. 394; Simpson v. Jersey City Contracting Co. 165 N. Y. 193, 55 L.R.A. 796, 58 N. E. 896; Plympton v. Bigelow, 93 N. Y. 592; Re Bronson, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707; New Orleans v. Stempel, 175 U. S. 319, 44 L. ed. 180, 20 S Ct. Rep. 110; Savings & L. Soc. v. Mult mah County, 169 U. S. 421, 42 L. ed. 8 18 Sup. Ct. Rep. 392.

The general course of decisions has s tained taxation of goods brought from ot states, if taxed like all other property the state.

Pittsburg & S. Coal Co. v. Bates, 156 S. 577, 39 L. ed. 538, 5 Inters. Com. R 30, 15 Sup. Ct. Rep. 415, 40 La. Ann. 2 8 Am. St. Rep. 519, 3 So. 642; Brown Houston, 114 U. S. 622, 29 L. ed. 257, Sup. Ct. Rep. 1091; Woodruff v. Parha 8 Wall. 123, 19 L. ed. 382.

A state may tax all property which h a situs within its limits, regardless of t fact that it may have come from or destined to foreign countries or anoth state. Certainly, then, it can tax a tran action,—to wit, a transfer taking pla within the borders of the state.

Coe v. Errol, 116 U. S. 517, 29 L. e 715, 6 Sup. Ct. Rep. 475; Brown v. Hou ton, supra; Standard Oil Co. v. Combs, 1 Ind. 179, 49 Am. Rep. 156; Rieman v. She ard, 27 Ind. 288; Carrier v. Gordon, 2 Ohio St. 605; Woodruff v. Parham, supra; American Steel & Wire Co. v. Speed, 19 U. S. 520, 48 L. ed. 546, 24 Sup. Ct. Rep 365.

The reluctance of the courts to interfere with enactments relating to taxation is demonstrated in a long line of cases. The scope of the taxing power enables the state, from time to time, to bring within the purview of its taxing power new subjects which have not been covered by previous legislation; as, for example, mortgages owned by citizens of other states on property within the state. Savings & L. Soc. v. Multnomah County, supra.

The right of succession to the property of one dying.

Magoun v. Illinois Trust & Sav. Bank, 17 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep 594.

Debts owing by a resident debtor to nonresident creditor.

Blackstone v. Miller, 188 U. S. 189, 4 L. ed. 439, 23 Sup. Ct. Rep. 277.

The rights given to a foreign corpora tion to carry on business within the state.

Horn Silver Min. Co. v. New York, 14 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep 57, 12 Sup. Ct. Rep. 403.

The amount of capital employed by foreign corporation within the state.

New York v. Roberts, 171 U. S. 658, 43 L ed. 323, 19 Sup. Ct. Rep. 58.

Likewise, the courts have been most li eral in recognizing that it becomes necessary for states to select certain classes, or ot

tain subject-matter, as distinguished from other classes and other subject-matter.

Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Pacific Exp. Co. v. Seibert, 142 U. S. 354, 35 L. ed. 1040, 3 Inters. Com. Rep. 310, 12 Sup. Ct. Rep. 250; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 228, 41 L. ed. 697, 17 Sup. Ct. Rep. 305; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 293, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594; Kentucky Railroad Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Hopkins v. United States, 171 U. S. 597, 598, 43 L. ed. 297, 298, 19 Sup. Ct. Rep. 40.

Mr. E. Crosby Kindleberger also argued the cause and filed a brief for defendant in error:

The court of appeals having decided that the act did not, in any respect, violate the Constitution of the state of New York, its decision precludes this question from being raised in this court.

West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Lewis v. Monson, 151 U. S. 545, 38 L. ed. 265, 14 Sup. Ct. Rep. 424; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 462, 42 L. ed. 236, 237, 17 Sup. Ct. Rep. 829; Rasmussen v. Idaho, 181 U. S. 198, 200, 45 L. ed. 820, 821, 21 Sup. Ct. Rep. 594; Williams v. Parker, 188 U. S. 491, 502, 47 L. ed. 559, 562, 23 Sup. Ct. Rep. 440; New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 35, 50 L. ed. 65, 74, 25 Sup. Ct. Rep. 705; Michigan C. R. Co. v. Powers, 201 U. S. 245, 290, 50 L. ed. 744, 760, 26 Sup. Ct. Rep. 459.

A taxing statute of a state should not be declared unconstitutional unless clearly opposed to the Constitution of the United States.

King v. Mullins, 171 U. S. 404, 436, 43 L. ed. 214, 226, 18 Sup. Ct. Rep. 925; Henderson Bridge Co. v. Henderson, 173 U. S. 592, 614, 615, 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 553; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 562, 563, 46 L. ed. 679, 690, 691, 22 Sup. Ct. Rep. 431.

The tax imposed by chapter 241 of the Laws of 1905 is a tax on transfers, and not a direct tax on property.

New York ex rel. Brooklyn City R. Co. v. New York State Tax Comrs. 199 U. S. 48, 50, 50 L. ed. 79, 84, 25 Sup. Ct. Rep. 713; Clark v. Titusville, 184 U. S. 329, 333, 334, 46 L. ed. 569, 573, 22 Sup. Ct. Rep. 382; Foppiano v. Speed, 199 U. S. 501, 50 L. ed. 288, 26 Sup. Ct. Rep. 138; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; New York v. Roberts, 171 U. S. 658, 664, 43 L. ed. 323, 326, 19 Sup. Ct. Rep. 58; Treat v. White, 181 U. S. 264, 268, 269, 45 L. ed. 853, 854, 855, 21 Sup. Ct. Rep. 611; Thomas v. United States, 192 U. S. 363, 370, 48 L. ed. 481, 483, 24 Sup. Ct. Rep. 305.

It is difficult to see how Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305, can be distinguished from the case at bar, for the state statute is identical with the act of Congress there construed, and the state, through its legislature, has like power in matters of taxation which is afforded to the Congress of the United States. This rule is particularly applicable in matters of taxation.

French v. Barber Asphalt Paving Co. 181 U. S. 324, 329, 45 L. ed. 879, 884, 21 Sup. Ct. Rep. 625; Cook v. Marshall County, 196 U. S. 261, 274, 49 L. ed. 471, 476, 25 Sup. Ct. Rep. 233; Kehrer v. Stewart, 197 U. S. 60, 69, 49 L. ed. 663, 668, 25 Sup. Ct. Rep. 403.

Due process of law, as applied to taxation, means only taxation according to accepted usage. Granting that this tax is an indirect one, and usage having settled that no hearing or grievance day is required, it necessarily follows that the imposition of tax is not without due process of law.

Hagar v. Reclamation District No. 108, 111 U. S. 701, 711, 28 L. ed. 569, 573, 4 Sup. Ct. Rep. 663; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 239, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Hylton v. United States, 3 Dall. 171, 1 L. ed. 556; Knowlton v. Moore, 178 U. S. 41, 60, 44 L. ed. 969, 977, 20 Sup. Ct. Rep. 747.

The state may classify its subjects of taxation in any reasonable way.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Kentucky Railroad Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 351, 35 L. ed. 1035, 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Giozza v. Tiernan, 148 U. S. 657, 662, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 539, 40 L. ed. 247, 252,

16 Sup. Ct. Rep. 83; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 195, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 300, 42 L. ed. 1037, 1045, 18 Sup. Ct. Rep. 594; Nicol v. Ames, 173 U. S. 509, 521, 43 L. ed. 786, 793, 19 Sup. Ct. Rep. 522; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 94, 45 L. ed. 102, 104, 21 Sup. Ct. Rep. 43; Connolly v. Union Sewer Pipe Co. 184 U. S. 562, 46 L. ed. 691, 22 Sup. Ct. Rep. 431; Travellers' Ins. Co. v. Connecticut, 185 U. S. 365, 46 L. ed. 950, 22 Sup. Ct. Rep. 673; Billings v. Illinois, supra; Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Coulter v. Louisville & N. R. Co. 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459.

The stock transfer act effects a reasonable classification.

Otis v. Parker, 187 U. S. 606, 610, 47 L. ed. 323, 328, 23 Sup. Ct. Rep. 168; Kidd v. Alabama, 188 U. S. 730, 733, 47 L. ed. 669, 673, 23 Sup. Ct. Rep. 401; Billings v. Illinois, 188 U. S. 97, 103, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272; Kentucky Railroad Tax Cases, 115 U. S. 321, 327, 29 L. ed. 414, 416, 6 Sup. Ct. Rep. 57; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690; Armour Packing Co. v. Lacy and Magoun v. Illinois Trust & Sav. Bank, supra.

The fact that the tax is measured by the par value of the shares does not invalidate the act.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Jennings v. Coal Ridge Improv. & Coal Co. 147 U. S. 147, 37 L. ed. 116, 13 Sup. Ct. Rep. 282; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829.

The act does not violate the commerce clause of the Federal Constitution.

Field v. Barber Asphalt Paving Co. 194 U. S. 618, 623, 48 L. ed. 1142, 1154, 24 Sup. Ct. Rep. 784; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 28, 48 L. ed. 325, 328, 24 Sup. Ct. Rep. 202; Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 616, 47 L. ed. 328, 332, 23 Sup. Ct. Rep. 206.

This court has frequently held that, although a state may not tax interstate commerce, yet it may impose a tax on property used to facilitate interstate commerce, such as the rolling stock or vessels of a foreign corporation.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 23, 35 L. ed. 613, 616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Old Dominion S. S. Co. v. Virginia, 198 U. S. 299, 305, 49 L. ed. 1059, 1062, 25 Sup. Ct. Rep. 686.

If chapter 241 of the Laws of 1905 had attempted merely to tax the sales or transfers of the shares of foreign corporations, it might be argued with more force that this was a restraint on interstate commerce; but the law specifically taxes the sales of all stocks, both domestic and foreign; and its jurisdiction to do so depends on the sales taking place within its borders; and no movement or transportation of goods is contemplated. Under these circumstances it is always held that the state may tax goods or the sale of such goods without violating the commerce clause of the Constitution.

Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; Emert v. Missouri, 156 U. S. 296, 311, 39 L. ed. 430, 434, 5 Inters. Com. Rep. 66, 15 Sup. Ct. Rep. 367; American Steel & Wire Co. v. Speed, 192 U. S. 500, 520, 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365; Kehrer v. Stewart, 197 U. S. 60, 69, 49 L. ed. 663, 668, 25 Sup. Ct. Rep. 403; Armour Packing Co. v. Lacy, 200 U. S. 226, 234, 235, 50 L. ed. 451, 456, 457, 26 Sup. Ct. Rep. 232.

The modern rule is that shares of stock have a taxable situs within the state where the certificates are physically present, even though, in one sense, they confer but a right to a share of property situated in the state where the corporation exists.

New York v. Tax & A. Comrs. 4 Wall. 258, 18 L. ed. 350; Simpson v. Jersey City Contracting Co. 165 N. Y. 193, 55 L.R.A. 796, 58 N. E. 896; Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 205, 50 L. ed. 150, 154, 26 Sup. Ct. Rep. 36.

The novelty of the tax does not condemn it.

New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 44, 45, 47, 50 L. ed. 65, 78, 79, 25 Sup. Ct. Rep. 705.

Arguments relating to the policy of the law, and not strictly to its constitutionality, should be addressed to the New York legislature, and not to this court, for this court is not concerned with the policy or wisdom of a taxation statute of a state, but merely whether or not it offends the Constitution of the United States.

Michigan C. R. Co. v. Powers, 201 U. S. 245, 295, 296, 50 L. ed. 744, 762, 763, 26 Sup. Ct. Rep. 459.

Mr. Justice Holmes delivered the opinion of the court:

This is a writ of error to revise an order dismissing a writ of *habeas corpus and remanding the relator to the custody of the defendant in error. The order was made by a single justice and affirmed successively by the appellate division of the supreme court (110 App. Div. 821, 97 N. Y. Supp. 95), and by the court of appeals (184 N. Y. 11, 77 N. E. 970). The facts are these: The relator, Hatch, a resident of Connecticut, sold in New York to one Maury, also resident of Connecticut, but doing business in New York, 100 shares of the stock of the Southern Railway Company, a Virginia corporation, and 100 shares of the stock of the Chicago, Milwaukee, & St. Paul Railroad Company, a Wisconsin corporation, and on the same day and in the same place received payment and delivered the certificates, assigned in blank. He made no memorandum of the sale and affixed to no document any stamp, and did not otherwise pay the tax on transfers of stock imposed by the New York Laws of 1905, chap. 41. He was arrested on complaint, and thereupon petitioned for this writ, alleging that the law was void under the 14th Amendment of the Constitution of the United States.

The statute in question levies a tax of 2 cents on each hundred dollars of face value of stock, for every sale or agreement to sell the same, etc.; to be paid by affixing and canceling stamps for the requisite amount to the books of the company, the stock certificate, or a memorandum required in certain cases. Failure to pay the tax is made a misdemeanor punishable by fine, imprisonment, or both. There is also a civil penalty attached. The petition for the writ sets up only the 14th Amendment, as we have mentioned, but both sides have argued the case under the commerce clause of the Constitution (art. 1, § 8) as well, and we shall say a few words on that aspect of the question.

It is true that a very similar stamp act of the United States, the act of June 13, 1898, chap. 448, § 25, Schedule A, 30 Stat. at L. 448, 458, U. S. Comp. Stat. 1901, p. 2300, was upheld in Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305. But it is argued that different considerations apply to the states, and the tax is said to be bad under the 14th Amendment *for several reasons. In the first place it is said to be an arbitrary discrimination. This objection to a tax must be approached with the greatest caution. The general expressions of the Amendment must not be allowed to upset familiar and long-established methods and processes by a formal elaboration of rules which its words do not import. See Michigan C. R. Co. v. Powers, 201 U. S. 245, 293, 50 L. ed. 744, 761, 26 Sup. Ct. Rep. 459. Stamp acts necessarily are confined to certain classes of transactions, and to classes which, considered economically or from the legal or other possible points of view, are not very different from other classes that escape. You cannot have a stamp act without something that can be stamped conveniently. And it is easy to contend that justice and equality cannot be measured by the convenience of the taxing power. Yet the economists do not condemn stamp acts, and neither does the Constitution.

The objection did not take this very broad form, to be sure. But it was said that there was no basis for the separation of sales of stock from sales of other kinds of personal property; for instance, especially, bonds of the same or other companies. But bonds in most cases pass by delivery, and a stamp tax hardly could be enforced. See further, Nicol v. Ames, 173 U. S. 509, 522, 523, 43 L. ed. 786, 794, 795, 19 Sup. Ct. Rep. 522. In Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168, practical grounds were recognized as sufficient to warrant a prohibition, which did not apply to sales of other property, of sales of stock on margin, although this same argument was pressed with great force. *A fortiori* do they warrant a tax on sales which is not intended to discriminate against or to discourage them, but simply to collect a revenue for the benefit of the whole community in a convenient way.

It is urged further that a tax on sales is really a tax on property, and that therefore the act, as applied to the shares of a foreign corporation owned by nonresidents, is a taking of property without due process of law. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36. This argument presses the expressions in Brown v. Maryland, 12 Wheat. 419, 444, 6 L. ed. 678, 687; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, and intervening cases, *to new applications, and farther than [159] they properly can be made to go. Whether we are to distinguish or to identify taxes on sales and taxes on goods depends on the scope of the constitutional provision concerned. Compare Foppiano v. Speed, 199 U. S. 501, 520, 50 L. ed. 288, 292, 26 Sup. Ct. Rep. 138. A tax on foreign bills of lading may be held equivalent to a tax on exports as against article 1, § 9; a license tax

on importers of foreign goods may be held an unauthorized interference with commerce; and yet it would be consistent to sustain a tax on sales within the state as against the 14th Amendment, so far as that alone is concerned. Whatever the right of parties engaged in commerce among the states, a sale depends in part on the law of the state where it takes place for its validity and, in the courts of that state, at least, for the mode of proof. No one would contest the power to enact a statute of frauds for such transactions. Therefore the state may make parties pay for the help of its laws, as against this objection. A statute requiring a memorandum in writing is quite as clearly a regulation of the business as a tax. It is unnecessary to consider other answers to this point.

Yet another ground on which the owners of stock are said to be deprived of their property without due process of law is the adoption of the face value of the shares as the basis of the tax. One of the stocks was worth $30.75 a share of the face value of $100, the other $172. The inequality of the tax, so far as actual values are concerned, is manifest. But, here again equality in this sense has to yield to practical considerations and usage. There must be a fixed and indisputable mode of ascertaining a stamp tax. In another sense, moreover, there is equality. When the taxes on two sales are equal, the same number of shares is sold in each case; that is to say, the same privilege is used to the same extent. Valuation is not the only thing to be considered. As was pointed out by the court of appeals, the familiar stamp tax of 2 cents on checks, irrespective of amount, the poll tax of a fixed sum, irrespective of income or earning capac-
[160]ity, and many others, illustrate the *necessity and practice of sometimes substituting count for weight. See Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829. Without going farther into a discussion which, perhaps, could have been spared in view of the decision in Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305, and the constitutional restrictions upon Congress, we are of opinion that the New York statute is valid, so far as the 14th Amendment is concerned.

The other ground of attack is that the act is an interference with commerce among the several states. Cases were imagined, which, it was said, would fall within the statute, and yet would be cases of such commerce; and it was argued that if the act embraced any such cases it was void as to them, and, if void as to them, void altogether, on a principle often stated. United States v. Ju Toy, 198 U. S. 253, 262, 49 L. ed. 1040, 1043, 25 Sup. Ct. Rep. 644. That the act is void as to transactions in commerce between the states, if it applies to them, is thought to be shown by the decisions concerning ordinances requiring a license fee from drummers, so called, and the like. Robbins v. Taxing District, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159.

But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a state on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if, for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all. Albany County v. Stanley, 105 U. S. 305, 311, 26 L. ed. 1044, 1049; Clark v. Kansas City, 176 U. S. 114, 118, 44 L. ed. 392, 396, 20 Sup. Ct. Rep. 284; Lampasas v. Bell, 180 U. S. 276, 283, 284, 45 L. ed. 527, 530, 531, 21 Sup. Ct. Rep. 363; Cronin v. Adams, 192 U. S. 108, 114, 48 L. ed. 365, 368, 24 Sup. Ct. Rep. 219. If the law is valid when confined to the *class of[161] the party before the court, it may be more or less of a speculation to inquire what exceptions the state court may read into general words, or how far it may sustain an act that partially fails. With regard to taxes, especially, perhaps it might be assumed that the legislature meant them to be valid to whatever extent they could be sustained, or some other peculiar principle might be applied. See, *e. g.*, People's Nat. Bank v. Marye, 191 U. S. 272, 283, 48 L. ed. 180, 186, 24 Sup. Ct. Rep. 68.

Whatever the reason, the decisions are clear, and it was because of them that it was inquired so carefully in the drummer cases whether the party concerned was himself engaged in commerce between the states. Stockard v. Morgan, 185 U. S. 27, 30, 35, 36, 46 L. ed. 785, 789, 793, 794, 22 Sup. Ct. Rep. 576; Caldwell v. North Caro-

a, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. p. 229; Rearick v. Pennsylvania, supra. erefore we begin with the same inquiry this case, and it is plain that we can t no farther. There is not a shadow of ground for calling the transaction deribed such commerce. The communitions between the parties were not beeen different states, as in Western U. eleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 167, and the bargain did not contemplate induce the transport of property from e state to another, as in the drummer ses. Rearick v. Pennsylvania. The barin was not affected in any way, legally r practically, by the fact that the parties appened to have come from another state efore they made it. It does not appear hat the petitioner came into New York to ell his stock, as it was put on his behalf. t appears only that he sold after coming nto the state. But we are far from imlying that it would have made any difference if he had come to New York with he supposed intent before any bargain was nade.

It is said that the property sold was not within the state. The immediate object of sale was the certificate of stock present in New York. That document was more than evidence, it was a constituent of title. No doubt, in a more remote sense, the object was the membership or share which the certificate conferred or made attainable. More remotely still it was an interest in the property of the corporation, which might be in other states than either the corporation or the certificate of stock. But we perceive no relevancy in the analysis. The facts that the property sold is outside of the state, and the seller and buyer foreigners, are not enough to make a sale commerce with foreign nations or among the several states, and that is all that there is here. On the general question there should be compared with the drummer cases the decisions on the other side of the line. Nathan v. Louisiana, 8 How. 73, 12 L. ed. 992; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367. A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one. American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365. We think it unnecessary to explain at greater length the reasons for our opinion that the petitioner has suffered no unconstitutional wrong.

Order affirmed.

OHIO VALLEY NATIONAL BANK, Plff. in Err.,
v.
JOHN HULITT, Receiver of the First National Bank of Hillsboro, Ohio.

(See S. C. Reporter's ed. 162-170.)

National banks—stockholder's liability—who are stockholders.

The pledgee of national bank stock as collateral security for a note, with power of public or private sale for the liquidation of the pledge, becomes the beneficial owner of such stock, and, as such, subject to the liability of a stockholder under U. S. Rev. Stat. § 5151, U. S. Comp. Stat. 1901, p. 3465, where, after the death of the pledgeor, it causes the stock to be registered in the name of an employee with no beneficial interest, and afterwards indorses upon the note the supposed value of the stock as of the date of the credit, and presents the note, as reduced by the amount of such valuation, to the pledgeor's administrator, who allows the claim in this form.

[No. 108.]

Argued November 16, 1906. Decided January 7, 1907.

IN ERROR to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which reversed a judgment of the Circuit Court for the Southern District of Ohio in favor of defendant in an action to enforce the statutory liability of a shareholder in a national bank, with a direction to enter judgment for plaintiff. Affirmed.

See same case below, 69 C. C. A. 609, 137 Fed. 461.

Statement by Mr. Justice **Day**:

This case was begun in the United States circuit court by John Hulitt as receiver of the First National Bank of Hillsboro, Ohio,

NOTE.—As to who are liable as shareholders in national banks—see notes to Beal v. Essex Sav. Bank, 15 C. C. A. 130, and Earle v. Carson, 46 C. C. A. 503.

On the rights and liabilities of pledgees of corporate stock—see notes to Andrews v. National Foundry & Pipe Works, 36 L.R.A. 139; Frater v. Old Nat. Bank, 42 C. C. A. 135; and Anderson v. Philadelphia Warehouse Co. 28 L. ed. U. S. 478.

Pledgee as shareholder in national bank.

One whose relation to a national bank is that of a pledgee of its stock, and who is not registered as owner, and has not held himself out as such, is not chargeable with the personal liability for the debts of the bank imposed by law upon shareholders. Pauly v. State Loan & T. Co. 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465, Af-

against the Ohio Valley National Bank, to recover the amount of an assessment upon certain shares of the stock of the Hillsboro Bank, which had become insolvent, which assessment was directed by the Comptroller of the Currency in accordance with the provisions of the national bank act. The case was tried upon an agreed statement of facts, from which it appears that on March 18, 1893, one Overton S. Price, for a loan of $10,000, gave his promissory note of that date to the Ohio Valley Bank, due ninety days after date, payable to his own order and indorsed by him, and deposited as collateral security for the note, among other securities, fifty shares of stock of the n First National Bank of Hillsboro, Ol The note had a power of sale attached it, signed by Price, and authorizing t holder to sell or collect any portion of t collateral, at public or private sale, on t nonperformance of the promise, and at a time thereafter, without advertising otherwise giving Price notice, and prov ing that, in case of public sale, the hol might purchase without liability to c count for more than the net proceeds the sale.

On December 25, 1893, Price died, leavi the note due and unpaid, and no payme

firming 56 Fed. 430; Beal v. Essex Sav. Bank, 15 C. C. A. 128, 33 U. S. App. 101, 67 Fed. 816; Welles v. Larrabee, 2 L.R.A. 471, 36 Fed. 866.

He can only become chargeable with such liability either by becoming the owner of the shares in fact, or by holding himself out to be the owner, and thereby estopping himself to deny his personal liability as such. Rankin v. Fidelity Ins. Trust & S. D. Co. 189 U. S. 242, 47 L. ed. 792, 23 Sup. Ct. Rep. 553.

He does become the owner, and, as such, subject to the statutory liability of a shareholder, by indorsing a credit for the supposed value of the stock upon the note to secure which the stock was pledged, and by presenting and obtaining the allowance of a claim against the estate of the deceased pledgeor for the balance of the indebtedness on such note. OHIO VALLEY NAT. BANK v. HULITT.

He does not become the owner by paying an assessment made by the Comptroller to make good the impaired capital of the bank, and charging the same to the pledgeor as an additional advance, nor by assenting to the reduction of the capital stock made agreeably to law, under the approval of the Comptroller of the Currency. Higgins v. Fidelity Ins. Trust & S. D. Co. 46 C. C. A. 509, 108 Fed. 475.

A sale by the pledgee of certificates of national bank stock standing in the name of the pledgeor on the books of the bank, although made just before the declared insolvency of the bank, and with a view to escape complications, does not make the pledgee liable as owner, where the contract of pledge required a sale of the shares on default, and did not permit the pledgee to retain the stock as his own property. Magruder v. Colston, 44 Md. 349, 22 Am. Rep. 47.

A national bank which receives as collateral security for a note the stock of another national bank, and, on default, proceeds to sell the stock and bid it in, is not liable as a stockholder, where it never has a transfer of the shares made on the books, and, as between the pledgee bank and the debtor, who claims that the sale is invalid, the stock continues to be held merely as collateral for his debt. Robinson v. Southern Nat. Bank, 180 U. S. 295, 45 L. ed. 536, 21 Sup. Ct. Rep. 383. Affirming C. C. A. 584, 94 Fed. 964. The court s that, where one national bank takes t shares of another national bank as secur for a loan, there is a presumption agai any intention to become the owner of t collateral.

The pledgee of national bank stock, wh not registered as the owner, may have s stock listed in the name of an irresponsi employee without becoming liable to cr itors as a shareholder, even though this done for the purpose of escaping such l bility. Rankin v. Fidelity Ins. Trust & D. Co. supra; Anderson v. Philadelp Warehouse Co. 111 U. S. 479, 28 L. 478, 4 Sup. Ct. Rep. 525; Hulitt v. O Valley Nat. Bank, 69 C. C. A. 609, 1 Fed. 461; Wilson v. Merchants' Loan & Co. 39 C. C. A. 231, 98 Fed. 688; Natio Park Bank v. Harmon, 25 C. C. A. 2 51 U. S. App. 148, 79 Fed. 891.

And the formal assent of the pledgeor unnecessary where the certificates are dorsed in blank. Higgins v. Fidelity I Trust & S. D. Co. supra.

And where there is no pretense of change of ownership, one who has ta national bank stock as collateral is liable a shareholder only upon the ground of toppel. Frater v. Old Nat. Bank, 42 C. A. 133, 101 Fed. 391, Affirming 86 F 1006; Welles v. Larrabee, 2 L.R.A. 471, Fed. 866.

And only in a clear case can a pledgee national bank stock be held liable on t ground. Frater v. Old Nat. Bank, su

When an estoppel of this kind arise grows out of conduct inconsistent with other relation than that of absolute own ship of the stock The question is ordi rily settled by the showing which the b of the bank make. Its creditors are titled to assume that those persons wh the books show to be shareholders are s in fact, and if a pledgee permits his n to appear on the books of the bank a shareholder he cannot escape liability such to creditors of the bank because he in fact hold the stock as collateral. An son v. Philadelphia Warehouse Co. su Pauly v. State Loan & T. Co. 165 U 606, 41 L. ed. 844, 17 Sup. Ct. Rep. Germania Nat. Bank v. Case, 99 U. S.

have been made thereon except as hereinafter stated.

On June 18, 1894, the bank made a transfer of the pledged stock of the First National Bank of Hillsboro, and also of certain other stock in the Dominion National Bank of Bristol, Virginia, to one Henry Otjen, an employee of the bank, and pecuniarily irresponsible. The shares were transferred on the books of the banks and new certificates issued in the name of Otjen and delivered to him on July 7, 1894. Otjen indorsed the certificates in blank. No money passed in consideration of the transfer, and none was expected, nor was any credit given or indorsed on the note by reason thereof.

The transfer was made upon the understanding and agreement between Otjen and the bank that Otjen should hold the stock as security for the indebtedness of the estate of Price upon the note, he to apply any amounts which he might realize from said stock as credits upon the note. In pursuance of this agreement Otjen subsequently paid the bank sums received from the Dominion National Bank on account of dividends received until the sale of that stock, when the proceeds of sale were likewise applied by him upon the note.

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25 L. ed. 448; Moore v. Jones, 3 Woods, 53, Fed. Cas. No. 9,769; Wheelock v. Kost, 77 Ill. 296; Hale v. Walker 31 Iowa, 344, 7 Am. Rep. 137; Magruder v. Colston, 44 Md. 349, 22 Am. Rep. 47.

And this is so even where the debt has been paid and the stock returned to the debtor, with power of attorney to retransfer the shares on the books of the bank, if such retransfer is never made. Bowden v. Farmers' & M. Bank, 1 Hughes, 307, Fed. Cas. No. 1,714.

The registry of shares of national bank stock on the books of a bank in the name of a person as cashier of another national bank does not estop either the latter bank or the cashier from showing, in a suit to enforce the statutory liability of a shareholder, that such stock was held as collateral security for a loan, as such an entry is of such a character as to suggest a qualified or representative holding, and as such to put the public upon inquiry. Frater v. Old Nat. Bank, supra.

A single entry on the stock register of a national bank which shows that a certificate of stock has been issued to a person named therein will not estop him from showing that he holds such stock as pledgee, where that fact could be ascertained from an examination of another entry in the stock register to which the entry in question refers,—especially where the stock list which U. S. Rev. Stat. § 5210, U. S. Comp. Stat. 1901, p. 3498, requires to be kept is not produced nor its absence accounted for. Tourtelot v. Stolteben, 101 Fed. 362.

But the failure to keep the list of stockholders of a national bank, required by law, does not affect the liability of one who appears on the books of the bank to be the owner, although he may in fact hold as pledgee. Hale v. Walker supra.

A case involving the question whether shares of national bank stock are held as owner or as pledgee, which turns upon the proper conclusion to be drawn from a commercial correspondence, in connection with other facts and circumstances, is properly referred to a jury, although the construction of written instruments is ordinarily a question for the court. Rankin v. Fidelity Ins. Trust & S. D. Co. 189 U. S. 242, 47 L. ed. 793, 23 Sup. Ct. Rep. 553.

Whether a pledgee of national bank stock is estopped to deny his personal liability as a shareholder by speaking of himself as holding or owning the stock, in letters to the officers of the bank, who understood perfectly the capacity in which such stock is retained, is a question for the jury. Ibid.

The burden is upon the receiver representing the creditors of an insolvent national bank of showing that a pledgee of its stock has knowingly permitted his name to be carried on the books of the bank as an owner of such stock, so as to estop him from denying such ownership as against creditors. Tourtelot v. Stolteben, supra.

In an action by the receiver of an insolvent national bank to recover an assessment from a pledgee of its stock, on the theory that such pledgee, by substituting for the original shares those of a bank with which the bank issuing them had been consolidated, converted the collateral, the receiver is charged with the burden of proving that the exchange was made without the consent of the pledgeor. Wilson v. Merchants' Loan & T. Co. 39 C. C. A. 231, 98 Fed. 688.

A pencil memorandum in the stock ledger of a national bank at the top of an account with a person to whom certain pledged shares of stock had been transferred at the request of the pledgee, which consists merely of the name of the latter, with whom the correspondence in regard to such account was carried on, is inadmissible in evidence on the issue whether such pledgee had become the owner of the stock and was chargeable with the personal liability of a shareholder. Rankin v. Fidelity Ins. Trust & S. D. Co. supra.

A memorandum made by the assignee of a pledgeor of national bank stock without the knowledge or acquiescence of the pledgee, to the effect that such stock had been converted by the latter and did not sell for enough to pay the debt for which it was pledged, is inadmissible in evidence on the issue whether such pledgee had become the owner of the shares, and, as such, chargeable with the personal liability of the shareholders,—especially where such memorandum was obviously untrue, as the stock had never been sold. Ibid.

On February 19, 1896, the bank prepared proof of claim against the estate of Price, and, at that time, believing the stocks transferred to Otjen to afford a reasonable security for the note to the amount of $4,484, indorsed a credit for that sum upon the note, as follows: "Forty-four hundred and eighty-four ($4,484.00) dolls. paid on ac. of within note June 18, '94, being proceeds of sale of 30 shrs. stock Dominion National Bank and 20 shares of stock 1st National Bank of Hillsboro, O." The bank filed its proof of claim for the balance of the indebtedness upon the note; that no consideration was paid for said credit, and the same was not entered on the bank's books; that all dividends arising upon the distribution of the estate of Price were applied upon the note.

The Hillsboro bank continued to do business until July 16, 1896. From the date of transfer at all times the stock appeared on the books of the Hillsboro bank in the name of Otjen, there being nothing on the books to connect the Ohio Valley National Bank with the stock, or to indicate that it had any interest therein; that the defendant bank at no time performed any act of ownership, or exercised or attempted to exercise any of the rights of a stockholder [165] in said bank, or of *the Dominion National Bank, unless the acts stated were, in legal intendment, of that character. The Ohio Valley National Bank procured the shares to be transferred to Otjen because it was unwilling to assume the risk of the statutory liability of a stockholder in respect thereto. The circuit court of appeals held the bank liable as a stockholder (69 C. C. A. 609, 137 Fed. 461), and directed judgment accordingly.

Mr. **Robert Ramsey** argued the cause, and, with Mr. J. J. Muir, filed a brief for plaintiff in error:

The transfer to Otjen did not bring defendant into such relation to the shares as to subject it to the statutory liability.

Anderson v. Philadelphia Warehouse Co. 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. Rep. 525; Pauly v. State Loan & T. Co. 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465; Rankin v. Fidelity Ins. Trust & S. D. Co. 189 U. S. 242, 47 L. ed. 792, 23 Sup. Ct. Rep. 553.

Defendant's relation to these shares was not in any manner affected by its proof of claim against the debtor's estate.

Deery v. Cray, 5 Wall. 795, 18 L. ed. 653; Ketchum v. Duncan, 96 U. S. 659, 666, 24 L. ed. 868, 871; 2 Pom. Eq. Jur. § 813.

National banks lack corporate power to incur the risks of a speculative enterprise or partnership liabilities, by taking or holding corporate or syndicate shares, even though taken in satisfaction of a debt; an estoppel will not lie to bar the defense.

First Nat. Bank v. Converse, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. Rep. 306; Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. Rep. 613.

Mr. **Henry M. Huggins** argued the cause and, with Mr. R. T. Hough, filed a brief for defendant in error.

*Mr. Justice **Day**, after making the foregoing statement, delivered the opinion of the court:

Section 5151 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3465) provides that the shareholders of every national banking association shall be held individually responsible, equally and ratably, not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. This section undertakes to hold all shareholders responsible, and questions have arisen under varying circumstances as to what constitutes such shareholder.

In Anderson v. Philadelphia Warehouse Co. 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. Rep. 525, it was held that the mere pledgee, who had never acted as a shareholder, would not be liable as such, notwithstanding the stock was transferred on the books of the bank and the certificate issued to an irresponsible person, in that instance a porter in the employment of the company, and this although the transfer had been thus made for the purpose of avoiding liability which might be incurred by the shareholders of the bank, in case of insolvency. In the course of the opinion, Mr. Chief Justice Waite, speaking for the court, recognized that the real owner might be held liable as a shareholder, but in that case the facts showed the warehouse company, sought to be held as a shareholder, was never other than a pledgee, and that notwithstanding the transfer to the irresponsible person, the real ownership of the stock remained in the original holder.

In Pauly v. State Loan & T. Co. 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465, the subject was considered at length, and it was held that one who was described in the certificate as a pledgee, and who in good faith held the shares as such, was not a shareholder, subject to the personal liability imposed by § 5151. The previous cases in this court were reviewed, and, in summing up the rules relating to the liability of shareholders in *national banks, deducible from previous decisions, among

other things it was said: "That the real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of § 5151." And again: "The object of the statute is not to be defeated by the mere forms of transactions between shareholders and their creditors. The courts will look at the relations of parties as they actually are, or as, by reason of their conduct, they must be assumed to be, for the protection of creditors. Congress did not say that those only should be regarded as shareholders, liable for the contracts, debts, and engagements of the banking association, whose names appear on the stock list distinctly as shareholders. A mistake or error in keeping the official list of shareholders would not prevent creditors from holding liable all who were, in fact, the real owners of the stock, and as such had invested money in the shares of the association. As already indicated, those may be treated as shareholders within the meaning of § 5151 who are the real owners of the stock, or who hold themselves out, or allow themselves to be held out, as owners in such way and under such circumstances as, upon principles of fair dealing, will estop them, as against creditors, from claiming that they were not, in fact, owners."

And in Rankin v. Fidelity Ins. Trust & S. D. Co. 189 U. S. 242, 252, 47 L. ed. 792, 796, 23 Sup. Ct. Rep. 553, the doctrine was stated that a defendant who was in fact the owner of shares of stock could not avoid liability by listing them in the name of another, notwithstanding it might do so if it were the mere pledgee of the stock; and further, that the case then under consideration turned upon the actual ownership of the shares, which question was properly left to the jury. And to the same effect are well-considered cases in other courts, Federal and state. It was held that the real owner might be charged, although his name never appeared upon the books of the bank. Davis v. Stevens, 17 Blatchf. 259, Fed. Cas. No. 3,653, opinion by Mr. Chief Justice Waite; Houghton v. Hubbell, 33 C. C. A. 574, 63 U. S. App. 31, *91 Fed. 453; Laing v. Burley, 101 Ill. 591; Lesassier v. Kennedy, 36 La. Ann. 539.

Assuming, then, the established doctrine to be that the mere pledgee of national bank stock cannot be held liable as a shareholder so long as the shares are not registered in his name, although an irresponsible person has been selected as the registered shareholder, we deem it equally settled, both from the terms of the statute attaching the liability and the decisions which have construed the act, that the real owner of the shares may be held responsible, although in fact the shares are not registered in his name. As to such owner the law looks through subterfuges and apparent ownerships and fastens the liability upon the shareholder to whom the shares really belong.

Applying these principles to the case at bar, we think there can be no doubt of the liability of the Ohio Valley National Bank in this case. Conceding that it was exempt so long as the relation which it held to the stock was that of a pledgee, and that Otjen was the registered stockholder, holding for the benefit of the bank as pledgee, and not as owner,—what was the attitude of the parties after the death of Price, and the credit of the supposed value of the stock upon the note, and its presentation for allowance and acceptance by the representatives of Price's estate? As the foregoing statement shows, the stock was originally delivered to the bank, with a power of public or private sale for the liquidation of the pledge. After the death of Price the bank caused the stock to be registered in the name of Otjen. After proof of the claim the dividends paid out of the Price estate were credited upon the note. If the bank had followed literally the authority of the power of attorney attached to the note and sold the stock at public or private sale, and itself become the purchaser, we take it there could be no question that it would thus have become the real owner of the stock, and, within the principles of the cases heretofore cited, the shareholder, liable under the terms of the statute. We think what was in fact done necessarily *had the same effect; the bank applied the [169] value of the stock with the consent of the pledgeor, and thus vested the title in the bank.

It is urged that although the indorsement upon the note in the form in which it was presented to Price's administrator recited credit as of June 18, 1894, being proceeds of a sale of the stock, there never was a sale in fact, and that the bank is not estopped by anything shown in the case from showing the true situation and the actual transaction between the parties.

Conceding, for this purpose, that Price's representative could have insisted upon a strict performance of the power conferred in the authority given to the bank as to the disposition of the collateral, yet, if the representative of Price desired to do so, there was nothing to prevent him from waiving a strict compliance with the terms named, and permitting the bank to acquire title to the stock by crediting its value on the note. This is in fact what was done. In-

stead of selling the stock, the bank, in executing the authority conferred, indorsed what it deemed the value of the stock, as of the date of the credit, upon the note, and, reduced by the amount of this valuation, presented the note to the administrator of Price, who must have allowed the claim in this form, as it is specifically stated that the subsequent dividends upon the claim were paid to the bank. By this transaction, who became the real owner of the stock? Certainly not Otjen, for it is not contended that he was other than a mere holder of the stock as collateral security to the bank, without any beneficial interest. Price had died, and his representative had allowed the claim, showing the application of the value of the stock as a credit upon the note. If Price's representative could have objected to the form in which the bank liquidated the pledge, he did not do so, but accepted the bank's method of devesting him of title by allowing the claim with the credit upon it. The bank thus become the beneficial owner of the stock, and had the Hillsboro National Bank continued solvent it certain-
[170] ly could not *have denied to the Ohio Valley Bank, after this transaction, the rights and privileges of a stockholder.

As we have seen, this court, in construing the banking act, has not limited the liability to the registered stockholders. While the registered stockholders may be held liable to creditors regardless of the true ownership of the stock, and the pledgee of the stock, not appearing otherwise, is not liable, although the registered stockholder may be an irresponsible person of his choice, yet, where the real ownership of the stock is in one, his liability may be established, notwithstanding the registered ownership is in the name of a person, fictitious or otherwise, who holds for him.

We think the Circuit Court of Appeals did not err in holding the bank, in view of the facts shown in the case, as the true owner and responsible shareholder of the stock in question.

Judgment affirmed.

CHARLES ZARTARIAN, Appt.,
v.
GEORGE B. BILLINGS, United States Commissioner of Immigration at the Port of Boston.

(See S. C. Reporter's ed. 170-176.)

Aliens—exclusion—effect of naturalization of parent.

An alien minor child who has never dwelt in the United States is not, when coming to join a naturalized parent, exempt from the provision of the act of March 3, 1903 (32 Stat. at L. 1213, chap. 1012, U. S. Comp. Stat. Supp. 1903, p. 170, U. S. Comp. Stat. Supp. 1905, p. 274), § 2, debarring aliens from landing if they are afflicted with a dangerous contagious disease, on the theory that she was invested with citizenship by virtue of the declaration of U. S. Rev. Stat. § 2172, U. S. Comp. Stat. 1901, p. 1334, that minor children of naturalized citizens shall, if "dwelling in the United States," be considered as citizens thereof.

[No. 120.]

Submitted December 7, 1906. Decided January 7, 1907.

APPEAL from the Circuit Court of the United States for the District of Massachusetts to review an order denying relief by habeas corpus to an alien minor child of a naturalized citizen, who is debarred from landing because afflicted with a dangerous contagious disease. Affirmed.

The facts are stated in the opinion.

Mr. Daniel B. Ruggles submitted the cause for appellant.

Assistant Attorney General Cooley submitted the cause for appellee.

Mr. Justice Day delivered the opinion of the court:

This is an appeal from an order of the circuit court of the United States for the district of Massachusetts, denying a petition *for a writ of habeas corpus filed by [171] Charles Zartarian in behalf of Mariam Zartarian, his daughter, who, it was alleged, was unlawfully imprisoned, detained, and restrained of her liberty at Boston by the United States Commissioner of Immigration, which imprisonment was alleged to have been in violation of the constitutional rights of the said Mariam Zartarian, without due process of law, and contrary to the provisions of § 2172 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1334), which section, it is alleged, made said Mariam a citizen of the United States by virtue of the citizenship of her father, the petitioner.

The United States District Attorney and the attorney for the petitioner stipulated the following facts:

"The petitioner, Charles Zartarian, formerly a subject of the Sultan of Turkey, became a naturalized citizen of the United States on September 12, 1896, at the circuit court of Cook county, in the state of Illinois. That his daughter Mariam, on whose behalf this petition is brought, is a girl between fifteen and sixteen years of age, and was born just prior to the petitioner leaving Turkey. That in the latter part of the year 1904 the Turkish govern-

ent, at the request of the United States inister at Constantinople, granted per-ission to the petitioner's wife, minor son, d his said daughter, Mariam, to emigrate the United States, it being stipulated in e passport issued to them that they could ver return to Turkey. That on March 22, 05, the Hon. G. V. L. Meyer, then United ates Ambassador at Rome, Italy, issued United States passport to your petition-'s said wife and daughter. That said Mar-m arrived at Boston from Naples, Italy, n April 18, 1905, and that on April 18, 905, she was found to have trachoma, and as debarred from landing by a board of pecial inquiry appointed by the United tates Commissioner of Immigration for the ort of Boston."

The petitioner's child, Mariam Zartarian, was debarred from landing at the port of Boston under the provisions of the act of March 3, 1903, chap. 1012, 32 Stat. at L. 1213, U. S. Comp. Stat. *Supp. 1903, p. 170, U. S. Comp. Stat. Supp. 1905, p. 274, entitled "An Act to Regulate the Immigration of Aliens into the United States."

Section 2 of that act, among other things, provides that certain classes of aliens shall be excluded from admission to the United States, including "persons afflicted with a loathsome or with a dangerous contagious disease." Upon the finding of the board of inquiry that said Mariam had trachoma, she was debarred from landing.

The contention is that she does not come within the terms of this statute, not being an alien, but entitled to be considered a citizen of the United States, under the provisions of § 2172 of the Revised Statutes, which provides: "The children of persons who have been duly naturalized under any law of the United States . . . being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof."

As Mariam was born abroad, a native Turkey, she has not become a citizen the United States, except upon compliance with the terms of the act of Congress, wanting native birth, she cannot otherwise become a citizen of the United States. r right to citizenship, if any she has, is creation of Congress, exercising the power over this subject conferred by the Constitution. United States v. Wong Kim Ark, U. S. 649, 702, 42 L. ed. 890, 909, 18 . Ct. Rep. 456.

The relevant section, 2172, which it is intained confers the right of citizenship, the culmination of a number of acts on subject passed by Congress from the liest period of the government. Their history will be found in vol. 3, Moore's International Law Digest, p. 467.

The act of 1872 is practically the same as the act of April 14, 1802 (2 Stat. at L. 153, chap. 28, U. S. Comp. Stat. 1901, p. 1334), which provided:

"The children of persons duly naturalized under any of the laws of the United States . . . being under the age of twenty-one years at the time of their parents being so naturalized . . . shall, if dwelling in the United States, be considered as citizens of the United States; and the children of persons who are now *or have been citizens [174] of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States."

In Campbell v. Gordon, 6 Cranch, 176, 3 L. ed. 190, it was held that this act conferred citizenship upon the daughter of an alien naturalized under the act of January 29, 1795 [1 Stat. at L. 414, chap. 20], she being in this country at the time of the passage of the act of April 14, 1802, and then "dwelling in the United States."

The act has also been held to be prospective in its operation and to include children of aliens naturalized after its passage, when "dwelling in the United States." Boyd v. Nebraska, 143 U. S. 135, 177, 36 L. ed. 103, 115, 12 Sup. Ct. Rep. 375.

The construction of this law and the meaning of the phrase "dwelling in the United States" has been the subject of much consideration in the executive department of the government having to do with the admission of foreigners and the rights of alleged naturalized citizens of the United States. The rulings of the State Department are collected in Prof. Moore's Digest of International Law, vol. 3, pp. 467 *et seq.*

The Department seems to have followed a rule established at an early period, and formulated with fullness in Foreign Relations for 1890, p. 301, in an instruction from Mr. Blaine to Minister Phelps, at Berlin, in which it was laid down that the naturalization of the father operates to confer the municipal right of citizenship upon the minor child if, at the time of the father's naturalization, dwelling within the jurisdiction of the United States, or if he come within that jurisdiction subsequent to the father's naturalization and during his own minority.

Whether, in the latter case, a child not within the jurisdiction of the United States at the time of the parent's naturalization, but coming therein during minority, acquires citizenship, is not a question now before us.

stead of selling the stock, the bank, in executing the authority conferred, indorsed what it deemed the value of the stock, as of the date of the credit, upon the note, and, reduced by the amount of this valuation, presented the note to the administrator of Price, who must have allowed the claim in this form, as it is specifically stated that the subsequent dividends upon the claim were paid to the bank. By this transaction, who became the real owner of the stock? Certainly not Otjen, for it is not contended that he was other than a mere holder of the stock as collateral security to the bank, without any beneficial interest. Price had died, and his representative had allowed the claim, showing the application of the value of the stock as a credit upon the note. If Price's representative could have objected to the form in which the bank liquidated the pledge, he did not do so, but accepted the bank's method of devesting him of title by allowing the claim with the credit upon it. The bank thus become the beneficial owner of the stock, and had the Hillsboro National Bank continued solvent it certain-
[170]ly could not *have denied to the Ohio Valley Bank, after this transaction, the rights and privileges of a stockholder.

As we have seen, this court, in construing the banking act, has not limited the liability to the registered stockholders. While the registered stockholders may be held liable to creditors regardless of the true ownership of the stock, and the pledgee of the stock, not appearing otherwise, is not liable, although the registered stockholder may be an irresponsible person of his choice, yet, where the real ownership of the stock is in one, his liability may be established, notwithstanding the registered ownership is in the name of a person, fictitious or otherwise, who holds for him.

We think the Circuit Court of Appeals did not err in holding the bank, in view of the facts shown in the case, as the true owner and responsible shareholder of the stock in question.

Judgment affirmed.

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[No. 120.]

Submitted December 7, 1906. Decided January 7, 1907.

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The petitioner's child, Mariam Zartarian, was debarred from landing at the port of Boston under the provisions of the act of March 3, 1903, chap. 1012, 32 Stat. at L. 1213, U. S. Comp. Stat. *Supp. 1903, p. 170, U. S. Comp. Stat. Supp. 1905, p. 274, entitled "An Act to Regulate the Immigration of Aliens into the United States."

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The act has also been held to be prospective in its operation and to include children of aliens naturalized after its passage, when "dwelling in the United States." Boyd v. Nebraska, 143 U. S. 135, 177, 36 L. ed. 103, 115, 12 Sup. Ct. Rep. 375.

The construction of this law and the meaning of the phrase "dwelling in the United States" has been the subject of much consideration in the executive department of the government having to do with the admission of foreigners and the rights of alleged naturalized citizens of the United States. The rulings of the State Department are collected in Prof. Moore's Digest of International Law, vol. 3, pp. 467 *et seq.*

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Whether, in the latter case, a child not within the jurisdiction of the United States at the time of the parent's naturalization, but coming therein during minority, acquires citizenship, is not a question now before us.

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As we have seen, this court, in construing the banking act, has not limited the liability to the registered stockholders. While the registered stockholders may be held liable to creditors regardless of the true ownership of the stock, and the pledgee of the stock, not appearing otherwise, is not liable, although the registered stockholder may be an irresponsible person of his choice, yet, where the real ownership of the stock is in one, his liability may be established, notwithstanding the registered ownership is in the name of a person, fictitious or otherwise, who holds for him.

We think the Circuit Court of Appeals did not err in holding the bank, in view of the facts shown in the case, as the true owner and responsible shareholder of the stock in question.

Judgment affirmed.

CHARLES ZARTARIAN, Appt.,
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(See S. C. Reporter's ed. 170-176.)

Aliens—exclusion—effect of naturalization of parent.

An alien minor child who has never dwelt in the United States is not, when coming to join a naturalized parent, exempt from the provision of the act of March 3, 1903 (32 Stat. at L. 1213, chap. 1012, U. S. Comp. Stat. Supp. 1903, p. 170, U. S. Comp. Stat. Supp. 1905, p. 274), § 2, debarring aliens from landing if they are afflicted with a dangerous contagious disease, on the theory that she was invested with citizenship by virtue of the declaration of U. S. Rev. Stat. § 2172, U. S. Comp. Stat. 1901, p. 1334, that minor children of naturalized citizens shall, if "dwelling in the United States," be considered as citizens thereof.

[No. 120.]

Submitted December 7, 1906. Decided January 7, 1907.

APPEAL from the Circuit Court of the United States for the District of Massachusetts to review an order denying relief by habeas corpus to an alien minor child of a naturalized citizen, who is debarred from landing because afflicted with a dangerous contagious disease. Affirmed.

The facts are stated in the opinion.

Mr. Daniel B. Ruggles submitted the cause for appellant.

Assistant Attorney General Cooley submitted the cause for appellee.

Mr. Justice Day delivered the opinion of the court:

This is an appeal from an order of the circuit court of the United States for the district of Massachusetts, denying a petition *for a writ of habeas corpus filed by[171] Charles Zartarian in behalf of Mariam Zartarian, his daughter, who, it was alleged, was unlawfully imprisoned, detained, and restrained of her liberty at Boston by the United States Commissioner of Immigration, which imprisonment was alleged to have been in violation of the constitutional rights of the said Mariam Zartarian, without due process of law, and contrary to the provisions of § 2172 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1334), which section, it is alleged, made said Mariam a citizen of the United States by virtue of the citizenship of her father, the petitioner.

The United States District Attorney and the attorney for the petitioner stipulated the following facts:

"The petitioner, Charles Zartarian, formerly a subject of the Sultan of Turkey, became a naturalized citizen of the United States on September 12, 1896, at the circuit court of Cook county, in the state of Illinois. That his daughter Mariam, on whose behalf this petition is brought, is a girl between fifteen and sixteen years of age, and was born just prior to the petitioner leaving Turkey. That in the latter part of the year 1904 the Turkish govern-

ent, at the request of the United States nister at Constantinople, granted per- ssion to the petitioner's wife, minor son, d his said daughter, Mariam, to emigrate the United States, it being stipulated in e passport issued to them that they could ver return to Turkey. That on March 22, 05, the Hon. G. V. L. Meyer, then United ates Ambassador at Rome, Italy, issued United States passport to your petition- 's said wife and daughter. That said Mar- m arrived at Boston from Naples, Italy, April 18, 1905, and that on April 18, 905, she was found to have trachoma, and as debarred from landing by a board of pecial inquiry appointed by the United tates Commissioner of Immigration for the ort of Boston."

The petitioner's child, Mariam Zartarian, was debarred from landing at the port of Boston under the provisions of the act of March 3, 1903, chap. 1012, 32 Stat. at L. 1213, U. S. Comp. Stat. *Supp. 1903, p. 170, U. S. Comp. Stat. Supp. 1905, p. 274, entitled "An Act to Regulate the Immigration of Aliens into the United States."

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The contention is that she does not come within the terms of this statute, not being an alien, but entitled to be considered a citizen of the United States, under the provisions of § 2172 of the Revised Statutes, which provides: "The children of persons who have been duly naturalized under any law of the United States . . . being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof."

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[No. 120.]

Submitted December 7, 1906. Decided January 7, 1907.

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Whether, in the latter case, a child not within the jurisdiction of the United States at the time of the parent's natura'' ation, but coming therein during minority, acquires citizenship, is not a question now before us.

The limitation to children "dwelling in the United States" was doubtless inserted in recognition of the principle that citizenship cannot be conferred by the United States on the citizens of another country [175]when under such foreign jurisdiction; *and is also in deference to the right of independent sovereignties to fix the allegiance of those born within their dominions, having regard to the principle of the common law which permits a sovereignty to claim, with certain exceptions, the citizenship of those born within its territory.

It is pointed out by Mr. Justice Gray, delivering the opinion in United States v. Wong Kim Ark, 169 U. S. 649, 686, 42 L. ed. 890, 904, 18 Sup. Ct. Rep. 456, that the naturalization acts of the United States have been careful to limit admission to citizenship to those "within the limits and under the jurisdiction of the United States."

The right of aliens to acquire citizenship is purely statutory; and the petitioner's child, having been born and remained abroad, clearly does not come within the terms of the statute. She was debarred from entering the United States by the action of the authorized officials, and, never having legally landed, of course could not have dwelt within the United States. Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336.

It is urged that this seems a harsh application of the law; but if the terms of the statute are to be extended to include children of a naturalized citizen who have never dwelt in the United States, such action must come from legislation of Congress, and not judicial decision. Congress has made provision concerning an alien's wife or minor child suffering from contagious disease, when such alien has made a declaration of his intention to become a citizen, and when such disease was contracted on board the ship in which they came, holding them under regulations of the Secretary of the Treasury until it shall be determined whether the disorder will be easily curable, or whether such wife or child can be permitted to land without danger to other persons, requiring that they shall not be deported until such facts are ascertained (32 Stat. at L. 1221, chap. 1012, U. S. Comp. Stat. Supp. 1903, p. 185, U. S. Comp. Stat. Supp. 1905, p. 290). But Congress has not said that an alien child who has never dwelt in the United States, coming to join a naturalized parent, may land when afflicted with a dangerous contagious disease.

As this subject is entirely within con- [176]gressional control, the *matter must rest there; it is only for the courts to ap law as they find it.

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Finding no error in the order of t cuit Court, it is affirmed.

CONRAD WECKER, Plff. in E
v.
NATIONAL ENAMELING & STA COMPANY and George Wettengel, in Err.

(See S. C. Reporter's ed. 176-18

Appeal—finality of decision below.

1. A judgment of a Federal court, rendered after the plaintiff, unsuccessfully moved to remand the to the state court whence it was re had elected to stand upon his motion mand, and refused to recognize the diction of the Federal court, that p take nothing by the suit, and that t fendants go hence without day and their costs against the plaintiff, is fi the purpose of appeal.

Removal of causes—separable contr

2. A Federal circuit court to w case has been removed as presen separable controversy properly refuse mand the cause to the state court,

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NOTE.—As to what judgments or are final for purposes of review—se to Brush Electric Co. v. Electric I Co. 2 C. C. A. 379; Central Trust Madden, 17 C. C. A. 238; Prescott & R. Co. v. Atchison, T. & S. F. R. Co C. A. 482; Gibbons v. Ogden, 5 L. ed 302; and Schlosser v. Hemphill, 49 U. S. 1001.

On the removal of causes from s Federal court in cases presenting a rable controversy—see notes to Mi Clifford, 5 L.R.A.(N.S.) 50; Robb Ellenbogen, 18 C. C. A. 86; Mecke v. town Mineral Co. 35 C. C. A. 155; v. Anderson, 29 L. ed. U. S. 899; Mc Cotton Press & Storage Co. v. Insura of N. A. 38 L. ed. U. S. 195; Bu National Home for Disabled Volunta diers, 36 L. ed. U. S. 346; and Torr Shedd, 36 L. ed. U. S. 528.

the testimony shows that the real purpose of the plaintiff in suing jointly in tort a resident employee and his nonresident employer was to prevent the exercise of the right of removal by the nonresident defendant.

Evidence—sufficiency—joinder of resident to prevent removal of cause.

3. Uncontradicted testimony that a resident employee sued jointly in tort with his nonresident employer was merely a draftsman, whose work was confined to making the necessary drawings based on the plans and ideas of others, and that he had nothing to do with planning the apparatus which is alleged to have been so defectively constructed as to have caused the injury complained of, is sufficient to support a conclusion of law that such employee was made a defendant for the sole purpose of preventing the exercise of the right of removal by the nonresident defendant.

Appeal—objections and exceptions.

4. The objection that a Federal circuit court, on motion to remand a cause to the state court whence it had been removed, should not have determined, upon affidavits, the question of the good faith of the plaintiff in suing jointly in tort a resident employee and his nonresident employer, is not open to the plaintiff in error, who made no objection to the consideration of affidavits in support of the petition for the removal, and himself filed a counter affidavit.

[No. 133.]

Submitted December 14, 1906. Decided January 7, 1907.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment in favor of defendants in a suit which had been removed to that court, as presenting a separable controversy, from the Circuit Court of the City of St. Louis, in that state. Affirmed.

The facts are stated in the opinion.

Mr. **Edward C. Kehr** submitted the cause for plaintiff in error. Messrs. Richard T. Brownrigg and William L. Mason were on the brief:

The complaint discloses a joint cause of action against the master, the nonresident defendant, and the servant, the resident defendant, in alleging plaintiff's injury as a result of their joint negligence; since a servant, as well as his master, is liable to third persons for injuries resulting not only from the servant's wilfulness, wantonness, or recklessness, but also for injuries resulting from the servant's negligence in the performance of any task which the servant has actually undertaken.

Alabama Great Southern R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161; Chesapeake & O. R. Co. v. Dixon, 79 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 96, 97, 42 L. ed. 673-675, 18 Sup Ct. Rep. 264; Dougherty v. Atchison, T. & S. F. R. Co. 126 Fed. 239; Fogarty v. Southern P. Co. 123 Fed. 973; American Bridge Co. v. Hunt, 64 C. C. A. 548, 130 Fed. 302; Hukill v. Maysville & B. S. R. Co. 72 Fed. 753; Harriman v. Stowe, 57 Mo. 93; Lottman v. Barnett, 62 Mo. 159; Martin v. Benoist, 20 Mo. App. 262; Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437; Mayer v. Thompson-Hutchison Bldg. Co. 104 Ala. 611, 28 L.R.A. 433, 53 Am. St. Rep. 88, 16 So. 620; Greenberg v. Whitcomb Lumber Co. 90 Wis. 225, 28 L.R.A. 439, 48 Am. St. Rep. 911, 63 N. W. 93; Donnelly v. Hufschmidt, 79 Cal. 74, 21 Pac. 546; Horner v. Lawrence, 37 N. J. L. 46; Ellis v. McNaughton, 76 Mich. 237, 15 Am. St. Rep. 308, 42 N. W. 1113; Griffiths v. Wolfram, 22 Minn. 185; Cincinnati, N. O. & T. P. R. Co. v. Bohn, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. Rep. 166; Southern R. Co. v. Carson, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; Dougherty v. Yazoo & M. Valley R. Co. 58 C. C. A. 651, 122 Fed. 205; Warax v. Cincinnati, N. O. & T. P. R. Co. 72 Fed. 637; Andrews v. Boedecker, 126 Ill. 605, 9 Am. St. Rep. 649, 18 N. E. 651; Lough v. John Davis & Co. 30 Wash. 204, 59 L.R.A. 802, 94 Am. St. Rep. 848, 70 Pac. 491; Bell v. Josselyn, 3 Gray, 311, 63 Am. Dec. 741; Campbell v. Portland Sugar Co. 62 Me. 552, 16 Am. Rep. 503; 5 Thomp. Neg. § 5771; Mechem, Agency, §§ 571, 572; 1 Shearm. & Redf. Neg. 5th ed. § 244.

Negligence for which a servant is liable to a third person, that is, misfeasance, may consist not only in an act directly injurious to such person, but may as well consist in a negligent omission in the course of some task which the servant has undertaken, as a result of which negligent omission such third person is injured.

Osborne v. Morgan, Harriman v. Stowe, Lottman v. Barnett, Bell v. Josselyn, Donnelly v. Hufschmidt, Hukill v. Maysville & B. S. R. Co. and Horner v. Lawrence,—supra; Ellis v. McNaughton, 76 Mich. 241, 15 Am. St. Rep. 308, 42 N. E. 1113; Griffiths v. Wolfram and Campbell v. Portland Sugar Co. supra; 5 Thomp. Neg. § 5771.

In order to justify removal on the ground of improper joinder of the resident defendant, it was necessary for the removal petitioner to both allege and prove that the allegation of joint liability made in the complaint was fraudulently made. There was no evidence even tending to show such fraud.

Alabama Great Southern R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 164; Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 601, 33 L. ed. 474, 475, 10 Sup. Ct. Rep. 203; Plymouth Consol. Gold

Min. Co. v. Amador & S. Canal Co. 118 U. S. 264, 270, 30 L. ed. 232, 233, 6 Sup. Ct. Rep. 1034; Hukill v. Maysville & B. S. R. Co. 72 Fed. 745; Warax v. Cincinnati, N. O. & T. P. R. Co. supra; Landers v. Felton, 73 Fed. 311; 2 Foster, Fed. Pr. § 384, p. 925;

If the allegations of a removal petition, charging that a plaintiff was guilty of fraud in alleging a joint cause of action against a resident and a nonresident defendant, are traversed by a motion to remand, such fraud must be proved by the removal petitioner independently of the allegations in the removal petition or of the affidavits filed in support thereof.

Alabama Great Southern R. Co. v. Thompson, supra; Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co. supra; Landers v. Felton, 73 Fed. 313; Foster, Fed. Pr. § 284, p. 925; Kelly v. Chicago & A. R. Co. 122 Fed. 286; Ross v. Erie R. Co. 120 Fed. 703; Dow v. Bradstreet Co. 46 Fed. 824; Prince v. Illinois C. R. Co. 98 Fed. 1; Arrowsmith v. Nashville & D. R. Co. 57 Fed. 170; Free v. Western U. Teleg. Co. 122 Fed. 309; Kansas City, Ft. S. & M. R. Co. v. Daughtry, 138 U. S. 303, 34 L. ed. 964, 11 Sup. Ct. Rep. 306.

The complaint states a joint cause of action. But even if it could be held, upon critical analysis thereof, that it fails to do so, the complaint must nevertheless be regarded as joint for purposes of removal, inasmuch as the allegations of the complaint do not disclose such palpable want of joint liability as to justify an imputation of bad faith upon the plaintiff.

Alabama Great Southern R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161; Steinhauser v. Spraul, 127 Mo. 541, 27 L.R.A. 441, 28 S. W. 620, 30 S. W. 102; Prince v. Illinois C. R. Co. supra; O'Neil v. Young & Sons' Seed & Plant Co. 58 Mo. App. 628; Harriman v. Stowe, 57 Mo. 93; Davenport v. Southern R. Co. 124 Fed. 983; Shaffer v. Union Brick Co. 128 Fed. 97.

There has been a final judgment.

Powers v. Chesapeake & O. R. Co. 169 U. S. 95, 42 L. ed. 674, 18 Sup. Ct. Rep. 264; Colorado Eastern R. Co. v. Union P. R. Co. 36 C. C. A. 263, 94 Fed. 313.

Even if it were true that the assignment of errors specifies other action of the court below than its action on the jurisdictional question, that fact could not affect the right and duty of this court to pass on the jurisdictional question thus brought before it.

United States v. Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; Alabama Great Southern R. Co. v. Thompson, supra.

Messrs. Robert A. Holland, Jr., and Charles P. Wise submitted the cause for defendant in error. Messrs. George F. McNulty and James A. Seddon were on the brief:

The motion to dismiss this writ of error should be sustained:

(a) Because the writ of error was not sued out to review a final judgment.

McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; United States v. Evans, 5 Cranch, 280, 3 L. ed. 101; Evans v. Phillips, 4 Wheat. 73, 4 L. ed. 516; Re Aspinwall, 33 C. C. A. 217, 61 U. S. App. 434, 90 Fed. 675; Re Coe, 1 C. C. A. 326, 5 U. S. App. 6, 49 Fed. 481.

(b) Because the question of jurisdiction of the Federal court is not the only question raised.

McLish v. Roff, 141 U. S. 661, 668, 35 L. ed. 893, 895, 12 Sup. Ct. Rep. 118.

The court below did not err in overruling the motion of plaintiff in error to remand the cause:

(a) Because there was a separable controversy as to defendant in error Stamping Company, the joinder of defendant in error Wittengel not being in good faith.

Hartog v. Memory, 116 U. S. 588, 591, 29 L. ed. 725, 726, 6 Sup. Ct. Rep. 521; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727; Gustafson v. Chicago, R. I. & P. R. Co. 128 Fed. 85; Ross v. Erie R. Co. 120 Fed. 703; Durkee v. Illinois C. R. Co. 81 Fed. 1; Boatner v. American Exp. Co. 122 Fed. 714; Hukill v. Maysville & B. S. R. Co. 72 Fed. 745; Alabama Great Southern R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161.

(b) The lack of good faith appeared on the face of the petition of plaintiff in error because said petition shows on its face that plaintiff in error never had a cause against the resident defendant.

Steinhauser v. Spraul, 127 Mo. 541, 27 L. R.A. 441, 28 S. W. 620, 30 S. W. 102; Carey v. Rochereau, 16 Fed. 87; Kelly v. Chicago & A. R. Co. 122 Fed. 286; Prince v. Illinois C. R. Co. 98 Fed. 1; Davenport v. Southern R. Co. 124 Fed. 983; Shaffer v. Union Brick Co. 128 Fed. 97; O'Neil v. Young & Sons' Seed & Plant Co. 58 Mo. App. 628; Harriman v. Stowe, 57 Mo. 93; Stone v. Cartwright (K. B.) 6 T. R. 411; Ferguson v. Chicago, M. & St. P. R. Co. 63 Fed. 177.

(c) Because the verified removal petition and the affidavits filed by the removing defendant abundantly show that the joinder of the resident defendant was wrongful, and for the sole purpose of attempting to prevent removal.

Kelly v. Chicago & A. R. Co. supra; Free

Western U. Teleg. Co. 122 Fed. 309; Kansas City, Ft. S. & M. R. Co. v. Daughtry, 138 U. S. 303, 34 L. ed. 964, 11 Sup. Ct. Rep. 306.

Mr. Justice Day delivered the opinion of the court:

This case is certified here from the circuit court of the United States for the eastern district of Missouri under § 5 of the court of appeals act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), upon a question of jurisdiction.

*Conrad Wecker, the plaintiff below, brought his action in the circuit court of the city of St. Louis, state of Missouri, against the National Enameling & Stamping Company, Harry Schenck, and George Wettengel, undertaking to recover jointly against the National Enameling & Stamping Company, a corporation of the state of New Jersey, and Schenck and Wettengel, residents of the city of St. Louis, state of Missouri. The substance of the complaint is that defendant is a corporation employing the plaintiff in the work of firing, filling, stirring, emptying, and attending certain metal pots used in the melting of grease and lubricant matter in the plant of the defendant corporation; that the grease and lubricant matter was delivered by the corporation to the plaintiff in barrels of great weight,—about 600 pounds each,—and it was the plaintiff's duty in the course of his employment to hoist the same to the top surface of the furnace structure, into which the pots were set, and then to dump the grease and lubricant matter into the pots.

The negligence charged against the defendant corporation consisted in allowing the pots, which were constantly filled with hot and boiling lubricants, to remain open and exposed, without covering, railing, device, or means of any character to protect the plaintiff from accidentally slipping or falling into the same while engaged in the service of the corporation in the performance of his duties, and negligently failing to provide and properly place safe and sufficient hoisting apparatus for the use of the plaintiff in his employment in lifting said masses of grease and lubricant to the top of the furnace, and for failing to give the plaintiff instructions as to the proper manner of performing his duty, and thereby unreasonably endangering his safety in said employment. Plaintiff alleges that, by reason of this negligence, while engaged in the performance of his duties on the 12th of November, 1902, on the top of the furnace, he lost his balance and fell into one of the open, unguarded, and unprotected pots containing hot and boiling grease and lubricant, receiving thereby great and painful injuries. *Plaintiff below further charged [179] that Schenck and Wettengel were employed by the corporation and charged by it with the superintendence and oversight of the plaintiff in the performance of his duty, and were employed and charged by the corporation with the duty of superintending and properly planning the construction of a furnace, and with the duty of providing for said pots reasonably safe and suitable covering, railing, or other device, and with the duty of providing and properly placing reasonably safe and sufficient hoisting apparatus for lifting the masses of grease and lubricant to the top of the furnace, and were further charged by the corporation with the duty of instructing the plaintiff as to the manner of performing his duties, and charges negligence of Schenck and Wettengel in planning and directing the construction of the furnace structure and providing suitable covers or railings as aforesaid, and providing and placing reasonably safe and sufficient hoisting apparatus, and in giving instructions as to the manner of performing plaintiff's duties, by reason whereof the plaintiff lost his balance and fell into one of the pots as aforesaid, to his great injury; and the complaint charges the joint negligence of the corporation and the defendants Schenck and Wettengel, and avers that his injuries were the result thereof, and prays judgment for damages jointly against the three defendants.

The defendant company filed its petition for a removal of the cause to the circuit court of the United States for the eastern district of Missouri, which petition contained the usual averments as to the character of the suit and the right of removal and diversity of citizenship between the defendant corporation and the plaintiff, and averred that Schenck, one of the codefendants, was also a nonresident of the state of Missouri and a citizen of the state of Illinois, and not served with process; also stated that Wettengel was, at the time of the commencement of the suit and since, a citizen of the state of Missouri; averred a separable controversy between it and the plaintiff as to the alleged negligence and as to the assumption *of the risk upon the part [180] of the plaintiff. As to Wettengel, the citizen of Missouri, it was alleged in the removal petition that he was not, at the time of the accident or prior thereto, charged with the superintendence and oversight of the plaintiff, or with the duty of superintending and properly planning the construction of the furnace, or providing a reason-

ably safe and suitable furnace and pots and railings or other device to protect the plaintiff, and was not charged with the duty of placing reasonably safe and sufficient hoisting apparatus, nor with the duty of instructing the petitioner in respect to his duties, as charged in the complaint, and, after stating that Schenck, like the defendant corporation, was a nonresident of Missouri and a citizen of another state, charged that Wettengel had been improperly and fraudulently joined as a defendant for the purpose of fraudulently and improperly preventing, or attempting to prevent, the defendant from removing the cause to the United States circuit court, and that the plaintiff well knew, at the time of the beginning of the suit, that Wettengel was not charged with the duties aforesaid, and that he was joined as a party defendant to prevent the removal of the cause, and not in good faith.

After removal, plaintiff filed his motion to remand the case to the state court, on the ground that there was not in the case a controversy between citizens of different states, and no separable controversy between the plaintiff and the company within the meaning of the removal act. The court, upon hearing the motion, refused to remand the cause, and afterward, plaintiff electing to stand upon his motion to remand, and refusing to recognize the jurisdiction of the United States court or to proceed with the prosecution of his case therein, upon motion of the defendant the court ordered the case to be dismissed, and rendered judgment that the plaintiff take nothing by the suit, and that the defendants go hence without day and recover their costs against the plaintiff. A bill of exceptions was allowed, and the court also certified that the only question decided by the court [181] in the cause was that the joining *of Wettengel as a codefendant with the company was palpably groundless and fictitious, and for the purpose of unlawfully depriving the defendant company of its right to remove the cause to the Federal court for trial; that for this reason the motion to remand was denied; that in deciding the motion the court took into consideration not only the complaint and petition for removal, but also the affidavits filed in support and opposition to the motion to remand; that the plaintiff refused to submit to the jurisdiction of the court and suffered a dismissal of the suit for the want of prosecution; that the question is whether the court had jurisdiction of the action.

In the first ruling upon the motion to remand, the court, in a written opinion, based its refusal upon the ground that the petition of plaintiff clearly showed that there was no joint cause of action against the company and the defendant Wettengel. Subsequently, the judge filed an opinion in which he said that in his former opinion he made no allusion to the affidavits tending to show the fictitious and fraudulent joining of Wettengel, and that, in his opinion, the same inevitably showed that the inferences drawn from the allegations of the petition were correct, and that he might properly consider these affidavits in determining the question of removal.

It is urged by counsel for defendants in error that the writ of error should be dismissed because there was no final judgment, and only in a case where a final judgment has been rendered can the question of jurisdiction be certified from a circuit court under § 5 of the court of appeals act. McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118, is relied upon, in which it was held that a writ of error could only be taken out after final judgment.

It is true that, after the circuit court of the United States maintained its jurisdiction, the plaintiff could have gone on and tried the case on its merits, and, after judgment, had there been reason for doing so, taken the case to the circuit court of appeals; but, upon refusing to recognize the jurisdiction of *the circuit court, final judg- [182] ment in the action was rendered, that the plaintiff take nothing by the suit and that the defendants go hence without day, and recover their costs against the plaintiff. Whether this judgment would be a bar to another action is not now before us; it is final, so far as the case is concerned, and terminated the action.

Section 5 of the court of appeals act provides that only the question of jurisdiction shall be brought to this court from the circuit court, and that is all that is now before us.

It is contended that this case should have been remanded upon the authority of Alabama Great Southern R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, decided at the last term of this court. In that case it was held that, upon a question of removal, where a plaintiff, in good faith, prosecuted his suit as upon a joint cause of action, and the removal was sought when the complaint was the only pleading in the case, the action as therein stated was the test of removability; and if that was joint in character, and there was no showing of a want of good faith of the plaintiff, no separable controversy was presented with a nonresident defendant, joined with a citizen of the state; in other words, if the plaintiff had, in good faith, elected to make a joint cause of action, the question of proper joinder is not to be tried in the

moval proceedings, and that, however that ght turn out upon the merits, for the rpose of removal the case must be held be that which the plaintiff has stated in ting forth his cause of action. And in at case it was said:

"The fact that by answer the defendant ay show that the liability is several can- t change the character of the case made the plaintiff in his pleading so as to fect the right of removal. It is to be membered that we are not now dealing ith joinders which are shown, by the pe- tion for removal or otherwise, to be at- mpts to sue in the state courts with a ew to defeat Federal jurisdiction. In such ses entirely different questions arise, and e Federal courts may, and should, take ch action as will defeat attempts to rongfully *deprive parties entitled to sue the Federal courts of the protection of heir rights in those tribunals."

And it was further stated in the court's pinion that there was nothing in that case o suggest an attempt to commit a fraud pon the jurisdiction of the Federal court.

Much discussion is had in this case as o whether the alleged cause of action is oint or several in its character, and whether he corporation and Wettengel could be ointly held responsible to the plaintiff upon he allegations of the complaint, but we do ot deem it necessary to determine that uestion.

Upon the authority of the Alabama Great Southern Case, supra, and the preceding ases in this court which are cited and ap- plied in the opinion in that case, if the omplaint is filed in good faith, the cause of action, for the purposes of removal, may be deemed to be that which the plaintiff has undertaken to make it; but in this case both parties filed affidavits upon the motion to remand, for and against the right to remove.

The petition for removal was sworn to by an agent of the company, and defend- ant corporation filed the affidavit of one George Eisenmayer, who testified that he was the chief engineer of the company, charged with the planning of new apparatus and the construction and repair thereof for the company, and that Wettengel was employed in the office as a draftsman, with several other persons in a similar capaci- ty; that the sole work of Wettengel was as such draftsman, and that he had nothing to do with selecting plans or approving the same, but took the plans and ideas fur- nished him and made the necessary draw- ings for the use of mechanics, and that he had no authority to employ or discharge men or superintend work or give instruc- tions to any of the men as to how they should perform their work. Wettengel's affidavit was also filed, in which he stated that for ten years he had been employed as a draftsman by the defendant company; that his work was performed in the office of the company; that he had no duties out- side of the office or with the plaintiff; that he had *no duty of superintendence in con- [184] nection with him; that he was not charged with any duty of planning or constructing the apparatus which was used in the de- fendant's plant; that the designing and selection thereof was made by other per- sons, and that his sole duty was to at- tend to the mechanical work of drafting, based upon the ideas and plans of others; that he had no discretion whatever as to the sort of apparatus to be used in any part of defendant's plant, nor as to the struc- tures mentioned in plaintiff's petition; that he had nothing to do with the planning of the pots, no right to determine what they should be, or whether a railing should be used, nor what sort of hoisting apparatus should be used in connection therewith; that he had no duty in connection with the plaintiff as to how or when he should do his work, and no authority to give him in- structions; in short, that his position was merely clerical and his duties confined to the making of drawings to enable mechanics to construct work from plans furnished by others in the employ of the defendant, and that he did not know the plaintiff by name, and did not know what sort of work he was doing or in what portion of defendant's plant he was engaged.

To these affidavits Wecker, the plaintiff, filed a counter affidavit, admitting that Ei- senmayer was charged with the general su- pervision of the work and business of the company at the place plaintiff was em- ployed and received his injury, and stating that just prior to the construction of the furnace structure he heard Eisenmayer di- rect Wettengel to prepare plans for a fur- nace to be erected where the one was built shortly after, upon which the plaintiff was at work when he received his injuries, and states his belief that the defendant Wetten- gel planned and directed the construction of the furnace.

Upon these affidavits the court reached the conclusion that, considered with the complaint, they showed conclusively an at- tempt to defeat the jurisdiction of the Fed- eral court by wrongfully joining Wettengel.

The consideration of these affidavits clear- ly shows that Wettengel's employment was not that of a superior or superintendent, *or one charged with furnishing designs, for [185] it is not contradicted that he was employed as a draftsman, receiving his instructions

from others; nor is there the slightest attempt to sustain the allegations of the petition that Wettengel was a superintendent over the plaintiff, or had any authority to direct his work or to give him instructions as to the manner in which his duty should be performed. The testimony certainly shows no basis for these charges. The affidavit of Wecker, except as to the statement of his belief, admits that Eisenmayer was superintendent, and claims that he heard him direct Wettengel to prepare plans for a furnace structure. This is not inconsistent with the undisputed testimony as to the nature and character of Wettengel's employment in the subordinate capacity of a draftsman.

In view of this testimony and the apparent want of basis for the allegations of the petition as to Wettengel's relations to the plaintiff, and the uncontradicted evidence as to his real connection with the company, we think the court was right in reaching the conclusion that he was joined for the purpose of defeating the right of the corporation to remove the case to the Federal court.

It is objected that there was no proof that Wecker knew of Wettengel's true relation to the defendant, and consequently he could not be guilty of fraud in joining him; but even in cases where the direct issue of fraud is involved, knowledge may be imputed where one wilfully closes his eyes to information within his reach.

It is further objected that the court should not have heard the matter upon affidavits, and should have required testimony, with the privilege to cross-examine; but the plaintiff made no objection to the consideration of affidavits in support of the petition for the removal, and himself filed a counter affidavit. In this state of the record there certainly can be no valid objection to the manner in which the court heard and considered the testimony.

While the plaintiff, in good faith, may [186] proceed in the state *courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.

Reaching the conclusion that the court did not err in holding upon the testimony in this case that the real purpose in joining Wettengel was to prevent the exercise of the right of removal by the nonresident defendant, we affirm the action of the Circuit Court in refusing to remand the cause.

Judgment affirmed.

SHROPSHIRE, WOODLIFF, & CO.
v.
BUSH et al., Trustees, etc.

(See S. C. Reporter's ed. 186-189.)

Bankruptcy—preferences—assigned claims for wages.

The priority of payment of wages "due to workmen, clerks, or servants" given by the bankruptcy act of July 1, 1898 (30 Stat. at L. 563, chap. 541, U. S. Comp. Stat. 1901, p. 3447), § 64, when earned within three months before the commencement of the bankruptcy proceedings, extends to claims which had been assigned before the bankruptcy proceedings were begun.

[No. 416.]

Submitted December 20, 1906. Decided January 7, 1907.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit presenting the question whether assigned claims for wages are entitled to priority of payment under the bankrupt act. Answered in the affirmative.

The facts are stated in the opinion.

Mr. Charles F. Benjamin submitted the cause for Shropshire, Woodliff, & Co. Mr. Rutherford Lapsley was on the brief:

A priority is defined as "a legal precedence or preference, as in saying that certain debts are paid in priority to others, or that certain encumbrances of an estate are allowed priority over others; that is, they are allowed to satisfy their claim out of the estate before others can be admitted to any share therein."

22 Am. & Eng. Enc. Law, 2d ed. p. 1257.

Liens created by statutes which are not merely declaratory of the common law, and which are not dependent for their existence on the possession of the property to which they are attached, are generally assignable; and an assignment of the claim for which such lien is security will usually carry with it the right to the lien.

19 Am. & Eng. Enc. Law, 2d ed. p. 25.

The right of priority in a wage claim is a right which attaches to the debt, and not to the person of the original creditor; and the right passes by assignment to the assignee.

Northern P. R. Co. v. Lamont, 16 C. C. A. 364, 32 U. S. App. 480, 69 Fed. 23; Columbus, S. & H. R. Co.'s Appeal, 48 C. C. A. 275, 109 Fed. 177; Re Kerby-Dennis Co. 8 C. C. A. 677, 95 Fed. 116; Union Trust Co.

, 107 U. S. 596, 27 L. ed. 490, 2 tep. 299; Burnham v. Bowen, 111 28 L. ed. 596, 4 Sup. Ct. Rep. 675; v. Binz, 80 Tex. 1, 26 Am. St. 13 S. W. 655; Re Waties, 39 Fed.

wance of priority to the assignee claim is not against public policy, tes in almost every case in the nd for the benefit, of the laborer. . Wenham, 209 Ill. 252, 65 L.R.A. m. St. Rep. 233, 70 N. E. 564, 13 r. Rep. 210.

reasonable construction of the he act, the petitioners are entitled y, presenting their claim as as- wage claims.

n, 4 Ben. 142, Fed. Cas. No. 1,974; Carolina Car Co. 127 Fed. 178, 11 r. Rep. 488; Re Campbell, 102 Fed. Harmon, 128 Fed. 170, 11 Am. ep. 64; Leftwich Lumber Co. v. Mut. Bldg. L. & Sav. Asso. 104 18 So. 48; 5 Thomp. Corp. § 7117.

George D. Lancaster and John P. ubmitted the cause for Bush et al. H. Beal and Williams & Lancas- on the brief:

stion certified has been answered ative by every Federal court that has had occasion to pass upon it. tlund, 99 Fed. 399; Re Campbell, 686; Re North Carolina Car Co. 78; Re Harmon, 128 Fed. 170; Re 58 C. C. A. 320, 121 Fed. 982. Loveland, Bankr. 276; Collier, 3; Brandenburg, Bankr. 1043; 5 & Proc. p. 386; Re St. Louis Ice orage Co. 147 Fed. 752.

he statute of a state, by its ex- ns, limits the lien given to those wages shall be due upon the hap- a given event, it will be found signment of the wages, made prior ent, does not carry with it a lien. e, L. & W. R. Co. v. Oxford Iron J. Eq. 192.

tice Moody delivered the opinion rt:

ellees are trustees of the bank- e of the Southern Car & Foundry The appellants, before the com- t of the proceedings in bankrupt- ed by purchase and assignment a ber of claims for wages of work- servants, none exceeding $300 in nd all earned within three months date of the commencement of the s in bankruptcy. The district the eastern district of Tennessee judgment disallowing priority to ns, because, when filed, they were o workmen, clerks, or servants."

On appeal to the circuit court of appeals for the sixth circuit that court duly certified here for instructions the following question:

"Is an assignee of a claim for wages earned within three months before the commencement of proceedings in bankruptcy against the bankrupt debtor entitled to priority of payment, under § 64 (4) of the bankrupt act [30 Stat. at L. 563, chap. 541, U. S. Comp. Stat. 1901, p. 3447], when the assignment occurred prior to the commencement of such bankruptcy proceedings?"

The question certified has never been passed upon by any circuit court of appeals, [188] and in the district courts the decisions upon it are conflicting. Re Westlund, 99 Fed. 399; Re St. Louis Ice Mfg. & Storage Co. 147 Fed. 752; Re North Carolina Car Co. [*semble*], 127 Fed. 178, where the right of the assignee to priority was denied; Re Brown, 4 Ben. 142, Fed. Cas. No. 1,974 [act of 1867, 14 Stat. at L. 517, chap. 176]; Re Harmon, 128 Fed. 170, where, on facts slightly but not essentially different, the right of the assignee to priority was affirmed.

The bankruptcy law (act July 1, 1898, 30 Stat. at L. pp. 544, 563, chap. 541, U. S. Comp. Stat. 1901, p. 3447), in § 1, defines "debt" as including "any debt, demand, or claim, provable in bankruptcy." Section 64, under which priority is claimed in this case, is, in the parts material to the determination of the question, as follows:

"Sec. 64. Debts which have priority.— . . . b. The debts to have priority, except as herein provided, and to be paid in full, out of bankrupt estates and the order of payment, shall be . . . (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; . . ."

The precise inquiry is whether the right of prior payment thus conferred is attached to the person or to the claim of the wage-earner; if to the person, it is available only to him; if to the claim, it passes with the transfer to the assignee. In support of the proposition that the right is personal to the wage-earner, and enforceable only by him, it is argued that it is not wages earned within the prescribed time which are given priority, but wages "due to workmen, clerks, or servants;" that when the claim is assigned to another it is no longer "due to workmen, clerks, or servants," but to the assignee; and therefore, when presented by him, lacks one of the characteristics which the law makes essential to priority. In this argument it is assumed that

the wages must be "due" to the earner at the time of the presentment of the claim for proof, or, at least, at the time of the commencement of the proceedings in bankruptcy. Without that assumption the argument fails to support the conclusion.

[189]*But the statute lends no countenance to this assumption. It nowhere expressly or by fair implication says that the wages must be due to the earner at the time of the presentment of the claim, or of the beginning of the proceedings, and we find no warrant for supplying such a restriction. Regarding, then, the plain words of the statute, and no more, they seem to be merely descriptive of the nature of the debt to which priority is given. When one has incurred a debt for wages due to workmen, clerks, or servants, that debt, within the limits of time and amount prescribed by the act, is entitled to priority of payment. The priority is attached to the debt, and not to the person of the creditor; to the claim, and not to the claimant. The act does not enumerate classes of creditors and confer upon them the privilege of priority in payment, but, on the other hand, enumerates classes of debts as "the debts to have priority."

In this case the Southern Car & Foundry Company had incurred certain debts for wages due to workmen, clerks, or servants, which were earned within three months before the date of the commencement of proceedings in bankruptcy. These debts were exactly within the description of those to which the bankruptcy act gives priority of payment, and they did not cease to be within that description by their assignment to another. The character of the debts was fixed when they were incurred, and could not be changed by an assignment. They were precisely of one of the classes of debts which the statute says are "debts to have priority."

The question certified is answered in the affirmative, and it is so ordered.

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[190]*NORTHERN LUMBER COMPANY, Appt.,

v.

WILLIAM O'BRIEN, Albert J. Lammers, and Mary E. Coffin.

(See S. C. Reporter's ed. 190-203.)

Public lands—railroad land grant—effect of prior withdrawal from entry.

1. Land which, at the date of the grant by the act of July 2, 1864 (13 Stat. at L. 365, 367, chap. 217), to the Northern Pacific Railroad Company, was withdrawn of record for the benefit of the Lake Superior & Mississippi railroad under the prior grant by the act of May 5, 1864 (13 Stat. at L. 64, chap. 79), was not "public land" within the meaning of the later grant, and did not pass under it when or because it was subsequently ascertained that such land was without the line of the definite location of the Lake Superior & Mississippi Railroad, and was within the place limits of the Northern Pacific Railroad, as defined by its map of definite location, but such land, when freed from the earlier grant, became a part of the public domain, subject only to be disposed of under the general land laws.

Public lands—railroad land grant—sufficiency of withdrawal order.

2. An order of the Land Department directing the local land office to suspend from pre-emption, settlement, and sale a "body of land about 20 miles in width" is not so uncertain and indefinite as to be without legal force as to lands which are coterminous and within 10 miles of the line of the general route of the railroad for the benefit of which the order was made, as such route is defined on a map or diagram to which the order refers.

[No. 121.]

Argued and submitted December 7, 1906. Decided January 14, 1907.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Minnesota, dismissing a bill to enjoin the cutting or removing of standing timber from certain land to which complainant claims title under the Northern Pacific Railroad land grant. Affirmed.

See same case below, 71 C. C. A. 588, 139 Fed. 614.

The facts are stated in the opinion.

Mr. Charles W. Bunn argued the cause, and, with Mr. James B. Kerr, filed a brief for appellant:

A so-called general route withdrawal is not withdrawal from or as against legislative control and disposition.

Northern P. R. Co. v. Sanders, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671; Menotti v. Dillon, 167 U. S. 703, 42 L. ed. 333, 17 Sup. Ct. Rep. 945; United States v. Oregon & C. R. Co. 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 261; Wilcox v. Eastern Oregon Land Co. 176 U. S. 51, 44 L. ed. 368, 20 Sup. Ct. Rep. 269; Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 288.

Cases in which withdrawals of land for the benefit of railroad companies have been held to exempt the land from the operation

NOTE.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

of subsequent legislative dispositions of public domain are all instances of withdrawal upon definite location.

Northern P. R. Co. v. Musser-Sauntry Land, Logging, & Mfg. Co. 168 U. S. 604, 42 L. ed. 596, 18 Sup. Ct. Rep. 205; St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 17, 35 L. ed. 77, 83, 11 Sup. Ct. Rep. 389; Wisconsin C. R. Co. v. Forsythe, 159 U. S. 46, 49, 40 L. ed. 71, 72, 15 Sup. Ct. Rep. 020; Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 354, 373, 375, 39 L. ed. 183, 189, 190, 15 Sup. Ct. Rep. 103.

Only those withdrawals are effective as against subsequent legislative grants which are made for the protection of possibly vested rights.

Newhall v. Sanger, 92 U. S. 761, 764, 765, 23 L. ed. 769, 770; Doolan v. Carr, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; Cameron v. United States, 148 U. S. 301, 37 L. ed. 459, 13 Sup. Ct. Rep. 595; Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; Sioux City & I. F. Town Lot & Land Co. v. Griffey, 143 U. S. 32, 36 L. ed. 64, 12 Sup. Ct. Rep. 362; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; Bardon v. Northern P. R. Co. 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856; Whitney v. Taylor, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796; Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 18 L. ed. 689; Williams v. Baker, 17 Wall. 144, 21 L. ed. 561; Wolsey v. Chapman, 101 U. S. 755, 25 L. ed. 915.

Mr. J. N. Searles submitted the cause for appellees:

When the context limits and restrains the meaning of the word "about," its use does not materially impair the certainty of a description.

Adams v. Harrington, 114 Ind. 66, 14 N. E. 603; Corey v. Swagger, 74 Ind. 211; Jones v. Plummer, 2 Litt. (Ky.) 161; Purinton v. Sedgley, 4 Me. 286; Stevens v. McKnight, 40 Ohio St. 341; Baltimore Permanent Bldg. & Land Soc. v. Smith, 54 Md. 204, 39 Am. Rep. 374; Sanders v. Morrison, 2 T. B. Mon. 109, 15 Am. Dec. 140; Shipp v. Miller, 2 Wheat. 316, 4 L. ed. 248; Cutts v. King, 5 Me. 482; Bodley v. Taylor, 5 Cranch, 224, 3 L. ed. 85; Johnson v. Pannel, 2 Wheat. 206, 4 L. ed. 221.

Lands withdrawn from sale, etc., are not "public lands" within the meaning of railroad grants.

Northern P. R. Co. v. Musser-Sauntry Land, Logging, & Mfg. Co. 168 U. S. 604, 42 L. ed. 596, 18 Sup. Ct. Rep. 205; Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 18 L. ed. 689; St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 18, 35 L. ed. 77, 84, 11 Sup. Ct. Rep. 389; Hewitt v. Schultz, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309; Wilcox v. Jackson, 15 Pet. 498, 10 L. ed. 264; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Newhall v. Sanger, 92 U. S. 761, 23 L. ed. 769; Doolan v. Carr, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; Cameron v. United States, 148 U. S. 301, 37 L. ed. 459, 13 Sup. Ct. Rep. 595; Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; Sioux City & I. F. Town Lot & Land Co. v. Griffey, 143 U. S. 32, 36 L. ed. 64, 12 Sup. Ct. Rep. 362; Bardon v. Northern P. R. Co. 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856; Whitney v. Taylor, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796.

Mr. Justice Harlan delivered the opinion of the court:

This suit involves the title to the south half of the southeast quarter of section twenty-seven, township fifty-two north, range fifteen west, in the state of Minnesota.

*The principal question in the case is [193] whether the land in dispute was embraced by the grant of public lands made by Congress July 2d, 1864 (13 Stat. at L. 365, 367, chap. 217), to the Northern Pacific Railroad Company, in aid of the construction of a railroad and telegraph line from Lake Superior to Puget sound. If it was not, then the decree of the circuit court dismissing the bill was right, as was that of the circuit court of appeals, affirming that decree.

By the act of May 5th, 1864 (13 Stat. at L. 64, chap. 79), Congress made a grant of public lands to the state of Minnesota in aid of the construction of a railroad from St. Paul to the head of Lake Superior. This grant was vested in the Lake Superior & Mississippi Railroad Company, and that company, on the 7th day of May, 1864, filed its map of *general* route. This map was accepted by the Land Department, and a copy was transmitted May 26th, 1864, to the proper local land office, which was informed of the approval by the Secretary of the Interior of a *withdrawal of lands for the Lake Superior & Mississippi* road, and that office was ordered to suspend, and it did suspend, "from pre-emption, settlement, and sale a body of land about 20 miles in width," *as indicated on the above map.* The land in dispute was within the exterior lines of this general route of the Lake Superior & Mississippi road, as defined by its map, and was *part of the land so withdrawn.*

After the acceptance of the map of gen-

eral route of the Lake Superior & Mississippi Railroad, and *after* the withdrawal by the Land Department, for the benefit of that company, of the lands covered by that map, Congress, by the above act of July 2d, 1864 (13 Stat. at L. 365, 367, chap. 217), declared "that there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of *public land*, not mineral, desig-
[194] nated by odd numbers, to the *amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office."

In 1866 the Lake Superior & Mississippi Railroad Company filed a map of the *definite* location of its road, from which it appeared that the land in dispute was outside of the place, indemnity, and terminal limits of that road as thus located.

In 1882 the Northern Pacific Railroad Company filed its map of definite location, which showed that the particular lands here in dispute were in the place limits indicated by that map.

In 1883 the latter company filed in the proper office a list of lands which it asserted were covered by the grant made to it on July 2d, 1864, and on that list, among other lands, were those here in dispute.

In 1901 the Commissioner of the Land Office refused to approve, and rejected, the list so far as the lands now in question were concerned, upon the ground that, although they appeared, after the definite location of the Northern Pacific Railroad, to be within the primary limits of the grant made for that road by the act of July 2d, 1864, they "were *excepted from the operation of said grant*, because they were, *at the date of the passage of said act*, within 10 miles of the probable route of the Lake Superior & Mississippi Railroad, in aid of the construction of which a grant was made by the act of May 5th, 1864, and *were embraced within the withdrawal of May* 26th, 1864, made on account of the last-mentioned grant." The

question was taken on appeal to retary of the Interior, and he als the above list, rendering a decisi date of *July 16th, 1901, affirmin cision of the Commissioner,—the ruling that, as these lands were, *at of the grant to the Northern Pac road Company*, already "include *an existing and lawful withdrawal* aid of a prior grant," they were deemed "public lands" when the Pacific grant of 1864 was made, sequently, were not embraced by th The Secretary held that the fac right under a prior grant did not ly attach to the lands here in ques immaterial; "first, because the act 2, 1864, was a grant *in præsenti*, an because a reservation on account o grant will defeat a later grant lik July 2, 1864, whether the lands a in satisfaction of the prior grant Re Northern P. R. Co. 31 Land Under that decision the above list the Northern Pacific Railroad Com formally and finally canceled, a lands were never assigned to it by Department.

Although the stipulation of th as to the facts is very lengthy, th stated are sufficient to present t upon which, it is agreed, the decisi case depends.

We have seen that, at the dat grant of July 2d, 1864, to the Nort cific Railroad Company, the partic in dispute was within the lines d by the accepted map of the *gene* of the Lake Superior & Mississip road; and that the grant for the Pacific Railroad was of "public lan the land here in dispute *public the date of the passage* of that act reason of its having been then w by the Land Department from pre-settlement, and sale, it was not, at of the Northern Pacific grant, to b public land, did that grant atta when the Northern Pacific road initely located in 1882? These were answered in the negative by circuit court and the unanimous j of the circuit court of appeals. 134 139 Fed. 614.

It has long been settled that the the Northern *Pacific Railroad Co the act of 1864 was one *in prase* is, the company took a present tit the date of the act, to the lands by the terms of the grant; the wo there be, and hereby is, granted" h "a transfer of present title, not a to transfer one in the future." In & P. R. Co. v. Northern P. R. Co

S. 1, 5, 35 L. ed. 77, 79, 11 Sup. Ct. Rep. 389, 390, the court said that "the route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once identified, the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in præsenti;* that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route. This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion. Schulenberg v. Harriman, 21 Wall. 44, 60, 22 L. ed. 551, 554; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578." The same principle was reaffirmed in Bardon v. Northern P. R. Co. 145 U. S. 535, 543, 36 L. ed. 806, 810, 12 Sup. Ct. Rep. 856, and in many other cases which are familiar to the profession and need not be cited.

Again, no lands passed that were not, at the date of the grant, public land; that is, lands "open to sale or other disposition under general laws;" not lands "to which any claims or rights of others have attached." Bardon v. Northern P. R. Co. supra. At the time of the grant of 1864 to the Northern Pacific Railroad Company the lands here in dispute were, as we have seen, among those *withdrawn* by the Land Department from pre-emption, settlement, and sale, and were held specifically under the grant of May 5th, 1864, for the Lake Superior & Mississippi Railroad. They were not, therefore, public lands embraced by the later grant to the other company. *The grant of the Northern Pacific Railroad Company spoke as of the date of the act of July 2d, 1864; and that company did not acquire any title to these lands, then withdrawn, by reason of the fact that when its line, at a subsequent date, was definitely located, they had become freed from the grant made by the act of May 5th, 1864, to the state of Minnesota. Being at the date of the grant of July 2d, 1864, *under the operation of an order of withdrawal by the Land Department,* they were not in the category of lands embraced by that grant of "public lands." When the withdrawal order ceased to be in force the lands so withdrawn did not pass under the later grant, but became a part of the public domain, subject to be disposed of under the general land laws, and not to be claimed under any railroad land grant. There is no escape from this conclusion under the adjudged cases.

In Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566, in which the attempt was made to include within a railroad grant lands to which a homestead claim had previously attached, but which claim had ceased to exist when the line of the railroad was definitely fixed, the court, speaking by Mr. Justice Miller, said: "No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road, and others with grants in similar language, have more than once passed through military reservations, for forts and other purposes, which have been given up or abandoned as such reservations, and were of great value. Nor is it understood that, *in any case where lands had been otherwise disposed of, their reversion to the government brought them within the grant.*"

In Bardon v. Northern P. R. Co. supra, Mr. Justice Field, delivering the unanimous judgment of the court, said: "In the Leavenworth Case, supra, the appellant, the railroad company, contended that the fee of the land was in the United States, and only a right of occupancy remained with the Indians; that, under the grant, the state would hold the title subject to their right of occupancy; but, as that had *been subsequently extinguished, there was no sound objection to the granting act taking full effect. The court, however, adhered to its conclusion, that the land covered by the grant could only embrace lands which were, at the time, public lands, free from any lawful claim of other parties, unless there was an express provision showing that the grant was to have a more extended operation,—citing the decision in Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264, to which we have referred above, *that land once legally appropriated to any purpose was thereby severed from the public domain, and a subsequent sale would not be construed to embrace it, though not specially reserved.* And of the Indians' right of occupancy it said that this right, with the correlative obligation of the government to enforce it, negatived the idea that Congress, even in the absence of any positive stipulation to protect the Osages, intended to grant their land to a railroad company, either absolutely or *cum onere.* 'For all practical purposes,' the court added, 'they owned it; as the actual right of possession, the only thing they deemed of value, was secured to them by treaty, until they should elect to sur-

[198]

render it to the United States,' Three justices, of whom the writer of this opinion was one, dissented from the majority of the court in the Leavenworth Case; but the decision has been uniformly adhered to since its announcement, and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted, that, in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are *at the time* free from existing claims, is better and safer, both to the government and to private parties than the rule which would pass the property subject to the liens and claims of others. The latter construction would open a wide field of litigation between the grantees and third parties."

Again, in the same case, where the contention was that the Northern Pacific grant embraced lands to which a pre-emption claim had previously attached, but which claim [199] was canceled *after the date of that grant, the court said: "That pre-emption entry remained of record until August 5, 1865, when it was canceled; but this was after the date of the grant to the Northern Pacific Railroad Company, and also after the dates of the several grants made to the state of Wisconsin to aid in the construction of railroad and telegraph lines within that state. *The cancelation, as already said, did not have the effect of bringing the land under the operation of the grant to the Northern Pacific Railroad Company; it simply restored the land to the mass of public lands,* to be dealt with subsequently in the same manner as any other public lands of the United States not covered by or excepted from the grant."

In United States v. Southern P. R. Co. 146 U. S. 570, 606, 36 L. ed. 1091, 1101, 13 Sup. Ct. Rep. 152, 160, this court, speaking by Mr. Justice Brewer, said: "Indeed, the intent of Congress in all railroad land grants, as has been understood and declared by this court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as *at that time* are public lands, and, therefore, grantable by Congress, and is never to be taken as a floating authority to appropriate all tracts within the specified limits which, at any subsequent time, may become public lands." In Whitney v. Taylor, 158 U. S. 85, 92, 39 L. ed. 906, 908, 15 Sup. Ct. Rep. 796, 799, Mr. Justice Brewer, again speaking for the court, said: "That when, on the records of the local land office, there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the government, and has not been canceled or set aside, the tract in respect to which the claim is existing *is excepted from the operation of a railroad land grant* containing the ordinary excepting clauses, and the notwithstanding such claim may not be enforceable by the claimant, and is subject to cancelation by the government at its own suggestion or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed and the question of its validity was a matter to be settled between *the government and the claimant, in respect to which the railroad company was not permitted to be heard. In Spencer v. McDougal, 159 U. S. 65, 40 L. ed. 77, 15 Sup. Ct. Rep. 1026, the court referred to Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 18 L. ed. 689, in which the question arose whether a grant of public lands on each side of Des Moines river in aid of navigation, terminated at the mouth of Raccoon fork or extended along the whole length of the river to the northern boundary of the state, and said: "The Land Department ordered that lands the whole length of the river within the state should be withdrawn from sale. In the course of subsequent litigation it was decided by this court that the grant terminated at the mouth of the Raccoon river. But in the case cited it was held that the withdrawal by the Land Department of lands above the mouth of the Raccoon river was valid, and that a subsequent railroad grant, with the ordinary reservation clause in it, *did not operate upon lands so withdrawn.*" So, in Northern P. R. Co. v. Musser-Sauntry Land, Logging, & Mfg. Co. 168 U. S. 604, 607, 611, 42 L. ed. 596, 597, 599, 18 Sup. Ct. Rep. 205, 206, 207: "But a single question is presented in this case, and that is whether the withdrawal from sale by the Land Department in March, 1864, of lands within the indemnity limits of the grant of 1856 and 1864 exempted such lands from the operation of the grant to the plaintiff. It will be perceived that the grant in aid of the defendant railway company was prior in date to that to the plaintiff, and that before the time of the filing of plaintiff's maps of general route and definite location the lands were withdrawn for the benefit of the defendant. The grant to the plaintiff was only of lands to which the United States had 'full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed.' The withdrawal by the Secretary in aid of the grant to the state of

Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the government under the general land laws. The act of the Secretary was in effect a reservation. Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 18 L. ed. 689; Wolsey v. Chapman, 101 U. S. 755, 25 L. ed. 915, and cases cited in the opinion; Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353, and cases cited in the opinion. It has also been held that such a withdrawal is effective against claims arising under subsequent railroad land grants. St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 17, 18, 35 L. ed. 77, 83, 84, 11 Sup. Ct. Rep. 389; Wisconsin C. R. Co. v. Forsythe, 159 U. S. 46, 54, 40 L. ed. 71, 73, 15 Sup. Ct. Rep. 1020; Spencer v. McDougal, 159 U. S. 62, 40 L. ed. 76, 15 Sup. Ct. Rep. 1026. . . . All that we here hold is, that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant, and made prior to the filing of the map of definite location by a company having a later grant,—the latter having such words of exception and limitation as are found in the grant to the plaintiff,—*it operates to except the withdrawn lands from the scope of such later grant.*" The doctrines of these cases were recognized in the recent case of Northern P. R. Co. v. DeLacey, 174 U. S. 622, 43 L. ed. 1111, 19 Sup. Ct. Rep. 791.

In view of these decisions it is clear that, as the lands in dispute were, at the date of the grant to the Northern Pacific Railroad Company, withdrawn, of record, for the benefit of the Lake Superior & Mississippi Railroad, under a prior grant, they were not public lands within the meaning of the later grant, and did not come under it, when or because it was subsequently ascertained that they were without the line of the definite location of the road of the Lake Superior Railroad Company, and within the place limits of the Northern Pacific, as defined by its map of definite location. When freed from the operation of the accepted map of general route filed by the Lake Superior & Mississippi Railroad Company, they did not come under the operation of the later grant to the Northern Pacific Railroad, but became a part of the public lands constituting the public domain, and subject only to be disposed of under the general laws relating to the public lands. If, by the act of July 2d, 1864, or before the line of the Northern Pacific Railroad was definitely located, Congress had, in terms, appropriated, for the benefit of that road, any of the lands embraced in the general route of the *other road, a different question would be presented. But it did not do so. It only granted for the benefit of the Northern Pacific Railroad lands which *then*, July 2d, 1864, were public lands, and no lands were public lands, within the meaning of Congress, which, at that time, were withdrawn by the Land Department; that is, reserved for the purposes of a grant prior, although such reservation turned out to have been a mistake.

The suggestion is made in this connection that the order of the Land Department was too uncertain and indefinite to have any legal force, because the direction to the local land office was to suspend from pre-emption, settlement, and sale "a body of land *about* 20 miles in width." We deem this suggestion without merit. The order for withdrawal referred to the diagram or map showing the road's probable route; and it is agreed that the lands in dispute are coterminous and within 10 miles of the line of the general route of the Lake Superior & Mississippi Railroad, *as defined by the above diagram or map.* The map, however indefinite, was intended to cover these lands. It sufficiently indicated these lands and the probable route of the road, and that was enough.

Many cases are called to our attention which are supposed to militate against the views we have here expressed. We have examined those referred to and do not perceive that any one of them decided the particular question now before us. No one of them holds that a grant, *in præsenti*, of public lands, with the ordinary reservations, embraces lands which, at the date of such grant, are under the operation of a formal order of the Land Department, of record, withdrawing them for the benefit of a prior grant in the event they should be needed for the purposes of such grant. Nor does any of them hold that the subsequent cancelation of such withdrawal order had the effect to bring them under the operation of a later grant of public lands. It is said that United States v. Oregon & C. R. Co. 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 261, and Wilcox v. Eastern Oregon Land Co. 176 U. S. 51, 44 L. ed. 368, 20 Sup. Ct. Rep. 269, should be regarded as controlling and decisive of this case for the appellant. We do not think so. The *principal point decided in [203] those cases was that nothing in the act of 1864 prevented Congress by legislation from appropriating for the benefit of other railroad corporations lands that might be or were embraced within the *general* route of the Northern Pacific Railroad; and this for the reason that an accepted map of general route only gave the company filing it an inchoate right, and did not pass title to specific sections until they were identified by a

definite location of the road. Besides, in neither case was there in force, at the date of the later grant, an accepted, effective order of the Land Department withdrawing the lands there in dispute pursuant to an accepted map of the *general* route of the Northern Pacific Railroad. If there had been an order of that kind, it would still have been competent for Congress to dispose of the lands within such general route, as it saw proper, at any time prior to the definite location of the road under the later grant. In conformity with prior decisions it was so adjudged in the two cases above cited. Those cases did not adjudge that a grant of "public land," with the usual reservations, embraced any lands which, *at the time*, were formally withdrawn by the Land Department from pre-emption, settlement, or sale, for the benefit of a prior grant.

We are of opinion that the Circuit Court and the Circuit Court of Appeals correctly interpreted the decisions of this court and did not err as to the law of the case. The judgment below must, therefore, be affirmed.

It is so ordered.

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[204] *MONTANA MINING COMPANY, Limited, Plff. in Err.,

v.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA.

(See S. C. Reporter's ed. 204-220.)

Certiorari to circuit court of appeals.

1. Certiorari to the circuit court of appeals will be allowed by the Federal Supreme Court, where the importance of the case demands it, to avoid any question as to the jurisdiction of the Supreme Court of a writ of error duly allowed, where an application for certiorari was made after a motion to dismiss the writ of error was filed.

Mines—conflicting lode locations—effect of compromise.

2. An adjustment of subsurface rights, and not merely the establishment of a surface boundary line between two conflicting lode mining claims, was accomplished by an agreement to compromise adverse proceedings, followed by the execution of a bond by the locator of one of such claims by the terms of which he was to obtain a patent, and was then to execute a deed of certain of the disputed territory, "together with all the mineral therein contained," which deed, when executed, pursuant to a decree for specific performance, conveyed the tract described in the bond with "all the mineral therein contained," together with "all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein."

[No. 402.]

Argued December 10, 11, 1906. Decided January 14, 1907.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Montana in favor of plaintiff in an action to recover damages for the removal of ore from certain disputed territory. Certiorari allowed to avoid the question of jurisdiction of writ of error, and the judgment of the Court of Appeals reversed and the case remanded to the Circuit Court for a new trial.

See same case below, 147 Fed. 897.

Statement by Mr. Justice Brewer:

The litigation between these parties has been protracted through a series of years. A brief history will help to an understanding of the present questions. Prior to 1881 Charles *Mayger had located the St. Louis lode claim in Lewis and Clarke county, Montana territory, and William Robinson and others had located, adjoining thereto, the Nine Hour lode claim. These claims conflicted. Mayger made application for a patent. Thereupon adverse proceedings were commenced by Robinson and his associates against Mayger in the district court of the third judicial district of Montana. For the purpose of settling and compromising the action on March 7, 1884, a bond was executed by Mayger to the other parties, in which he agreed to proceed as rapidly as possible to obtain a patent, and then to execute and deliver to Robinson a good and sufficient deed of conveyance of a tract described as "comprising a part of two certain quartz lode mining claims, known as the St. Louis lode claim and the Nine Hour lode claim

NOTE.—On certiorari to the circuit courts of appeals—see note to State ex rel. Hamilton v. Guinotte, 50 L.R.A. 801.

On certiorari in the United States courts generally—see note to Clark v. Hackett, 17 L. ed. U. S. 69.

On intersecting, crossing, or uniting veins—see note to Calhoun Gold Min. Co. v. Ajax Gold Min. Co. 50 L.R.A. 209.

As to right to follow a vein or lode on its dip beyond the surface lines of the location—see notes to Parrot Silver & Copper Co. v. Heinze, 53 L.R.A. 491, and Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co. 66 C. C. A. 311.

On conflicting lode locations—see note to Last Chance Min. Co. v. Tyler Min. Co. 39 L. ed. U. S. 859, and Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co. 42 L. ed. U. S. 96.

and particularly described as follows, to wit." Then follows a description of what is known as the compromise ground,—a tract including an area of 12,844.5 square feet, "together with all the mineral therein contained." Mayger proceeded to obtain a patent for the St. Louis claim, including the compromise ground, as did also Robinson and his associates, a patent to the Nine Hour claim, omitting the compromise ground. Thereafter the plaintiff in error acquired the interest of Robinson and his associates and the defendant in error the interest of Mayger. The former company demanded a conveyance of the compromise ground in accordance with the terms of the bond executed by Mayger, which being refused, suit was brought in a district court of the state, which rendered a decree in its favor. That decree having been affirmed by the supreme court of the state, the St. Louis company brought the case to this court, and on October 31, 1898, the judgment of the supreme court of Montana was affirmed. 171 U. S. 650, 43 L. ed. 320, 19 Sup. Ct. Rep. 61. In pursuance of the decree the St. Louis company deeded the tract described in the bond, giving its boundaries, the number of square feet contained therein, and adding, "together with all the mineral therein contained. Together with all the dips, spurs, and angles, [206]*and also all the metals, ores, gold and silver-bearing quartz rock and earth therein, and all the rights, privileges, and franchises thereto incident, appended, or appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits therein, and also all and every right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the said premises and every part and parcel thereof, with the appurtenances."

Prior explorations, the exact date of which is not shown, but apparently long after the compromise agreement, had disclosed the fact that beneath the surface of this compromise ground there was a large body of ore which, it was claimed, belonged to a vein apexing in the territory of the St. Louis claim. This was not the discovery vein, but a secondary vein, frequently called the Drumlummon vein or lode, whose apex was between the compromise ground and the apex of the St. Louis discovery vein. Some of this ore was mined and removed by the Montana company. On September 16, 1893, a year before the specific performance suit was brought, the St. Louis company filed its complaint in the circuit court of the United States for the district of Montana, against the Montana company and several individual defendants, claiming to recover $200,000 for the damages sustained by the trespass of the defendants in removing the ore. In its complaint the St. Louis company alleged that it was a corporation organized under the laws of Montana, and that the Montana company was a corporation incorporated under the laws of the Kingdom of Great Britain, but nothing was said as to the residence or citizenship of the individual defendants.

On November 21, 1898, three weeks after the decision by this court in the specific performance suit, an amended and supplemental complaint was filed, which omitted the individual defendants and sought a recovery from the Montana* company alone for the ore [207] so wrongfully removed, as alleged. On June 26, 1899, a second amended and supplemental complaint was filed, also against the Montana company alone, and asking for the same relief. To this an answer was filed, setting up the bond and deed heretofore referred to, and pleading that thereby the plaintiff was estopped from claiming any part of the compromise ground or any mineral contained therein.

Pending this litigation, and on respectively the sixth and twelfth days of December, 1898, orders were issued by the circuit court restraining severally each of the parties to this litigation from taking any more mineral from the disputed ground. On the second amended and supplemental complaint a trial was had in which judgment was rendered in favor of the St. Louis company for $23,209. To review this judgment, the Montana company prosecuted a writ of error from the circuit court of appeals of the ninth circuit, which writ was dated October 7, 1899, and the judgment was affirmed May 14, 1900. 42 C. C. A. 415, 102 Fed. 430. The St. Louis company took out a cross writ of error from the circuit court of appeals dated January 30, 1900, and that court reversed the judgment October 8, 1900, and remanded the case for a new trial as to the recovery sought for the conversion and value of certain ores, which had been excluded by the circuit court from the consideration of the jury. 56 L.R.A. 725, 44 C. C. A. 120, 104 Fed. 664. The parties then brought, by separate writs of error, these two decisions of the court of appeals to this court, on consideration whereof this court held that the judgment in the circuit court was entirely set aside by the second decision of the court of appeals, and therefore dismissed both cases on the ground that there was no final judgment. 186 U. S. 24, 46 L. ed. 1039, 22 Sup. Ct. Rep. 744.

Whereupon the court of appeals sent down to the circuit court a mandate setting aside

the judgment *in toto*, and ordering a new trial. This new trial was held on May 31, 1905, and resulted in a judgment in favor of [208]the St. Louis company for $195,000, *which judgment was affirmed by the circuit court of appeals, to reverse which decision the Montana company sued out this writ of error.

After this last decision by the court of appeals, the circuit court, on the application of the St. Louis company, set aside the order which restrained it from extracting ore from the disputed territory. Thereupon the Montana company filed its application in this court for a reinstatement of that order and that it be continued in force until the final termination of the litigation.

The St. Louis company filed a motion to dismiss the writ of error sued out by the Montana company, on the ground that the jurisdiction of the circuit court depended entirely on diverse citizenship, and therefore the decision of the court of appeals was final. The Montana company then made application for a writ of certiorari, which application was passed for consideration to the final hearing of the case.

Mr. Charles J. Hughes, Jr., argued the cause, and, with Messrs. W. E. Cullen, Aldis B. Browne, and Alexander Britton, filed a brief for plaintiff in error:

The words "together with all the mineral therein contained" when employed in the decree, even had they not been accompanied by a perpetual injunction precluding any claim of any kind on the part of the defendant in error within the bounded area of the compromise ground, acquired a fixed, definite, and certain meaning, and without the injunction, but certainly with it, operated to award the plaintiff in error every particle of mineral in the compromise ground.

Bogart v. Amanda Consol. Gold Min. Co. 32 Colo. 32, 74 Pac. 882.

At common law a deed to real estate passed every interest which the grantor had in the premises described unless some interest was expressly reserved therein.

The common law is in force in the state of Montana unless where repealed, either expressly or by some statute in conflict therewith.

Territory v. Ye Wan, 2 Mont. 479; Territory ex rel. Blake v. Virginia Road Co. 2 Mont. 96; Butte Hardware Co. v. Sullivan, 7 Mont. 312, 16 Pac. 588; Palmer v. McMaster, 8 Mont. 192, 19 Pac. 585; Milburn Mfg. Co. v. Johnson, 9 Mont. 541, 24 Pac. 17; Forrester v. Boston & M. Consol. Copper & S. Min. Co. 21 Mont. 544, 55 Pac. 229, 353.

There exists in the deed nothing which authorizes the invocation of the rule of law upon which the circuit court of appeals nounces it proceeded, to wit, a resort to nature of the property and the circ stances surrounding the execution of deed for the purpose of ascertaining meaning. That can only be done when terms of the deed, its contents, render necessary in order to determine what is veyed by it.

Van Ness v. Washington, 4 Pet. 28 L. ed. 860; Tiernan v. Jackson, 5 Pet. 8 L. ed. 240; St. Louis v. Rutz, 138 U 243, 34 L. ed. 948, 11 Sup. Ct. Rep. 2 Devlin, Deeds, 2d ed. § 836.

The patent in this case is the usual ent, and there is nothing in its terms w permits, suggests, or gives an excuse investigating the prior history of the te tory embraced within the claim as paten or controversies which may have ra however bitterly, before its issuance, a they are terminated conclusively by its suance.

Boggs v. Merced Min. Co. 14 Cal. 2 Waterloo Min. Co. v. Doe, 56 Fed. 685; C houn Gold Min. Co. v. Ajax Gold Min. 182 U. S. 499, 45 L. ed. 1200, 21 Sup. Rep. 885; Lavagnino v. Uhlig, 198 U. 443, 445, 49 L. ed. 1119, 1121, 25 Sup. Rep. 716; Wight v. Dubois, 21 Fed. 6 Creede & C. C. Min. & Mill. Co. v. Un Tunnel Min. & Transp. Co. 196 U. S. 3 355, 49 L. ed. 501, 511, 25 Sup. Ct. Rep. 2 2 Lindley, Mines, 2d ed. § 778, p. 1389.

A compromise does not concede or knowledge that either party is wholly ri and surely does not permit either party it to maintain such a position for the p pose of defeating the grant it made as consideration for what it received under compromise.

Webster's Dict. "compromise;" Sm Synonyms Discriminated. p. 62; Cent Dict. "compromise;" 1 Bouvier's Law D 308; Huddersfield Banking Co. v. Li [1895] 2 Ch. 285; Sharp v. Knox, 4 456; Attrill v. Patterson, 58 Md. 226; La v. Obert, 5 Tex. Civ. App. 620, 25 S. W. 1 Continental Nat. Bank v. McGeoch, 22 V 286, 66 N. W. 606; Rankin v. Schofield, Ark. 83, 66 S. W. 197; Gregg v. Weath field, 55 Vt. 385; Colburn v. Groton, 6 H. 151, 22 L. R. A. 763, 28 Atl. 95; Bell v. Sowles, 55 Vt. 391, 45 Am. Rep. 621.

Mr. Milton S. Gunn argued the cause, with Messrs. Arthur Brown, J. H. Rals Thomas C. Bach, J. B. Clayberg, F. L. dons, Ira T. Wight, and W. E. Richard filed a brief for defendant in error:

Where a party assumes a certain posi in a legal proceeding and succeeds in m taining that position, he may not thereaf simply because his interests have chan assume a contrary position, especially i

be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Davis v. Wakelee, 156 U. S. 680, 39 L. ed. 578, 15 Sup. Ct. Rep. 555.

The language used is to be construed with reference to the peculiar property about which the parties were contracting.

Richmond Min. Co. v. Eureka Min. Co. 103 U. S. 846, 26 L. ed. 560.

In construing contracts, a court may look not only to their terms, but to their subject-matter and the surrounding circumstances, and avail itself of the same light which, at the time of making them, the parties possessed.

Merriam v. United States, 107 U. S. 437, 27 L. ed. 531, 2 Sup. Ct. Rep. 536.

The construction of all deeds must be made with a reference to their subject-matter.

Doe ex dem. Freeland v. Burt, 1 T. R. 701.

Previous and contemporary transactions and facts may be properly taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used.

Brawley v. United States, 96 U. S. 173, 24 L. ed. 624.

Mr. Justice Brewer delivered the opinion of the court:

The first question is, of course, the one [213] of jurisdiction. If *the jurisdiction of the circuit court depended alone on diverse citizenship, then, undoubtedly, the decision of the court of appeals was final, and the case could only be brought here on certiorari. On the other hand, if it did not depend alone on diverse citizenship, the decision of the court of appeals was not final, and the case is properly here on writ of error. The original complaint alleged the citizenship of the two corporations, plaintiff and defendant, but did not allege the citizenship of the individual defendants. In order to sustain the jurisdiction of the circuit court on the ground of diverse citizenship, the citizenship of all the parties on one side must be diverse from that of those on the other. So, unless there was a Federal question presented by that complaint, as the citizenship of the individual defendants was not shown, the circuit court had no jurisdiction of the case. It may be that this was remedied by the subsequent first and second amended complaints; in which the individual defendants were left out, the citizenship of the two corporations, plaintiff and defendant, alleged, and to which complaints the Montana company, without raising any question of jurisdiction, appeared and answered. Conolly v. Taylor, 2 Pet. 556, 7 L. ed. 518; Anderson v. Watt, 138 U. S. 694, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449. Be that as it may, in view of the fact that this litigation has been twice before this court, has been protracted for many years, involves so large an amount, and also presents questions of Federal mining law which, though perhaps not necessary for our decision, have yet been elaborately argued by counsel, we are of opinion that if the jurisdiction of the circuit court did, after the filing of the amended complaints, depend entirely on diverse citizenship, the case ought to be brought here by writ of certiorari. As either by writ of error or certiorari the decision of the court of appeals can be brought before this court, and as each has been applied for, and as the importance of the case seems to demand our examination, it is scarcely necessary to consume time in attempting to decide positively whether there was a Federal question involved, or the jurisdiction depended solely on diverse citizenship. The *writ of error [214] was duly allowed prior to the filing of the record in the first instance, and, to avoid any further question of our jurisdiction, we allow the certiorari. Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.

We pass, therefore, to a consideration of the merits; and the first question presented by counsel—indeed, as we look at it, the pivotal question—is the proper construction of the bond and deed by which the plaintiff in error claims title to the compromise ground.

The bond described the ground, adding, "together with all the mineral therein contained." The deed executed in pursuance of the judicial decree contains the same description, followed by the words above quoted and also the further words given in the statement of facts,—"together with all the dips, spurs, and angles," etc.

Now, the contention of the defendant in error is that the effect of the compromise followed by the bond and conveyance was simply to locate the boundary line between the two claims, leaving all subsurface rights to be determined by the ordinary rules recognized in the mining districts and enforced by the statutes of Congress.

The argument in favor of this construction is forcibly put by Circuit Judge Gilbert, delivering the opinion of the court of appeals, when the case was first presented to that court. 42 C. C. A. 415, 102 Fed. 430. Without quoting it in full it is to the effect that agreements and conveyances of the whole or parts of mining claims are to be construed in the light of the mining law, as, generally speaking, we construe a contract, not merely by its terms, but having regard to the subject-matter involved and the surrounding

circumstances, in order to ascertain the intention of the parties. Particular reference was made to Richmond Min. Co. v. Eureka Min. Co. 103 U. S. 846, 26 L. ed. 557, in which this court held that a line specified in a contract between the owners of contiguous mining claims to be one continued downward to the center of the earth was not a [215] vertical plane, but must be construed as *extending the boundary line downward through the dips of the veins or lodes wherever they might go in their course toward the center of the earth.

Further, the argument is that the adverse proceedings were maintained by the owners of the Nine Hour claim on the theory that the strip of land so contracted to be conveyed was a portion of that claim; that if the action had gone to judgment, sustaining their contention, the result would have been simply to fix the surface line of division between the two claims, without affecting the subsurface rights. Reference was also made to the suit for specific performance brought by the present plaintiff in error, in which it alleged that the contract had been made for the purpose of settling and agreeing upon the boundary line between the two claims, and that the suit was maintained upon the theory that, as owner of the Nine Hour claim, it owned the compromise ground afterwards conveyed.

We are not insensible to the force of this argument, and also appreciate fully what is said by counsel in reference to the familiarity of the several concurring justices with mining law and contracts and conveyances made under it.

Yet, notwithstanding, we are compelled to dissent from their construction of these instruments, and to hold that something more was intended and accomplished than the mere establishment of a surface boundary line. We premise by saying that nothing can be invoked in the nature of an estoppel from the averments in the pleadings in the suit for specific performance. True, the plaintiff in error alleged that the compromise ground was a part of its mining claim, and that the bond was executed "to settle and compromise the said suit and adverse claims, and for the purpose of settling and agreeing upon the boundary line between" the two claims; but the bond itself, reciting the fact of a settlement and compromise, and an agreement by the contestants to withdraw their objections to the application for a patent, stipulates for a conveyance, after patent, of the compromise ground, [216] "comprising *a part of two certain quartz lode mining claims, known as the St. Louis lode claim and the Nine Hour lode claim," they being, respectively, the two claims owned by the parties hereto. Further, the answer denied that the compromise ground was a part of the Nine Hour lode claim and alleged that the then owner of the St. Louis lode claim executed the bond as a compromise of the adverse claim and suit, and enable him to obtain a patent for the whole of his claim.

The facts in the case, as well as the allegations in these pleadings, show that the two claims conflicted, that when application was made for a patent adverse proceedings were instituted, and that rather than try the title of the respective locators to the territory in conflict, and by way of compromise, they agreed that the owner of the St. Louis claim might proceed to patent, and then convey the compromise ground to the grantors of the plaintiff in error.

It must also be noticed that the dispute between the two claims was not simply in respect to the compromise ground,—at least, testimony offered to prove this was ruled out,—but involved a larger area, and that the disputing parties settled by the bond, describing what was to be conveyed.

It is undoubtedly true that if the bond had simply described the surface area or fixed a boundary line between the two claims, the subsurface and extralateral rights might have been determined by the mining law. It might have been implied that there was no intention to disturb the rights given by it.

Further, while it may be true that the words "together with all the dips, spurs, and angles," etc., are generally employed in conveyances of mining claims in order to emphasize the fact that not merely the surface but the extralateral rights which go with a mining claim are conveyed, yet it must be noticed that in addition to these customary words are these, found in both the bond and the deed: "Together with all the mineral therein contained;" and they cannot be ignored, but must be given a meaning reasonable and consistent with other parts of the instruments. It is not satisfactory to say that *they are only equivalent to those that [217] follow, "dips, spurs," etc., that the same thing is meant by each expression. While, of course, repetition is possible, yet it is not to be expected; and when, in addition to the ordinary words found in conveyances of mining claims, is this extra clause, we naturally regard it as making some further grant.

The scope of this deed would not be open to doubt if only the common law was to be considered. And in this connection it may be remarked that the common law has been kept steadily in force in Montana. "The common law of England, so far as the same is applicable and of a general nature, and not in conflict with special enactments of

his territory, shall be the law and the rule of decision, and shall be considered as of full force until repealed by legislative authority." Laws of Montana, 1871, 1872, chap. 13, § 1, p. 388, substantially re-enacted in Mont. Anno. Code, § 5152. See also Territory v. Ye Wan, 2 Mont. 478, 479; Territory ex rel. Blake v. Virginia Road Co. 2 Mont. 96; Butte Hardware Co. v. Sullivan, 7 Mont. 312, 16 Pac. 588; Palmer v. McMaster, 8 Mont. 186, 192, 19 Pac. 585; Milburn Mfg. Co. v. Johnson, 9 Mont. 541, 24 Pac. 17; Forrester v. Boston & M. Consol. Copper & S. Min. Co. 21 Mont. 544, 556, 55 Pac. 229, 353. By that law a deed of real estate conveys all beneath the surface, unless there be some words of exception or limitation. But the mining laws of both state and territory were in force, and in construing conveyances of mining claims the provisions of those laws must be taken into account, and may add to or subtract from the rights passing by a common-law conveyance of agricultural or timber lands. It is probably not necessary to specify extralateral rights in order that a conveyance of a mining claim be operative to transfer them, and yet it is not strange that the custom grew up of naming them for the sake of avoiding the possibility of disputes. While the bond made no mention of extralateral rights, yet in all probability it would have been held to pass them and the court may have thought that the single specification, "all the mineral therein contained," was liable to be construed as narrowing the conveyance so as to *include only the mineral beneath the surface, and therefore required that there should be incorporated in the deed the words "together with all the dips, spurs," etc. Yet, in requiring the introduction of these words, which in terms define extralateral rights, it also retained the phrase "together with all the mineral therein contained."

To the suggestion that giving this construction to the bond and conveyance is in effect the granting of a section of a vein of mineral, the answer is that there is nothing impractical or unnatural in such a conveyance. It does not operate to transfer the vein *in toto*, but simply carves out from the vein the section between the vertical side lines of the ground, and transfers that to the grantee. The title to the balance of the vein remains undisturbed.

To the further suggestion that the owner of the apex might be left with a body of ore on the descending vein beyond the further side line of the compromise ground which he could not reach, the answer is that this assumes as a fact that which may not be a fact. The owner of the apex may be the owner of other ground by which access can be obtained to the descending vein, and it also is a question worthy of consideration whether granting a section out from a descending vein does not imply a right reserved in the grantor to pass through the territory of the section conveyed in order to reach the further portion of the vein. Those are questions which need not now be determined. This secondary vein does not appear to have been known at the time of the compromise, and while, of course, there is always a possibility of such a vein being discovered, yet parties are more apt to contract and settle upon the basis of what they know than upon the possibilities of future discovery.

The action of the parties hereto is suggestive, although not of itself decisive. This action for the recovery of ore taken out from beneath the surface of the compromise ground was pending when the suit for specific performance was brought in 1894. Nothing was done in this action from that time until *three weeks after a final decision [219] of the specific performance case by this court, when an amended complaint was filed, and the case thereafter proceeded by ordinary stages to trial and judgment. The original complaint alleged the ownership by the St. Louis company of its mining claim and of all veins, lodes, or ledges having their tops or apexes inside of its surface boundary lines, with the right to follow those veins, lodes, or ledges on the dips or angles outside the side lines of the mining claim. It also alleged that the defendants entered wrongfully upon one of the veins, lodes, or ledges having its top or apex within the surface location of the St. Louis claim, and which had in its dip or angle passed outside the side lines of the St. Louis claim and "entered beneath the mining property claimed or pretended to be claimed by the said defendants or some of them, and that, in utter disregard of the right or title of plaintiff, the said defendants ever since have been and now are extracting and taking therefrom large quantities of coarse rock and ore," etc. In other words, it sought to recover from the Montana company the value of the ore taken by the latter from a vein whose apex was within the surface boundaries of the former's claim, but which in its dip had passed outside the side lines into territory claimed by the Montana company. With that as its claim the litigation was dormant for four years. Now, if it were true that the apex of the vein was within the side lines of the St. Louis claim and the ore taken by the defendants was taken from below the surface of the compromise ground, and all that was accomplished by the compromise and bond was the establishment of a boundary line, leaving subsurface and extralateral rights undisturbed, there was no

necessity of postponing the litigation until the question of title to the surface was disposed of. As we have said, we do not mean that this is decisive, because the St. Louis company may have thought that all controversies would be ended if it could once establish that the Montana company took nothing by virtue of the compromise and bond. Still the delay in the litigation is in [220] harmony with the belief that *the words in the bond, 'together with all the mineral therein contained," meant all the mineral below the surface.

The disposition of this question compels a reversal of the judgment. It may also effectually dispose of all disputes between the parties, and, therefore, it would be a mere waste of time to attempt to consider other questions which have been discussed with ability and elaboration by counsel.

In view of this conclusion it is also apparent that the order restraining defendant in error from removing ore from the disputed territory ought not to have been set aside.

The judgment of the Court of Appeals is reversed and the case remanded to the Circuit Court with instructions to grant a new trial. Further, the order restraining defendant in error from mining and removing any of the ore in dispute will be reinstated and continued in force until the final disposition of the case.

ERIE RAILROAD COMPANY, Petitioner,
v.
ERIE & WESTERN TRANSPORTATION COMPANY.

(See S. C. Reporter's ed. 220–228.)

Admiralty jurisdiction—suit to enforce contribution.

1. A court of admiralty has jurisdiction of a libel brought by one of two vessels, which were both adjudged to be in fault for a collision, to enforce contribution on account of its payment of the entire damage to the cargo of the other vessel.

Contribution—between vessels in fault for collision.

2. The right of one of two vessels which were both in fault for a collision to enforce contribution where it has paid the entire damage to the cargo of the other vessel not affected by provisions in the latter vessel's bills of lading, giving her the benefit of insurance, and fixing the time within which claims for damage must be made and suits therefor instituted.

Judgment—res judicata.

3. A decree dividing the damage sustained by two vessels held in fault for collision, but refusing to divide the damages to cargo, because that question was not open under the pleadings, does not prevent the vessel which has been compelled to pay the entire cargo damage from bringing a libel in admiralty against the other vessel to enforce contribution.

[No. 134.]

Argued December 14, 1906. Decided January 14, 1907.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which reversed a decree of the District Court for the Northern District of Illinois, enforcing contribution to cargo damage between two vessels held in fault for a collision, and ordered the libel dismissed. Decree of Circuit Court of Appeals reversed and that of the District Court affirmed.

See same case below, 73 C. C. A. 195, 142 Fed. 9.

The facts are stated in the opinion.

Mr. Charles E. Kremer argued the cause, and, with Mr. W. O. Johnson, filed a brief for petitioner:

Each of two vessels held jointly at fault should equally bear the damage resulting from such negligence.

The Catharine v. Dickinson, 17 How. 170, 15 L. ed. 233; The North Star (Reynolds v. Vanderbilt) 106 U. S. 17, 27 L. ed. 91, 1 Sup. Ct. Rep. 41; The Manitoba (Beatty v. Hanna) 122 U. S. 97, 30 L. ed. 1095, 7 Sup. Ct. Rep. 1158; The Albert Dumois, 177 U. S. 240, 44 L. ed. 751, 20 Sup. Ct. Rep. 595.

Additional pleadings, besides libel and answer, were not necessary to enable a court of admiralty to properly apportion the damages between wrongdoers, when these were the libellant and defendant then before the court.

The Eleanora, 17 Blatchf. 88, Fed. Cas. No. 4,335; Leonard v. Whitwill, 10 Ben. 63, Fed. Cas. No. 8,261; Duncan v. The C. H. Foster, 1 Fed. 733; Atlantic Mut. Ins. Co. v. Alexandre, 16 Fed. 279; The Canima, 17 Fed. 271; The Hercules, 20 Fed. 205; The Job T. Wilson, 84 Fed. 204; The Livingstone, 104 Fed. 918; The Albert Dumois and The Manitoba, supra.

An appeal in admiralty entitles the appellant to a trial *de novo*.

NOTE.—On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

. Chicago Ins. Co. 44 C. C. A. 566.

it is the right whereby mutual ch arise out of the same trans- be adjusted in one action.

Eng. Enc. Law, p. 547.

nmon-law origin and independ- atutes of set-off.

Inst. 2d ed. 706; 1 Chitty, Pl. 595; Baltimore & O. R. Co. v. W. Va. 833, 31 Am. Rep. 775; title "Discount," 556.

be equity early transposed.

ge of Masons v. Knox, 20 Mo. y, Pl. 14 Am. ed. *p. 568.

to common law and equity; ty.

Carruth, 1 Sprague, 324, Fed. ,144; Nichols v. Tremlett, 1 , Fed. Cas. No. 10,247.

is not bound to recoup.

Inst. pt. 1, p. 656; Burwell v. Barb. 267; Jennison Hardware n, 112 Mich. 57, 70 N. W. 428; Adjudicata, 236, 305.

ion of recoupment and set-off nsidered by the court in the ion, and therefore that decision held to be *res judicata*.

, Former Adjudication, § 256; v. Bartle, 114 Mo. 276, 21 S. W. or v. New York & Y. Land 8 Misc. 243, 28 N. Y. Supp. 544; House, 62 Conn. 459, 21 L.R.A. 352; Koelsch v. Mixer, 52 Ohio . E. 417; Cottingham v. Shrews- e, 27; Doe ex dem. McCall v. 3 How. 297, 15 L. ed. 389; Wash- G. Steam Packet Co. v. Sick- 580, 18 L. ed. 550; Cromwell v. 94 U. S. 353, 24 L. ed. 198; Min. Co. v. Tyler Min. Co. 157 9 L. ed. 859, 15 Sup. Ct. Rep. rleans v. Citizens Bank, 167 U. ed. 202, 17 Sup. Ct. Rep. 905; ng. Enc. Law, p. 200; Lore v. Ohio St. 45; Porter v. Wagner, 471.

action existed for contribution iralty court had jurisdiction.

on, 15 Fed. 162; The Mariska, 115, 107 Fed. 989; Wellman v. . C. A. 318, 33 U. S. App. 610, Ralli v. Troop, 157 U. S. 400, 19, 15 Sup. Ct. Rep. 657; The (Flint v. Christall) 171 U. S. . 130, 18 Sup. Ct. Rep. 831; The d. 343; The Wm. Murtagh, 17

to this case in principle as to r being maritime, and, if so, h it a lien, we have the cases eneral average.

Admiralty, § 295; Dupont de Nemours v. Vance, 19 How. 162, 15 L. ed. 584.

In every maritime transaction, whether of tort or contract, coming within the jurisdiction of an admiralty court, if property is concerned a lien is provided, the principal, if not the only, exception to this rule being the case of home supplies, and, even in this class of cases, a lien, if provided by any law, is recognized and enforced in admiralty.

The J. E. Rumbell, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498.

If the cause is a maritime cause, subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship. It must, in its nature, be complete, for it cannot be confined to one of the remedies on the contract, when the contract itself is within its cognizance.

New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465.

It has been held that a lien in admiralty may be assigned and enforced in the name of the assignee.

19 Am. & Eng. Enc. Law, p. 1136, and cases cited.

Taking a bill or note does not extinguish the lien or claim for which the note was given, unless it is so understood. The note is surrendered at the trial.

19 Am. & Eng. Enc. Law, p. 1133, and cases cited.

Money borrowed to pay bills stands in the same relation to a vessel as the bill paid.

The Cumberland, 30 Fed. 449; The Arctic, 75 Fed. 601; The Wyoming, 36 Fed. 493; Southern Bank v. The Alexander McNeil, Fed. Cas. No. 13,186.

The right to recover in this case is not one resting upon the right of subrogation, but upon the right of contribution. In numerous cases the courts of admiralty have held that there is a right of recovery even when no direct action could be sustained by the shipper against the carrier. Subrogation is therefore not the rule in such cases.

The North Star (Reynolds v. Vanderbilt) 106 U. S. 17, 27 L. ed. 91, 1 Sup. Ct. Rep. 41; The Chattahoochee, 173 U. S. 540, 43 L. ed. 801, 19 Sup. Ct. Rep. 491; The Viola, 60 Fed. 296; The Albert Dumois, 177 U. S. 240, 44 L. ed. 751, 20 Sup. Ct. Rep. 595; The George W. Roby, 49 C. C. A. 481, 111 Fed. 601.

The rule which applies and which controls this case is the rule of contribution. It arises in this class of cases in admiralty only. At common law contributory negligence defeats the right of action. In admiralty it does not, but entitles the party guilty of negligence to recover if negligence can be proved against the opposite party.

In such a case a plaintiff recovers one half of his damages.

The Atlas (Phœnix Ins. Co. v. The Atlas) 93 U. S. 302, 23 L. ed. 863; The Alabama (The Alabama v. De Las Casas) 92 U. S. 695, 23 L. ed. 763; Dering v. Winchelsea, 1 Cox, Ch. Cas. 318; Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; Chapman v. Todd, 60 Me. 282; Pine Hill Coal Co. v. Harris, 7 Ky. L. Rep. 519; Bank of Catskill v. Messenger, 9 Cow. 39; Durrell v. Wendell, 8 N. H. 369; Byers v. Alcorn, 6 Ill. App. 39; Drummond v. Yager, 10 Ill. App. 380; Chipman v. Morrill, 20 Cal. 135.

The right is regarded as resting, not on the original contractor, but on the relation created thereby of the parties bound by a common obligation, and the contract implied therefrom of discharging such common obligation equally.

7 Am. & Eng. Enc. Law, p. 331.

Evidence that the right of contribution does not grow out of the contract, but is based upon the equitable principle of bearing a loss equally with another, is the fact that the statute of limitations does not begin to run until the plaintiff has paid more than his share of the debt.

7 Am. & Eng. Enc. Law, p. 365; Wolmershausen v. Gullick [1893] 2 Ch. 514; Moore v. Bruner, 31 Ill. App. 400.

While we find it frequently stated that there is no contribution between tort feasors, this is not, by any means, a universal rule, and we find that this rule applies only to cases of intentional and conscious wrongdoing, but does not apply to cases which are committed without guilty intent.

Bailey v. Bussing, 28 Conn. 455; 7 Am. & Eng. Enc. Law, p. 365; Selz v. Unna, 6 Wall. 327, 18 L. ed. 799; Ankeny v. Moffett, 37 Minn. 109, 33 N. W. 320; Horbach v. Elder, 18 Pa. 33; Armstrong County v. Clarion County, 66 Pa. 218, 5 Am. Rep. 368.

The rule that there is no contribution among tort feasors does not apply to admiralty, because there there is contribution.

The Frankland, 9 Asp. Mar. L. Cas. 196.

Messrs. Harvey D. Goulder and Frank S. Masten argued the cause, and, with Mr. S. H. Holding, filed a brief for respondent:

The right of contribution proper exists only where two or more persons are jointly or jointly and severally responsible to a third for the same amount, and one or more are compelled to pay more than their share. It arises in the equity of equality, dictating that a common obligation should be borne equally by all obligated for its payment; that one should not, as to others equally obligated, be obligated to sustain more than his own share. The doctrine had its origin in equity.

Dering v. Winchelsea, 1 Cox, Ch. Cas. 318; 3 Pom. Eq. Jur. § 1418; Sheldon, Subrogation, § 169; Baltimore & O. R. Co. v. Walker, 45 Ohio St. 577, 16 N. E. 475.

There is some doubt, under the decisions, whether contribution will be enforced at all as to joint tort feasors.

Selz v. Unna, 6 Wall. 328, 18 L. ed. 799; Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298.

It is elementary that a proceeding *in rem* can only be maintained on a maritime contract or tort giving rise to a lien existing at the time action is brought. If no lien arose, or, having arisen, has been waived or lost, a proceeding *in rem* will not lie.

The Sabine (The Mayflower v. The Sabine) 101 U. S. 384–388, 25 L. ed. 982–984; The Rock Island Bridge (Galena, D. D. & M. Packet Co. v. Rock Island Bridge Co.) 6 Wall. 213–215, 18 L. ed. 753, 754.

The right of contribution, where it exists, cannot be asserted in the admiralty either *in rem* or *in personam*.

The Argus, 71 Fed. 891.

Notwithstanding an original liability may be maritime, and payment may carry with it an implied or express promise or obligation on the part of another to bear the whole or a part of the amount so paid, the new promise or obligation is not maritime, so as to be within the jurisdiction of admiralty.

Fox v. Patton, 22 Fed. 746; The Centurion, 1 Ware, 477, Fed. Cas. No. 2,554.

It has long been the practice of courts of admiralty to accomplish contribution, or, more properly, to allow recoupment, to the extent of the funds in the registry of the court or the property under its control; but it does not follow that it has power to do so by independent proceedings. While the word "contribution" has been used *arguendo*, it is rather as defining a result than as a substantive right.

The Hudson, 15 Fed. 162; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 583, 22 L. ed. 654, 664; The J. E. Rumbell, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498; Schuchardt v. Babbidge, 19 How. 239–241, 15 L. ed. 625, 626; Duryee v. Elkins, Abb. Adm. 529, Fed. Cas. No. 4,197; The C. C. Trowbridge, 11 Biss. 154, 14 Fed. 874; Davis v. Child, 2 Ware, 78, Fed. Cas. No. 3,623; The H. E. Willard, 52 Fed. 387.

The greatest right the New York could have in an independent proceeding in the admiralty would be that which the cargo interests themselves had.

The Mariska, 47 C. C. A. 115, 107 Fed. 988.

Mr. Justice Holmes delivered the opinion of the court:

This is a libel in admiralty, brought by the petitioner as successor in corporate

identity to the Union Steamboat Company, to recover a part of a sum paid by it to the respondent *as the result of previous admiralty proceedings which came before this court several times. The former proceedings were begun by the respondent, as owner of the propeller Conemaugh and bailee of her cargo, to recover for damages to both by a collision between her and the propeller New York. After hearings below (53 Fed. 553, 27 C. C. A. 154, 54 U. S. App. 248, 82 Fed. 819, 30 C. C. A. 628, 16 U. S. App. 146, 86 Fed. 814) it was decided by this court, on certiorari, that both vessels were in fault, and that the representatives of the cargo could recover their whole damages from the New York. The New York, 175 U. S. 187, 44 L. ed. 126, 20 Sup. Ct. Rep. 67. Thereupon the district court entered a decree dividing the damages sustained by the steamers, requiring the New York to pay to the Conemaugh on that account $13,083.33 and interest, and further required it to pay all the damages to the cargo of the latter,—the insurers on cargo who had intervened receiving their share, and the Conemaugh receiving the residue as trustee. The owners of the New York then applied to this court for a mandamus directing the district court to divide the damages to cargo. This was denied on the ground that, if the court below erred, the remedy was by appeal. Ex parte Union B. Co. 178 U. S. 317, 44 L. ed. 1084, 20 Sup. Ct. Rep. 904. Upon that intimation an appeal was taken to the circuit court of appeals for the sixth circuit, and after a motion to dismiss had been denied (44 C. C. A. 38, 104 Fed. 561) the decree was affirmed (47 C. C. A. 232, 108 Fed. 102). On second certiorari that decree was affirmed by this court. 189 U. S. 363, 47 L. ed. 854, 23 Sup. Ct. Rep. 504. The New York paid the damages and brought this suit.

The ground of the last-mentioned decree was that the claim of the New York was not open, and the circuit court of appeals denied leave to amend the pleadings, for the reason that the petitioner would be left free to assert its claim in an independent proceeding. 47 C. C. A. 232, 108 Fed. 107. In the present case the district court followed this expression of the circuit court of appeals, and made a decree giving the petitioner one half of the damages paid by it on account of cargo. The circuit court of appeals for the seventh circuit, however, *before which the present case came on appeal, held that the whole matter was *res judicata* by the final decree in the former cause, and ordered the libel dismissed. 142 Fed. 9. Thereupon a third certiorari was granted by this court, and the record is now before us.

The respondent set up three defenses, below and here. It argued that there was no jurisdiction in admiralty over the claim in its present form, that the petitioner had no case upon the merits, and that it was concluded by the former decree. The circuit court of appeals decided against the first two points before sustaining the third. We shall take them up in their order. The jurisdiction appears to us tolerably plain. If it be assumed that the right to contribution is an incident of the joint liability in admiralty, and is not *res judicata*, it would be a mere historical anomaly if the admiralty courts were not free to work out their own system, and to finish the adjustment of maritime rights and liabilities. Indeed, we imagine that this would not have been denied very strenuously had the question been raised by proper pleadings in connection with the original suit. But if the right is not barred by the former decree, it would be still more anomalous to send the parties to a different tribunal to secure that right at this stage. For the decree was correct as far as it went, and, by the hypothesis, might stop where it did without impairing the claim to contribution. That claim is of admiralty origin and must be satisfied before complete justice is done. It cannot be that, because the admiralty has carried out a part of its theory of justice, it is prevented by that fact alone from carrying out the rest. See The Mariska, 47 C. C. A. 115, 107 Fed. 989.

On the merits also we have no great difficulty. The rule of the common law, even, that there is no contribution between wrongdoers, is subject to exception. Pollock, Torts, 7th ed. 195, 196. Whatever its origin, the admiralty rule in this country is well known to be the other way. The North Star (Reynolds v. Vanderbilt) 106 U. S. 17, 27 L. ed. 91, 1 Sup. Ct. Rep. 41; The Sterling (The Sterling v. Petersen) 106 U. S. 647, 27 L. ed. 98, 1 Sup. Ct. Rep. 89; Admiralty rule, 59. Compare The Frankland [1901] P. 161. *And it is estab- [226] lished, as it logically follows, that the division of damages extends to what one of the parties pays to the owners of cargo on board the other. The Chattahoochee, 173 U. S. 540, 43 L. ed. 801, 19 Sup. Ct. Rep. 491. The right to the division of the latter element does not stand on subrogation, but arises directly from the tort. The liability of the New York, under our practice, for all the damage to cargo, was one of the consequences plainly to be foreseen, and, since the Conemaugh was answerable to the New York as a partial cause of the tort, its responsibility extended to all the manifest consequences for which, on the general ground that they were manifest, the New

York could be held. Therefore the contract relations between the Conemaugh and her cargo have nothing to do with the case. See The Chattahoochee, supra. More specifically, the last-named vessel's liability to the eNw York is not affected by provisions in the Conemaugh's bills of lading, giving her the benefit of insurance, and requiring notice of any claim for damage to be made in writing within thirty days, and suit to be brought within three months.

It only remains, then, to consider whether the petitioner is concluded by the former decree. If the liability of the Conemaugh arises, as we have said, out of the tort, then it is said to follow that the New York either is attempting to split up its cause of action, or to recover in excess of a decree covering the case. It is true that the New York was the defendant in the former suit, but the damage to the New York was allowed for in the division. If the allowance was by way of recoupment, then it may be said that the New York, by asserting a counterclaim for its damages, bound itself to present its whole claim to the same extent as if it had brought the suit; at least, until it had neutralized the claim made against it in the Conemaugh's own right. If the allowance was because division is the very form and condition of any claim for damage to vessels in case of mutual fault (The North Star, supra; Stoomvaart Maatschappy Nederland v. Peninsular & O. Steam Nav. Co. L. R. 7 App. Cas. 795, 801, 806), and the mutual [227] rights *cancel each other *pro tanto* as they arise, just as in an account current, as distinguished from set-off, then it might be contended that the claim in respect of the payment of damage to cargo is an item in the same account with the one for damage to the ship, and that a decree as to one involves a disposition of the other, and makes the whole matter *res judicata*. See The Manitoba (Beatty v. Hanna) 12 U. S. 97, 111, 30 L. ed. 1095, 1100, 7 Sup. Ct. Rep. 1158.

But, whatever be the technical theory, the right of a defendant to a division of the damage to the vessels when both are in fault, and its contingent claim to partial indemnity for payment of damage to cargo, must be separable, from the necessity of to case. To illustrate. Suppose, in a case of collision, one vessel to be sued for damage to the other vessel alone. It could not set up the possibility that the cargo owners might sue, some time within six years, and suspend the decree on the ground that otherwise the defendant might be barred from demanding indemnity in case the cargo owners should sue and succeed. If cargo owners should sue one or the other vessels after a division of the damages to the vessels themselves, it must be that the libellee would be free to require the other to exonerate or indemnify it to the same extent as if no such division had taken place. It would be impossible to do justice otherwise. As to the English law, see Stoomvaart Maatschappy Nederland v. Peninsular & O. Steam Nav. Co. L. R. 7 App. Cas. 795, 806.

If we are right, then this is a strong case for holding that the petitioner is not barred. It stands adjudicated that its pleadings did not open its present claim. They could not have done so, because, at that stage, the petitioner not having paid, it had no claim for indemnity, but only for exoneration. It was not bound to adopt the procedure permitted to it by rule 59. It did ask leave to amend so as to protect its rights, but was met by the argument of the respondent and the opinion of the circuit court of appeals that it could bring a new suit. This court said the same thing in affirming the decree against the New York. "If, as between her and the Conemaugh, *she have a [228] claim for recoupment, the way is open to recover it." 189 U. S. 368, 47 L. ed. 857, 23 Sup. Ct. Rep. 504. The same proposition was implied in The Juniata (United States v. Juniata) 93 U. S. 337, 340, 23 L. ed. 930, 931. Every consideration leads us to adhere to this statement in the circumstances of the case at bar.

Decree of Circuit Court of Appeals reversed.

Decree of District Court affirmed.

GEORGE W. CROWE, Appt.,
v.
M. M. TRICKEY, Administrator of the Estate of Norman H. Chapin, Deceased.

(See S. C. Reporter's ed 228-240.)

Appeal from territorial supreme court—questions reviewable.

1. The jurisdiction of the Supreme Court of the United States on an appeal from a territorial supreme court is limited to determining whether the findings of fact support the judgment, where the exceptions to rulings of the trial court in the admis-

NOTE.—As to review by the United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

On performance by real estate broker of his contract to find a purchaser or effect an exchange of his principal's property—see note to Lunney v. Healey, 44 L.R.A. 893.

On broker's right to commissions generally—see note to McGavock v. Woodlief, 16 L. ed. U. S. 884.

sion or rejection of evidence were not insisted upon in the territorial supreme court, and were not considered by that tribunal.

Appeal from territorial supreme court—sufficiency of statement of facts.

2. The statement of facts made by the territorial supreme court will not be held defective on appeal to the Supreme Court of the United States because it may be confused and may give a mass of unnecessary details, if a sufficient statement finally emerges therefrom.

Appeal—sufficient bill of exceptions.

3. The failure of the bill of exceptions on appeal to state in express terms that it contains all the evidence does not prevent the appellate court from considering or determining the case upon questions of fact if the record shows that all the evidence was contained in such bill.

Brokers—commissions.

4. A broker who finds a person who takes an option on the purchase of certain mining property, which is never carried out, cannot, where the owner dies before the option expires, recover his agreed commission from the administrator, when the latter, after the expiration of the option, sells the property to the same person and at the same price.

[No. 71.]

Submitted October 31, 1906. Decided January 21, 1907.

APPEAL from the Supreme Court of the Territory of Arizona to review a judgment which reversed a judgment of the District Court of Santa Cruz County, in that territory, in favor of plaintiff in an action to recover a broker's commission, and remanded the case to the latter court with directions to render judgment for defendant. Affirmed.

See same case below (Ariz.) 71 Pac. 965.

Statement by Mr. Chief Justice **Fuller**:

*This was an action brought by Crowe in the district court of Santa Cruz county, Arizona, against Trickey, administrator of the estate of N. H. Chapin, deceased, to recover the sum of $5,000 as commission on a sale alleged to have been effected by Crowe for Chapin, during his life, of a one-fourth interest in a mine. The case was tried by the district court without a jury, a jury having been waived by agreement of the parties, and that court made findings of fact and stated conclusions of law therefrom, on which it rendered judgment in Crowe's favor, January 10, 1902, to be paid in due course of administration. From that judgment the case was carried by appeal to the supreme court of the territory of Arizona, which, March 20, 1903, reversed the judgment, and remanded the case to the district court, with directions to render judgment for defendant. 71 Pac. 965.

The record states:

"In the above-entitled action the supreme court finds the facts to be as follows:

"1. Previous to March, 1899, a mine known as the Pride of the West mine was owned by three parties. A man named Olsen owned one half thereof, and Norman H. Chapin, the defendant's intestate, and Jerry Neville each owned one fourth interest therein.

"In March, 1899, the plaintiff Crowe brought this mine to the attention of one Emerson Gee and his associate, A. R. Wilfley. Subsequently, in the latter part of March, 1899, Wilfley purchased Olsen's one-half interest, and made an agreement with Chapin and Neville, in pursuance whereof a deed to the remaining one-half interest was executed by Chapin and Neville, and placed in escrow, the terms of the escrow agreement providing that the deed was to be delivered to Wilfley upon the payment by him of the sum of $100,000 in cash, on or before the 1st day of April, 1900.

"2. It was verbally agreed between Crowe on the one part, and Chapin on the other, representing himself and Neville, that Crowe was to receive 10 per cent of the purchase money *received by them for their interest [230] in the mine, as commission for making the the sale. Such deed and escrow agreement were executed by Chapin and Neville on the 1st day of April, 1899.

"3. Prior to the 1st day of April, 1900, Chapin and Neville both died.

"M. M. Trickey was appointed administrator of Chapin's estate and one Henry H. Harmon was appointed administrator of Jerry Neville's estate.

"Wilfley failed to pay the money and take the property under his option, and after the 1st day of April, 1900, at the expiration of the time mentioned in the escrow agreement, and in accordance with the terms thereof, the deed in escrow was returned to Trickey, the administrator of Chapin's estate.

"4. Thereafter, and on the 7th day of April, 1900, upon the payment of $1,000 by Wilfley, the administrators of these two estates made another agreement with Wilfley, by the terms of which they agreed to execute a deed to a one-half interest owned by the two estates, upon the payment of the purchase price of $100,000, in specific amounts, on different dates therein expressed. This option also lapsed.

"5. After said lapse, and on the 19th day of June, 1900, M. M. Trickey, as administrator of the estate of Chapin, entered into another agreement which was offered in evi-

dence by the plaintiff, and appears in the bill of exceptions as 'Exhibit 3.'

"By this agreement, Trickey, as administrator, gave to Wilfley an option to purchase the one-fourth interest in the mine owned by the estate of Chapin, and obligated himself to execute to Wilfley a deed for such interest upon the payment of $5,000 in cash, $5,000 within three months; the further sum of $5,000 within six months; the further sum of $5,000 within nine months; the further sum of $5,000 within twelve months; and the further sum of $25,000 within eighteen months.

"The plaintiff Crowe had nothing whatever to do with either of the last-mentioned options, or with the sale of the property after the death of Chapin.

[231] *"6. In pursuance of this option, Wilfley paid to Trickey the sum of $5,000 in cash on the 19th day of June, 1900; and the following sums on the following dates, respectively: $5,000 on September 19, 1900; $5,000 on December 19, 1900; $5,000 on March 20, 1901; $5,000 on June 17, 1901; $25,000 on December 7, 1901.

"7. The above-mentioned agreement (Exhibit 3) was only an option to purchase, and under it there was no obligation on the part of Wilfley to pay any portion of the purchase price, and no obligation on the part of Trickey to deliver the deed mentioned in the agreement until the last payment of $25,000, in December, 1901, had been made.

"8. On the 10th day of December, 1900, Crowe presented to Trickey, as administrator of Chapin's estate, in accordance with the law of the territory of Arizona, his claim against the estate of Chapin for '10 per cent of the purchase price of the Pride of the West mine, agreement for the sale of which was entered into about April 1st, 1899, and which said agreement of sale was made by Chapin and Neville to A. R. Wilfley, and which sale was brought about by the said George W. Crowe, upon the agreement that he was to receive 10 per cent commission upon said purchase price from said Chapin and Neville, one half of said 10 per cent being $5,000.'

"9. This claim was rejected by the administrator, and he thereupon brought this action in the district court of Santa Cruz county on the 25th day of January, 1901, at which time the estate of N. H. Chapin, deceased, was solvent, and amply able to pay all debts of the said estate, and the said Chapin nor the said Trickey nor anyone else had paid to the plaintiff the said sum of $5,000, or any part thereof, or anything on account thereof.

"The case was tried before the court, without a jury, a jury having been by agreement of parties waived, and the court m the following findings of fact:

[Here follow findings of fact and c clusions of law by the district court, u which judgment was rendered in favor the plaintiff, and an appeal prayed the from to the supreme court as stated.]

"The only statements of fact in the re ord were contained in the foregoing findin of fact, and in a bill of exceptions. The sai bill of exceptions, which was transmitted t the supreme court of Arizona with the rec ord in this case, did not state that it con tained all of the evidence which was introduced upon the trial of the case in the district court, nor upon the points presented to the Arizona supreme court for its decision. nor does it otherwise appear from the record in the case that all of the evidence which was introduced upon the trial of the case in the district court was before the said supreme court of Arizona. The abstract of the transcript which contained the evidence stated that 'the defendant, by his bill of exceptions, which contained all the evidence taken on said trial, and which is as follows:' then follows the bill of exceptions reciting the testimony of the different witnesses, covering some 23 pages, and at the conclusion thereof the following allowance:

" 'The foregoing bill of exceptions was presented to me for allowance on the 24th day of January, 1902, and was by me on the same date submitted to Messrs. Hereford & Hazzard, attorneys for the opposite party, who made no objection thereto, whereupon the said bill of exceptions is now by me signed, approved, and allowed as of the said 24th day of January, 1902. Geo. R. Davis, Judge;' but the record contains no certificate from the clerk or court that the evidence contained in the bill of exceptions constituted all of the evidence taken on the trial in the lower court, and that fact is controverted by the counsel for the appellee.

"The Arizona supreme court found the following facts:

"1. That the efforts of the plaintiff, Crowe, resulted in procuring the purchaser Wilfley not to purchase absolutely, but to take an option on the purchase of the property involved, for $100,000; that Crowe's principals accepted a deed to the property and placed it in escrow; that although Chapin died before the expiration of that escrow agreement, *the deed executed by him remained subject to the order of the purchaser, and that, if he had availed himself of the terms of that agreement, the sale would have been completed and plaintiff Crowe would have been entitled to his commission; but that Wilfley failed to make the payment and take up the deed, and, after the expiration of the option and after Chapin's death, the

as returned to the administrator of
s estate and the transaction was
rithout any sale being made.
hat the sale of the property that
sequently effected was the result of
otiations between Trickey, the ad-
tor of Chapin's estate, and Wilfley;
fore the date of the sale, Crowe's
r authority to act in the matter had
rminated, and his agency revoked
leath of Chapin.
at in regard to the latter negotia-
owe rendered no services to Trickey,
no appointment or agreement from
in reference to the matter, and took
whatever in the ultimate sale.
at the plaintiff, Crowe, did not, be-
he 8th day of February, 1898, and
day of January, 1900, bring about
f Chapin's interest in the property
oversy.
e said A. R. Wilfley paid to the
endant the sum of $50,000, as fol-
pril 7, 1900, $500; June 19, 1900,
September 19, 1900, $5,000; Decem-
900, $5,000; March 20, 1901, $5,000;
1901, $5,000; December 7, 1901, $25,-
for the right, title, and interest of
Norman H. Chapin, but for the
itle, and interest of the said estate
an H. Chapin, deceased, in and to the
perty, in compliance with the terms
ontract of sale and title bond exe-
the said Wilfley by Trickey, the
rator of said estate."
follow conclusions of law and judg-

s. W. C. Keegin and Seth E. Hazzard
d the cause for appellant. Mr. F.
ford was on the brief:
upreme Court of Arizona erred in
g the case upon the evidence and
the judgment, in the absence of
ng that all of the evidence in the
before it.
l States v. Copper Queen Consol.
185 U. S. 495, 46 L. ed. 1008, 22
Rep. 761; Russell v. Ely, 2 Black,
L. ed. 258; Providence v. Babcock
r v. Babcock) 3 Wall. 240, 18 L. ed.
as & P. R. Co. v. Cox, 145 U. S.
ed. 829, 12 Sup. Ct. Rep. 905.
ments of fact must affirmatively
at they contain all the evidence;
of exception must likewise show
y contain all the evidence necessary
mine the point in controversy.
m v. Putnam, 3 Ariz. 182, 24 Pac.
rritory v. Flores, 3 Ariz. 215, 77
; Paul v. Cullum, 2 Ariz. 16, 8 Pac.
ns v. Glencross, 4 Ariz. 222, 36 Pac.

the bill of exceptions does not pur-
port to give all the evidence, the proof sufficient to sustain the findings will be presumed to have been supplied unless the error is affirmatively shown.

Evans v. Glencross and Paul v. Cullum, supra; Territory v. Clanton, 3 Ariz. 1, 20 Pac. 94; Score v. Griffin (Ariz.) 80 Pac. 331; 2 Enc. Pl. & Pr. pp. 441, 486; 3 Century Dig. col. 680, § 2911, col. 702, § 2916; Texas & P. R. Co. v. Cox, supra; Hansen v. Boyd. 161 U. S. 397, 40 L. ed. 746, 16 Sup. Ct. Rep. 571; Elliott, App. Proc. Dig. 773, 774, § 823.

Bills of exception are presumed not to contain all the evidence.

Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679.

It is the rule in Arizona that a bill of exceptions or statement of facts must affirmatively show that it contains all the evidence in the case, or the supreme court of Arizona will refuse to review the case upon questions of fact.

Abernathy v. Reynolds (Ariz.) 71 Pac. 914; Curtis v. Boquillas Land & Cattle Co. (Ariz.) 71 Pac. 924; Costello v. Friedman (Ariz.) 71 Pac. 937; Edwards v. Simms (Ariz.) 71 Pac. 902; Charouleau v. Shields (Ariz.) 76 Pac. 821; Score v. Griffin, supra; McCormack v. Arizona Central Bank, 5 Ariz. 278, 52 Pac. 469; Webber v. Kastner, 5 Ariz. 324, 53 Pac. 207; Miller v. Green, 3 Ariz. 205, 73 Pac. 399; Brash v. White, 3 Ariz. 212, 73 Pac. 445; Howard v. Perrin (Ariz.) 76 Pac. 460; Ryder v. Leach (Ariz.) 77 Pac. 490; Goldman v. Sotelo, 7 Ariz. 23, 60 Pac. 696.

Mr. Eugene S. Ives submitted the cause for appellee:

It is not disputed that the ordinary rule is that, to review a decision upon a question of conflict of evidence, all of the evidence upon which that decision was based must be before the reviewing tribunal, and that it must so affirmatively appear from the record. Where the reason of the rule fails, the rule itself will not be applied; as in a case where the error claimed is the direction of a verdict for one party, and there is evidence in the bill which will warrant a verdict for the other.

Leslie v. Standard Sewing-Mach. Co. 39 C. C. A. 314, 98 Fed. 827.

So, where the record, taken as a whole, shows that all the evidence is before the court, the reason of the rule likewise falls and the rule itself falls with it. It is not the mere form of the certificate to the bill of exceptions, but the whole record, that controls; and, if the record, taken as a whole, shows that the bill in fact contains all the evidence, it will be so considered; and a court authorized to pass upon such matters will inquire upon the record as to the

correctness of the decision sought to be reviewed.

Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep. 390: Spangler v. Green, 21 Colo. 505, 52 Am. St. Rep. 259, 42 Pac. 674.

Nothing is better settled than that the power of this court, upon appeal from a judgment of the supreme court of a territory, in a case not tried by a jury, is limited to determining whether the facts found by the supreme court sustain its judgment, and whether there is error in the admission or rejection of evidence.

Holloway v. Dunham, 170 U. S. 615, 42 L. ed. 1165, 18 Sup. Ct. Rep. 784; Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. Rep. 135; Harrison v. Perea, 168 U. S. 311, 42 L. ed. 478, 18 Sup. Ct. Rep. 129; Young v. Amy, 171 U. S. 179, 43 L. ed. 127, 18 Sup. Ct. Rep. 802.

The essential foundation of the earning of commissions by the broker is the fact that he has secured a purchaser who has either bought, or obligated himself to buy, the property and pay for it; and unless such obligation exists, there is no sale and no earning of commissions.

Kimberly v. Henderson, 29 Md. 512; Ramsey v. West, 31 Mo. App. 676; Zeidler v. Walker, 41 Mo. App. 118; Levy v. Kottman, 11 Misc. 372, 32 N. Y. Supp. 241; Jenkins v. Hollingsworth, 83 Ill. App. 139; Brackenridge v. Claridge, 91 Tex. 527, 43 L.R.A. 593, 44 S. W. 819.

In all cases where the principal has revoked the contract before the broker has earned his commissions, the broker's right to commissions is absolutely cut off, except where it has been found as a fact that such revocation was a mere device to defraud the broker of his right to commissions.

Sibbald v. Bethlehem Iron Co. 83 N. Y. 378, 38 Am. Rep. 441; Beale v. Creswell, 3 Md. 196; Zeimer v. Antisell, 75 Cal. 509, 17 Pac. 642; Armstrong v. Wann, 29 Minn. 126, 12 N. W. 345; Satterthwaite v. Vreeland, 48 How. Pr. 508; Carlson v. Nathan, 43 Ill. App. 364; Buehler v. Weiffenbach, 21 Misc. 30, 46 N. Y. Supp. 861; O'Toole v. Tucker, 17 Misc. 554, 40 N. Y. Supp. 695; Pryor v. Jolly, 91 Tex. 86, 40 S. W. 959, Reversing (Tex. Civ. App.) 39 S. W. 1019; Antisdel v. Canfield, 119 Mich. 229, 77 N. W. 944.

The right of the principal to revoke is absolute.

Sibbald v. Bethlehem Iron Co. supra.

The interest arising from commissions is not such an interest as will render the authority irrevocable.

Stier v. Imperial L. Ins. Co. 58 Fed. 843; Barr v. Schroeder, 32 Cal. 609; Chambers v. Seay, 73 Ala. 372.

An interest in the proceeds does not render the authority irrevocable.

Hamilton v. Frothingham, 59 Mich. 251, 26 N. W. 486; Green v. Cole, 103 Mo. 70, 15 S. W. 317; Coffin v. Landis, 46 Pa. 426; Shisler's Estate, 2 Pa. Dist. R. 588.

The death of the principal puts an end to the agency, when the authority is not coupled with an interest.

1 Am. & Eng. Enc. Law, p. 1223; Boone v. Clarke, 3 Cranch, C. C. 389, Fed. Cas. No. 1,641.

The power must be ingrafted on an estate in the thing.

Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589.

An interest arising from commissions or the proceeds of a transaction is not an interest which will prevent revocation.

Missouri ex rel. Walker v. Walker, 125 U. S. 339, 31 L. ed. 769, 8 Sup. Ct. Rep. 929.

That death revokes the agency in the case of principal and broker has been directly held in Shisler's Estate, supra, and in Scruggs v. Driver, 31 Ala. 274.

The contention that, after the expiration of such option, the administrators might never sell the property to Wilfley, who already owned one half of it, without subjecting themselves to a liability to pay Crowe 10 per cent of any price which Wilfley might pay them for the mine, would be to deprive the administrators from making a sale to the natural and probable purchaser of their property.

Sibbald v. Bethlehem Iron Co. supra.

An agent cannot claim remuneration from either party unless it is clearly shown that both parties knew and assented to the agreement.

1 Am. & Eng. Enc. Law, 2d ed. p. 1113; Robbins v. Sears, 23 Fed. 875.

Mr. Chief Justice Fuller delivered the opinion of the court:

The supreme court of the territory was called upon to make a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court in the admission or rejection of evidence when excepted to. Our *jurisdiction is limited to the consideration of such exceptions and to determining whether the findings of fact support the judgment. Harrison v. Perea, 168 U. S. 311, 42 L. ed. 478, 18 Sup. Ct. Rep. 129; Young v. Amy, 171 U. S. 179, 43 L. ed. 127, 18 Sup. Ct. Rep. 802.

The statement of facts required by the statute should present clearly and precisely the ultimate facts. And while it may be objected to the statement in this case that it does not properly comply with that rule, for it is quite confused and gives a mass

innecessary details, yet we think the im-
fections in that regard should not be held
l, as a sufficient statement finally
rges. This will be understood by refer-
to the statement itself, which we have
forth for that purpose.

he bill of exceptions contains some minor
gs on questions propounded to witnesses,
the exceptions thereto were not insisted
in the supreme court nor considered
hat tribunal, so that the question be-
us is whether the findings of fact sup-
the judgment.

it several of the errors assigned are to
effect that the supreme court erred in
idering or determining the case upon
tions of fact, because the bill of excep-
s failed to state that it contained all
he evidence given in the case, and the
d failed "to show that the bill of ex-
ions contains all of the evidence given in
ase, or all of the evidence bearing upon
questions involved in the decision" of
court.

e supreme court proceeded upon the rec-
as containing all the evidence, and we
not inclined to hold that the contention
it should not have done so is open to
consideration under the limitations of
statute. But, be that as it may, we
k the record shows that all the evidence
contained in the bill of exceptions, and
that is sufficient, even though the bill
f did not so state in express terms.
nison County v. E. H. Rollins & Sons,
U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep.

aragraphs 1485 and 1582 of the Revised
utes of Arizona, 1901 (pp. 461, 474),
ide:

"Every paper filed in a case shall consti-
a part of the record of the case, in-
ing depositions and all written evidence
exhibits offered or admitted in evidence;
no papers thus filed or admitted in evi-
e, or offered in evidence and rejected
the court, need be incorporated in a
ement of facts in order to make it a
of the record."

On taking an appeal . . . the appel-
. . . shall cause to be filed in the
eme court . . . the original record
he case, together with a copy of all min-
entries made in the case, the same to
ertified to by the clerk of the district
t, with the seal of the court affixed, that
ntains a true copy of all minute entries
e in the case, and that the papers there-
attached are all the papers constituting
record of the case. . . ."

he clerk accordingly transmitted to the
eme court all of the original records and
s of the minute entries. The case com-
n for hearing, the minute entries state:

"The trial then proceeded upon the pleadings herein, in the presence of and before the court sitting without a jury, a jury having been expressly waived in open court by both parties hereto, and the plaintiff, to maintain upon his part the issues herein, introduced certain documentary evidence, and also called as a witness the following named person, to wit, George W. Crowe, the plaintiff, who was duly sworn, examined, and cross-examined, and thereupon the plaintiff rested his case. The defendant then, to maintain upon his part the issues herein, called as a witness the following named person, to wit, M. M. Trickey, who was duly sworn, examined, and cross-examined, and thereupon the defendant rested his case. The evidence being now adduced and the case closed, arguments of the respective counsel followed, and the cause being now fully submitted, the same was, by the court, taken under advisement."

The evidence of two witnesses, Wilfley and Gee, was taken by deposition, and their depositions were sent up in the transcript. The minute entries show that only two witnesses, *Crowe and Trickey, administrator, [237] were examined before the court, and their testimony is given in narrative form in the bill of exceptions, as well as the testimony of Wilfley and Gee. The minute entries, in speaking of the introduction of "documentary evidence," were manifestly intended to embrace depositions in that term. There is no room for presuming that any evidence was omitted, and the points to which the evidence adduced was addressed preclude such a suggestion.

We are brought, then, to the question of the sufficiency of the facts found to support the judgment. The findings may be summarized as follows:

Chapin and Neville each owned one fourth of the mine, and on April 1, 1899, signed a paper addressed to the Consolidated National Bank of Tuscon, Arizona, which is contained in the bill of exceptions, and, by reference, in the statement of facts, and was couched in these terms:

Gentlemen: The enclosed deed from N. H. Chapin, Marie Chapin, Jerry Neville, and Refugia Neville, parties of the first part, to Arthur R. Wilfley, party of the second part, is to be delivered to the said Arthur R. Wilfley upon the payment of the sum of $100,000 at or before the expiration of one year from the date hereof.

And you are further directed that all moneys sent you from time to time by the said Arthur R. Wilfley, with instructions to apply the same to the payment of the aforesaid purchase money, shall be so applied and

the same placed to the credit of N. H. Chapin and Jerry Neville.

Therefore, if the said Arthur R. Wilfley shall pay or cause to be paid the sum of money above mentioned, at or before the time aforesaid, you will then deliver the said deed to the said A. R. Wilfley, his agent or assigns. Otherwise the said deed is to be held subject to the order of the said N. H. Chapin and Jerry Neville.

Dated Washington, Arizona, April 1st, 1899.

This paper and the deed therein mentioned were deposited in escrow in the bank on that day.

[238] *The terms of the transaction had been arranged the latter part of March, and it was verbally agreed that Crowe should receive 10 per cent commission on the purchase money received by Chapin and Neville.

Chapin died January 11, 1900, and Trickey was appointed administrator February 8, 1900, and qualified as such. Neville died January 3, 1900, and Harmon was appointed administrator and qualified as such.

Wilfley failed to pay the money and take the property, and after the expiration of the time mentioned in the escrow agreement the deed in escrow was returned to Trickey, administrator.

On April 7, 1900, the administrators of the two estates made an agreement with Wilfley to execute a deed to the half interest on payment of $100,000, in amounts prescribed. This option also expired. Thereafter, and on the 19th of June, 1900, Trickey, as administrator of the estate of Chapin, entered into an agreement with Wilfley to convey to him the right, title, and interest of the estate of Chapin in the mining property (described as a quarter interest), on payment of $50,000, in designated amounts, and these payments were subsequently made.

Crowe had nothing whatever to do with either of the last-mentioned options, or with the sale of the property after the death of Chapin.

And the claim he presented to Trickey as administrator of Chapin's estate was for $5,000, being one half of the commission agreed to be paid to him in March, 1899, on the purchase price which would have been received by Chapin and Neville if the option of April 1, 1899, had been carried out.

In these circumstances we concur in the judgment of the supreme court of the territory.

In McGavock v. Woodlief, 20 How. 221, 15 L. ed. 884, it was laid down that in order to be entitled to commission "the broker must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on." But this rule is inapplicable when the *owner refuses, without sufficient reasons, to fulfil the agreement which the agent has made. Kock v. Emmerling, 22 How. 69, 16 L. ed. 292. Even though he could not have been compelled to carry out his contract if he had chosen to set up the statute of frauds. Holden v. Starks, 159 Mass. 503, 38 Am. St. Rep. 451, 34 N. E. 1069. Or when the agent's authority is revoked in bad faith before the completion of the sale. Sibbald v. Bethlehem Iron Co. 83 N. Y. 378, 38 Am. Rep. 441. In this case the subject was much considered, and Finch, J., in delivering the opinion of the court, said, among other things:

"It follows, as a necessary deduction from the established rule, that a broker is never entitled to commissions for unsuccessful efforts. . . . The broker may devote his time and labor, and expend his money with ever so much of devotion to the interests of his employer. and yet if he fails,—if, without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated,—he gains no right to commissions. . . . And, in such event, it matters not that, after his failure and the termination of his agency, what he has done proves of use and benefit to the principal. . . . He may have introduced to each other parties who otherwise would have never met; he may have created impressions which, under later and more favorable circumstances, naturally lead to, and materially assist in, the consummation of a sale. . . . This, however, must be taken with one important and necessary limitation. If the efforts of the broker are rendered a failure by the fault of the employer; if capriciously he changes his mind after the purchaser, ready and willing and consenting to the prescribed terms, is produced; or if the latter declines to complete the contract because of some defect of title in the ownership of the seller, —some unremoved encumbrance; some defect which is the fault of the latter,—then the broker does not lose his commissions. . . . One other principle applicable to such a contract as existed in the present case needs to be kept in view. Where no time for the continuance of the contract is fixed, by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. *Usual-[239] ly the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject, of course, to the right of the seller to sell independently. But, that having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to es-

ment of the broker's commis-

:he broker has been allowed a me within which to produce a fect a sale, he has failed to do seller in good faith and fairly ed the agency and sought other the aid of which a sale is con- t does not give the original it to commissions because the one whom he introduced, and e is in some degree aided or rd by his previous unsuccessful

sent case what Crowe had ob- ot an absolute contract of pur- option on the purchase.

of Chapin and Neville termi- hority of Crowe to sell on com- ch was not a power coupled rest, that is, an interest in the which the power was to operate. smanier, 8 Wheat. 174, 5 L. ed. ex rel. Walker v. Walker, 125 L. ed. 769, 8 Sup. Ct. Rep. 929. ss, up to the first of April, ley had availed himself of the e escrow agreement, the sale een completed and Crowe have to his commission; but Wil- do so, and the deed held in es- turned in accordance with the t agreement.

o legal basis for the imputa- faith, and it is not pretended as employed by Trickey or ren- rvice to him in the matter of e bare fact that what he had former negotiations may have to the accomplishment of the ey is not enough to sustain his commission sued for.

affirmed.

:GE W. CROWE, Appt.,

v.

RMON, Administrator of the of Jerry Neville, Deceased.

. C. Reporter's ed. 241.)

is governed by the decision in ckey, ante, 454.

[No. 70.]

ctober 31, 1906. Decided Janu- ary 21, 1907.

rom the Supreme Court of the of Arizona to review a judg- reversed a judgment of the District Court of Santa Cruz County, in that territory, in favor of plaintiff in an action to recover a broker's commission, and remanded the case to the latter court with directions to render judgment for defendant. Affirmed.

See same case below (Ariz.) 71 Pac. 1125.

Messrs. **W. C. Keegin and Seth E. Hazzard** submitted the cause for appellant. Mr. F. H. Hereford was on the brief.

Mr. **Eugene S. Ives** submitted the cause for appellee.

For the contentions of these counsel, see their briefs as reported in Crowe v. Trickey, ante, 454.

Mr. Chief Justice **Fuller**:

This case is identical in all essential respects with that just decided, and must take the same course.

Judgment affirmed.

A. B. BALLARD and Josephine W. Ballard, Plffs. in Err.,

v.

CHARLES W. HUNTER, A. Hackler, and the Board of Directors of the St. Francis Levee District.

(See S. C. Reporter's ed. 241-265.)

Constitutional law—equal protection of the laws—privileges and immunities—notice to nonresidents.

1. Nonresident owners of lands within the levee district created by Ark. act of Feb. 15, 1893, are not denied the equal protection of the laws or the privileges and immunities of citizens of the United States because § 11 of that act, as amended in 1895, while requiring personal service of summons upon resident owners or occupants for at least twenty days before rendering a decree of sale for unpaid levee taxes, provides for constructive service by publication upon nonresident owners of only four weeks.

Constitutional law—due process of law—validity of tax sale.

2. The decree of sale rendered in a suit

NOTE.—On the sufficiency of notice of tax sale — see note to Brown v. Pool, 9 L.R.A. 769.

On due process of law in tax cases—see note to Read v. Dingess, 8 C. C. A. 398.

As to what constitutes due process of law —see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to

to enforce the payment of levee taxes does not deprive the owners of their property without due process of law because of mistakes in ascribing the ownership of the lands, which do not increase the taxation, or cast that which should have been paid by one tract of land upon another tract.

Constitutional law—due process of law—validity of tax sale.

3. An erroneous judgment as to what costs the law allows in a suit to enforce the payment of levee taxes does not deprive the defendants in that suit of their property without due process of law.

Constitutional law—due process of law in tax proceedings—notice.

4. Four weeks' notice given by publication to nonresident owners of lands within the levee district created by Ark. act of Feb. 15, 1893, of the pendency of the suit authorized by § 11 of that act, as amended in 1895, to enforce the collection of levee taxes, is adequate to afford due process of law.

Constitutional law—due process of law in tax proceedings—notice.

5. Due process of law does not require that the nonresident owners of lands within a levee district should have personal notice of the pendency of a suit to collect the levee taxes assessed upon their lands.

Constitutional law—due process of law in tax proceedings—who may raise question.

6. Nonresident owners of lands within the levee district created by Ark. act of Feb. 15, 1893, who do not assert the existence of conditions which, under § 11 of that act, as amended in 1895, would entitle them to personal service of summons in a suit to enforce the payment of levee taxes, cannot abject that they were deprived of their property without due process of law by a decree of sale because the verified complaint in a suit to collect such taxes was insufficient, by reason of its failure to deny the existence of such conditions, to sustain service by publication.

Constitutional law—due process of law—constructive service of process—entry of warning order.

7. A decree for the sale of lands for unpaid levee taxes based on constructive service cannot be deemed to deny due process of law because there was no sufficient proof of publication of a warning order or notice filed or produced in court when the decree was made, where, under the local procedure, the entry of a warning even if required, is not jurisdictions

Judgment—conclusiveness on collate tack.

8. A recital in a decree for the lands for unpaid levee taxes that tl resident defendants were "severall structively summoned by publicati . proof of which has been previous herein" is conclusive as against a co attack based on the objection tha was no sufficient proof of publication warning order or notice filed or p in court when the decree was made, under the local procedure, the entr warning order, even if required, is risdictional.

[No. 123.]

Argued and submitted December 7 Decided January 21, 1907.

IN ERROR to the Supreme Court State of Arkansas to review a which affirmed a decree of the Cl Court of Crittenden County, in that denying relief from a decree for the lands for levee taxes. Affirmed.

See same case below, 74 Ark. 174, 8 252.

Statement by Mr. Justice McKenna

This writ of error is prosecuted to a judgment of the supreme court of sas, sustaining the validity of a the lands of plaintiffs in error fo taxes.

The state of Arkansas, by an act legislature passed February 15, 1893, eight counties, or portions of eight c which constituted what was known Francis basin," a levee district, for t pose of constructing and maintaini against the waters of the Mississipp and incorporated a board of directors it power to "levee the St. Francis f Arkansas and to protect and maint same." The board was also authori the purpose of building, repairing, an taining the levee, to assess and levy a a tax on all lands within the distr exceeding 5 per cent of the increase or betterment estimated to accrue fr

Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194, and Ulman v. Baltimore, 11 L.R.A. 225.

As to what service of process is sufficient to constitute due process of law—see note to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 577.

As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Le & N. R. Co. 14 L.R.A. 579.

On conclusiveness of judgments ally—see notes to Sharon v. Terry, 1 572; Bollong v. Schuyler Nat. Bank, A. 142; Wiese v. San Francisco Fund Soc. 7 L.R.A. 577; Morrill v. 11 L.R.A. 155; Bank of United St Beverly, 11 L. ed. U. S. 76; Johns Street Rail Co. v. Wharton, 38 L. e 429; and Southern P. R. Co. v. States, 42 L. ed. U. S. 355.

protection given by the levee against floods from the river. The act prescribed that the landowners should determine upon the assessments and levy of the tax in a meeting called for that purpose upon notice by the board, and prescribed the procedure to be observed in the assessment and levy of the tax, and provided that the lands assessed should be entered upon the books, in convenient subdivisions, as surveyed by the United States government, with appropriate columns showing the names and residences of owners of the lands, and mortgages of record, if any, known to the assessors; and that no error in the description of the lands should invalidate the assessments, if sufficient description was given to ascertain where the land was situated. The assessment was made a lien upon the lands in the nature of a mortgage.

[243] *Section 11 of the act was amended in 1895: As amended, it provided that a tax collector should be elected by the board of directors and be furnished a list of assessments for his county; that he should proceed to collect the assessments, and that if the assessments were not paid within thirty days a penalty of 25 per cent should at once attach for such delinquency. The board of directors was required to enforce the collection of the taxes by chancery proceedings in a court of the county in which the lands were situated, having chancery jurisdiction, and it was provided that the court should give judgment against the persons claiming to be the owners of the lands, if known to the board, for the amount of such assessments, interest, penalties, and costs. It was further provided that, if the ownership of any of the delinquent lands should be unknown to the board, the lands might be proceeded against "as being owned by unknown owners;" that the judgment should provide for sale of the delinquent land for cash by a commissioner of a court after advertisement, as hereafter set out; and, further, that the proceedings and judgment should be in the nature of proceedings *in rem*, and it should be immaterial if the ownership of the lands should be incorrectly alleged; that the judgment should be enforced only as against the land, and not against any other property. All lands for each of the counties might be included in one suit, and all delinquent owners, including those unknown, might be made defendants, notice of the pendency of the suit to be given as against nonresidents of the county and unknown owners respectively by publication weekly, for four weeks prior to the day of the term of court on which final judgment should be entered for the sale of the land, in some newspaper published in the county where the suit might be pending. The form of notice which might be given is inserted in the margin.†

*It was provided that where the owners [244] were unknown that fact should be stated in the published notice, and against any defendant who resided in the county, and whose ownership appeared on the records, notice should be given by the service of personal summons of the court at least twenty days before the day on which the defendant was required to answer, as set out in the summons. And the suit should stand for trial at the first term of the court after the complaint should be filed, if said four weeks in the case of a nonresident or unknown defendant, or twenty days in case of resident defendants, should expire before the first day of the term or during the term of the court to which the suit was brought, unless a continuance be granted for good cause shown, within the discretion of the court, and such continuance for good cause shown might be granted as to part of the land or defendants without affecting the duty of the court to dispose finally of the others as to whom no continuances might be granted. And it was further provided that actual service of summons should be had when the defendant was in the county, or when there was an occupant upon the land. In all cases where notice had been properly given and where no answer had been filed, and the cause decided for the plaintiff, the court, by its decree, should grant the relief as prayed in the complaint, and should require the commissioner to sell the lands at the *court- [245] house door, at public outcry, for cash, after first having advertised such sale weekly for two weeks consecutively, and convey to the purchasers the lands sold, the titles of which should thereupon vest in the purchaser against all persons whomsoever, saving rights to infants and insane persons. The act contained the following:

"Provided, that at any time within three years after the rendition of the final decree of the chancery court herein provided for, the owner of the lands may file his petition in the court rendering the decree, alleging

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†"St. Francis Levee District vs. Delinquent Lands. } Notice.

"The following named persons and corporations, and all others having or claiming an interest in any of the following described lands, are hereby notified that suit is pending in the circuit court of ——— county, Arkansas, to enforce the collection of certain levee taxes on the subjoined list of lands, each supposed owner's lands being set opposite his or her or its name, respectively, together with the amounts severally due from each, to wit."

Then shall follow a list of supposed own-

the payment of the taxes on said lands for the year for which they were sold, and, upon the establishment of that fact, the court shall vacate and shall set aside said decree."

Section 2 of the act of 1895, amending the act of 1893, provided as follows:

"That § 13 of said act be amended so as to read as follows: Said suit shall be conducted in accordance with the practice and proceedings of chancery courts in this state. except as herein otherwise provided, and except that neither attorneys nor guardians *ad litem*, nor any provision of § 5877 of Sandels & Hill's Digest of the Statutes of Arkansas, shall be required, and except that said suits may be disposed of on oral testimony, as in ordinary suits at law; and this law shall be liberally construed to give said assessment lists the effect of bona fide mortgages, for a valuable consideration, and a first lien upon said land as against all persons having an interest therein; Provided, That no informality or irregularity in holding the meetings or in the description or valuation of the lands, or in the names of the owners or the number of acres therein, shall be a valid defense to such action." [Ark. Acts 1895, pp. 91, 92.]

Suit was brought as provided for in the acts. and, in the complaint, plaintiff in error A. B. Ballard was made a defendant and named as a nonresident of Crittenden county, Arkansas, Josephine W. Ballard was not made a defendant. In the list of lands attached to and made part of the complaint the following appears:

[246] *Township 4 North, Range 7 East.

West half southeast quarter, section 32, T. 4 N. R. 7 E. 480 acres, assessed to A. B. Ballard—

Taxes for 1895, $19.20
" " 1896, 19.20
" " 1897, 19.20

West half northeast quarter, section 32, T. 4 N. R. 7 E. 80 acres, assessed to A. B. Ballard—

Taxes for 1895, $3.20
" " 1896, 3.20
" " 1897, 3.20

Northeast quarter, section 31, T. 4 N. R. 7 E. 160 acres, assessed to A. B. Ballard—

Taxes for 1895, $6.40
" " 1896, 6.40

A decree in due course passed against defendants. It designated the defendants who were duly served with summons, as shown by the return of the sheriff, and made default, and the defendants who were, as the decree recites, "severally constructively summoned by publication in the newspaper published in Crittenden county, Arkansas, weekly, for four weeks before this day, proof of which has been previously filed herein, and all of the before-named defendants . . . having failed to plead, answer, or demur to the complaint of the plaintiff, the court, on motion of the attorney for the plaintiff, awards a decree *pro confesso* as to them in favor of the plaintiff for the amount of taxes, interest, penalty, and costs due for their said lands." The court also found and recited the steps preceding the assessment of the taxes, the assessment of the same, and that "all of said taxes on said lands of said defendants are yet wholly unpaid and are delinquent." A lien was declared, and it was considered and adjudged that plaintiff recover from the defendants severally, to be enforced wholly against said lands, the amount of taxes, interest, penalty, and costs assessed, levied, and extended against the lands belonging to each of said defendants, respectively, for *the years 1893, 1894, 1895, 1896, and 1897. A list of the lands was given, in which were the lands assessed against A. B. Ballard (described in the opinion). The lands were decreed to be sold, and it was also decreed that there should be allowed to the commissioner fees as follows:

"For furnishing printer with list of lands to be advertised, five cents per tract, and for attending and making and reporting sale, twenty-five (25) cents per tract; and there shall be allowed to the printer for publishing said notice fifty (50) cents per tract, which fee shall be taxed as costs against each several tract, to be paid by the purchaser or person discharging said lien before sale, and the said commissioner shall report his proceedings hereunder to the next term of this court."

In the report of the commissioner of his proceedings under the decree he showed that he sold the lands in section 31 to A. Hackler and the lands in section 32 to C. W. Hunter, hereafter described.

The sale was approved and the deeds made were also approved.

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ers, with a descriptive list of said delinquent lands and amounts due thereon, respectively, as aforesaid; and said published notice may conclude in the following form:

"Said persons and corporations, and all others interested in said lands, are hereby notified that they are required by law to appear and make defense to said suit, or the same will be taken for confessed, and judgment final will be entered directing the sale of said lands for the purpose of collecting said delinquent levee taxes, together with the payment of interest, penalty, and costs allowed by law."

At September term of the court, 1899, the following order was entered:

"A. B. Ballard and Mrs. Josephine W. Ballard come by their solicitors and on their motion leave is given them to file herein their answer, motion, petition, and bill of review herein, and be made parties to this suit with reference to the N. E. ¼ of section 31, the southwest ¼ of section 32, and the south ½ of the northwest ¼ of section 32, all in township 4 north, range 7 east, and the said pleading is ordered to be filed and they are made defendants and parties to this suit for the purposes set out in said pleadings.

"And thereupon the said C. W. Hunter, by L. P. Berry, Esq., his attorney, enters his appearance herein and has ninety days given him within which to plead, answer, or demur herein."

It does not appear that A. Hackler or the board of directors of the levee district ever entered their appearance or were made parties to the proceeding.

*In compliance with the order, plaintiffs in error filed what is called in the record "Answer to Motion of Ballard." It commences as follows:

"To the Hon. E. D. Robertson, Chancellor:

"The answer and motion of A. B. Ballard, who is a citizen of the state of Florida, residing at Tampa, and Mrs. Josephine W. Ballard, who is a citizen of the state of Georgia, residing at Atlanta, also to be taken and considered as a petition, under §§ 5839–5843, Sandels & Hill's Digest, and as an original complaint, under §§ 4197–4199 of same, and under §§ 6120–6124 of same, and the amendments thereto, and as a bill of review under the chancery practice, as appears by the prayer herein."

It then sets out in detail the facts which constitute the basis of the assignment of errors in this court, presently given, as well as specifications of errors under the Constitution and statutes of the state. It prayed that the paper be considered in the several characters mentioned in its opening paragraph; that all the parties to the original suit be considered parties, including the purchasers at the sale; that the decree of the 14th of February, 1898, be "reviewed, reversed, and vacated, and that the report of the sales and the sales be set aside and the deeds canceled."

The case was submitted on a statement of facts, by which it was agreed that plaintiffs in error were the owners of the land on the 21st day of December, 1897, and that their title appeared of record. That at that date they were, and continued to be, respectively, citizens of Florida and of Georgia, and that they would testify that they had no knowledge of the suit or its pendency, or that taxes for levee purposes had been levied prior to the date of the sale of their lands and the purchase thereof by Hunter or Hackler, or "that any law on that subject had been enacted." That the clerk of the court was allowed $1 for each of the deeds made in pursuance of the sale, and allowed the fees set out in the decree, and all said sums were taxed as costs and paid *out of the [249] proceeds of sale. That plaintiff in error made the tenders to Hunter and Hackler, respectively, as stated in "their answer and motion filed herein on the 25th day of September, 1899, and in the manner and at the time stated, and that the said C. W. Hunter and A. Hackler, respectively, refused to receive such tenders, and severally refused to state the amounts that they claimed they were entitled to receive in order to redeem the said tracts of land respectively."

It was also agreed that the record of the suit, including all orders, returns of officers, minutes of proceedings, etc., should be read in evidence, subject only to objections for irrelevancy and incompetency.

The decree of the court, after reciting the submission of the case and upon what submitted, concluded as follows: "The court orders that all the relief as prayed for in the said answer, motion, petition, and original complaint of the said A. B. Ballard and Josephine W. Ballard be and the same is hereby denied and refused, and that the said answer, motion, petition, and original complaint be and the same is hereby dismissed."

The supreme court of the state affirmed the decree.

The errors assigned are that the supreme court erred in not decreeing that (1) The lands of plaintiffs in error were not properly described in the complaint. (2) and (3) In not decreeing that the sale was unlawfully made, for the reason that the lands of plaintiffs in error were sold as a whole and for taxes on the whole west one half of section 32, when plaintiffs in error did not own or claim the N. ½ of the N. W. ¼ of that section. (4) The decree was void because the lands were sold for sums not legally chargeable thereon. (5) That the acts of 1893 and 1895 required a notice to be given to the owners of the lands proceeded against in the suit they provided for, and no such notice was given, and the sales were therefore unauthorized and void. (6) The notice provided for by the act, assuming notice was given, was insufficient. It was not such a notice of the pendency of the suit as the act or the general law required to be given to the owners of lands resident in *the state of Arkansas [250] and Crittenden county, where the lands were located, and to persons owning lands there similarly circumstanced and subject to the same taxation, or persons having tenants on

such lands. All such persons were entitled by said act and had personal service for at least twenty days before the rendition of the decree of sale. Plaintiffs in error, respectively citizens of Georgia and Florida, were allowed and given constructive service, if any were given, only by publication in a newspaper, published in Crittenden county, and only weekly for four weeks, the first notice being, and required to be, only four weeks before the rendition of the decree. Plaintiffs in error had no personal or other notice of the suit, and did not appear therein. They were denied thereby the privileges and immunities of citizens of the United States and of Arkansas, and denied the equal protection of the laws within the state of Arkansas, and deprived of their property without due process of law, in violation of the Constitution of the United States, and the decree of sale and sales thereunder are void. (8) In not decreeing that the sales of the land of the plaintiffs in error were void and passed no title, because in the suit the laws of the state were violated in that (*a*) the complaint was deficient; (*b*) that there was no sufficient affidavit made and filed to support a warning order or order for notice to plaintiffs in error; (*c*) there was no sufficient proof of publication of warning order or notice filed or produced in court when decree of sale was made; (*d*) the decree of sale did not state, and the record did not show, the facts essential to the validity of the decree of sale as against plaintiffs in error or other lands. Thereby the plaintiffs in error, in violation of the Constitution of the United States, have been denied the benefit of such laws in this suit. (9) The decree of sale was rendered in violation of the laws of Arkansas requiring proof of evidence to support the allegations of the plaintiff as against plaintiffs in error, persons before the court only by a constructive service of process. And the decree was pronounced as [251] based on an alleged order or decree *pro confesso* entered in the suit, not authorized by law, and so was rendered without due process of law, in violation of the Constitution of the United States.

Mr. William M. Randolph argued the cause, and, with Messrs. George Randolph and Wassell Randolph, filed a brief for plaintiffs in error:

No judgment of a court is due process of law if rendered without jurisdiction in the court, or without notice to the party.

Scott v. McNeal, 154 U. S. 46, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; Harris v. Hardeman, 14 How. 343-346, 14 L. ed. 448, 449; Earle v. McVeigh, 91 U. S. 503, 23 L. ed. 398; Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237; Kibbe v. Benson, 17 Wall. 625, 21 L. ed. 741; Alexandria v. Fairfax, 95 U. S. 774, 24 L. ed. 583; Amy v. Watertown, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530; Knowlton v. Watertown, 130 U. S. 327-334, 32 L. ed. 956-958, 9 Sup. Ct. Rep. 539, 542; St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; Conley v. Mathieson Alkali Works, 190 U. S. 411, 47 L. ed. 1115, 23 Sup. Ct. Rep. 728; Pana v. Bowler, 107 U. S. 529, 27 L. ed. 424, 2 Sup. Ct. Rep. 704; Cheely v. Clayton, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 328; Wilson v. Seligman, 144 U. S. 41, 36 L. ed. 338, 12 Sup. Ct. Rep. 541; Pennoyer v. Neff, 95 U. S. 714-727, 24 L. ed. 565-570; Bischoff v. Wethered, 9 Wall. 812-814, 19 L. ed. 829, 830; Haddock, v. Haddock, 201 U. S. 567, 568, 50 L. ed. 868, 869, 26 Sup. Ct. Rep. 525; Hagar v. Reclamation Dist. No. 108, 111 U. S. 707, 708, 28 L. ed. 571, 572, 4 Sup. Ct. Rep. 663; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 41 L. ed. 518, 17 Sup. Ct. Rep. 161; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; Hodge v. Muscatine County, 196 U. S. 276, 49 L. ed. 477, 25 Sup. Ct. Rep. 237.

Whether the obligation of a contract has been impaired, or whether a citizen has been deprived of his property without due process of law, and similar questions, are determined, when presented in the courts of the United States, without reference to the local laws or decisions of the courts of the state where the controversy arose, even upon their own Constitution or statutes.

Scott v. McNeal, 154 U. S. 34, 45, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; Butz v. Muscatine (United States ex rel. Butz v. Muscatine) 8 Wall. 582-584, 19 L. ed. 493, 494; Pennoyer v. Neff, 95 U. S. 733, 24 L. ed. 572; Burgess v. Seligman, 107 U. S. 22, 27 L. ed. 364, 2 Sup. Ct. Rep. 10; Carroll County v. Smith, 111 U. S. 562, 28 L. ed. 519, 4 Sup. Ct. Rep. 539; Anderson v. Santa Anna Twp. 116 U. S. 362, 29 L. ed. 635, 6 Sup. Ct. Rep. 413; Spencer v. Merchant, 125 U. S. 352, 31 L. ed. 766, 8 Sup. Ct. Rep. 921; Huntington v. Attrill, 146 U. S. 663, 36 L. ed. 1133, 13 Sup. Ct. Rep. 224; Mobile & O. R. Co. v. Tennessee, 153 U. S. 492, 38 L. ed. 795, 14 Sup. Ct. Rep. 968; Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 48 L. ed. 784, 24 Sup. Ct. Rep. 576.

We do not insist that A. B. Ballard and Josephine W. Ballard were necessarily entitled to the service of a personal notice of the existence of the legislation, or of the assessments on their lands for levee taxes, or of the levy of the taxes, nor even of the suit brought to enforce the collection of the taxes. We admit that, being nonresidents

of the state of Arkansas, they could have been brought before the court by the publication of notice, or the constructive service of process, if there had been statutes providing for such notice or such service, and the statutes had been substantially pursued. But they were entitled to have the law complied with, and, if it has not been complied with, what has been done towards the sale of their lands is void as to them.

Greenstreet v. Thornton, 60 Ark. 369, 27 L.R.A. 735, 30 S. W. 347; Wilson v. Gaylord, 77 Ark. 477, 92 S. W. 26; Hassall v. Wilcox, 130 U. S. 493, 32 L. ed. 1001, 9 Sup. Ct. Rep. 590; Martin v. Ward, 60 Ark. 510, 30 S. W. 1041; Clark v. Reyburn, 8 Wall. 318, 19 L. ed. 354; Bigler v. Waller, 14 Wall. 297, 20 L. ed. 891; Howell v. Western R. Co. (Howell v. McAden) 94 U. S. 463, 24 L. ed. 254; Shillaber v. Robinson, 97 U. S. 68, 24 L. ed. 967; Chicago, D. & V. R. Co. v. Fosdick, 106 U. S. 47, 71, 72, 27 L. ed. 47, 55, 56, 1 Sup. Ct. Rep. 10; 2 Jones, Mortg. §§ 1038–1046, 1563, 1565, 1573, 1586; State v. Bailey, 27 Ark. 473; Pardee v. Aldridge, 189 U. S. 429, 47 L. ed. 883, 23 Sup. Ct. Rep. 514; Gardner v. Ogden, 22 N. Y. 339, 78 Am. Dec. 192; Brown v. Levee Comrs. 50 Miss. 468; Earle v. McVeigh, 91 U. S. 508, 23 L. ed. 400; Hunt v. Wickliffe, 2 Pet. 201, 214, 215, 7 L. ed. 397, 402; Hollingsworth v. Barbour, 4 Pet. 466, 472, 7 L. ed. 922, 924; Galpin v. Page, 18 Wall. 351, 369, 21 L. ed. 959, 963; Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co. 139 U. S. 137, 35 L. ed. 118, 11 Sup. Ct. Rep. 512; Roller v. Holly, 176 U. S. 398, 406, 44 L. ed. 520, 523, 20 Sup. Ct. Rep. 410.

We do not deny that the state of Arkansas had the power to enact the legislation providing for the assessment and collection of the levee taxes on the lands embraced in the two acts of the general assembly, and also the power to make the taxes assessed liens on the lands, and, in order to collect the taxes, to provide by legislation for the bringing and prosecution of the special suit in the chancery court authorized by the two acts. We concede, also, that the state had the power to provide by legislation for the bringing of the lands assessed for taxation and the owners of them, with respect to those lands, before one of its courts as defendants to the suit authorized, by publication of notice, or by substituted service of process, where the owners of the land could not be personally served with process within the state.

See Roller v. Holly, 176 U. S. 398, 402–407, 44 L. ed. 520, 522–524, 20 Sup. Ct. Rep. 410.

But the state, as against A. B. Ballard and Josephine W. Ballard, who were citizens of Florida and Georgia, respectively, and resided in those states, and owned the lands in question here, located in Crittenden county, Arkansas, could not authorize the special suit provided for in the two acts of its general assembly, until those lands were substantially brought under the control of the court, in the suit, in the manner prescribed in its legislation; and could not, in the suit, with respect to those lands, dispense with notice to A. B. Ballard and Josephine W. Ballard, the owners, of the institution, or pendency, or object of the suit, or how or when they should appear and make defense, and bind them by the decrees or proceedings in the suit.

Hart v. Sansom, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586; Woodruff v. Taylor, 20 Vt. 65; Brown v. Levee Comrs. 50 Miss. 469; Bardwell v. Collins (Bardwell v. Anderson) 44 Minn. 97, 9 L.R.A. 152, 20 Am. St. Rep. 547, 46 N. W. 315; Smith v. Hurd, 50 Minn. 503, 36 Am. St. Rep. 661, 52 N. W. 922; Dull v. Blackman, 169 U. S. 243, 42 L. ed. 733, 18 Sup. Ct. Rep. 333.

It was thoroughly settled by the decisions under the acts of Congress providing for the confiscation of the property of persons engaged in the late rebellion against the government of the United States, that the district courts of the United States acquired no possession of, and no jurisdiction for the condemnation of, property forfeited, and no power to make any order with reference to such property, or fix a lien upon it, encumbering the title, or sufficient to bind the title, until the property was actually seized, or fixed specially under the process authorized by the statute to be issued for the purpose.

Miller v. United States (Page v. United States) 11 Wall. 268, 294, 296, 20 L. ed. 135, 141, 142; Pelham v. Way, 15 Wall. 196, 201, 202, 21 L. ed. 55–57; Pike v. Wassell, 94 U. S. 711, 24 L. ed. 307.

The jurisdiction and authority of the circuit or chancery court to decree sales of the lands proceeded against, in the suit provided for, to collect the levee taxes, were expressly limited and confined to cases where the notice prescribed in that act had been properly given, as directed in the act, and where no answer had been filed, or, if an answer had been filed, then to cases where the decision of the court, on the final hearing as to the person answering, or the land embraced in the answer, was in favor of the St. Francis Levee District, and against such owner or his land, and that the fact of the notice having been given, as required, must be established as a condition precedent in order to fix the lien on the land, or authorize the decree of sale.

Gregory v. Bartlett, 55 Ark. 30, 17 S. W. 344; McCarter v. Neil, 50 Ark. 188, 6 S. W.

731; Galpin v. Page, 18 Wall. 366, 21 L. ed. 962; Dick v. Foraker, 155 U. S. 404, 39 L. ed. 201, 15 Sup. Ct. Rep. 124.

In Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271, the court took the distinction between cases where the jurisdictional facts do not exist, and cases presenting the absence of facts quasi jurisdictional, or jurisdictional only in a qualified sense.

In the first class, the judgments or decrees are void. In the second class, erroneous, or voidable only.

Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; Eltonhead v. Allen, 55 C. C. A. 671, 119 Fed. 127; Scott v. Pleasants, 21 Ark. 364; Bloom v. Burdick, 1 Hill, 143, 37 Am. Dec. 299; Wright v. Douglass, 10 Barb. 111; Gregory v. Bartlett, 55 Ark. 35, 17 S. W. 344; Elliott v. Peirsol, 1 Pet. 328, 7 L. ed. 164; Williamson v. Berry, 8 How. 495, 12 L. ed. 1170; Windsor v. McVeigh, 93 U. S. 282-284, 23 L. ed. 917, 918; Ludlow v. Ramsey, 11 Wall. 581, 20 L. ed. 216; Pennoyer v. Neff, 95 U. S. 724-726, 24 L. ed. 569, 570; Voorhees v. Jackson, 10 Pet. 449, 9 L. ed. 490; Applegate v. Lexington & C. County Min. Co. 117 U. S. 255, 29 L. ed. 892, 6 Sup. Ct. Rep. 742; Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co. 139 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. Rep. 512.

The furthest the decisions of the courts entitled to consideration as authority have gone in support of the jurisdiction of courts over the subject-matter and parties to suits is to hold that where the court rendering the judgment or decree is a superior court of record, of general jurisdiction, proceeding in the usual way, according to the ordinary course of courts of law, or courts of chancery in suits before them, and the subject-matter is within the jurisdiction of the court, and nothing appears in the record showing a want of jurisdiction over the subject-matter or the parties, then, when the decree or judgment of such court is called in question in another court, there is a presumption that the court had jurisdiction, both of the subject-matter and the parties, and that its judgment or decree was rendered within its jurisdiction, and it is immaterial whether the facts showing the jurisdiction are affirmatively recited in the record or not. The cases go no further than the proposition stated.

Borden v. State, 11 Ark. 519, 54 Am. Dec. 217; Boyd v. Roane, 49 Ark. 397, 5 S. W. 704; McLaughlin v. McCrory, 55 Ark. 444, 29 Am. St. Rep. 56, 18 S. W. 762; McLain v. Duncan, 57 Ark. 50, 20 S. W. 597; McConnell v. Day, 61 Ark. 464, 33 S. W. 731; White v. Smith, 63 Ark. 513, 39 S. W. 555; Voorhees v. Jackson, supra; Harvey v. Tyler, 2 Wall. 342, 17 L. ed. 873; Secombe v. Milwaukee & St. P. R. Co. 23 Wall. 108, 23 L. ed. 67; Applegate v. Lexington & C. County Min. Co. supra; Shields v. Coleman, 157 U. S. 169, 182, 183, 39 L. ed. 660, 665, 15 Sup. Ct. Rep. 570.

But there are exceptions to the rule just stated, just as well established as the rule itself, and the recitals in the record of the jurisdictional facts are wholly impotent to establish the jurisdiction, when, as a matter of fact, it really did not exist.

State v. Hill, 50 Ark. 461, 8 S. W. 401; Ridgeway v. Bank of Tennessee, 11 Humph. 523; Bell v. Williams, 1 Head, 229; Bridgeport Sav. Bank v. Eldredge, 28 Conn. 556, 73 Am. Dec. 688; Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; Ex parte Pile, 9 Ark. 336; Ryan v. Boyd, 33 Ark. 778; Kizer Lumber Co. v. Mosely, 56 Ark. 544, 20 S. W. 409; McLeod v. Tisdale, 57 Ark. 354, 21 S. W. 465; Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. ed. 362.

And before the recital can be evidence against A. B. Ballard and Josephine W. Ballard, of what it recites, it must be made to appear independently of the recital itself that they were parties to the suit, and before the court for the purposes of the suit, when the decree containing the recital was pronounced. For it is certainly the settled law, that no one but parties or privies are bound by, or in any way affected by, the record or proceedings in a suit.

Trammell v. Thurmond, 17 Ark. 212; Greenstreet v. Thornton, 60 Ark. 374, 27 L.R.A. 735, 30 S. W. 347; Harris v. Hardeman, 14 How. 341, 14 L. ed. 447; Hollingsworth v. Barbour, 4 Pet. 477, 8 L. ed. 926; Mutual Ben. L. Ins. Co. v. Tisdale, 91 U. S. 238, 23 L. ed. 314; Hegler v. Faulkner, 153 U. S. 109, 38 L. ed. 653, 14 Sup. Ct. Rep. 779; Pardee v. Aldridge, 189 U. S. 493, 47 L. ed. 886, 23 Sup. Ct. Rep. 514; Hannah v. Carrington, 18 Ark. 85; McArthur v. Scott, 113 U. S. 388, 28 L. ed. 1030, 5 Sup. Ct. Rep. 652.

Citizens of other states and nonresidents of the state in which the suit was brought and the judgment or decree rendered, and not personally served with process within the state, and not appearing in the suit, are not estopped by the statements or recitals in the judgment or decree, or elsewhere in the record, of the service of process on them, or of notice to them to appear, or of their appearance in the suit. Notwithstanding such statements or recitals in the record, such judgment or decree does not estop such non[illegible]nt citizens of other states, and they may [illegible]ny their truth, and if, upon the trial, it is not established affirmatively against th[illegible] that the court pro-

nouncing the judgment or decree had jurisdiction of the subject-matter, and personally of them, they are not bound by the judgment or decree, and it is absolutely void as to them.

Pana v. Bowler, 107 U. S. 545, 27 L. ed. 430, 2 Sup. Ct. Rep. 704; Wilson v. Seligman, 144 U. S. 41, 36 L. ed. 338, 12 Sup. Ct. Rep. 541; Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92; St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; Owens v. Henry (Owens v. McCloskey) 161 U. S. 642, 40 L. ed. 837, 16 Sup. Ct. Rep. 693; Cooper v. Newell, 173 U. S. 565, 43 L. ed. 811, 19 Sup. Ct. Rep. 506; Thormann v. Frame, 176 U. S. 356, 44 L. ed. 503, 20 Sup. Ct. Rep. 446; Howard v. De Cordova, 177 U. S. 613, 44 L. ed. 910, 20 Sup. Ct. Rep. 817; Andrews v. Andrews, 188 U. S. 37, 47 L. ed. 371, 23 Sup. Ct. Rep. 237; Barkman v. Hopkins, 11 Ark. 157; Iglehart v. Moore, 16 Ark. 46; Pickett v. Ferguson, 45 Ark. 192, 55 Am. Rep. 545; Needham v. Thayer, 147 Mass. 536, 18 N. E. 429; Vilas v. Plattsburgh & M. R. Co. (Vilas v. Butler) 123 N. Y. 453, 9 L.R.A. 844, 20 Am. St. Rep. 771, 25 N. E. 941; Henning v. Planters' Ins. Co. 28 Fed. 440.

If the face of the record discloses affirmatively what was done toward acquiring jurisdiction, there is no presumption that anything more was done to confer it. Hence, if the record recites such jurisdictional facts, and these are insufficient to confer jurisdiction, the authority of the court to pronounce judgment in the particular case cannot be aided by the indulgence in presumptions that such recital is incorrect, or incomplete, for the affirmation of the existence of jurisdictional facts precludes the possibility of support by way of presumptions that otherwise would prevail were there no recitals whatever in the record. If the disclosures of the record show affirmatively a want of jurisdiction, the judgment cannot be supported by any presumptions, and is a nullity. And if the entire record shows process was not served, recitals of due service of process cannot sustain the judgment.

Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; National Exch. Bank v. Wiley, 195 U. S. 257, 49 L. ed. 184, 25 Sup. Ct. Rep. 9; Settlemier v. Sullivan, 97 U. S. 444, 24 L. ed. 1110; Gregory v. Bartlett, 55 Ark. 30, 17 S. W. 344; Dick v. Foraker, 155 U. S. 404, 39 L. ed. 201, 15 Sup. Ct. Rep. 124; Lusk v. Perkins, 48 Ark. 238, 2 S. W. 847; Brodie v. Skelton, 11 Ark. 130; Coons v. Throckmorton, 25 Ark. 60; Cissell v. Pulaski County, 3 McCrary, 446, 10 Fed. 894; Parr v. Matthews, 50 Ark. 390, 8 S. W. 22; Cheely v. Clayton, 110 U. S. 708-710, 28 L. ed. 300, 1, 4 Sup. Ct. Rep. 328; Martin v. McDiarmid, 55 Ark. 213, 17 S. W. 877; Nevada County v. Williams, 72 Ark. 397, 81 S. W. 384; Galpin v. Page, 18 Wall. 368, 21 L. ed. 963; Hollingsworth v. Barbour, 4 Pet. 466, 7 L. ed. 922; Roller v. Holly, 176 U. S. 402-407, 44 L. ed. 522-524, 20 Sup. Ct. Rep. 410.

A distinction exists between proceedings of a superior court in cases where it has general jurisdiction, and cases of special or statutory jurisdiction, where the court exercises summary powers, contrary to the usual course of proceedings in a suit at law or in equity.

Gibney v. Crawford, 51 Ark. 39, 9 S. W. 309; Milor v. Farrelly, 25 Ark. 353; Morris v. Dooley, 59 Ark. 487, 28 S. W. 30, 430; Pulaski County v. Stuart, 28 Gratt. 879; Hindman v. O'Connor, 54 Ark. 627, 13 L.R.A. 490, 16 S. W. 1052; Galpin v. Page, 18 Wall. 367, 21 L. ed. 963.

A. B. Ballard and Josephine W. Ballard were entitled to be treated substantially the same as all other owners of lands subject to the levee taxes, in the suit for the collection of those taxes.

Ward v. Maryland, 12 Wall. 430, 20 L. ed. 452; Yick Wo v. Hopkins, 118 U. S. 367, 30 L. ed. 225, 6 Sup. Ct. Rep. 1064; Slaughter-House Cases, 16 Wall. 77, 21 L. ed. 409; Cole v. Cunningham, 133 U. S. 113, 114, 33 L. ed. 541, 542, 10 Sup. Ct. Rep. 269; Blake v. McClung, 172 U. S. 256, 257, 43 L. ed. 438, 439, 19 Sup. Ct. Rep. 165; Ex parte Deeds, 75 Ark. 542, 87 S. W. 1030.

The notice was not a reasonable notice, and was not due process of law.

Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; Clapp v. Houg, 12 N. D. 600, 65 L.R.A. 757, 102 Am. St. Rep. 589, 98 N. W. 710; Lockman v. Lang, 65 C. C. A. 621, 132 Fed. 6; Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 318, 319, 43 L. ed. 461, 462, 19 Sup. Ct. Rep. 205; Marx v. Hanthorn, 148 U. S. 183-185, 37 L. ed. 414, 415, 13 Sup. Ct. Rep. 508; Cunnius v. Reading School District, 198 U. S. 476, 477, 49 L. ed. 1132, 1133, 25 Sup. Ct. Rep. 721.

Not only must the notice be, in itself, sufficient, and be properly given, but, to constitute due process of law, it must place the defendant in a position to assert his rights, and have the benefit of them, and he must not be disabled from doing so by any obstruction put in his way.

Dean v. Nelson, 10 Wall. 172, 19 L. ed. 929; McVeigh v. United States, 11 Wall. 259, 20 L. ed. 80; Lasere v. Rochereau, 17 Wall. 437, 21 L. ed. 694; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Hovey v. Elliott, 167 U. S. 445, 42 L. ed. 230, 17 Sup. Ct. Rep. 841.

Being foreign laws, A. B. Ballard and

Josephine W. Ballard were not required to take notice of act No. 19 of the year 1893, and No. 71 of the year 1895.

Story, Confl. L. §§ 637, 638a; Wharton, Confl. L. §§ 772, 773; 1 Wharton, Ev. §§ 292, 300; 2 Pom. Eq. Jur. § 854; Miller v. Johnston, 71 Ark. 174, 72 S. W. 371.

The courts below—both the Crittenden chancery court and the supreme court of Arkansas—have treated the case as one presenting all the questions involving the title to the lands in controversy, as between A. B. Ballard and Josephine W. Ballard, on the one side, and Hunter and Hackler, respectively, on the other, which could be raised, or could be presented in any suit or proceeding that either party could institute for the purpose of trying those questions.

Randolph v. Nichol, 74 Ark. 101, 84 S. W. 1037.

And all the questions that could be presented in any such suit are now before this court upon this writ of error.

Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; Jones v. Great Southern Fireproof Hotel Co. 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370, 54 C. C. A. 165, 116 Fed. 794, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576; Thomas v. Ohio State University, 195 U. S. 207, 49 L. ed. 160, 25 Sup. Ct. Rep. 24; W. L. Wells Co. v. Gastonia Cotton Mfg. Co. 198 U. S. 177, 49 L. ed. 1003, 25 Sup. Ct. Rep. 640; Butz v. Muscatine (United States ex rel. Butz v. Muscatine) 8 Wall. 575, 19 L. ed. 490; Olcott v. Fond du Lac County, 16 Wall. 690, 21 L. ed. 386; Parker v. Overman, 18 How. 137, 15 L. ed. 318; Martin v. Barbour, 140 U. S. 634, 35 L. ed. 546, 11 Sup. Ct. Rep. 944.

The decree of sale does not state, and the record does not show, the facts essential to the validity of the decree of sale, as against A. B. Ballard and Josephine W. Ballard, or their lands, and thereby they have been denied the benefit of the laws of the state of Arkansas, applicable to the facts of their case, in violation of the Constitution of the United States, whereby they have been deprived of their property without due process of law.

Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; Morse v. Presby, 25 N. H. 302; Harvey v. Tyler, 2 Wall. 332, 17 L. ed. 872; Gibney v. Crawford, 51 Ark. 34, 9 S. W. 309; Trice v. Crittendon County, 7 Ark. 159; Hudson v. Jefferson County Court, 28 Ark. 362; Bush v. Visant, 40 Ark. 130; Lusk v. Perkins, 48 Ark. 239, 2 S. W. 847; Cross v. Wilson, 52 Ark. 312, 12 S. W. 576; Morris v. Dooley, 59 Ark. 486, 28 S. W. 30, 430; Games v. Stiles, 14 Pet. 322, 328, 10 L. ed. 476, 479; Early v. Doe, 16 How. 618, 619, 14 L. ed. 1082, 1083; Ransom v. Williams, 2 Wall. 318, 319, 17 L. ed. 804, 805; Deputron v. Young, 134 U. S. 256, 257, 33 L. ed. 920, 931, 10 Sup. Ct. Rep. 539; Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co. 139 U. S. 147, 148, 35 L. ed. 119, 120, 11 Sup. Ct. Rep. 512; Thatcher v. Powell, 6 Wheat. 119, 5 L. ed. 221; Sabariego v. Maverick, 124 U. S. 292-296, 31 L. ed. 442, 443, 8 Sup. Ct. Rep. 461; Williams v. Peyton, 4 Wheat. 77, 4 L. ed. 518; M'Clung v. Ross, 5 Wheat. 116, 5 L. ed. 46; Cissell v. Pulaski County, 3 McCrary, 446, 10 Fed. 893; Hogins v. Brashears, 13 Ark. 242; McDermott v. Scully, 27 Ark. 226; Thompson v. Scanlan (Ark.) 16 S. W. 197; Little v. Herndon, 10 Wall. 26, 19 L. ed. 878; Williams v. Skipwith, 34 Ark. 529.

The attempt made in act No. 71 of the year 1895, and in the present suit, to make the order *pro confesso* and the decree based on it conclusive against A. B. Ballard and Josephine W. Ballard, is void and without effect as to A. B. Ballard and Josephine W. Ballard, because, in effect, the act and the suit have undertaken to deprive them of their property without due process of law, and have denied to them, within the state of Arkansas, the equal protection of the laws.

Martin v. Barbour, 34 Fed. 701, 140 U. S. 634, 35 L. ed. 546, 11 Sup. Ct. Rep. 944; Cunnius v. Reading School District, 198 U. S. 476, 477, 49 L. ed. 1132, 1133, 25 Sup. Ct. Rep. 721; Crowell v. Barham, 57 Ark. 186, 21 S. W. 33; Alexander v. Gordon, 41 C. C. A. 228, 101 Fed. 92; Caldwell v. Barrett, 71 Ark. 310, 74 S. W. 748; Bagley v. Castlin, 42 Ark. 77; Files v. Fuller, 44 Ark. 273; Shaw v. Hill, 46 Ark. 333; Thweat v. Howard, 68 Ark. 431, 59 S. W. 764; Dash v. Van Kleeck, 7 Johns. 508, 5 Am. Dec. 291; Denny v. Mattoon, 2 Allen, 361, 79 Am. Dec. 794; Greenough v. Greenough, 11 Pa. 489, 51 Am. Dec. 567; Groesbeck v. Seeley, 13 Mich. 329; Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656; Martin v. Snowden, 18 Gratt. 100; Bannon v. Burnes, 39 Fed. 893; Black, Tax Titles, 1st ed. § 253; Cooley, Taxn. 1st ed. chap. 15, 355, 356; Cooley, Const. Lim. 6th ed. 452, 453.

Mr. L. P. Berry submitted the cause for defendants in error.

Assuming that the procedure was such as was authorized by the levee act, the mere fact that the lands of plaintiffs in error were sold in part for taxes, penalty, interest, and costs not legally chargeable thereon, if, in fact, true, does not amount to a deprivation of property without due process of law.

Burcham v. Terry, 55 Ark. 388, 29 Am. St. Rep. 42, 18 S. W. [illegible] Doyle v. Martin, [illegible] Ark. 37, 17 S. W. [illegible]; Kelley v. Lonoke Levee District, 74 Ark. 202, 85 S. W. [illegible]

7 S. W. 638; Minneapolis R. Terminal Co. v. Minnesota Debenture Co. 81 Minn. 66, 3 N. W. 485.

Due process of law does not require that the true owner of land be named in a judicial proceeding for the collection of delinquent taxes, where the land is described in public notice directed to an alleged owner and all others interested therein.

Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Tyler v. Registration Ct. Judges, 175 Mass. 1, 51 L.R.A. 433, 55 N. E. 812.

The four weeks' notice provided by the levee act by publication to unknown owners and owners of lands who are nonresidents of the county in which suit is brought is not so unreasonable as to amount to a taking of property without due process of law, nor does it abridge the privileges or immunities of citizens of the United States, nor does it discriminate against citizens of other states, nor does it amount to a denial of the equal protection of the laws to persons within the jurisdiction of the court.

Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 314, 43 L. ed. 460, 9 Sup. Ct. Rep. 205; Davidson v. New Orleans and Tyler v. Registration Ct. Judges, supra; Hager v. Reclamation District No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Wurts v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; Fallbrook Irrig. District v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 192, 46 L. ed. 1113, 1114, 22 Sup. Ct. Rep. 857; Manson v. Duncanson, 166 U. S. 533, 41 L. ed. 1105, 17 Sup. Ct. Rep. 647; Johnson v. Hunter, 127 Fed. 222; Huling v. Kaw Valley R. & Improv. Co. 130 U. S. 559-563, 32 L. ed. 1045-1047, 9 Sup. Ct. Rep. 603.

The levee act is not a private act, but a public act, operating over a limited territory, of which plaintiffs in error were bound to take notice, and proceedings had under this levee act constitute due process of law.

Huling v. Kaw Valley R. & Improv. Co. and Johnson v. Hunter, supra.

An erroneous construction by a state court of matters of practice under a state statute, where the statute, as construed by the court, provided for notice and an opportunity to be heard, is not a deprivation of property without due process of law.

Baltimore Traction Co. v. Baltimore Belt R. Co. 151 U. S. 138, 38 L. ed. 102, 14 Sup. Ct. Rep. 294; Castillo v. McConnico, 168 U. S. 683, 42 L. ed. 625, 18 Sup. Ct. Rep. 229; Brown v. New Jersey, 175 U. S. 175, 44 L. ed. 120, 20 Sup. Ct. Rep. 77; Allen v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; West v. Louisiana, 194 U. S. 263, 48 L. ed. 969, 24 Sup. Ct. Rep. 650; Thorington v. Montgomery, 147 U. S. 492, 37 L. ed. 252, 13 Sup. Ct. Rep. 394; Re King, 46 Fed. 911.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The assignments of error present the contention that plaintiffs in error have been deprived of their property without due process of law. One of them urges, in addition, the clauses of the 14th Amendment, which prohibit a state from making or enforcing any law which will abridge the privileges or immunities of citizens of the United States, and from depriving any person within her jurisdiction of the equal protection of the laws. Plaintiffs in error invoke those provisions against the statutes of Arkansas, because of the different manner and time of service of summons of the suit authorized by said statutes to enforce the payment of the levee taxes. It is contended that, by requiring personal service of summons upon resident owners or occupants of lands for at least twenty days before the rendition of the decree of sale, and providing for constructive service by publication upon nonresident owners of only four weeks, a discrimination is made between owners of lands, and that nonresident owners are thereby denied the rights secured to them by the Constitution of the United States. We have no doubt of the power of the state to so discriminate, nor do we think extended discussion is necessary. Personal service upon nonresidents is not always within the state's power. Its process is limited by its boundaries. Constructive service is at times a necessary resource. The land stands accountable to the demands of the state, and the owners are charged with the laws affecting it and the manner by which those demands may be enforced. Huling v. Kaw Valley R. & Improv. Co. 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603. This accountability *of the land and the knowledge the [255] owners must be presumed to have had of the laws affecting it is an answer to the contention of the insufficiency of the service. Certainly it was not so insufficient that it can be said that a difference in the time allowed for such service was not the equivalent of that allowed to resident owners. Mixed with the contention is a charge that the notice to nonresidents did not comply with the act of 1893 or the general law of the state, but this is decided against plaintiffs in error by the supreme court of the state, and we accept its ruling.

In passing upon the other contentions of plaintiffs in error we are brought to the consideration of what is due process of law. A precise definition has never been attempted. It does not always mean proceedings in court. Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335 Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case. Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Iowa R. C. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344.

In Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616, a proposition was laid down which has since been quoted many times. The court said, at pages 104 and 105, L. ed. on pages 619 and 620: "That whenever, by the laws of a state or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." And Mr. Justice Bradley, in a concurring opinion, said, on pages 107 and 108, L. ed. on pages 620 and 621, "that, in judging what is 'due proc-
[256] ess of *law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular state may require." See also Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894, and Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

In Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229, prior decisions defining due process of law were applied to a law assessing taxes. The case involved the validity of a title derived from a tax sale made to enforce delinquent state taxes. The title thus acquired was assailed on the ground that the assessment upon which it was based was void because the property was not assessed in the name of its owner. The state law made the deed given in pursuance of the sale prima facie evidence of the fact that the property was subject to taxation and the fact that the taxes had not been paid, and conclusive evidence that the property had been assessed, the taxes levied, and the property advertised according to law; also that the property was adjudicated and sold, as stated in the deed, and all the prerequisites of the law were complied with, from the assessment up to and including the execution and registry of the deed. The state court sustained the sale. This court, in passing upon the contention that the assessment and sale constituted a taking of property without due process of law, went behind the presumptions created by the deed, considered the alleged defects in the assessment and the advertisement, and decided that a notice of thirty days by publication was due process of law. The court also decided that, although the statutes under which the assessment was made provided *for the placing of the name of the owner on the assessment roll, where such name was known, they also provided that the property assessed should be described in the assessment roll; and, therefore, that the notice required by the statute was not addressed to each person assessed, but to all persons having property subject to taxation. It was held that the statute afforded both constructive and actual notice. "It cannot be doubted," it was said at page 681, L. ed. at page 625, Sup. Ct. Rep. at page 232, "that, in the exercise of its taxing power, the state of Louisiana could have directed that the property subject to its taxing authority should be assessed without any reference whatever to the name of the owner; that is to say, by any such description and method as would have been legally adequate to convey either actual or constructive notice to the owner. As said in Witherspoon v. Duncan, 4 Wall. 217, 18 L. ed. 342: 'It is not the province of this court to interfere with the policy of the revenue laws of the state, nor with the interpretation given to them by their courts. Arkansas has the right to determine the manner of levying and collecting taxes, and can declare that the particular tract of land shall be chargeable with the taxes, no matter who is the owner or in whose name it is assessed and

dvertised, and that an erroneous assessment does not vitiate a sale for taxes.'" See lso Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 0, 23 Sup. Ct. Rep. 20, and Leigh v. Green, 93 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 90.

In view of these principles let us examine he contentions of the plaintiffs in error.

First. They charge that there is an incorrect description of the lands owned by laintiffs in error in the original complaint nd decree, in that they did not own all the ands described or sold. In the original transcript of the record there were apparently liscrepancies between the lands assessed and those described in the decree. These discrepancies have been corrected by the return o a certiorari granted for that purpose, and t appears that the lands assessed and those decreed to be sold in section 32, T. 4 N., R. E., were the W. ½ and S. E. ¼, 480 acres, W. ½ of N. E. ¼, 80 acres. Plaintiffs *in error, however, allege that they owned only the S. W. ¼ and the S. ½ of the N. W. ¼, and contend that the two tracts owned by them made up 240 acres, and the two tracts sold by the commissioner and conveyed to Hunter, embracing such 240 acres, made 480 acres. Thus, it is urged, the lands plaintiffs in error owned were sold to pay the levee taxes on land they did not own, and their lands were thereby taken without due process of law.

This point was made in the complaint attacking the decree and sale, but was not passed on by the supreme court. Presumably the court regarded the point as precluded by the original decree, and not a ground upon which the decree could be attacked, and this is our view. What lands were properly assessed to Ballard and what lands he owned were facts to be alleged in the original suit and established by the proof there introduced or by admission through the default of the owners of the lands. If there was error it cannot be a ground of setting aside the decree if the court had acquired jurisdiction to render the decree. Error or irregularities in the suit do not take from it or its decree the attribute of due process. Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; Iowa C. R. Co. v. Iowa, supra. It is only this aspect of the suit and decree with which we are concerned. No defense, therefore, which could have been made or rights which could have been taken care of in the suit can now be set up to impugn its decree.

The statutes of the state under which the taxes were levied virtually make the land a party to the suit to collect the taxes. It is from the lands alone, and not from their owner, that the taxes are to be satisfied, and each acre bears its part. The burden of taxation could have been easily and definitely assigned by the court. Mistakes in ascribing the ownership of the lands did not increase the taxation, or cast that which should have been paid by one tract of land upon another tract. In Doyle v. Martin, 55 Ark. 37, 17 S. W. 346, it was held that it is no valid objection to a tax proceeding against land *owned by one person that it [259] was described, not separately, but as a portion of a larger tract owned by a different person. See also Minneapolis R. Terminal Co. v. Minnesota Debenture Co. 81 Minn. 66, 83 N. W. 485.

Second. The fourth error assigned is that the lands were sold for sums not legally chargeable thereon. The illegal charges alleged are fees to the commissioner for furnishing the printer with a list of lands sold, fees to the commissioner for reporting the sale, and to the printer for publishing notice of sale. The comment we have made above applies to this assignment of error. The act under which the suit was brought provided that notice to those interested in the delinquent lands proceeded against should specify, among other things, that a final judgment would be entered, "directing the sale of lands for the purpose of collecting said delinquent levee taxes, together with the payment of interest, penalty, and costs allowed by law." It was for the court to determine, therefore, what costs were allowed by law, and an erroneous judgment of what the law allowed did not deprive the defendants in the suit of their property without due process of law. The supreme court, in passing on this objection, said: "A decree of a court of competent jurisdiction is not subject to a collateral attack because lands were sold thereunder for illegal penalties and costs. Kelley v. Laconia Levee District, 74 Ark. 202, 85 S. W. 249, 87 S. W. 638; Johnson v. Hunter, 127 Fed. 219." [74 Ark. 181, 85 S. W. 254.] And this decision is an answer to the other decisions of Arkansas cited by plaintiffs in error, to the effect that a sale for taxes, in excess of the amount due, or embracing costs not legally due, is void. And the case at bar is also distinguishable from the cases cited from this court.†

Third. The fifth assignment of error is based on the contention that the supreme

†French v. Edwards, 13 Wall. 514, 20 L. ed. 704; Den ex dem. Walker v. Turner, 9 Wheat. 541, 6 L. ed. 155; Moore v. Brown, 11 How. 411, 13 L. ed. 751; Woods v. Freeman, 1 Wall. 398, 17 L. ed. 543; McClung v. Ross, 5 Wheat. 116, 3 L. ed. 46; Thatcher v. Powell, 6 Wheat. 119, 5 L. ed. 221; Gage v. Pumpelly, 115 U. S. 454, 29 L. ed. 449, 6 Sup. Ct. Rep. 136; Dick v. Foraker, 155 U. S. 404, 39 L. ed. 201, 15 Sup. Ct. Rep. 124.

[260] court of the state erred in not *deciding that plaintiffs in error were not given the notice required by the statutes of the state. This assignment of error is elaborately argued by counsel, but the distinction is not clearly made between the construction of the statutes and their effect as construed. What the statute required was for the supreme court to determine; whether, as determined, it constituted due process, is for us to decide. The case at bar does not come within Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224, or Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108, or the cases where the statute of a state was assailed as impairing the obligation of a contract. We come, then, to what was done in the suit which decreed the sale, and the discussion answers as well for the other assignments of error without specially enumerating them. The ultimate ground of all of them is that the proceedings were conducted without the notice to plaintiffs in error required by the demands of due process of law. In discussing the contention of plaintiffs in error, that they had been denied the equal protection of the laws by the different manner of service upon resident and nonresident owners of land, and the different times for appearance after service, we declared that it was competent for the state to make the distinction, and that the notice and time were adequate to give the plaintiffs in error the equal protection of the laws. They were also adequate to afford due process of law. And we will pass to the consideration of the other objections. The most important are the following: That there was no sufficient affidavit made and filed to support a warning order or order for notice to plaintiffs in error, and there was no proof of such order or notice filed or produced in court when the decree was rendered. Replying to these objections, the supreme court said:

"3. The act provides that notice by publication shall be given to the defendants in suits instituted for the collections of levee taxes, who are nonresidents of the county where the suits are brought. The plaintiff in the complaint in the proceedings attacked in this suit stated who of the de-
[261] fendants *therein were nonresidents of the county in which the proceedings were pending; and such complaint was sworn to. This was sufficient to authorize notice, by publication, without a separate affidavit to the same effect. It was held in Sannoner v. Jacobson, 47 Ark. 31, 14 S. W. 458, that an affidavit and complaint may be included in one instrument of writing, if it contains all the essentials of both. The complaint in the proceedings attacked contained the essentials of the affidavit and is sufficient to answer the same purpose. Johnson v. Hunter, supra.

"4. The act under which the aforesaid proceedings were instituted does not require a warning order to be entered on record, or on the complaint; and, if it had, the proceedings could not be attacked collaterally, unless such entry was made jurisdictional, as it was in Gregory v. Bartlett, 55 Ark. 30, 17 S. W. 344, and it was not in this case. Clay v. Bilby, 72 Ark. 101, 78 S. W. 749."

The court held, therefore, that, under the laws of the state, an "affidavit and complaint may be included in one instrument of writing, if it contains all the essentials of both." And it was held that the complaint in the proceedings attacked did contain those essentials. If we could dispute with the supreme court at all upon the requirements of the laws of the state it would have to be on a clearer showing of error than is made in the case at bar. The statute provides that all or any part of the delinquent lands for a county may be included in the suit instituted in such county, and there may be included in the suit known and unknown owners; "and notice of the pendency of such suit shall be given as against nonresident owners of the county and unknown owners, respectively," by publication weekly. The time of publication is specified. The complaint showed that Ballard was the owner of the lands and that he was a nonresident of the county. It was said, however, that Josephine Ballard was not made a defendant in the suit, though the records of the county showed that she was an owner thereof. But the statute provided against *such an omission. It provided that the proceedings and judgment should be in the nature of proceedings *in rem*, and that it should be immaterial that the ownership of the lands might be incorrectly alleged in the proceedings. We see no want of due process in that requirement, or what was done under it. It is manifest that any criticism of either is answered by the cases we have cited. The proceedings were appropriate to the nature of the case.

It should be kept in mind that the laws of a state come under the prohibition of the 14th Amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of the practical affairs of man. The law cannot give personal notice of its provisions or proceedings to everyone. It charges everyone with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may

frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises. This was pointed out in Huling v. Kaw Valley R. & Improv. Co. 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603, where it was declared to be the "duty of the owner of real estate, who is a nonresident, to take measures that in some way he shall be represented when his property is called into requisition; and, if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences." It makes no difference, therefore, that plaintiffs in error did not have personal notice of the suit to collect the taxes on their lands or that taxes had been levied, or knowledge of the law under which the taxes had been levied.

Our attention is directed to the case of Johnson v. Hunter, decided by the circuit court of appeals for the eighth circuit, 147 Fed. 133, to establish that the verified complaint *in the suit to collect the levee taxes was not sufficient to sustain the service by publication. The appellants in that case were complainants in the circuit court in a suit to quiet their title against sales under decrees made in suits prosecuted by the St. Francis levee district,—suits identical with that with which the case at bar is concerned. The court held that an affidavit, "adapted to the terms of the levee act," and placed on record in the suit, was a prerequisite to the issuance and publication of the prescribed warning order, and was strictly jurisdictional. A number of cases were cited. Considering the terms of the levee act, the court quoted the following provisions of § 11 as amended February 15, 1893: "And provided further, actual service of summons shall be had where the defendant is in the county or where there is an occupant upon the land." "The conditions are," the court said, "that the defendant must be a nonresident of the county, and must be absent therefrom, and that there must not be an occupant upon the land. If the defendant be a resident of the county, or be present therein, or if there be an occupant upon the land, actual service of a summons is required. . . . And a defendant may be a noresident of the county and absent therefrom and yet the land be occupied by a tenant or other representative upon whom a summons can be served. If the land is so occupied the act plainly calls for such service. Banks v. St. Francis Levee District, 66 Ark. 490, 51 S. W. 830." The court assented to the view that a complaint, properly verified, containing what was required to be set forth, would be a sufficient affidavit to sustain service by publication, but observed, that "of the three concurring conditions, without the existence of which that mode of service was not permissible, the complaints alleged the existence of one, and were altogether silent in respect of the other two; that is, they stated that Johnson [the defendant] was a nonresident of the county, but did not state that he was not present therein or that there was not an occupant upon the lands."

*Referring to the case of Memphis Land & [264] Timber Co. v. St. Francis Levee District, 70 Ark. 409, 68 S. W. 242, and the decision of the supreme court of the state in the case at bar, it was said: "In one the question actually considered was whether or not any affidavit for publication was necessary, rather than what it should contain, and in the other it was whether or not a verified complaint could perform the office of such an affidavit; but in neither does the court's attention appear to have been directed to the provision, 'and provided further, actual service of summons shall be had where the defendant is in the county or where there is an occupant upon the land.' In the arrangement of the act this provision is somewhat separated from the others which it is obviously designed to modify and restrain, and, in the absence of any controversy respecting it, it may well be that it was not observed by the court." We cannot concur in the supposition. We think those cases can be better explained by a different supposition. In the case at bar plaintiffs in error are not in a position to make the objection. They do not assert that, though nonresidents of the county, they were present therein or that their lands were occupied by a tenant or other representatives, as was the case in Banks v. St. Francis Levee District, supra. They, on the contrary, assert, and make it a ground of relief under the Constitution of the United States, that, as nonresidents, they were discriminated against, in that the act of 1895 did not require the same notice to be given to nonresident owners as to resident owners or to persons owning and having tenants upon the land.

Plaintiffs in error, it is true, allege that no "sufficient affidavit of the plaintiff" was filed "stating positively or sufficiently any one of the facts" required to be stated, and that the clerk did not make, on the complaint or otherwise, any warning order to plaintiffs in error, or to either of them, to appear in the suit as required, or which obliged them to appear therein or bound them by the proceedings which were had therein. But there was no allegation that either of them *was in [265] the county or that there was an occupant upon their lands. Not being defendants who were entitled to personal service, they cannot urge against the decree that they were not given personal service, or complain that

the complaint was insufficient as an affidavit for service by publication, because it did not deny the existence of conditions which there is no pretense existed.

Another assignment of error is that "there was no sufficient proof of the publication of any warning order, or any notice to the plaintiffs in error, filed or produced in court when the decree of sale of their lands was rendered." To this contention the supreme court replied: "The act under which the aforesaid proceedings were instituted does not require a warning order to be entered on record or on the complaint, and, if it had, the proceedings could not be attacked collaterally unless such entry was made jurisdictional, as it was in Gregory v. Bartlett, 55 Ark. 30, 17 S. W. 344, and it was not in this case. Clay v. Bilby, 72 Ark. 101, 78 S. W. 749." And the decree recites that the defendants "were severally constructively summoned by publication, . . . proof of which has been previously filed herein." The contention of plaintiffs in error is therefore answered by Grignon v. Astor, 2 How. 319, 11 L. ed. 283; Sargeant v. State Bank, 12 How. 371, 13 L. ed. 1028; Voorhees v. Jackson, 10 Pet. 449, 9 L. ed. 490; Applegate v. Lexington & C. County Min. Co. 117 U. S. 255, 29 L. ed. 892, 6 Sup. Ct. Rep. 742.

The other assignments of error do not require specific mention. They are either answered by that which we have already said or do not involve jurisdictional questions.

Decree affirmed.

Mr. Justice Brewer concurs in the judgment.

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[266]*EAST CENTRAL EUREKA MINING COMPANY, James Toman, and Eliza A. Toman, Plffs. in Err.,

v.

CENTRAL EUREKA MINING COMPANY.

(See S. C. Reporter's ed. 266-272.)

Mines—lode location—parallelism of end lines.

1. The requirement of parallelism of end lines of lode mining locations which is made by the act of May 10, 1872 (17 Stat. at L. 91, chap. 152, § 2, U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, pp. 1424, 1425 cannot be deemed to apply where the location had been made at the time of the passage of that act, and the proceedings under the act of July 26, 1866 (14 Stat. at L. 251 chap. 262), had then so far advanced as to exclude adverse claims, in view of the various provisions of the later act for the protection of all rights previously acquired under existing laws, and of the provision of § 3 of that act, that prior locators shall have "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface locations."

Mines—lode location—rights protected by subsequent legislation as then existing.

2. Rights in mining property entitled to protection under the act of May 10, 1872, as previously acquired under existing laws, exist where a lode mining location had been made at the time of the passage of that act, and the proceedings under the act of July 26, 1866, had then so far advanced as to exclude adverse claims.

Mines—lode location—effect of patent.

3. An election by the grantee of a patent for a lode mining claim to abandon rights acquired under the act of July 26, 1866, cannot be imported from the fact that such patent, in addition to granting such rights, also purports to grant all that would have been acquired by a location under the act of May 10, 1872.

Error to state court—following decisions of state courts.

4. The construction given by the highest court of a state to a conveyance of mining property, as not including the portion of a vein beneath the surface and within the converging lines, produced, of the grantor's location, will be followed by the Federal Supreme Court, on writ of error to the state court.

[No. 141.]

Argued January 8, 9, 1907. Decided January 21, 1907.

IN ERROR to the Supreme Court of the State of California to review a decree

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NOTE.—On intersecting, crossing, and uniting veins—see note to Calhoun Gold Min. Co. v. Ajax Gold Min. Co. 50 L.R.A. 209.

As to the right to follow a vein or lode on its dip beyond the surface lines of the location—see notes to Parrot Silver & Copper Co. v. Heinze, 53 L.R.A. 491; and Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co. 66 C. C. A. 311.

On conflicting lode locations—see notes to Last Chance Min. Co. v. Tyler Min. Co. 39 L. ed. U. S. 859; and Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co. 42 L. ed. U. S. 96.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 871.

As to review in the Supreme Court of the United States of decisions of state courts in cases involving mining claims—see note to McMillen v. Ferrum Min. Co. 49 L. ed. U. S. 784.

ffirmed a decree of the Superior Amador County, in that state, in plaintiff in a suit to quiet title.

me case below, 146 Cal. 147, 79 Pac.

cts are stated in the opinion.

ckson H. Ralston argued the cause, Messrs. Frederick L. Siddons and E. Richardson, filed a brief for in error:

nt cannot initiate any rights over nd those conferred by statute upon man by his entry. A patent is convenient evidence of the perfec- the rights secured by the entry, like with the entry, must be limit- extent by the acts authorizing it. nerely another way of saying that utive officer must act within the ns of the authority given him, and act going beyond such limitations and is subject to attack in any l proceeding.

v. Carr, 125 U. S. 618, 31 L. ed. p. Ct. Rep. 1228.

ly patent allowed to be issued after 1872, was a patent which should ly in pursuance of the provisions ct of that date.

v. Whitney, 9 Wall. 187, 19 L. ed. n v. Forrest, 8 Wash. 700, 24 L.R.A. Pac. 971.

tent could issue save for a claim he end lines were parallel to each

v. Roberts, 4 C. C. A. 438, 7 U. S. , 54 Fed. 461.

not think that we can search for an the act of 1872 which will destroy language.

onte Min. & Mill. Co. v. Last Chance Mill. Co. 171 U. S. 67, 43 L. ed. 77, Ct. Rep. 895.

§ 3 of the act of 1872 dispense with iring parallelism of end lines?

Dunderberg Min. Co. v. Old, 25 C. 3, 49 U. S. App. 201, 79 Fed. 601.

s. Campbell, Metson, & Campbell pin & Bolton also filed a brief for s in error:

lant in error acquired no title un- of May, 1872 (U. S. Rev. Stat. § S. Comp. Stat. 1901, p. 1432), be- e end lines of patent were not par-

Silver Min. Co. v. Elgin Min. & Co. 118 U. S. 196, 30 L. ed. 98, 6 Rep. 1177; Del Monte Min. & Mill. ast Chance Min. & Mill. Co. 171 U. L. ed. 77, 18 Sup. Ct. Rep. 895.

cepting a patent granting all rights under the law of 1872, the patentee nd renounced all the rights in con- S.

flict with the provisions of the act under which his patent issued, so that he renounced the right to retain converging end lines and obtain a patent which should give extralateral rights on the vein.

New Dunderberg Min. Co. v. Old, 25 C. C. A. 116, 49 U. S. App. 201, 79 Fed. 598; Walrath v. Champion Min. Co. 171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. Rep. 909.

At the date of the passage of the act of 1872 the defendant had acquired no existing right, under the act of 1866, to have extralateral rights on a claim with converging end lines.

Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; Davis v. Wiebbold, 139 U. S. 508, 35 L. ed. 239, 11 Sup. Ct. Rep. 628; Yosemite Valley Case (Hutchings v. Low) 15 Wall. 87, 21 L. ed. 85; Michigan Land & Lumber Co. v. Rust, 168 U. S. 594, 42 L. ed. 593, 18 Sup. Ct. Rep. 208; United States v. Montana Lumber & Mfg. Co. 196 U. S. 573, 49 L. ed. 604, 25 Sup. Ct. Rep. 367; Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 70, 43 L. ed. 79, 18 Sup. Ct. Rep. 895; Lakin v. Dolly, 53 Fed. 337, 4 C. C. A. 438, 7 U. S. App. 539, 54 Fed. 461; Lakin v. Roberts, 154 U. S. 507, 38 L. ed. 1077, 14 Sup. Ct. Rep. 1148.

If a man grant all his land, he grants thereby all the mines of metal or other fossils, his woods, his waters, and his houses, as well as his fields and meadows.

2 Bl. Com. 19.

Where individuals convey lands, the minerals of gold and silver pass unless expressly reserved.

Moore v. Smaw, 17 Cal. 199, 79 Am. Dec. 123.

A quitclaim deed is as effectual to pass everything below the surface and extending to the center of the earth as a grant, bargain, and sale deed.

Moelle v. Sherwood, 148 U. S. 21–29, 37 L. ed. 350–353, 13 Sup. Ct. Rep. 426; Carpentier v. Williamson, 25 Cal. 154; Graff v. Middleton, 43 Cal. 341.

Mr. S. S. Burdett argued the cause, and, with Mr. Curtis H. Lindley, filed a brief for defendant in error:

To contend that a valid location, made and maintained in accordance with the mineral laws of the United States and the local customs and regulations, may be impaired, defeated, or destroyed before payment for and entry of the land, is utterly inconsistent with the rulings of this court.

Noyes v. Mantle, 127 U. S. 348, 32 L. ed. 168, 8 Sup. Ct. Rep. 1132; Dahl v. Raunheim, 132 U. S. 262, 33 L. ed. 325, 10 Sup. Ct. Rep. 74; Forbes v. Gracey, 94 U. S. 762, 24 L. ed. 313.

Mr. Curtis H. Lindley also filed a separate brief for defendant in error:

The first mining law passed by Congress, known as the lode and water law, which went into effect July 26, 1866 (14 Stat. at L. 251, chap. 262), was but a crystalization of the miners' rules and customs which, prior to congressional action, formed the Pacific coast common law of mines.

Jennison v. Kirk, 98 U. S. 453, 456, 25 L. ed. 240, 241; Broder v. Natoma Water & Min. Co. 101 U. S. 274, 276, 25 L. ed. 790, 791; Chambers v. Harrington, 111 U. S. 350, 352, 28 L. ed. 452, 453, 4 Sup. Ct. Rep. 428; Northern P. R. Co. v. Sanders, 166 U. S. 620, 634, 41 L. ed. 1139, 1144, 17 Sup. Ct. Rep. 671.

Under the local rules, as well as under the act of 1866, the lode was the principal thing, and the surface was, in reality, an incident.

Johnson v. Parks, 10 Cal. 447; Patterson v. Hitchcock, 3 Colo. 533; Wolfley v. Lebanon Min. Co. 4 Colo. 112; Walrath v. Champion Min. Co. 63 Fed. 556; Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 64, 43 L. ed. 72, 76, 18 Sup. Ct. Rep. 895; Eureka Consol. Min. Co. v. Richmond Min. Co. 4 Sawy. 323, Fed. Cas. No. 4,548.

Before patent, if no attempt was made to inclose the lode within surface boundaries, the locator might pursue it in its course or strike to the extent of the number of feet claimed. The notice of location usually called for so many feet on the vein, and a misdescription as to its course did not vitiate the location. The locator had a right prior to patent to follow it wherever it ran.

Johnson v. Parks, supra.

The locator could hold out one lode or vein.

Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 65, 43 L. ed. 72, 76, 18 Sup. Ct. Rep. 895; Walrath v. Champion Min. Co. 63 Fed. 552; Eureka Consol. Min. Co. v. Richmond Min. Co. supra; Eclipse Gold & S. Min. Co. v. Spring, 59 Cal. 304.

A patent could be issued but for one vein.

Walrath v. Champion Min. Co. 171 U. S. 293, 305, 43 L. ed. 170, 175, 18 Sup. Ct. Rep. 909.

If the locator inclosed his vein within defined surface boundaries, he could not follow his vein on its course outside of such boundaries.

Flagstaff Silver Min. Co. v. Tarbet, 98 U. S. 463, 25 L. ed. 253; McCormick v. Varnas, 2 Utah, 355; Wolfley v. Lebanon Min. Co. 4 Colo. 112; Johnson v. Buell, 4 Colo. 557.

Under the act of 1866 parallelism in the lines of a surface location was not required.

Iron Silver Min. Co. v. Elgin Min. & Smelting Co. 118 U. S. 196, 208, 30 L. ed. 98, 102, 6 Sup. Ct. Rep. 1177; Eureka Consol. Min. Co. v. Richmond Min. Co. 4 Sawy. 319, Fed. Cas. No. 4,548, Affirmed in 103 U. S. 839, 847, 26 L. ed. 557, 560; Walrath v. Champion Min. Co. 63 Fed. 556; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. 63 Fed. 550; Carson City Gold & S. Min. Co. v. North Star Min. Co. 73 Fed. 599, 28 C. C. A. 333, 48 U. S. App. 724, 8 Fed. 669; Argonaut Min. Co. v. Kennedy Min. & Mill. Co. 131 Cal. 15, 82 Am. St. Rep. 317, 63 Pac. 148.

A lode locator acquires a vested property right by virtue of his location.

Clipper Min. Co. v. Ely Min. & Land Co. 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632; Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337, 342, 49 L. ed. 501, 505, 25 Sup. Ct. Rep. 268.

Under the act of 1872 the miner locates a surface which must be so defined as to include the top or apex of his lode. Failing in this he obtains practically nothing. If he mistakes the course of his vein it is his loss. He can only hold the vein on its course to the extent that the top or apex thereof is found within his boundaries.

Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 84, 43 L. ed. 72, 84, 18 Sup. Ct. Rep. 895.

In other words, under the old law he located the lode, with such area adjacent to it as might be necessary for its convenient working, or as might be permitted under local rules. Under the new, he must locate a piece of land containing the top or apex of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made, the location must be of a piece of land including the top or apex of the vein. The end lines of his location must be parallel and crosswise of the vein, otherwise he cannot pursue his lode or lodes on their downward course beyond his vertical side-line planes.

Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 88, 43 L. ed. 72, 85, 18 Sup. Ct. Rep. 895; Calhoun Gold Min. Co. v. Ajax Gold Min. Co. 182 U. S. 499, 508, 45 L. ed. 1200, 1206, 21 Sup. Ct. Rep. 885.

Under the old law he could acquire but one vein. Under the new, he acquired all other veins having their tops or apices within the surface boundaries of the location, the extralateral rights on all veins being defined by the same set of end-line planes. Walrath v. Champion Min. Co. 171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. Rep. 909.

Previously existing rights are carefully preserved by the new law.

Eureka Consol. Min. Co. v. Richmond Min. Co. 4 Sawy. 323, Fed. Cas. No. 4,548; Eclipse Gold & S. Min. Co. v. Spring, 59 Cal. 306; Argonaut Min. Co. v. Kennedy Min. & Mill. Co. supra; Carson City Gold & S. Min. Co. v. North Star Min. Co. 73 Fed. 597, 28 C. C. A. 333, 48 U. S. App. 724, 83 Fed. 669; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. 63 Fed. 540.

The title conveyed by a mining patent relates back to the inception of the right; that is, to the location on which the patent is based.

Heydenfeldt v. Daney Gold & S. Min. Co. 93 U. S. 634, 23 L. ed. 995; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875; Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; Calhoun Gold Min. Co. v. Ajax Gold Min. Co. 182 U. S. 499, 45 L. ed. 1200, 21 Sup. Ct. Rep. 885; Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co. 57 C. C. A 200, 119 Fed. 164, 196 U. S. 337, 49 L. ed. 501, 25 Sup. Ct. Rep. 266.

The underground segment of the vein within the Summit end-line planes lying underneath the surface of the Toman ranch would pass by a conveyance of the Summit quartz mine, by name, or by description of its surface boundaries.

Eureka Consol. Min. Co. v. Richmond Min. Co. 4 Sawy. 326, Fed. Cas. No. 4,548, 103 U. S. 839, 26 L. ed. 557; Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 89 Fed. 532.

As a corollary to this principle, no part of the extralateral right on a vein acquired through a Federal mining location would be conveyed by a deed simply describing land adjoining, into which the vein penetrated. As appears from the cases, this is true where the contiguous land conveyed is the subject of patent under the mining law; *a fortiori* should it be true when land patented under the agricultural laws is conveyed.

Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; Tyler Min. Co. v. Last Chance Min. Co. 32 C. C. A. 498, 61 U. S. App. 193, 90 Fed. 21.

Messrs. Curtis H. Lindley and Henry Eickhoff filed a brief for defendant in error on motion to dismiss writ of error:

The writ of error should be dismissed.

Strader v. Baldwin, 9 How. 261, 13 L. ed. 130; Jersey City & B. R. Co. v. Morgan, 160 U. S. 288, 292, 40 L. ed. 430, 431, 16 Sup. Ct. Rep. 276; Linton v. Stanton, 12 How. 423, 13 L. ed. 1050; Manning v. French, 133 U. S. 186, 191, 192, 33 L. ed. 582, 584, 585, 10 Sup. Ct. Rep. 258; McNulta v. Lochridge, 141 U. S. 327, 330, 35 L. ed. 796, 12 Sup. Ct. Rep. 11; Texas & P. R. Co. v. Johnson, 151 U. S. 81, 98, 38 L. ed. 81, 87, 14 Sup. Ct. Rep. 250; De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 528, 44 L. ed. 872, 874, 20 Sup. Ct. Rep. 715; Quimby v. Boyd, 128 U. S. 488, 32 L. ed. 502, 9 Sup. Ct. Rep. 147; Egan v. Hart, 165 U. S. 188, 192, 41 L. ed. 680, 682, 17 Sup. Ct. Rep. 300; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; Crary v. Devlin, 154 U. S. 619, and 23 L. ed. 510, 14 Sup. Ct. Rep. 1199; Kizer v. Texarkana & Ft. S. R. Co. 179 U. S. 199, 200, 45 L. ed. 152, 153, 21 Sup. Ct. Rep. 100; Gillis v. Stinchfield, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; Beals v. Cone, 188 U. S. 186, 47 L. ed. 438, 23 Sup. Ct. Rep. 275; Speed v. McCarthy, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Beaupre v. Noyes, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; Wheaton v. Peters, 8 Pet. 638, 657, 8 L. ed. 1072, 1079; Packer v. Bird, 137 U. S. 661, 669, 34 L. ed. 819, 820, 11 Sup. Ct. Rep. 210; Spies v. Illinois (Ex parte Spies) 123 U. S. 131, 181, 31 L. ed. 80, 91, 8 Sup. Ct. Rep. 21; Brooks v. Missouri, 124 U. S. 394, 395, 31 L. ed. 454, 456, 8 Sup. Ct. Rep. 443; French v. Hopkins, 124 U. S 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589; Chappell v. Bradshaw, 128 U. S. 132, 134, 32 L. ed. 369, 370, 9 Sup. Ct. Rep. 40; Baldwin v. Kansas, 129 U. S. 52, 57, 32 L. ed. 640, 642, 9 Sup. Ct. Rep. 193; Texas & P. R. Co. v. Southern P. Co. 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; Roby v. Colehour, 146 U. S. 153, 159, 36 L. ed. 922, 924, 13 Sup. Ct. Rep. 47; Schuyler Nat. Bank v. Bollong, 150 U. S. 85, 88, 37 L. ed. 1008, 1009, 14 Sup. Ct. Rep. 24; Zadig v. Baldwin, 166 U. S. 486, 488, 41 L. ed. 1087, 1088, 17 Sup. Ct. Rep. 639; Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Chicago & N. W. R. Co. v. Chicago, 164 U. S. 454, 457, 41 L. ed. 511, 512, 17 Sup. Ct. Rep. 129; Louisville & N. R. Co. v. Louisville, 166 U. S. 709, 714, 715, 41 L. ed. 1173, 1175, 1176, 17 Sup. Ct. Rep. 725; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 649, 653, 655, 41 L. ed. 1149, 1151, 1152, 17 Sup. Ct. Rep. 709; Keokuk & H. Bridge Co. v. Illinois, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205; Kipley v. Illinois, 170 U. S. 182, 186, 42 L. ed. 998, 1001, 18 Sup. Ct. Rep. 550; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 66-68, 43 L. ed. 368, 369, 19 Sup. Ct. Rep. 97; Harding v. Illinois, 196 U. S. 78, 84, 49 L. ed. 394, 395, 25 Sup. Ct. Rep. 176; Home for Incurables v. New York, 187

U. S. 155, 157, 47 L. ed. 117, 118, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; Michigan Sugar Co. v. Michigan (Michigan Sugar Co. v. Dix) 185 U. S. 112, 114, 46 L. ed. 829, 830, 22 Sup. Ct. Rep. 581; Warfield v. Chaffe, 91 U. S. 690, 692, 23 L. ed. 383, 384; Clark v. Pennsylvania, 128 U. S. 395, 397, 32 L. ed. 487, 488, 9 Sup. Ct. Rep. 113; Butler v. Gage, 138 U. S. 52, 56, 34 L. ed. 869, 871, 11 Sup. Ct. Rep. 235; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Mutual L. Ins. Co. v. McGrew, 188 U. S. 308, 47 L. ed. 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 128, 132, 49 L. ed. 413, 417, 25 Sup. Ct. Rep. 200; French v. Taylor, 199 U. S. 274, 50 L. ed. 189, 26 Sup. Ct. Rep. 78; Ansbro v. United States, 159 U. S. 695, 697, 698, 40 L. ed. 310, 311, 16 Sup. Ct. Rep. 187; Cornell v. Green, 163 U. S. 75, 80, 41 L. ed. 76, 78, 16 Sup. Ct. Rep. 969; Chapin v. Fye, 179 U. S. 128, 130, 45 L. ed. 120, 121, 21 Sup. Ct. Rep. 71; New York C. & H. R. R. Co. v. New York, 186 U. S. 269, 273, 46 L. ed. 1158, 1160, 22 Sup. Ct. Rep. 916.

Mr. Justice Holmes delivered the opinion of the court:

This is a writ of error to reverse a decree in favor of the defendant in error, the orig-[268]inal plaintiff and hereinafter called *the plaintiff, which was ordered by the superior court and affirmed by the supreme court of California. 146 Cal. 147, 79 Pac. 834. The decree was made on a bill to quiet title, upon the following facts, which appeared at the trial of the case. The plaintiff is the owner of the "Summit quartz mine" in California. The apex of a vein runs through this mine between and nearly parallel with the surface side lines. This vein dips under the easterly side line and enters the adjoining land of the defendants, known as the Toman ranch. The controversy concerns the portion of the vein under the defendants' land. The main ground of defense is that the end lines of the mine are not parallel, but converge towards each other in the direction of the ranch, and that the plaintiff's patent was granted on November 25, 1873, when the act of May 10, 1872, chap. 152, 17 Stat. at L. 91, Rev. Stat. §§ 2320, 2322, U. S. Comp. Stat. 1901, pp. 1424, 1425, was in force. Iron Silver Min. Co. v. Elgin Min. & Smelting Co. 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177; Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 67, 43 L. ed. 72, 77, 18 Sup. Ct. Rep. 895. But the patent was issued upon an application made on February 7, 1871, based upon two locations of March 20, 1863, and June 22, 1865, respectively. The question is whether the requirement of parallelism in § 2 of the act of 1872 (Rev. Stat. § 2320) applies to such a case.

The patent of the mine recites proceedings in pursuance of the Acts of 1866 [14 Stat. at L. 251, chap. 262], 1870 [16 Stat. at 217, chap. 235], and 1872, and describes and grants the premises by metes and bounds, with the exclusive right of possession and enjoyment of the same and of 1165$^{56}/_{100}$ linear feet of the vein throughout its entire depth, although it may enter the land adjoining, with similar rights in other veins having their apex within the surface bounds; the extralateral or outside rights in the veins being confined, as by the act of 1872, § 3, to such portions as lie between vertical planes drawn downward through the end lines of the survey at the surface, and so continued in their own direction as to intersect the exterior part of the veins. In short, the patent purports to convey the rights claimed by the plaintiff in this suit, and *also the additional rights that would[have been gained by a location and patent under the act of 1872 alone. The defendants derive title from later patents issued under the laws of the United States concerning the sale of agricultural land, and admit that, if the plaintiff's patent conveyed what it purported to convey, then, subject to a question to be mentioned later, the plaintiff must prevail.

Before the act of 1872 it was not required that the end lines should be parallel (118 U. S. 208, 30 L. ed. 102, 6 Sup. Ct. Rep. 1177); and when, with some dissent, it was decided that that requirement of that act made a condition to the right of a patentee to follow his vein outside of the vertical planes drawn through his side lines, the decision was confined in terms to cases where the location was made since the passage of the act. Ibid. That there is no such condition when the patent was issued in pursuance of proceedings under the earlier statutes has been decided, so far as we know, when the question has arisen. See *e. g.* Argonaut Min. Co. v. Kennedy Min. & Mill. Co. 131 Cal. 15, 62 Am. St. Rep. 317, 63 Pac. 148; Carson City Gold & S. Min. Co. v. North Star Min. Co. 28 C. C. A. 333, 48 U. S. App. 724, 83 Fed. 658, 669. The granting of the patent indicates what we believe to be a fact, that the construction of the act of 1872 adopted at the time by the land office agreed with the decisions of the courts. Unless, therefore, the meaning of the act of 1872 is pretty plainly the other way, this consensus of opinion and practice must be accorded considerable weight.

Apart from the last-mentioned considerations we are of opinion that the act of 1872 authorized the plaintiff's patent. Under the

former law the miner located the lode. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. 182 U. S. 499, 508, 45 L. ed. 1200, 1206, 21 Sup. Ct. Rep. 885. When the act of 1872 substituted the location of a piece of land by surface boundaries, it preserved the rights of locators to all mining locations previously made in compliance with law and local regulations, and provided that they should "have the exclusive right of possession and enjoyment of all the surface included within [271] the lines of their locations, and of *all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface locations." § 3. Rev. Stat. 2322. It is argued that this refers only to possessory rights, and that when a patent was applied for it was required to conform to the new law; that under the old law the miner got but a single vein, while the new law gave him all veins having their apex within the surface, and that when he accepted this advantage he had to comply with the conditions, as otherwise he would be given a preference over later comers. It is said further that in the present case no rights had been acquired. These arguments do not command our assent, for reasons which we will state.

A broader construction of the passage quoted from § 3 is favored by other provisions in the act. It provided that the repeal of certain sections of the act of 1866 "shall not affect existing rights. Applications for patents for mining claims now pending may be prosecuted to a final decision in the General Land Office; but, in such cases, when adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act." § 9. So in § 12. "Nor shall this act affect any right acquired under said act" (of 1866). And in § 16, "Provided, that nothing contained in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws." Whatever ambiguity may be found in the first of these quotations, the last is plain. The chance of a possible advantage to outstanding applicants does not seem to us to outweigh the injustice of preventing them from getting what the law had promised as the reward for the steps they had taken in accordance with its invitation.

The provision that the act shall not impair existing rights is, perhaps, some indication that it extends to inchoate rights which constitutionally it might have impaired. At all events, *it should be taken in a liberal sense. There was no sufficient reason why the United States should not be liberal, and, as we have said, it was just that it should be. We are of opinion that in the present case rights had been acquired within the meaning of the act. It is said that the survey of the mineral patent was not approved or payment made to the United States until after the passage of the act of 1872. But the location had been made and the proceedings under the act of 1866 so far advanced as to exclude adverse claims. The locator had done all that he could do, and we are satisfied that the act of 1872 intended to treat parties that were in that position as having rights that were to be preserved. If Congress were unrestricted by the Constitution, the word "rights" still would be the natural word to express the relation of persons to this kind of property, where the facts required the officers of the government to take steps necessary to permit them to acquire it, and they were seeking to acquire it, and had manifested their intent and desire by occupation, labor, and expenditures. Yet, on that supposition, there could be no technically legal right. We believe that Congress used the word in a somewhat popular sense, as no doubt it would have used it in the case supposed, without considering what injustice might be within its constitutional power to commit. See Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632; Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337, 342, 49 L. ed. 501, 505, 25 Sup. Ct. Rep. 266.

The plaintiff is not responsible for the form of the patent. It grants the rights that would have been granted under the act of 1866, and the fact that it also purports to grant all that would have been acquired by a location under the act of 1872 does not import an election by the grantee to abandon the former. We do not mean to disparage the additional grant, but, as was pointed out by the California court, the question before us does not touch that point.

The defendants rely, for a further defense, upon a quitclaim deed, from the plaintiff, of the land under which lies the *portion [272] of the vein in dispute. The land was described as lying east of the mining ground known as the Summit quartz mine. Assuming, in accordance with its decision, that the part of the vein under this land was embraced in the patent to the plaintiff, and severed from the surface, the California court held that this instrument did not purport to convey the portion of the vein beneath the surface and within the converging lines, produced, of the plaintiff's location.

The court also adverted to the fact, which sufficiently appeared, that the real object of the deed was to free the defendants' title from a previous contract on their part to convey the land, and simply to replace the grantees in their former position; and it sustained a finding of the court below. The construction and effect of a conveyance between private parties is a matter as to which we follow the court of the state. Brine v. Hartford F. Ins. Co. 96 U. S. 627, 636, 24 L. ed. 858, 861; De Vaughn v. Hutchinson, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461. The assumption upon which that construction proceeded we have decided to be correct, and it is enough to add that there is nothing in the decision rendered last week in Montana Min. Co. v. St. Louis Min. & Mill. Co. 204 U. S. 204, ante 444, 27 Sup. Ct. Rep. 254, that prevents our agreeing with the result.

Judgment affirmed.

JOHNSTON ARMSTRONG, Ancillary Receiver for the New South Building & Loan Association of New Orleans, Louisiana, Appt.,

v.

JAMES A. ASHLEY, Mary M. Ashley, Hayden H. Ashley, Ralph B. Ashley, Mary A. Breckinridge, Henry F. Beardsley, and Joseph R. Beardsley, and Emma B. Jenkins.

(See S. C. Reporter's ed. 272–286.)

Lis pendens—effect of defective index.

1. Failure of the clerk properly to index amended declarations in ejectment covering additional property, which were duly filed in his office, does not excuse the failure of a searcher to examine the files.

Principal and agent—imputed knowledge.

2. Knowledge of the local attorney and president of the local board of directors of a foreign building and loan association in regard to a matter coming within the sphere of their duty, and acquired while acting with reference thereto, and before sending to the company at its home office the report which it was their duty to make, —must be imputed to the company.

Principal and agent—imputed knowledge—effect of agent's fraud.

3. The fraud of an agent cannot alter the legal effect of his knowledge with respect to his principal in regard to third parties who had no connection whatever with such agent in relation to the perpetration of the fraud, and no knowledge that any such fraud had been perpetrated.

Mortgage—equitable lien for improvements—constructive notice.

4. Land in the possession of the true owners, as established by their successful prosecution of ejectment actions, which were pending when the defendant executed a deed of trust of the property, duly recorded, to secure a loan of money to be used in erecting improvements thereon, cannot be subjected, at the suit of the mortgagee, to an equitable lien for the value of such improvements, on the theory that such owners were charged with the duty of active investigation to discover from what source the money used in the improvements was obtained and on what security, where the mortgagee, even if unaware of the pendency of the ejectment actions, had knowledge that a suit in equity, raising the question of the mortgagor's title to the premises, had been begun, and dismissed for want of prosecution, without prejudice.

[No. 122.]

Argued December 7, 10, 1906. Decided January 21, 1907.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, dismissing a bill to establish an equitable lien upon certain property for the value of improvements erected thereon. Affirmed.

See same case below, 22 App. D. C. 368.

Statement by Mr. Justice Peckham:

This suit was brought in the supreme court of the District of Columbia by the appellant, who is the ancillary receiver for the New South Building & Loan Association of New Orleans, Louisiana, hereinafter called "the company," against the owners of the real property described in the bill, to establish an equitable lien upon the property for the value of improvements placed thereon with money which the company loaned to one Bradshaw for that purpose, Bradshaw claiming to be the owner at the time. After hearing, the bill was dismissed on its merits by the trial court, and the decree of dismissal was affirmed by the court of appeals of the District. The opinions of both courts are to be found in 22 App. D. C. 368. The receiver has appealed here.

The title to the property, which consisted of certain numbered lots in square number 939 in Washington, had been in dispute some time prior to 1891. During the year 1891

NOTE.—On knowledge of agent as notice to principal—see notes to Smith v. Niagara F. Ins. Co. 1 L.R.A. 217; McGurk v. Metropolitan L. Ins. Co. 1 L.R.A. 563; Constant v. University of Rochester, 2 L.R.A. 734; Akers v. Rowan, 10 L.R.A. 705; and Bank of Overton v. Thompson, 56 C. C. A. 561.

On equitable liens generally—see notes to Bell v. Pelt, 4 L.R.A. 248; and Walker v. Brown, 41 L. ed. U. S. 865.

1890, or 1891 one Aaron Bradshaw, acting, as alleged, as agent of one John H. Walter, who claimed to have acquired the title of George Walker, entered upon and took forcible possession of the lots in question, and proceeded to erect a small brick structure on the corner lot, whereby to continue to hold possession.

] *The respondents herein claim to be the owners of these lots, and in the latter part of 1891 they or their grantors commenced four actions of ejectment in the supreme court of the District to recover possession of separate and undivided interests in the designated "ink-lot" number 1, and subsequently, by proper amendments, other lots in the same square, comprising the property involved herein, were included in the declarations in those actions. A statement of facts regarding the title to these various lots may be found in Bradshaw v. Ashley, 14 App. D. C. 485, and in this court, upon review of that decision, in 180 U. S. 59, 60, 45 L. ed. 423, 428, 21 Sup. Ct. Rep. 297, where the expression "ink-lot" is explained as referring to certain ink numbers on a map of the lots in square 939, on file in one of the public offices of the city, and which also had pencil numbers on it, which were different. In that litigation the Ashleys, the respondents herein, finally established their right to the possession of the property, and obtained judgment to that effect against Bradshaw, defendant in the ejectment actions, in the supreme court of the District some time in 1897, and in this court in 1901. These respondents were thereupon placed in possession of the property, including these lots.

While the litigation in these ejectment actions was pending, and some years before judgment therein, Bradshaw, while defending them, became a stockholder in the company in order to obtain a loan from it, and succeeded, in October, 1893, in borrowing $20,000 from the company, secured by a deed of trust upon the property in litigation in the actions in ejectment other than ink-lot 1 above mentioned. The deed was duly recorded and the money was to be used for the construction of buildings, which were subsequently placed on these lots. The money was advanced to Bradshaw by the company in instalments, the last being in April, 1894.

It was obtained from the company by means, as alleged, of a fraudulent combination between Bradshaw and one Walter, the president of the local board of directors of the *company at Washington (who claimed to have been the owner at one time of the property, but whose title, whatever it was, had been acquired by Bradshaw), together with the local attorney of the company in this district. The local attorney, in carrying out the alleged fraud, sent a defective so-called "chain of title," which, nevertheless, had been accepted by the local board of the company in Washington. It omitted certain tax and other deeds under which the respondents claimed title in themselves. This defective paper was continued by other examiners of the title, but was not revised by them. The certificate regarding the title was sent, with the defective chain of title, to the company in New Orleans by the local attorney about May 26, 1893. The certificate approved the application for the loan, but such loan was not acted upon favorably at that time. Subsequently, in October, 1893, the loan was made, the company, as is stated, relying upon the certificate of the local attorney for the period which it covered, and the certificate of the other examiner for the time thereafter passing until the making of the loan. The company has insisted that it acted at all times in good faith and made its advances upon the security of the trust deed, which it supposed was perfectly good. The trial court found that before the money was paid to Bradshaw, upon the security of this trust deed, the company was aware, through its general attorney in New Orleans, of the fact that a suit in equity had (theretofore, in 1890, and before the ejectment actions) been brought by the Ashleys against Bradshaw, Walter, and others, in which the plaintiffs therein claimed ownership of these lots, and wherein they asked for an injunction to restrain the defendants from setting up any title to them. The bill on file in the equity suit showed a common source of title to all the lots mentioned therein, which included the lots here in question. The attorney also knew that, although the suit had been dismissed, yet it was only for want of prosecution, and was "without prejudice." The New Orleans attorney wrote to the Washington attorney, who *then had [276] charge of the matter, calling his attention to these facts. No notice seems to have been taken of the letter, but the certificate of title by the examiner was given after its receipt. The company insists that during all the time it made advances to Bradshaw under the deed of trust it was ignorant of the existence of these ejectments actions, and at any rate did not know that they covered other than the corner lot, as described in the declarations before they were amended, and the amendments they were ignorant of, because, as is alleged, the clerk of the court in which the actions were pending had not properly kept the books so as to show the amendments and their nature, although they had been filed. The corner lot was not one of the lots upon which the buildings were erected.

The trial court, in the opinion delivered,

said that the complainant charged the defendants with knowledge of the advances made by the company to Bradshaw towards the erection of the buildings; but to this allegation the defendants interposed, in their answer (which was under oath) a positive denial. They admitted that, although wholly ignorant of the source from which the money came to construct the houses, yet, soon after learning that one Childs, a contractor, was engaged in their construction, they notified him in writing, January 4, 1894, that he had been represented to them as a contractor and builder of the houses for which the ground had been broken, and which houses were then in course of erection, and he was thereby notified that if he, his agents or employees, entered upon the grounds, they would be held liable for trespassing thereon, as they (defendants herein) were the owners of the lots, and had not given him or anyone else, the right or permission to enter thereon for the erection of houses or any purpose whatever, and that, as the improvements were not made with their authority, they would not be responsible for any liability contracted by Mr. Bradshaw.

The defendants, in their answer, also allege that it was not until in or about February, 1895, that defendants, or any of *them, [277] learned of the advances made by the company or of the existence of the deed of trust. The trial court, in its opinion, stated that although "there is no evidence contradicting either of these denials, nor of actual knowledge possessed by the defendants of the matters thus denied, still it seems to me there is evidence in the record that facts might readily have been ascertained by them from which they might well have learned at an earlier time of the building and of the source from which the money employed was derived." While not finding that the defendants had actual knowledge of the advances made by the company, the court did impute knowledge of certain conveyances made to Bradshaw, and of the existence of the deed of trust to the company at earlier dates than those assigned in the answer, February, 1895. And in relation to an offer of compromise the joint answer alleged that after that time, viz., about May 31, 1895, during negotiations for the compromise of the differences between the parties, Mr. H. F. Beardsley, one of the defendants, wrote to the attorneys representing the company, in behalf of himself and his associates, offering to sell to the company the lots upon which the houses then were "at their present market value or price, said value not to exceed the price at which similar lots (unimproved) in the same or contiguous squares are offered for sale. Upon the payment of said price, or sum, we will convey our title to them by deed or quitclaim, or make a building agreement to so convey upon the determination of the pending suits, or a deed in escrow, as counsel shall advise. We will hold this offer open until the 1st of July next." This offer was not accepted, but there is nothing stating what, if any, objections were made to it.

Bradshaw had, in 1894, defaulted in his payments of amounts due for his stock in the company, which he had taken in order to procure his loan. Thereafter some arrangements were attempted between him and the company in regard to making his payments, but they fell through, and nothing could be done in the way of collecting anything on the mortgage or *deed of trust for the reason [278] that the ejectment actions resulted unfavorably. The company, in 1899, became embarrassed and went into the hands of a receiver in New Orleans, and the same person was appointed ancillary receiver in this District, and brought this suit with leave of the court.

The court of appeals held that Bradshaw was an occupant of the premises in bad faith, with the fullest possible knowledge of the rights and claims of the appellees, and that it could not be supposed that the grantee of an occupant in bad faith could have any better right than his grantor had.

Some other facts are stated in the course of the opinion.

Messrs. George H. Lamar, and Blair Lee argued the cause and filed a brief for appellant:

The appellees, by standing by and acquiescing therein while the buildings were being erected on the property claimed by them, with the funds of the association, advanced in good faith, are estopped to deny the right of the appellant to a lien on the property to the extent of the value of the improvements.

Anderson v. Reid, 14 App. D. C. 76; Story, Eq. Jur. §§ 1237, 1238; 2 Beach, Eq. 1107; 16 Cyc. Law & Proc. pp. 312, 313; Grady v. Robinson, 28 Ala. 300; Dellett v. Kemble, 23 N. J. Eq. 58; Murray v. Ballou, 1 Johns. Ch. 566; Frost v. Beekman, 1 Johns. Ch. 288; Brydon v. Campbell, 40 Md. 331; Brown v. Mutual Ben. L. Ins. Co. 32 N. J. Eq. 809; Gatling v. Rodman, 6 Ind. 289; Kingman v. Graham, 51 Wis. 248, 8 N. W. 181; Bigelow, Estoppel, 596; Anderson v. Hubble, 93 Ind. 573, 47 Am. Rep. 394; Sumner v. Seaton, 47 N. J. Eq. 112, 19 Atl. 894; Morgan v. Chicago & A. R. Co. 96 U. S. 716, 24 L. ed. 744; Funk v. Newcomer, 10 Md. 317; Hoffman v. Smith, 1 Md. 491; McIntire v. Pryor, 10 App. D. C. 440; Searl v. School

Dist. No. 2, 133 U. S. 553, 33 L. ed. 740, 10 Sup. Ct. Rep. 374.

The defense set up in t he answer,—an alleged willingness to sell to the association as unimproved property, extra costs, etc., —while an admision of the equitable rights of the appellant, was not proved, and, if proved, could not prevent the equitable relief craved.

16 Cyc. Law & Proc. p. 386; Marmion v. McClellan, 11 App. D. C. 485; Dexter v. Gordon, 11 App. D. C. 62.

Good faith, as applicable to the case at bar, must be considered and determined upon the broad common-sense idea of actual knowledge and positive intent to perpetrate a wrong upon the true owner.

Woodward v. Blanchard, 16 Ill. 432; Searl v. School Dist. No. 2, supra; Wright v. Mattison, 18 How. 50, 15 L. ed. 280.

In the light of the law applicable to the case, it is immaterial whether the officers of the local board were agents of the association or not. For the sake of the argument only, conceding them to have been agents, as parties to the fraud against the association, their knowledge cannot be imputed to the association, so as to render it guilty of bad faith.

Mechem, Agency, art. 723; 2 Sugden, Vend. & P. *1043, § 20; 2 Pom. Eq. Jur. art. 675.

To affect a purchaser with notice, there ought to be close and continuous prosecution of the *lis pendens* and this is required by Lord Bacon's rule.

2 Sugden, Vend. & P. p. 1046, art. 24; Murray v. Ballow, 1 Johns. Ch. 576.

The equity cause for injunction, being subject to dismissal for lack of prosecution, could not affect a purchaser with a notice; but, as a matter of fact, as shown, it was finally dismissed, the cause being thereafter no longer *lis pendens* in any sense, dismissal being naturally more conclusive to do away with notice than the want of close and continuous prosecution upon which the dismissal was based.

13 Am. & Eng. Enc. Law, p. 888.

A voluntary abandonment or discontinuance destroys the *lis pendens*.

Wortham v. Boyd, 66 Tex. 404, 1 S. W. 169; Hammond v. Paxton, 58 Mich. 398, 25 N. W. 321.

The association is relieved, by the inquiries made and the precautions taken, of the charge of bad faith in respect to the pendency of the ejectment suits, in the absence of actual knowledge thereof, independently of the defects in the records, to be discussed below.

Rogers v. Jones, 8 N. H. 269; Williamson v. Brown, 15 N. Y. 363; Jones v. Smith, 1 Hare, 43; Acer v. Westcott, 46 N. Y. 384, 7 Am. Rep. 355; Ware v. Egmont, 31 Eng. L. & Eq. 97; Brydon v. Campbell, 40 Md. 338; Spencer v. Spencer, 56 N. C. (3 Jones, Eq.) 404.

The appellant is further relieved and his good faith sustained by the errors in the docket and the indexes thereto, but for which the association's title examiner, Mr. Acker, would have discovered the ejectment suits.

Washington A. & G. Steam Packet Co. v. Sickles, 24 How. 333, 16 L. ed. 650; Brydon v. Campbell, supra.

A purchaser bona fide from a fraudulent vendor is free from effects of fraud.

Colorado Coal & I. Co. v. United States, 123 U. S. 313, 31 L. ed. 185, 8 Sup. Ct. Rep. 131; United States v. California & O. Land Co. 148 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. Rep. 458; Pom. Eq. Jur. art. 754.

The showing of good faith, in fact, is much stronger than is required by the authorities bearing on the subject. Many of the precautions actually taken in this case could have been omitted, and still, under the authorities, the courts below should have held that the association acted in good faith.

Acer v. Westcott, 46 N. Y. 384, 7 Am. Rep. 359; Searl v. School Dist. No. 2, supra; Bright v. Boyd, 1 Story, 478, Fed. Cas. No. 1,875.

Without reference to the connivance and estoppel of the appellees, the appellant, as receiver of the New South Building & Loan Association, an improver in good faith, is entitled in equity to a lien on the property to the extent of the value of the improvements bestowed with the funds of the association.

Searl v. School Dist. No. 2, 133 U. S. 553, 33 L. ed. 740, 10 Sup. Ct. Rep. 374; Bright v. Boyd, 1 Story, 492, Fed. Cas. No. 1,875; Thomas v. Thomas, 16 B. Mon. 421; Valle v. Fleming, 29 Mo. 152, 77 Am. Dec. 557; Hatcher v. Briggs, 6 Or. 31; McKelway v. Armour, 10 N. J. Eq. 115, 64 Am. Dec. 445; Union Hall Asso. v. Morrison, 39 Md. 281.

Mr. J. J. Darlington argued the cause and filed a brief for appellees:

Even one who has, in good faith, and without notice or negligence upon his part, improved real estate under an honest belief in his title, but who is afterwards evicted through a latent defect in the title,—a case infinitely stronger than the present,—cannot recover the cost of his improvements by a bill against the successful evictor.

Williams v. Gibbes, 20 How. 538, 15 L. ed. 1014; Anderson v. Reid, 14 App. D. C. 54.

How can a mere lender of money to one who makes improvements, with full knowledge and in bad faith, claim to do so?

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The foregoing facts show that Bradshaw, if he were plaintiff, would have no cause of action against the defendants, based upon any allegation that he was permitted by them to build on what he thought was his own land, while the defendants stood by and did not interfere to prevent it, although knowing that the land was not his, and claiming title themselves. At all times Bradshaw had knowledge that not only was his title denied, but that these defendants were asserting, to the best of their ability, in actions of ejectment against him, the right to the possession of, and title to, the property in question. Under such circumstances it would simply be at his own risk that he expended money on what might turn out to be other people's property, and which he knew was so claimed. His attitude in the matter would seem to have been that, [280] if he *could successfully defend the ejectment actions, he could then pay the loan he had obtained from the company; while, if he should prove unsuccessful in the defense, it would be the company's misfortune.

The company now insists that the money was obtained from it through the fraud of Bradshaw and the others, as stated. But before coming to the question of what duty the defendants owed to the company, it may be well to examine for a moment the position of the company in the transaction leading up to its loan to Bradshaw. It is true, the company asserts that it has acted in good faith throughout the whole matter. Upon examining its position one fact is apparent and uncontradicted: Before the execution of the deed of trust, and, of course, before the advance of any of the moneys by the company to Bradshaw, the company was aware, through its general attorney in New Orleans, that a suit in equity had been commenced about March 1, 1890, by the Ashleys against Bradshaw and others, wherein they alleged their claim of ownership of the property, which included the lots in question in this case, and in which the plaintiffs sought to enjoin the defendants from setting up any title thereto. It appeared that there was a common source of title to all the lots mentioned in the bill. The bill charged fraudulent and illegal acts on the part of Bradshaw, Walter, and other confederates, in undertaking to seize possession of the lots there claimed to belong to the plaintiffs therein (the defendants in this suit), and specifically described the status of the parties then existing, and denied to Walter and Bradshaw any ownership or right to the possession of the lots. The facts regarding this equity suit were presented by the general attorney for the company, in New Orleans, to the local attorney of the company in this District, and the fact that the bill had been dismissed only for want of prosecution, and without prejudice, was specially called to the attention of the local attorney. No action seems to have been taken regarding the contents of that letter by the local attorney after its receipt other than *to certify to the title, nor does the general attorney seem to have inquired further about the facts. The bill was, of course, on file in the clerk's office, and it showed the contention as to the title between these defendants and Bradshaw and his associates. With this knowledge, therefore, it is impossible to say that the company was ignorant of the fact of the existence of a question as to the title of Bradshaw to the premises on which he was seeking to obtain this loan. The dismissal of the bill without prejudice, for want of prosecution, would not be evidence that the title of Bradshaw was good or that the controversy had been settled. It certainly was a warning of the existence of a question as to the title, and it was, at any rate, notice enough to start the company upon some investigation of the facts as to the actual condition of the controversy respecting it. And at this time the ejectment actions had been brought and were pending. The declarations in those actions were then on file in the clerk's office of the supreme court of the District, and showed the actions were originally brought to recover possession of "ink-lot" 1. It is true that while that particular lot did not include the premises upon which the buildings were subsequently erected, yet the source of title to all the lots was the same. Some months before the deed of trust was executed amendments to these declarations, which did include these lots, had been made and were on file in the clerk's office among the papers in those actions.

Actual knowledge of the fact of the existence of the ejectment actions in regard to ink-lot 1 is, however, denied by the company, and a like denial is made in regard to the amendments to the declarations. The local attorney had knowledge of them, or ought to have had. But, so long as the company had knowledge of the equity suit and the contents of the bill therein, there was enough to put the company on inquiry as to the state of the title. If, under such facts, the company loaned the money, it showed its willingness to take the risk of the validity and sufficiency of the title of Bradshaw.

*The company denied knowledge of the amended declarations because of the alleged defect in the manner of keeping the books in the clerk's office, wherein the ejectment actions were entered, but no statement was

made on the page of the docket devoted to those actions of the existence of amendments to the declarations. The amendments were, however, duly filed in the clerk's office, and the alleged failure of the clerk to properly index the amendments was no answer to the failure on the part of the searcher to examine the files for the purpose of seeing the papers in existence in the actions. In this matter we agree with the opinion of the court of appeals, in holding that the respondents here were in nowise responsible for the alleged failure of the clerk to make additions to the docket or index book. Nor is there any evidence that the persons acting for the company were in any way misled by such failure, to the company's detriment.

The company also insists that it ought not to be charged with any knowledge of any fact which was known only by Walter and the local attorney. The company asserts, first, that Walter and the local attorney were not its agents; and, in any event, by reason of their fraud, knowledge by the company should not be imputed to it because of the knowledge of its agents. The company asserts that Walter was simply the president of its local board, composed of the stockholders in the company residing or to be found in Washington, and that his action was not the action of an agent under such circumstances. It also asserts the same thing in regard to the local attorney, and denies liability for their acts. We think the position cannot be maintained. The president and attorney were directors of the local board and had to be directors before they could hold either office, and the local directors had to be approved by the board of the main office. It was to this local board that the application was first to be made for a loan, and it was to be approved by it and transmitted at once to the main office, signed by the president, secretary, and attorney of the local board on a form furnished by the *association to applicants for a loan. Transactions of a local nature were put in charge of the local attorney, who represented the company at his locality, and loans were consummated by him and papers sent to him by the company for such action as was necessary for the completion of a loan. The knowledge of the attorney and of the president of the board in regard to a matter coming within the sphere of their duty, and acquired while acting in regard to the same, and sending to the company in New Orleans their report which it was their duty to make, must be imputed to the company. The fact that those agents committed a fraud cannot alter the legal effect of their acts or of their knowledge with respect to the company in regard to third parties who had no connection whatever with them in relation to the perpetration of the fraud, and no knowledge that any such fraud had been perpetrated. There is no pretense of any evidence that the defendants had any connection with these alleged frauds, and no pretense that they had any knowledge of their existence, if they did exist. In such case the rule imputing knowledge to the company by reason of the knowledge of its agent remains.

But, even if it be assumed that the company had no more than a knowledge of the equity suit and its dismissal without prejudice, it simply shows that the company was willing to take the risk of the title, although confessedly questionable.

Upon these facts we cannot see that the defendants can be held liable to the plaintiff on account of any failure of duty on defendants' part. If the buildings were being erected by Bradshaw, there was certainly no duty on the part of defendants to notify him of their title to the property, and we cannot see that there was any such duty resting upon the defendants to endeavor to find out through what sources Bradshaw obtained the money to erect the buildings, and to inform the person who was loaning the money that the defendants claimed the property as theirs.

Assuming, even, that the company made the loan in the bona fide belief that Bradshaw had title, and that the claims *of the de- [284] fendants to the ownership of the lots were not well founded, and also that no knowledge of the agents of the company in Washington could properly be imputed to it, and we still have the fact that the company loaned its money with knowledge of the equity suit and of the allegations of the bill therein regarding the title of the defendants and the lack of any title in Bradshaw. Imputing no knowledge to the company other than it actually possessed, the same course should be taken with the defendants. In that case we have their sworn denial, unaffected with any proof to the contrary, that they had any actual knowledge of the existence of the deed of trust or of any connection of the company with Bradshaw, or of any advances made by it to Bradshaw, until February, 1895 (long after all the moneys had been advanced), and, even in regard to Bradshaw himself, they notified the contractor early in January, 1894, that they owned the property and they would not be responsible for any expenditures made by Bradshaw, and that if the contractor went on he would be regarded as a trespasser.

There is no finding that Bradshaw was insolvent, or that the defendants had any knowledge of it if he were insolvent, and hence there is nothing to lead to the as-

sumption that the defendants knew the buildings could only be erected by Bradshaw with borrowed money, and nothing to show any duty on the part of defendants to take active steps and make a search to endeavor to find out who was loaning him money, and on what security. And yet this is the contention on the part of the complainant. We think it must be regarded as an extraordinary contention and an unreasonable application of the doctrine of constructive notice. This is the language used by the court of appeals, and it properly describes the situation. Certainly constructive notice cannot be applied to the owner of property in regard to the existence of a mortgage thereon, placed there by someone who did not own such property. The owner of real estate is under no obligation whatever to watch [285] the records to see whether someone who *does not own his property has assumed to place a mortgage upon it or convey it by deed to some third person. The defendants knew Bradshaw was in possession and they saw buildings being erected on the lots. Were they to assume that Bradshaw was borrowing the money, and that they must, therefore, go to work to find out from whom he was borrowing, and notify him of the facts? They in fact knew nothing of the deed of trust, but, by imputing knowledge, the claim is made that a duty founded upon such imputed, but not upon any actual, knowledge, rested upon defendants, for the failure to discharge which the defendants ought to be held liable.

No case has been called to our attention which in any degree resembles the claim made by the company herein. The man who actually erected the buildings knew all about the state of the title, and that it was contested by the defendants in the most earnest and emphatic manner in their actions of ejectment to recover the lots. The evidence fails to show that the company was, before the money was advanced, entirely innocent of any knowledge on its part which would lead to doubt as to the ownership of the property by Bradshaw. But, even its actual good faith, in the popular sense, cannot charge the defendants with the duty of active investigation to discover from what source Bradshaw obtained the money to build. The simple facts are that the defendants were in possession of the property when this suit was commenced, and they ask no aid from a court of equity to place them in possession. They had recovered it in their actions at law, and a court of equity will not, even in the case of a bona fide improver, grant active relief in such a case. 2 Story, Eq. Jur. 12th ed. §§ 1237, 1238; Williams v. Gibbes, 20 How. 535-538, 15 L. ed. 1013, 1014; Anderson v. Reid, 14 D. C. App. 54; Canal Bank v. 111 U. S. 66, 79, 28 L. ed. 354, 358, Ct. Rep. 303; Searl v. School Dist. 133 U. S. 553, 561, 33 L. ed. 740, 745, Ct. Rep. 374, and other cases, cited trial judge in his opinion, and in the of the court of appeals. The case company is not strengthened by its edge that the title of Bradshaw wa tionable.

*Morgan v. Chicago & A. R. Co. 9 716, 720, 24 L. ed. 743, 744, cited, other cases, by the appellant, has no tion. The facts are so wholly diff their nature as to present a case wh not touch the principle decided There was conduct on the part of pellant which was such as to am fraud or misrepresentation, leading to believe the existence of a fact u existence of which appellee acted. no cases in opposition to the result arrived at.

The decree of the court below is a

MERCHANTS HEAT & LIGHT CO
Plff. in Err.,
v.
JAMES B. CLOW & SONS.

(See S. C. Reporter's ed. 286-2

Pleading—objection to service of p effect of setting up cross claim.

The lack of any valid se process upon a foreign corporation defeat the jurisdiction of a Federa court of an action in which such co pleaded in its answer a demand in ment,—especially since, under th practice, as defined in Ill. Rev. Sta 110, §§ 30, 31, the defendant may verdict and judgment in his favor pears that the plaintiff is indebted for a balance when the two claims against each other, and, after the cr is set up, the plaintiff is not perm dismiss his suit without the consen defendant or leave of court gra cause shown.

[No. 118.]

Argued January 15, 1907. Decided 28, 1907.

IN ERROR to the Circuit Court United States for the Northern of Illinois to review a judgment in plaintiff in an action on a contract a foreign corporation. Affirmed.

The facts are stated in the opini

Mr. W. H. H. Miller argued the ca with Messrs. James W. Fesler, C. C. and Samuel D. Miller, filed a brief f tiff in error:

Where a party once makes objection to the jurisdiction and reserves a right thereunder, he does not waive an illegality in the service if, after said motion is denied, he answers to the merits. Set-off is certainly part of the answer to the merits, and, it seems to us, is no waiver.

Central Grain & Stock Exchange v. Board of Trade, 60 C. C. A. 299, 125 Fed. 463; Louden Machinery Co. v. American Malleable Iron Co. 127 Fed. 1008.

Mr. Newton Wyeth argued the cause, and with Messrs. Warren B. Wilson and Walter L. Fisher, filed a brief for defendant in error:

General jurisdiction of the court not being in question, the right not to be sued in the particular district was a mere personal privilege, which, of course, it was competent for the defendant company to waive.

St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982.

The right to set-off, except as it is enforced in equity, is a matter of local legislation, and the Federal courts sitting in any state, when dealing with the subject, will follow the rules established by the tribunals of the state.

Charnley v. Sibley, 20 C. C. A. 157, 34 U. S. App. 705, 73 Fed. 982; Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696.

Leave of the court has been held by Illinois decisions to mean a reasonable discretion by the court, and further, after such plea or notice of set-off, the plaintiff cannot dismiss against the objection of the defendant.

East St. Louis v. Thomas, 102 Ill. 453; Butler v. Cornell, 148 Ill. 276, 35 N. E. 767.

Mr. Justice Holmes delivered the opinion of the court:

This case comes up on the single question of the jurisdiction of the circuit court, which was saved by bill of exceptions and stipulation, and which is certified to this court. The defendant in error, the original plaintiff, and hereafter called plaintiff, is an Illinois corporation; the plaintiff in error is a purely local Indiana corporation, organized for the furnishing of heat, light, and power in Indianapolis. The questions are whether the service of the writ was good (Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 435, 49 L. ed. 1111, 1116, 25 Sup. Ct. Rep. 740), or, if not, whether the defendant submitted to the jurisdiction. The material facts are these: The service was upon one Schott in Chicago. By the laws of Illinois a foreign corporation may be served with process by leaving a copy with its general agent, or with any agent of the company. Schott had an entire contract with the defendant by which he was to build and equip the plant, assume general management of it, and operate it for the company until fully completed, "approve contracts therefor," certify bills, and have the heating plant ready for service on December 1, 1902, and finally finished by July 1, 1903. Schott was acting as general manager under this contract at the date of service, March 23, 1903, and did any purchasing *required for the company in Illinois. In the [289] same capacity he made the contract sued upon, which was for materials to be used for equipping the plant. He made it in the city of Chicago. After the suit was begun, a motion to quash the return of service was made and overruled, and thereupon the defendants, after excepting, appeared, as ordered, and pleaded the general issue and also a recoupment or set-off of damages under the same contract, and overcharges, in excess of the amount ultimately found due to the plaintiff. There was a finding for the plaintiff of $9,082.21.

It is tacitly conceded that the provision as to service does not apply unless the foreign corporation was doing business in the state. If it was, then, under the decisions of this court, it would be taken to have assented to the condition upon which alone it lawfully could transact such business there. Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, ante, 345, 27 Sup. Ct. Rep. 236. Whether the purchase of materials for the construction or equipment of its plant, as a preliminary to doing its regular and proper business, which necessarily would be transacted elsewhere, in the state of its incorporation, is doing business, within the meaning of the Illinois statute, was argued at length and presents a question upon which the decisions of the lower courts seem not to have agreed. We shall intimate no opinion either way, because it is not necessary for the decision of the case, in view of the submission to the jurisdiction which the facts disclose.

We assume that the defendant lost no rights by pleading to the merits, as required, after saving its rights. Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44. But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action, and, by invoking, submitted to it. It is true that the counterclaim seems to have arisen wholly out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in set-off proper. But, even at common law, since the doctrine has

[290] been developed, *a demand in recoupment is recognized as a cross demand, as distinguished from a defense. Therefore, although there has been a difference of opinion as to whether a defendant, by pleading it, is concluded by the judgment from bringing a subsequent suit for the residue of his claim, a judgment in his favor being impossible at common law, the authorities agree that he is not concluded by the judgment if he does not plead his cross demand, and that whether he shall do so or not is left wholly to his choice. Davis v. Hedges, L. R. 6 Q. B. 687; Mondel v. Steel, 8 Mees. & W. 858, 872; O'Connor v. Varney, 10 Gray, 231. This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences. The right to do so is of modern growth, and is merely a convenience that saves bringing another suit, not a necessity of the defense.

If, as would seem and was assumed by the form of pleading, the counterclaim was within the Illinois statutes (Charnley v. Sibley, 20 C. C. A. 157, 34 U. S. App. 705, 73 Fed. 980, 982), the case is still stronger. For by that statute the defendant may get a verdict and a judgment in his favor if it appears that the plaintiff is indebted to him for a balance when the two claims are set against each other; and after the cross claim is set up the plaintiff is not permitted to dismiss his suit without the consent of the defendant or leave of court granted for cause shown. Ill. Rev. Stat. chap. 110, §§ 30, 31; East St. Louis v. Thomas, 102 Ill. 453, 458; Butler v. Cornell, 148 Ill. 276, 279, 35 N. E. 767.

There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits. De Lima v. Bidwell, 182 U. S. 1, 174, 45 L. ed. 1041, 1047, 21 Sup. Ct. Rep. 743; Fisher v. Shropshire, 147 U. S. 133, 145, 37 L. ed. 109, 115, 13 Sup. Ct. Rep. 201; Farmer v. National Life Asso. 138 N. Y. 265, 270, 33 N. E. 1075. As we have said, there is no question at the present day that, by an answer in recoupment, the defendant makes himself an actor, and, to the extent of his claim, a cross plaintiff in the suit. See Kelly v. Garrett, 6 Ill. 649, [291] 652; Ellis v. *Cothran, 117 Ill. 458, 461, 3 N. E. 411; Cox v. Jordan, 86 Ill. 560, 565.

Judgment affirmed.

Mr. Justice Brewer, Mr. Justice Peckham, and Mr. Justice Day dissent.

STATE OF MONTANA EX REL. CHARL. S. HAIRE, Plff. in Err.,
v.
JAMES H. RICE, as State Treasurer.

(See S. C. Reporter's ed. 291-301.)

Error to state court—Federal question.

1. The claim of a right under an "authority exercised under the United States," within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, defining the appellate jurisdiction of the Supreme Court of the United States over state courts, is presented by a contention that a Montana statute was authorized by the enabling act of Feb. 22, 1889 (25 Stat. at L. 676, chap. 180), and was therefore valid, even if repugnant to the Constitution of that state.

Error to state court—Federal question—how raised.

2. A right claimed under an authority exercised under the United States will be regarded as "specially set up or claimed," within the meaning of U. S. Rev. Stat. § 709, defining the appellate jurisdiction of the Supreme Court of the United States over state courts, where it clearly and unmistakably appears from the opinion of the state court that the Federal question was assumed to be in issue, that the decision was against the Federal claim, and that the decision of the question was essential to the judgment rendered.

Constitutional law—legislative disposal of public lands under congressional authority—effect of restraints in state Constitution.

3. The Montana legislature must act in subordination to the state Constitution in executing the authority intrusted to it by Congress in the enabling act of Feb. 22, 1889, § 17, which granted certain public lands to the state for a normal school, to be held, appropriated, and disposed of exclusively for that purpose, in such manner as the legislature should provide.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

Error to state court—questions reviewable—validity of state statute under state Constitution.

4. The decision of the highest court of a state, that a state statute is repugnant to the Constitution of that state, is conclusive upon the Supreme Court of the United States in reviewing the judgment of the state court.

Error to state court—scope of review—questions not raised in time.

5. Raising the Federal question for the first time in the petition for a writ of error to a state court and in the accompanying assignment of errors is not sufficient to enable the Supreme Court of the United States to consider that question, even though another Federal question has been properly raised and brought up by the same writ of error.

[No. 252.]

Argued January 7, 8, 1907. Decided January 28, 1907.

IN ERROR to the Supreme Court of the State of Montana to review a judgment in favor of respondent in a proceeding to compel the state treasurer by mandamus to pay a claim of an architect for services performed in the erection of an addition to the state normal school. Affirmed.

See same case below, 33 Mont. 365, 83 Pac. 874.

Statement by Mr. Justice **Moody**:

By an act approved February 22, 1889 (25 Stat. at L. 676, chap. 180), hereafter referred to as the enabling act, the state of Montana [292]*was, with other states, admitted to the Union. By it grants of public lands were made by the United States to the several states admitted, of which only those made by § 17 need be stated here. By that section grants were made to the state of Montana in the following terms:

"To the state of Montana: For the establishment and maintenance of a school of mines, one hundred thousand acres; *for state normal schools, one hundred thousand acres;* for agricultural colleges, in addition to the grant hereinbefore made for that purpose, fifty thousand acres; for the establishment of a state reform school, fifty thousand acres; for the establishment of a deaf and dumb asylum, fifty thousand acres; for public buildings at the capital of the state, in addition to the grant hereinbefore made for that purpose, one hundred and fifty thousand acres.

" . . . *And the lands granted by this posed of exclusively for the purposes herein mentioned, in such manner as the legislature section shall be held, appropriated, and dis- of the respective states may severally provide.*"

Provision was made in the act for the selection of the granted lands from the surveyed, unreserved, and unappropriated public lands of the United States, and selections were made by the state of Montana. The constitutional convention of Montana adopted an ordinance designated as Ordinance No. 1, entitled "Federal Relations," which ordained that "the state hereby accepts the several grants of land from the United States to the state of Montana, . . . upon the terms and conditions therein provided." An act of the legislative assembly of the state of Montana, approved February 2, 1905, authorized and directed the state board of land commissioners to sign and issue interest-bearing bonds to the amount of $75,000, for the principal and interest of which the state of Montana should not be liable (§ 1), and directed the state treasurer to sell the bonds (§ 6). Section 7 directed that—

"The moneys derived from the sale of said bonds shall be used to erect, furnish, and equip an addition to the present*state nor- [293] mal school building at Dillon, Montana, and shall be paid out for such purpose by the state treasurer upon vouchers approved by the executive board of the state normal school, and allowed and ordered paid by the state board of examiners."

The law further provided that all sums realized from the sale of, or the leasing of, or from licenses to cut trees on, the lands granted for the state normal school by § 17 of the enabling act, should be pledged as security for the payment of the principal and interest of the bonds issued under the act, and should be set apart as a separate fund for that purpose. It was made the duty of the state treasurer to keep such money in a fund to be designated as the state normal school fund, and to pay therefrom the principal and interest of the bonds authorized by the act.

Section 12, article 11, of the Constitution of the state of Montana, is as follows:

"The funds of the state university and all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the state against loss or diversion. The interest of said invested funds, together with the rents from leased lands or properties, shall be devoted to the maintenance and perpetuation of these respective institutions."

The bonds authorized by the foregoing law of the state of Montana were duly offered for sale, and purchased by the state board of land commissioners themselves as

an investment of the common school fund of the state.

Charles S. Haire performed valuable services as an architect in the erection of an addition to the state normal school, obtained vouchers approved and allowed in the manner prescribed in § 7 of the state law, and presented the vouchers to the state treasurer, who declined to pay them, whereupon the state of Montana, on his relation, [294] brought a petition in *the supreme court of the state of Montana against the state treasurer, praying an alternative writ of mandamus, directing the respondent to pay his claim out of the fund created by the sale of bonds aforesaid, or to show cause for the refusal. The alternative writ issued, and to it the respondent interposed a demurrer and a motion to quash. The only reason alleged by the respondent in support of his pleadings, material here, was that the act of the legislature was in violation of the Constitution of Montana. The case was heard by all the judges of the supreme court of the state, as an original case, and it was adjudged that the alternative writ of mandamus be quashed and the proceedings dismissed, for the reasons that the act authorizing the issue of the bonds, secured by pledge of the proceeds of the lands, was a violation of § 12, article 11, of the state Constitution, and that this section of the Constitution was not in conflict with § 17 of the enabling act. Haire then petitioned the court for a rehearing, alleging the following reasons:

1st. Because the opinion is inconsistent and contradictory;

2d. Because the court does not give any force or effect to the requirements of § 17 of the enabling act, that the lands granted for a state normal school shall be *appropriated* for the purpose for which the grant is made, and in other respects misconstrue § 17;

3d. Because the court misconstrued § 12, article 11, of the Constitution of Montana.

In the further development and specification, in the petition for rehearing, of the second reason, it appears, in substance, that among the grounds relied upon to support it were the claims that § 17 of the enabling act had directed that the legislature, and not the state, should dispose of the granted lands; that the lands or their proceeds were appropriated by Congress to the establishment as well as the maintenance of the normal school; and that, in acting in pursuance of the authority conferred by Congress, the legislature was not restricted by the Constitution of the state, which in that respect [295] was subordinate *to the authority of a law of the United States. The supreme court of the state took the petition for rehearing under advisement, modified slightly, but not essentially, its former opinion, which h passed adversely on the claims of the p titioner set forth in the petition for rehea ing, denied the rehearing, and entered fi judgment for the respondent. Whereup this writ of error was brought, assigning errors:

"1. The said court erred in holding and de ciding that the act of Congress, approved February 22, 1889, providing, among other things, for the admission of Montana into the Union, and known as the 'enabling act,' does not authorize the legislative assembly of the state of Montana to appropriate or apply the proceeds derived from the sale or leasing of the lands granted to said state by § 17 of said act for state normal schools, or from the sale of the timber thereon, to the establishment of such schools.

"The court erred in holding that § 12 of article 11 of the Constitution of the state, as construed by said court, is not repugnant to § 17 of said act of Congress, and is valid.

"3. The court erred in holding and deciding that § 12 of article 11 of the Constitution of the state of Montana, as construed by said court, does not impair the obligation of the contract resulting from the acceptance of the grant of lands made to the state of Montana by § 17 of said act of Congress.

"4. The court erred in holding and deciding that the proceeds derived from the sale of said lands and the timber thereon constitute a permanent fund, no part of which can be used to establish a state normal school, or for any other purpose, except that of investment.

"5. The court erred in holding and deciding that the interest received from the investment of the proceeds of the sale of said lands and the timber thereon, together with the rents derived from leasing said lands, can be used only for the purpose of maintaining and perpetuating a state normal school.

*"6. The court erred in holding and deciding that the act of the legislative assembly of the state of Montana, entitled 'An Act to Enable the Normal School Land Grant to be Further Utilized in Providing Additional Buildings and Equipment for the State Normal School College,' approved February 1905, is invalid, as being in conflict with 12 of article 11 of the Constitution of the state of Montana.

"7. The court erred in denying the application of plaintiff in error for a writ of mandate."

Mr. Milton S. Gunn argued the cause and filed a brief for plaintiff in error:

If it was the intention of Congress that the grant to the state normal school "should constitute an endowment for the maint

nance and perpetuation of such school," it certainly follows that Congress also intended that the grant for public buildings at the capital of the state should constitute an endowment for the maintenance and perpetuation of such buildings. This must be so, or the language used in expressing the intention has one meaning as applied to the grant for a normal school, and another meaning as applied to the grant for buildings at the capital.

The supreme court of the state has decided that Congress intended that the proceeds of the lands granted for public buildings at the capital should be used for the purpose of erecting such buildings.

State ex rel. Bickford v. Cook, 17 Mont. 529, 43 Pac. 928.

The erection of buildings for a state normal school is the establishment of such school, within the meaning of the word "establishment" as used in the enabling act.

Story, Const. § 1139.

The authority to appropriate the lands to the purpose of the grant authorized the application of the proceeds received from the sale of the lands to the erection of such buildings.

The fundamental rule in construing statutes is to ascertain the intention of the lawmaking power, and to give effect to such intent, even though it does not conform to the letter of the statute.

Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Heydenfeldt v. Daney Gold & S. Min. Co. 93 U. S. 634, 23 L. ed. 995.

It is not the state to which power is granted to determine the manner in which the lands shall be held, appropriated, and disposed of, but such power is conferred upon the legislature of the state. There is a clear distinction between the state and the legislature of the state.

Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962.

Did the acceptance of the grant contained in § 17 of the enabling act create a contract, and does § 12 of article 11 of the Constitution, as construed by the supreme court of the state, impair the obligation of such contract?

McGee v. Mathis, 4 Wall. 143, 18 L. ed. 314; Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; Gunn v. Barry, 15 Wall. 610, 21 L. ed. 212.

Mr. **Albert J. Galen** argued the cause, and, with Messrs. W. H. Poorman and E. M. Hall, filed a brief for defendant in error:

No Federal question is involved.

Mills County v. Burlington & M. River R. Co. 107 U. S. 557, 27 L. ed. 578, 2 Sup. Ct. Rep. 654; United States v. Des Moines Nav. & R. Co. 142 U. S. 511, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308; Kennard v. Nebraska, 186 U. S. 304, 46 L. ed. 1175, 22 Sup. Ct. Rep. 879.

The construction placed upon a state statute or a state Constitution by the highest tribunal of the state will be regarded as conclusive upon the Federal court as to the state law.

Williams v. Eggleston, 170 U. S. 304, 311, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 219, 41 L. ed. 683, 694, 17 Sup. Ct. Rep. 305; Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 651, 34 L. ed. 1110, 1115, 11 Sup. Ct. Rep. 435.

A grant of land to the state for the purpose named in the act, that leaves the state the sole judge of when that purpose is accomplished, is not a grant on condition.

Mills County v. Burlington & M. River R. Co. supra; United States v. Louisiana, 127 U. S. 182, 32 L. ed. 66, 8 Sup. Ct. Rep. 1047; Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435.

If, then, this grant is without condition, the state owns these lands the same as though title had been obtained from some other source. Being the owner of the fee simple, without condition or restriction, the state, in the exercise of its sovereign authority, can, either by constitutional provision or legislative enactment, place a restriction upon the use of these funds.

The words "establish" and "establishment," standing alone, are never construed in the sense of "to construct" or "to erect" buildings. They are used in connection with incorporeal rather than corporeal things.

Webster's Century, and Bouvier's Dicts., "establish"; Brockport v. Green, 39 Misc. 231, 79 N. Y. Supp. 418.

It is clear from the context of the enabling act that the phrase, "for the establishment and maintenance of," as used in § 17, means, "for the endowment and maintenance of."

16 Cyc. Law & Proc. p. 591.

"Maintenance" means the running or current expenses, and does not include the construction of buildings.

Sheldon v. Purdy, 17 Wash. 135, 49 Pac. 230; Mitchell v. Colgan, 122 Cal. 296, 54 Pac. 905; Roach v. Gooding, 11 Idaho, 244, 81 Pac. 644.

Mr. Justice **Moody**, after making the foregoing statement, delivered the opinion of the court:

The objection is made that no Federal question is presented by the record. It must, therefore, be determined whether the contro-

versy turned in the state court upon any Federal question, and, if so, whether it was raised and decided in that court in a manner required to give this court jurisdiction to re-examine the decision upon it. The jurisdiction to do this depends upon whether the case falls within that part of § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), by which this court is given the authority upon writ of error to re-examine the final judgment or decree of the highest court of a state, "where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority." Our jurisdiction in this case does not exist, unless a right claimed under a law of the United States, or an authority exercised under the United States, was specially set up in and denied by the supreme court of Montana. A brief discussion of the facts will determine whether these conditions of jurisdiction are present. The United States granted to the state of Montana 100,000 acres of the public lands for a normal school, to be held, appropriated, and disposed of for such purpose, in such manner as the legislature should provide. The legislature, by a law enacted in due form, did provide that bonds should be [298] issued, secured by the *proceeds of the sale or leasing of the lands; that the proceeds of the bonds should be used for the erection of an addition to a normal school building and paid out for that purpose on approved vouchers. In effect, though by a circuitous method, this was a devotion of the proceeds of the sale of the land to the erection of an addition to the building. Haire presented to the state treasurer, the custodian and disbursing officer of the fund, approved vouchers for his claim for services in the erection, and payment of them was refused. The state, on relation of Haire, by proceedings which were deemed appropriate in form, sought to enforce against the state treasurer the payment of the vouchers, claiming, as appears from the opinion of the state court:

First. That the legislature had authority, under a statute of the United States, namely, § 17 of the enabling act, to deal with the lands as it did by the bond act;

Second. That the bond act was not in violation of the state Constitution; and,

Third. That if it were in violation of that Constitution, the law enacted in pursuance of an authority granted by the United States was valid and effective notwithstanding. All three of these claims were denied by the state court. The first and third s clearly claims of a "right under an authori exercised under the United States," a therefore, raised a Federal question. Magu v. Tyler, 1 Black, 195, 17 L. ed. 137. But it not enough that a claim of a Federal rig arose upon the facts. It must also appe affirmatively that the right was "special set up." No reference was made to a Federal right in the petition for the writ o mandamus, the demurrer, or the motion t quash, and the petition for a rehearing where the Federal question was first brought forward by the plaintiff in error, so far as the record discloses, was denied by the court. It is not enough that the Federal question was first presented by a petition for rehearing, unless that question was thereupon considered, and passed on adversely by the court. Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 182, 50 L. ed. 143, 26 Sup. Ct. Rep. 41.

*But an examination of the opinion of the supreme court of the state shows clearly that that court decided two questions: First, that the bond act was in violation of § 12 of article 11 of the state Constitution, which in substance provided that all funds of the state institutions of learning should be invested and only the interest upon them used for the support of those institutions; and, second, a question stated in the opinion as follows: "But, on behalf of the relator, it is contended that by the terms of § 17 of the enabling act the lands granted to the state for normal school purposes are to be held, appropriated, and disposed of [exclusively] for normal school purposes, in such manner as the legislature of Montana may provide, and that this act is sufficiently broad to warrant the legislature in borrowing money and pledging such lands for the payment of the principal and interest. And it is further contended that, if § 12 of article 11 of the Constitution contravenes the provisions of § 17 of the enabling act, § 12 is invalid and of no force or effect" [83 Pac. 876]; which was decided adversely to the contentions stated. The decision of both questions, as the court determined them, was essential to the judgment rendered, and the decision of the second was a distinct denial of the Federal right claimed by the plaintiff in error. Where it clearly and unmistakably appears from the opinion of the state court under review that a Federal question was assumed by the highest court of the state to be in issue, was actually decided against the Federal claim, and the decision of the question was essential to the judgment rendered, it is sufficient to give this court authority to re-examine that question on writ of error. San José Land & Water Co. v. San José Ranch Co. 189 U. S.

177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487. Applying this rule to the case, there is jurisdiction to re-examine the claim of the plaintiff in error on its merits.

In support of it the plaintiff in error argues that the grant of all the land by the enabling act was by an ordinance accepted by the state "upon the terms and conditions therein provided;" that the legislature of the [0]state was, by the last *clause of § 17, appointed as agent of the United States, with full power to dispose of the lands in any manner which it deemed fitting, provided only that the lands or their proceeds should be devoted to normal school purposes; and that, therefore, in the execution of this agency, the legislature was not and could not be restrained by the provisions of the state Constitution. It is vitally necessary to the conclusion reached by these arguments that the enabling act should be interpreted as constituting the legislature, as a body of individuals, and not as a parliamentary body, the agent of the United States. But it is not susceptible of such an interpretation. It granted the lands to the state of Montana, and the title to them, when selected, vested in the grantee. In the same act the people of the territory, about to become a state, were authorized to choose delegates to a convention charged with the duty of forming a Constitution and state government. It was contemplated by Congress that the convention would create the legislature, determine its place in the state government, its relations to the other governmental agencies, its methods of procedure, and, in accordance with the universal practice of the states, limit its powers. It is not to be supposed that Congress intended that the authority conferred by § 17 of the enabling act upon the legislature should be exercised by the mere ascertainment of its will, perhaps when not in stated session, or by a majority of the votes of the two houses, sitting together, or without the assent of the executive, or independently of the methods and limitations upon its powers prescribed by its creator. On the contrary, the natural inference is that Congress, in designating the legislature as the agency to deal with the lands, intended such a legislature as would be established by the Constitution of the state. It was to a legislature whose powers were certain to be limited by the organic law, to a legislature as a parliamentary body, acting within its lawful powers, and by parliamentary methods, and not to the collection of individuals who, for the time being, might happen to be members *of that body, that the authority over these lands was given by the enabling act. It follows, therefore, that in executing the authority intrusted to it by Congress the legislature must act in subordination to the state Constitution, and we think that in so holding the supreme court of the state committed no error.

It is further claimed by the plaintiff in error that the supreme court of the state erred in holding that the law under which the bonds were issued and the proceeds of public lands devoted to their payment was repugnant to the Constitution of the state. Upon this question the decision of that court is conclusive, and plainly we have no power to review it.

It is further urged that the construction given by the state court to its Constitution impaired the obligation of a contract, resulting from the acceptance of the granted lands by the state of Montana, and that this impairment was in violation of the Constitution of the United States. Nothing more need be said of that claim than that it appears for the first time in the petition for a writ of error from this court, and the accompanying assignment of errors. This is not sufficient to give this court jurisdiction of any Federal question (Corkran Oil & Development Co. v. Arnaudet, ubi supra), even though another Federal question has been properly raised and brought here by the same writ of error (Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379).

Other questions were argued, but the view we have taken of the case renders it unnecessary to consider them.

The judgment of the Supreme Court of Montana is therefore affirmed.

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*W. A. WALKER, Executor of the Estate of W. H. Ansley, Deceased, Appt., [302]

v.

J. W. McLOUD, Trustee, and Francis I. Gowen, Receiver of the Choctaw Coal & Railway Company.

(See S. C. Reporter's ed. 302-311.)

Judicial sale—to enforce forfeiture—validity—who may question.

1. A railway company and its receiver did not, by building outside its right of way through the Indian territory, lose the right to assert that a sheriff's sale to enforce a forfeiture to the Choctaw Nation, so incurred, was invalid because made on credit, in clear violation of the Choctaw law of October 30, 1888, under which the sheriff assumed to sell.

Evidence—conclusion.

2. A statement that the principal chief of the Choctaw Nation ratified an illegal sheriff's sale, giving no facts upon which the alleged ratification was based, is a conclusion of law, and as such is inadmissible in evidence.

Judicial sale—to enforce forfeiture—validity —ratification.

3. Ratification by the general council of the Choctaw Nation of a sheriff's sale to enforce a forfeiture incurred by a railway company by reason of its erection of buildings outside its right of way through the Indian territory, which sale, because made on credit, was a clear violation of the law under which the sheriff assumed to sell, was not accomplished by subsequent legislation which appropriates money to defend the Nation in all suits "in any manner relative to the full and complete execution of the laws of the Choctaw Nation by the sheriffs of each and every county in the confiscation of the property of noncitizens who are now occupying lands or buildings, or who may hereafter occupy, not in conformity to the laws of the Choctaw Nation."

[No. 140.]

Argued and submitted January 8, 1907. Decided February 4, 1907.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the United States Court for the Central District of Indian Territory, dismissing, on the merits, a bill to quiet title to property judicially sold to enforce a forfeiture to the Choctaw Nation incurred by the erection by a railroad company of buildings outside its right of way through the Indian territory. Affirmed.

See same case below, 70 C. C. A. 534, 138 Fed. 394.

Statement by Mr. Justice Peckham:

The appellant, who was plaintiff below, appeals from the judgment of the circuit court of appeals (70 C. C. A. 534, 138 Fed. 394) affirming a decree of the United States court of the central district of Indian territory, dismissing the appellant's bill on the merits. 5 Ind. Terr. 563, 82 S. W. 908.

The appellant describes this action "as in the nature of ejectment on the equity docket, instituted for the purpose of securing possession of certain buildings and the right to the occupancy of the land on which they were erected, and to quiet plaintiff in his [303] title and possession of the same, and to *remove the cloud from the title." The appellant is the executor of the will of W. H. Ansley, who was the purchaser of the buildings, hereinafter referred to, at the sheriff's sale.

The facts necessary to state in considering the question decided are as follows: The defendant McLoud is a trustee under a deed of trust, which need not now be more particularly stated, and defendant Gowen is the receiver of the Choctaw Coal & Railway Company, which was a corporation creat under the laws of the state of Minneso By the 2d section of the act of Congress February 18, 1888 (25 Stat. at L. 35, ch 13), it was granted the right to take a use for all purposes of a railway, but f no other purposes, a right of way 100 fe in width through the Indian territory for it main line and branch. The 10th section o the act provided that the company shoul accept this right of way upon the expres condition that it would neither aid, advis, nor assist in any effort looking towards the changing or extinguishing of the present tenure of the Indians in their land, and would not attempt to secure from the Indian nations any further grant of land or its occupancy than was provided in the act; and that any violation of the condition mentioned should operate as a forfeiture of all the rights and privileges of the company under the act.

The Choctaw Nation, on October 30, 1888, passed an act, the 1st section of which reads as follows:

"All noncitizens not in the employ of a citizen of the Choctaw Nation, and not authorized to live in the Choctaw Nation under the provisions of existing treaty stipulations, who have made or bought improvements in said Nation, are hereby notified that they are allowed to sell their so-called improvements to citizens, and if such noncitizens fail to comply with this section, then it shall be the duty of the sheriffs of the counties in which such improvements may be located to advertise the same for sale in thirty days, and sell the same at the appointed time to the highest Choctaw citizen bidder for cash; one half of which shall be paid into their respective *treasuries, and the other half into the national treasury. Provided, however, that, if any such noncitizen fail or refuse to deliver the possession of such an improvement, he shall be reported by the sheriff of that county to the principal chief, and by said chief to the United States Indian agent, to take proper steps for the removal and prosecution of such offender under § 2118 of the Revised Statutes of the United States. Provided, further, that a notice of sale shall be posted by the sheriff in three public places in his county, which shall be legal notice to all persons against whom this law may operate."

While the above acts were in force and during the years from 1889 to 1893, both inclusive, it is charged that the company, through its officers and agents, built certain buildings at the town of South McAlester, Indian territory, outside and beyond its right of way, illegally and in violation of such acts, and were using the same in behalf and in the interest of the company.

In 1895 William Ansley, who was a citizen of the Choctaw Nation, and a deputy sheriff of the county where the buildings were erected, wrote to the governor of the Choctaw Nation and subsequently made a report in regard to the buildings as being erected by the company outside of its right of way, and that they were controlled by the company, and he was then directed by the principal chief of the Choctaw Nation to proceed according to law to sell and dispose of the buildings which had been built by the company outside its right of way. The sheriff proceeded to advertise the buildings for sale according to law, and in June, 1895, sold some of them to the appellant's intestate for $270; and the sheriff accepted his note as payment, conditioned that the same should be paid as soon as the purchaser was put into or otherwise obtained possession. This note has never been paid. The property purchased was, as alleged, of the value of about $60,000, and the purchaser was the son of the deputy sheriff who made the sale. The reason the money was not paid at the time of the bid, as stated by the bidder Ansley, was that the property was held by the company, and he was informed that it would take litigation *to obtain possession. Immediately after the sale the sheriff who made it reported his action to the chief of the Choctaw Nation.

The appellant, upon the trial, offered in evidence the deposition of the deputy sheriff who made the sale, in relation to this matter, in which he swore that "the chief ratified my action as to the sale and payments of said property, and instructed me to proceed at once and employ attorneys to assist me in getting possession of the property for the purchasers, and I at once employed attorneys to assist the plaintiff, W. H. Ansley, in obtaining possession of the property sold by me as sheriff. Mosely & Smith, of Denison, Texas, a firm of lawyers, and Cole & Redwine, attorneys at South McAlester, were employed by the chief of the Choctaw Nation to assist the plaintiff in obtaining possession of said property. In 1895 the Choctaw council passed a special act, appropriating $1,500 to employ attorneys to represent the Choctaw Nation and to assist the plaintiff in obtaining possession of the property aforesaid. In the December following contracts employing the aforesaid lawyers were signed by Jeff Gardner, chief of the Choctaw Nation, and all my acts as deputy sheriff aforesaid as to the sale and payments of the purchase price of the aforesaid property were accepted and ratified by the Choctaw Nation."

All that portion of the deposition above quoted was objected to on the part of the defendants, and the objection was sustained, and that portion was stricken out under the exception of appellant.

The appellant also put in evidence the act of the general council of the Choctaw Nation, entitled "An Act Authorizing the Principal Chief to Employ Counsel," approved October 30, 1895, the 1st section of which reads as follows:

"Section 1. Be it enacted by the general council of the Choctaw Nation, assembled: That the sum of two thousand dollars ($2,000.00) is hereby appropriated out of any money in the national treasury not otherwise appropriated, and *said sum to be placed [306] to the credit of the principal chief, and to be by him used for and in behalf of the Choctaw Nation, in the employing of able and competent counsel to defend the interest of this nation in all suits now pending or that may hereafter come before the United States courts in any manner relative to the full and complete execution of the laws of the Choctaw Nation by the sheriffs of each and every county in the confiscation of property of noncitizens who are now occupying lands or buildings, or who may hereafter occupy, not in conformity to the laws of the Choctaw Nation."

Mr. W. N. Redwine argued the cause, and, with Messrs. Chester Howe, George R. Walker, Preslie B. Cole, and J. O. Poole, filed a brief for appellant:

A person not interested in the property sold cannot be heard in objection to the sale, and the person attacking the sale must be able to show injury resulting to him therefrom.

McLaughlin v. Bradford, 82 Ala. 431, 2 So. 515; Re Johnson, 3 La. Ann. 656; Fortier v. Zimpel, 6 La. Ann. 53; Gilmer v. Nicholson, 21 La. Ann. 589; Bachle v. Webb, 11 Neb. 429, 9 N. W. 473; Frink v. Morrison, 13 Abb. Pr. 80; Brackman v. Allison, 1 Ky. L. Rep. 278; Stockton v. Downey, 6 La. Ann. 581.

In the case at bar the appellees have no interest in said action, and stand as strangers to the suit, and cannot be heard to complain.

Semmes v. United States, 91 U. S. 24, 23 L. ed. 195.

Though the statute required the sheriff to sell for cash, yet, by agreement of the parties, this might be altered and time allowed.

Strother v. Lucas, 12 Pet. 438, 9 L. ed. 1148; 25 Am. & Eng. Enc. Law, 2d ed. p. 768; Chase v. Monroe, 30 N. H. 427; Sauer v. Steinbauer, 14 Wis. 71.

A defendant in ejectment, who shows no title to the land in dispute, cannot take ad-

vantage of technical imperfections in plaintiff's title.

M'Alister v. Williams, 1 Overt. 119.

Where a sale is made under a foreign system of laws, the sale should be construed according to the construction placed thereon by the authorities who made the same.

McGuire v. Blount, 199 U. S. 142, 50 L. ed. 125, 26 Sup. Ct. Rep. 1; Strother v. Lucas, 12 Pet. 410–438, 9 L. ed. 1137–1148; United States v. Arrendondo, 6 Pet. 691, 727, 8 L. ed. 547, 560.

Mr. John W. McLoud submitted the cause for appellees. Mr. Charles B. Stuart was on the brief:

The officer is not authorized to sell on credit; nor has he any authority to accept payment otherwise than in cash.

Negley v. Stewart, 10 Serg. & R. 207; Isler v. Andrews, 66 N. C. 552; Robins v. Bellas, 2 Watts, 359; Freeman, Executions, art. 300.

The purchaser who has not complied nor offered to comply with his bid has acquired no interest in nor right to the property sold, and can maintain no action or proceeding in regard thereto.

Freeman, Executions, art. 300; People ex rel. Kohler v. Hays, 5 Cal. 66; Hardesty v. Wilson, 2 Gill, 481, 41 Am. Dec. 439; Davis v. Pryor, 6 Smedes & M. 114; Williams v. Smith, 6 Cal. 91; Askew v. Ebberts, 22 Cal. 263; Leach v. Koenig, 55 Mo. 451.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The circuit court of appeals decided but one question in this case, and that one related to the validity of the sale of the property by the sheriff on credit instead of for cash. In our opinion that question was rightly decided by the court when it held such sale absolutely void, and it is unnecessary for us to refer to or decide any other.

The son of the deputy sheriff who conducted the sale bid off property worth $60,000 for $270, and gave his note for that amount, payable when possession was given him, or he, by some means, had otherwise obtained it. He has not yet obtained it, and the note has never been paid.

The court of appeals held the sale void, as in violation of the statute under which the sheriff assumed to sell. The proceedings of the sheriff were under the act of the Choctaw legislature, approved October 30, 1888, referred to in the foregoing statement. By that act it was provided that the sheriffs of the counties in which the improvements were located should advertise the improvements for sale for thirty days, and should "sell the same at the appointed time to the highest Choctaw citizen bidder for cash."

The sale was a clear violation of the provisions of the statute, under which alone there was authority to sell at all.

The appellant answers this objection by stating that the parties consented to the sale for credit instead of cash. We find no evidence of such consent, so far as the coal company was concerned, or its receivers. The buildings were, as alleged by appellant, erected by the company or its receivers, although outside the right of way, and, therefore, as is claimed by appellant, they became forfeited to the Choctaw Nation. It is unnecessary to decide this question at present. But if the *property were to be taken away from the company or its receivers, on the ground of the alleged forfeiture, they certainly had the right to demand that it should be taken from them pursuant to law, and not in open violation thereof. When a party whose only title to property depends upon its sale to him under a statute demands possession of such property from one who is in possession under a bona fide claim of right, the party making such demand must show some right to it, and this obligation he does not meet by showing that he purchased it under a sale which was in plain violation of the very statute under which the sale took place. Hockett v. Alston, 49 C. C. A. 180, 110 Fed. 910. The coal company or the receivers, therefore, had great interest in this property, as owners, until, at least, their title was devested upon a valid sale. They never consented to any sale on credit.

The appellant asserts that the railroad or the receivers had forfeited the property by building outside the right of way, and hence they had no right to be heard as to the manner of sale, whether in violation of the statute or not. But, assuming the validity and applicability of the Indian statute, the title to the property did not become forfeited by the mere act of building. There must be at least some valid action looking towards the enforcement of the forfeiture. To assert that those who are in possession are intruders upon the land and have forfeited their property, and therefore are not entitled to be heard upon the question whether those who claim the property have complied with the law, is to say that one in possession and claiming to be the owner may be deprived of his property without due process of law. On the contrary, he is entitled to insist upon obedience to law by those who assume to take his property by reason of an alleged forfeiture. To insist upon a forfeiture the person who claims it must show some legal right to insist upon it. In case of a sovereign state or nation, its conclusion to insist upon a forfeiture for breach of a condition subsequent may be by legislation (Atlantic

P. R. Co. v. Mingus, 165 U. S. 413, 431, L. ed. 770, 777, 17 Sup. Ct. Rep. 348), nd that legislation must be *followed in asrting and enforcing the forfeiture by those cting for the state. So the owners of this roperty, even if it be liable to forfeiture, nay nevertheless insist upon obedience to he statute by those assuming to act under it. Their consent to its violation is most essential. They did not become outlaws by building outside of the right of way.

It is also urged on the part of the appellant that the act of the sheriff was ratified both by the principal chief and also by the council of the Nation. The only proof of the ratification by the principal chief (even if he had power to ratify, which cannot be assumed) is given in the deposition of the appellant's intestate, referred to in the foregoing statement of facts. Therein the sheriff said that the chief ratified his action as to the sale and payments on the property, and instructed him to proceed at once to employ attorneys to assist him in getting possession of the property for the purchaser. The statement that the chief ratified his action was a mere conclusion of law. It gave no facts upon which such alleged ratification was based, and was clearly inadmissible as proof of ratification. The same witness had already testified that before the sale he was directed by the chief of the Choctaw Nation "to proceed according to law to dispose of the buildings which had been built by the Choctaw Coal & Railway Company off of its right of way." It would hardly be supposed that he would at once ratify a violation of the law in the conduct of the sale. But the proof of ratification by the principal chief is totally insufficient, and is, as already said, a mere conclusion of law by the witness. And, as a separate and distinct reason, we find no proof of any power of the chief to ratify a violation of this act.

Nor is the alleged ratification by the general council of the Choctaw Nation of any greater effect. This ratification consists in the passage by the general council of the act approved October 30, 1895, and already referred to. It appropriates the sum of $2,000, to be used by the principal chief in the employment of counsel for the purpose of defending the interest of the Nation in all suits pending or that may thereafter come *before the United States courts, "in any manner relative to the full and complete execution of the laws of the Choctaw Nation by the sheriffs of each and every county in the confiscation of property of noncitizens who are now occupying lands or buildings, or who may hereafter occupy, not in conformity with the laws of the Choctaw Nation."

Certainly there is nothing in that act which in any way ratifies, or purports to ratify, an illegal sale by a sheriff assuming to act under the law providing for sales by sheriffs, of buildings erected on land outside the right of way of the railroad company. It appropriates money to defend the Nation in suits relative to the full and complete execution of the laws, and nothing else; not a suspicion of any ratification of an illegal sale under those laws.

The record shows a gross violation of the act under which the sale was made, and an entire absence of any evidence showing a ratification of such act either by the principal chief, assuming he could ratify, or by the council of the Nation. The case is not one in which any court would strive to find a way to uphold such a proceeding.

Without going into the other questions which arise, it is sufficient to say that, upon the ground above discussed, the decree of the Circuit Court of Appeals is right.

Decree affirmed.

ORLANDO F. BACON, Plff. in Err.,
v.
PAUL H. WALKER et al.

(See S. C. Reporter's ed. 311–320.)

Constitutional law—due process of law—restrictions on sheep grazing.

1. An owner of sheep is not deprived of his property without due process of law by Idaho Rev. Stat. §§ 1210, 1211, under which damages may be recovered from him for permitting his sheep to graze on the public domain within 2 miles of a dwelling house.

Constitutional law—police power of state—limits.

2. The police power of a state is not confined to the suppression of what is offensive, disorderly, or unsanitary, but embraces regulations designed to promote the public convenience or the general prosperity.

NOTE.—As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L. R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621; and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

For a discussion of police power generally—see notes to State v. Marshall, 1 L.R.A. 51; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; State v. Schlemmer, 10 L. R.A. 135; and Barbier v. Connolly, 28 L. ed. U. S. 923.

Constitutional law—equal protection of the laws—discrimination.

3. An arbitrary and unreasonable discrimination against the sheep industry, prohibited by the guaranty in U. S. Const. 14th Amend. of the equal protection of the laws, is not made by Idaho Rev. Stat. §§ 1210, 1211, under which damages may be recovered from one who permits his sheep to graze on the public domain within 2 miles of a dwelling house.

[No. 147.]

Argued January 10, 1907. Decided February 4, 1907.

IN ERROR to the Supreme Court of the State of Idaho to review a judgment which affirmed a judgment of the District Court for the County of Elmore, in that state, which had in turn affirmed a judgment of the Justice's Court of Little Camas Precinct, in such county, for the recovery of damages sustained by the violation of a statute prohibiting the grazing of sheep on the public domain within 2 miles of a dwelling house. Affirmed.

See same case below, 11 Idaho, 127, 81 Pac. 155.

The facts are stated in the opinion.

Mr. S. M. Stockslager argued the cause, and, with Messrs. W. E. Borah, Frank T. Wyman, and John C. Rice, filed a brief for plaintiff in error:

It is the duty of the courts to step in and prevent an unreasonable and arbitrary exercise of the police power.

Freund, Pol. Power, p. 139; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

As to the limitations of police power, see—

Tiedeman, State & Federal Control of Persons & Property, p. 505; Freund, Pol. Power, pp. 138, 482, 705, 738; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Gulf, C. & S. F. R. Co. v. Ellis and Lawton v. Steele, supra.

We have the question squarely presented, whether the legislature can in this manner discriminate against a long-established and legitimate industry, and, in effect, except from the operation of the law all others engaged in similar industries, when it is not dangerous, or more dangerous than the excepted classes, to the health, comfort, or welfare of the people.

Buford v. Houtz, 133 U. S. 320, 33 L. ed. 618, 10 Sup. Ct. Rep. 305; Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259.

The common-law rule that a man must confine his own domestic animals to his own inclosure has never obtained in Idaho.

Johnson v. Oregon Short Line R. Co. 11 Idaho, 355, 53 L.R.A. 744, 63 Pac. 112.

When a calling is not dangerous to the public, either directly or indirectly, it can not be subjected to any police regulation whatever which does not fall within the power of taxation.

Freund, Pol. Power, p. 738.

Offensiveness must, as a rule, consist in actual physical discomfort, or in violation of the sense of decency; mere undesirableness by reason of social or other prejudices is not sufficient; not even if it leads to a depreciation of property.

Freund, Pol. Power, § 178.

The nature of the business must also be such as to justify restriction as to locality. If the business is of an unoffensive character, and its prosecution does not involve the creation of a nuisance, a law is unconstitutional which undertakes to confine it to a certain locality.

Tiedeman, State & Federal Control of Persons & Property, p. 556; New York Sanitary Utilization Co. v. Health Department, 61 App. Div. 106, 70 N. Y. Supp. 510.

Classification, to relieve a law from the charge of a denial of equal protection, cannot be made arbitrarily, but must be based upon some difference which bears a just and proper relation to the attempted classification.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 51 L. ed. 666, 17 Sup. Ct. Rep. 255.

As the statute is unreasonable and arbitrary, and is a discrimination against the owners and herders of sheep,—a well-established, harmless industry,—it violates not only the 14th Amendment, which guarantees protection to the citizen against the abridgment of his privileges and immunities, but it likewise deprives him of due process of law, and denies to him the equal protection of the laws, in violation of other provisions of the Constitution.

McGehee, Due Process of Law under the Federal Constitution, pp. 306, 345; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Plessy v. Ferguson, 163 U. S. 550, 41 L. ed. 260, 16 Sup. Ct. Rep. 1138.

No counsel for defendants in error.

Mr. Justice McKenna delivered the opinion of the court:

This action involves the validity, under the Constitution of the United States, of the following sections of the Revised Statutes of the state of Idaho:

"Sec. 1210. It is not lawful for any person owning or having charge of sheep to herd the same, or permit them to be herded, on

the land or possessory claims of other persons, or to herd the same or permit them to graze within 2 miles of the dwelling house of the owner or owners of said possessory claim.

"Sec. 1211. The owner or the agents of such owner of sheep violating the provisions of the last section, on complaint of the party or parties injured, before any justice of the peace for the precinct where either of the interested parties may reside, is liable to the party injured for all damages sustained; and, if the trespass be repeated, is liable to the party injured for the second and every subsequent offense in double the amount of damages sustained."

Defendants in error, under the provisions of those sections, brought this action in the justice's court of Little Camas precinct, Elmore county, state of Idaho, for the recovery of $100 damages, alleged to have accrued to them by the violation by plaintiff in error of the statutes, and obtained judgment for that sum. The judgment was successively affirmed by the district court for the county of Elmore, and the supreme court of the state, 81 Pac. 155. The case was then brought here.

It was alleged in the complaint of defendants in error, who were plaintiffs in the trial court, that plaintiff in error caused his sheep, about three thousand in number, to be herded upon the public lands within 2 miles of the dwelling house of defendants in error. The answer set up that the complaint did "not state a cause of action other than the violation of §§ 1210 and 1211 of the Revised Statutes of the state of Idaho," and that said sections were in violation of the 14th Amendment of the Constitution of the United States. The specifications of the grounds of the unconstitutionality of those sections were, in the courts below, and are, [315] *in this court, (1) that plaintiff in error has an equal right to pasture with other citizens upon the public domain, and that, by imposing damages on him for exercising that right, he is deprived of his property without due process of law; (2) that a discrimination is arbitrarily and unlawfully made by the statutes between citizens engaged in sheep grazing on the public domain and citizens engaged in grazing other classes of stock.

These grounds do not entirely depend upon the same considerations. The first denies to the state any power to limit or regulate the right of pasture asserted to exist; the other concedes such power, and attacks it only as it discriminates against the grazers of sheep. We speak only of the right to pasture, because plaintiff in error does not show that he is the owner of the land upon which his sheep grazed, and what rights owners of land may have to attack the statute we put out of consideration. New York ex rel. Hatch v. Reardon, 204 U. S. 152, ante, 415, 27 Sup. Ct. Rep. 188. But we may remark that the supreme court of Idaho said in Sweet v. Ballentyne, 8 Idaho, 431, 440, 69 Pac. 995: "These statutes [§§ 1210, 1211, quoted above] were not intended to prevent owners from grazing sheep upon their own lands, although situated within 2 miles of the dwelling of another." Is it true, therefore, even if it be conceded that there is right or license to pasture upon the public domain, that the state may not limit or regulate the right or license? Defendants in error have an equal right with plaintiff in error, and the state has an interest in the accommodation of those rights. It may even have an interest above such accommodation. The laws and policy of a state may be framed and shaped to suit its conditions of climate and soil. Illustrations of this power are afforded by recent decisions of this court. In Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, a use of property was declared to be public which, independent of the conditions existing in the state, might otherwise have been considered as private. So also in Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301. In the first case there was a recognition of the power of the state to deal with and accommodate its laws to the [316] *conditions of an arid country and the necessity of irrigation to its development. The second was the recognition of the power of the state to work out from the conditions existing in a mining region the largest welfare of its inhabitants. And again, in Offield v. New York, N. H. & H. R. Co. 203 U. S. 372, ante, 231, 27 Sup. Ct. Rep. 72, the principle of those cases was affirmed and applied to conditions entirely dissimilar, and it was declared that it was competent for a state to provide for the compulsory transfer of shares of stock in a corporation, the ownership of which stood in the way of the increase of means of transportation, and the public benefit which would result from that. Of pertinent significance is the case of Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576. There a statute of the state of Indiana was attacked, which regulated the sinking, maintenance, use, and operation of natural gas and oil wells. The object of the statute was to prevent the waste of gas. The defendants in the action asserted against the statute the ownership of the soil and the familiar principle that such ownership carried with it the right to the minerals beneath and the consequent privilege of mining to extract them. The principle was conceded, but it was declared inapplicable, as ignoring the peculiar character of the substances—oil and gas—with which the statute was concerned. It was pointed out that

those substances, though situated beneath the surface, had no fixed situs, but had the power of self-transmission. No one owner, it was therefore said, could exercise his right to extract from the common reservoir, in which the supply was held without, to an extent, diminishing the source of supply to which all the other owners of the surface had to exercise their rights. The waste of one owner, it was further said, caused by a reckless enjoyment of his right, operated upon the other surface owners. The statute was sustained as a constitutional exercise of the power of the state, on account of the peculiar nature of the right and the objects upon which it was exerted, for the purpose of protecting all of the collective owners.

[317] *These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power of a state, and their contention that the statute of Idaho transcends those limits. It is enough to say that they have fallen into the error exposed in Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341. In that case we rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said, embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. We do not enter, therefore, into the discussion whether the sheep industry is legitimate, and not offensive. Nor need we make extended comment on the 2-mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose. But the abuse must be shown. It is not shown by quoting the provision which expresses the limit. The mere distance expressed shows nothing. It does not display the necessities of a settler upon the public lands. It does not display what protection is needed, not from one sheep or a few sheep, but from large flocks of sheep, or the relation of the sheep industry to other industries. These may be the considerations that induced the statutes, and we cannot pronounce them insufficient on surmise or on the barren letter of the statute. We may refer to Sifers v. Johnson, 7 Idaho, 798, 54 L.R.A. 785, 97 Am. St. Rep. 271, 65 Pac. 709, and Sweet v. Ballentyne, 8 Idaho, 431, 69 Pac. 995, for a statement of the practical problem which confronted the legislature and upon what considerations it was solved. We think, therefore, that the statutes of Idaho are not open to the objection that they take the property of plaintiff in error without due process of law, and pass to the consideration of the charge that they make an unconstitutional discrimination against the sheep industry.

Counsel extend to this contention the conception of the police power which we have just declared to be erroneous, and, *enumer- [318] ating the classes discriminated in favor of as cattle, horses, hogs, and even poultry, puts to question whether, in herding or grazing sheep, "there is more danger to the public 'health, comfort, security, order, or morality,' than the classes of animals and fowls above enumerated." "What," counsel asks, "are the dangers to the public growing out of this industry that do not apply with equal force to the others? Does the herding or grazing of sheep necessarily, and because of its unwarrantable character, work an injury to the public? And, if dangerous in any degree whatever, are the other classes which are omitted and in effect excepted entirely free from such danger, or do such exceptions tend to reduce the general danger?" Contemplating the law in the aspect expressed in these questions, counsel are unable to see in it anything but unreasonable and arbitrary discrimination. This view of the power of the state, however, is too narrow. That power is not confined, as we have said, to the suppresion of what is offensive, disorderly, or unsanitary. It extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people. This is the principle of the cases which we have cited.

But the statutes have justification on the grounds which plaintiff in error urges as determinative, and on those grounds they were sustained by the supreme court of the state. They were deliberate enactments, made necessary by and addressed to the conditions which existed. They first (1873) had application only to three counties, while Idaho was a territory. They were subsequently extended to two other counties, and were made general in 1887. They were continued in force by the state Constitution. Sweet v. Ballentyne, supra. The court said in the latter case:

"It is a matter of public history in this state that conflicts between sheep owners and cattle men and settlers were of frequent occurrence, resulting in violent breaches of the peace. It is also a matter of public history of the state that sheep are not only able to hold their own on the public ranges with other *live stock, but will in the end [319] drive other stock off the range, and that the herding of sheep upon certain territory is an appropriation of it almost as fully as if it was actually inclosed by fences, and this is especially true with reference to cattle. The legislature did not deem it necessary to prohibit the running at large of

gether, recognizing the fact that
the state large areas of land un-
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statutes, it was said, by holding
visions unconstitutional, would
lands of the state "one immense
ure." And further: "The owners
not permit them to roam at will,
are under the immediate control
, who have shepherd dogs with
wherever they graze they take
sion of the range as effectually as
ls were fenced. . . . It is a
common observation and expe-
sheep eat the herbage closer to
than cattle or horses do, and,
being sharp, they devastate and
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BOWN and Leander L. Ormsby,
Plffs. in Err.,
v.
ENOS C. WALLING.

. C. Reporter's ed. 320-321.)

e is governed by the decision in
Valker, ante, p. 499.

[No. 81.]

Argued January 10, 1907. Decided February 4, 1907.

IN ERROR to the Supreme Court of the State of Idaho to review a judgment which affirmed a judgment of the District Court for Elmore County, in that state, which had in turn affirmed a judgment of the Probate Court in and for that county for the recovery of damages sustained by the violation of a statute prohibiting the grazing of sheep on the public domain within 2 miles of a dwelling house. Affirmed.

See same case below, 9 Idaho, 740, 76 Pac. 318.

The facts are stated in the opinion.

Mr. S. M. Stockslager argued the cause, and, with Messrs. W. E. Borah, Frank T. Wyman, and John C. Rice, filed a brief for plaintiffs in error.

For their contentions, see their brief as reported in Bacon v. Walker, ante, 499.

Messrs. W. E. Borah, Frank T. Wyman, and John C. Rice filed a separate brief for plaintiffs in error:

The supreme court of the state of Idaho, construing this statute and upholding it, has held that the man who owns sheep may not go upon the public domain within 2 miles of anyone's house, although a man owning any other kind of stock may allow it to graze up to his door. Under the holdings of the court, if a man's sheep eat the grass from the public domain he is liable to his neighbor within 2 miles for the value thereof, although, if the horseman or the cattleman destroys it, he is not liable to anyone for the value thereof.

Sweet v. Ballentyne, 8 Idaho, 431, 69 Pac. 995; Walling v. Bown, 9 Idaho, 184, 72 Pac. 960, 9 Idaho, 740, 76 Pac. 318; Phipps v. Grover, 9 Idaho, 415, 75 Pac. 64; Spencer v. Morgan, 10 Idaho, 542, 79 Pac. 459.

Any distinctions in classifications which are made with reference to property or different industries, or in placing limitations upon the pursuit of industries, must be founded upon real distinctions and differences existing in fact. Burdens cannot be imposed upon legitimate and rightful industries, and interfering with the full enjoyment of property, or denying to certain people privileges which belong to others, except as a result of real distinctions or differences, and such as are well founded in fact.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Cooley, Const. Lim. 1st ed. p. 391; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Health

Department v. Trinity Church, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Ex parte Whitwell, 98 Cal. 73, 19 L.R.A. 729, 35 Am. St. Rep. 152, 32 Pac. 870; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; State v. Speyer, 67 Vt. 502, 29 L.R.A. 573, 48 Am. St. Rep. 832, 32 Atl. 476; Sutton v. State, 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

The policy of the United States as to the public lands not only permits but encourages their use for the purpose of pasturing of all kinds of live stock.

Buford v. Houtz, 133 U. S. 320, 33 L. ed. 618, 10 Sup. Ct. Rep. 305; Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259.

No counsel for defendant in error.

Mr. Justice **McKenna** delivered the opinion of the court:

This action was brought in the probate court in and for Elmore county, state of Idaho, for the sum of $200 damages sustained by defendant in error by the violation by plaintiffs in error of §§ 1210, 1211, of the Revised Statutes of Idaho. The amended complaint alleged that the offense was committed by plaintiffs in error by wrongfully and negligently permitting and [321] allowing their sheep to graze *within 2 miles of the dwelling house of defendant in error and upon the government lands around his premises. The defense, set up by demurrer, was, as in Bacon v. Walker, 204 U. S. 311, ante, 499, 27 Sup. Ct. Rep. 289, that those sections were void under the due process and equality clauses of the 14th Amendment of the Constitution of the United States. The trial court rendered judgment for the defendant in error, which was affirmed by the district court for Elmore county and by the supreme court of the state. 9 Idaho, 740, 76 Pac. 318.

The case was argued with Bacon v. Walker, and, on the authority of that case, the judgment is affirmed.

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissent.

CITY OF CHICAGO, Appt.,
v.
DARIUS O. MILLS.

(See S. C. Reporter's ed. 321-331.)

Direct appeal from circuit court—sufficiency of certificate.

1. The failure of the certificate of a Federal circuit court to show the exact nature of the jurisdictional question relied upon to sustain a direct appeal to the Supreme Court does not defeat the jurisdiction of the latter court, where an examination of the record, aided by the opinion of the circuit court, contained therein and made part thereof, distinctly shows the nature of the question of jurisdiction passed upon.

Courts—jurisdiction of circuit court—diverse citizenship—collusion.

2. The jurisdiction of the circuit court of the United States for the northern district of Illinois of a suit brought by a California stockholder of an Illinois gas company, after the company's refusal to sue, to enjoin the city of Chicago from enforcing an ordinance regulating gas rates, on the ground of want of power in the municipality to pass the ordinance, cannot be regarded as collusively or fraudulently invoked because of complainant's motive in preferring a Federal tribunal, or because subsequent events made it to the interest of the company to make common cause with him against the enforcement of the ordinance, or because an officer and large stockholder in such company personally contributed to the expenses of the suit, or because complainant's counsel was afterwards retained in a suit then pending between the company and the municipality.

[No. 286.]

Submitted December 21, 1906. Decided February 4, 1907.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a decree enjoining the enforcement of a municipal ordinance regulating gas rates. Affirmed.

See same case below, 143 Fed. 430.

The facts are stated in the opinion.

Messrs. **James Hamilton Lewis, Henry M. Ashton,** and **David K. Tone** submitted the cause for appellant:

Where the question of conferring jurisdiction upon a Federal court by getting up a collusive controversy is involved, the burden of proof is upon the complainant.

Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 337, 40 L. ed. 448, 16 Sup. Ct. Rep. 307.

A majority of the stockholders of a cor-

Note. — On direct review of circuit or district court judgments in the Federal Supreme Court—see note to Gwin v. United States, 46 L ed. U. S. 741.

As to diverse citizenship as ground of Federal jurisdiction—see notes to Shipp v. Williams, 10 C. C. A. 247; Mason v. Dullagham, 27 C. C. A. 296; Seddon v. Virginia T. & C. Steel & I. Co. 1 L.R.A. 108; Myers v. Murray, N. & Co. 11 L.R.A. 216; Roberts v. Lewis, 36 L. ed. U. S. 579; Emory v. Greenough, 1 L. ed. U. S. 640; and Strawbridge v. Curtiss, 2 L. ed. U. S. 435.

ration, through its board of directors, is rested with the sole power to institute its in behalf of the corporation, and to re-ess corporate grievances, and to determine en and in what courts such suits shall be stituted, and an individual stockholder has standing for any such purpose.

Hawes v. Oakland (Hawes v. Contra Costa ater Co.) 104 U. S. 450–457, 26 L. ed. 827–0; Morawetz, Priv. Corp. § 238.

To the foregoing rule should be added the alification that where a corporation re-ses to act, and that refusal is arbitrary d wrongful and without just cause, and a mand is made upon the corporation to t and it still refuses, a stockholder may stitute a suit in his own name, in behalf himself and other stockholders, to pro-ct corporate rights. The mere allegation at a demand has been made upon the rporation and it refuses to act is insuffi-ent to authorize a stockholder to begin it. It must further appear that the refus-was wrongful, constituting a breach of ust; for although the corporate officers ay have acted erroneously in refusing to ring a suit, that is not sufficient to au-horize the stockholders to proceed, so long it appears that the corporate officers were cting in good faith, with reasonable dili-ence, and in the exercise of their sound iscretion.

Memphis v. Dean, 8 Wall. 64–73, 19 L. ed. 26–328; Dodge v. Woolsey, 18 How. 345, 15 ed 406; Wallace v. Lincoln Sav. Bank, 9 Tenn. 635, 24 Am. St. Rep. 625, 15 S. W. 48; Samuel v. Holladay, Woolw. 400, Fed. as. No. 12,288; Morawetz, Priv. Corp. § 44; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 457, 460, 462, 26 L. ed. 827; Huntington v. Palmer, 104 U. S. 482, 26 L. ed. 833; Corbus v. Alaska Treadwell Gold Min. Co. 187 U. S. 462, 47 L. ed. 259, 23 Sup. Ct. Rep. 157; Smith v. Prattville Mfg. Co. 29 Ala. 503.

The record in this case shows that a specific question of Federal jurisdiction was in issue in the court below and was properly certified to this court.

Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; The Bayonne, 159 U. S. 687, 40 L. ed. 306, 16 Sup. Ct. Rep. 185.

Messrs. **William D. Guthrie, John J. Herrick,** and **I. K. Boyesen** submitted the cause for appellee:

In the absence of collusion, the right of a stockholder to invoke the jurisdiction of a circuit court of the United States on the ground of diverse citizenship between himself and his corporation, in a suit founded upon rights which might have been asserted by the corporation, is not open to question.

Doctor v. Harrington, 196 U. S. 579, 587, 49 L. ed. 606, 609, 25 Sup. Ct. Rep. 355.

The right to maintain a stockholder's bill upon general principles administered by courts of equity is not such a question of jurisdiction as may be certified to this court under the 5th section of the act of 1891.

Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 432, 49 L. ed. 1111, 1115, 25 Sup. Ct. Rep. 740; World's Columbian Exposition v. United States, 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 654.

The question of collusion, as a question of the jurisdiction of the circuit court, is whether it distinctly appeared, to the satisfaction of said circuit court, that the suit was a collusive one.

Barry v. Edmunds, 116 U. S. 550, 559, 29 L. ed. 729, 732, 6 Sup. Ct. Rep. 501; Deputron v. Young, 134 U. S. 241, 252, 33 L. ed. 923, 929, 10 Sup. Ct. Rep. 539; Wetmore v. Rymer, 169 U. S. 115, 122, 42 L. ed. 682, 684, 18 Sup. Ct. Rep. 293; Put-in-Bay Waterworks, Light & R. Co. v. Ryan, 181 U. S. 409, 431, 45 L. ed. 927, 937, 21 Sup. Ct. Rep. 709.

The issue of collusion was a question of fact, which the court had jurisdiction to determine under the act of 1875, and its finding on the evidence ought not to be set aside. Having determined that question as it did, it had unquestionable jurisdiction, on the ground of diverse citizenship, to proceed to a final decree.

Doctor v. Harrington, 196 U. S. 579, 588, 49 L. ed. 606, 610, 25 Sup. Ct. Rep. 355; Put-in-Bay Waterworks, Light & R. Co. v. Ryan, 181 U. S. 409, 428, 45 L. ed. 927, 935, 21 Sup. Ct. Rep. 709.

Nor does any issue of fact arising under denials of due compliance with the 94th rule involve any question as to the jurisdiction of a circuit court as a court of the United States.

Illinois C. R. Co. v. Adams, 180 U. S. 28, 33, 45 L. ed. 410, 412, 21 Sup. Ct. Rep. 251.

A formal certificate of the jurisdictional question by the court below, or an equivalent therefor, is an essential to the exercise of jurisdiction by this court.

Maynard v. Hecht, 151 U. S. 324, 328, 38 L. ed. 179, 181, 14 Sup. Ct. Rep. 353; Courtney v. Pradt, 196 U. S. 89, 91, 49 L. ed. 398, 399, 25 Sup. Ct. Rep. 208; Trenchard v. Kell, 202 U. S. 613, 50 L. ed. 1171, 26 Sup. Ct. Rep. 765.

In the absence of a sufficient formal certificate, its equivalent in an equity case must be found, if at all, in the explicit terms of the final decree or of the order allowing the appeal.

Huntington v. Laidley, 176 U. S. 668, 676, 44 L. ed. 630, 634, 20 Sup. Ct. Rep. 526;

Arkansas v. Schlierholz, 179 U. S. 598, 601, 45 L. ed. 335, 337, 21 Sup. Ct. Rep. 229; Courtney v. Pradt, supra.

Such certificate, or its equivalent, must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction.

Huntington v. Laidley, supra; Courtney v. Pradt, 196 U. S. 89, 92, 49 L. ed. 398, 399, 25 Sup. Ct. Rep. 208.

It is insufficient to certify the question of jurisdiction generally, without defining or indicating any specific question of jurisdiction.

Chappell v. United States, 160 U. S. 499, 508, 509, 40 L. ed. 510, 513, 514, 16 Sup. Ct. Rep. 397; Filhiol v. Torney, 194 U. S. 356, 358, 359, 48 L. ed. 1014, 1016, 1017, 24 Sup. Ct. Rep. 698; The Bayonne, 159 U. S. 687, 693, 40 L. ed. 306, 309, 16 Sup. Ct. Rep. 185.

There must also be a statement of a definite question; that is, the precise question, clearly, fully, and separately stated. No mere suggestion that the jurisdiction of the court was in issue will answer.

Shields v. Coleman, 157 U. S. 168, 177, 39 L. ed. 660, 663, 15 Sup. Ct. Rep. 570; Chappell v. United States, 160 U. S. 499, 508, 40 L. ed. 510, 513, 16 Sup. Ct. Rep. 397; Arkansas v. Schlierholz, 179 U. S. 600, 601, 45 L. ed. 336, 337, 21 Sup. Ct. Rep. 229.

The question of jurisdiction must also have been so plainly and distinctly specified that no further examination of the record would be necessary.

Van Wagenen v. Sewall, 160 U. S. 369, 373, 40 L. ed. 460, 461, 16 Sup. Ct. Rep. 370.

The question thus sent up must be a question of Federal jurisdiction; that is, of the jurisdiction of the circuit court as a court of the United States, and not in respect of its general authority as a judicial tribunal or a court of equity.

Courtney v. Pradt, 196 U. S. 89, 91, 49 L. ed. 398, 399, 25 Sup. Ct. Rep. 208; Illinois C. R. Co. v. Adams, 180 U. S. 28, 34, 35, 45 L. ed. 410, 412, 413, 21 Sup. Ct. Rep. 251; Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 432, 49 L. ed. 1111, 1115, 25 Sup. Ct. Rep. 740.

The better practice in every case of direct review on a question of jurisdiction is to make apparent on the record, by a bill of exceptions, or other appropriate mode, the fact that the question of jurisdiction was raised and passed upon, and the elements upon which the decision of the question was based.

C. H. Nichols Lumber Co. v. Franson, 203 U. S. 278, ante, 181, 27 Sup. Ct. Rep. 102.

The certificate in the case at bar falls far short of the statutory requirement.

McHenry v. Alford, 168 U. S. 651, 659, 42 L. ed. 614, 617, 18 Sup. Ct. Rep. 242.

With respect to assignment of errors, may be repeated that the equivalent for t required certificate in an equity case c exist only in the explicit terms of the fi decree or of the order allowing the app (Huntington v. Laidley, 176 U. S. 668, 6 44 L. ed. 630, 634, 20 Sup. Ct. Rep. 52 Courtney v. Pradt, 196 U. S. 89, 91, 49 L. 398, 399, 25 Sup. Ct. Rep. 208, and ca cited), and that, therefore, the assignme are not entitled to be considered as equiv lent to the required certificate unless th are so incorporated in the order allowi the appeal, by appropriate words of ref ence, as to show that the court intend to certify the assignments as presenting t questions put in issue and decided (Mayna v. Hecht, 151 U. S. 324, 328, 38 L ed. 179, 181, 14 Sup. Ct. Rep. 353; Th Bayonne, 159 U. S. 687, 40 L. ed. 306, 1 Sup. Ct. Rep. 185; New York, N. H. & H R. Co. v. Weisberg, 191 U. S. 558, 48 L. ed 301, 24 Sup. Ct. Rep. 844).

The opinion of the court below in th case at bar, filed four days before the entry of the final decree, cannot be regarded a equivalent to the required certificate.

Merritt v. Bowdoin College, 167 U. S 745, 42 L. ed. 1209, 17 Sup. Ct. Rep. 994.

By one day's violation of this ordinan the company might incur the practical for feiture and confiscation of all its property

Cotting v. Kansas City Stock Yards Co (Cotting v. Godard) 183 U. S. 79, 109, 4 L. ed. 92, 105, 22 Sup. Ct. Rep. 30.

The bill in the prior suit had been dismissed for want of jurisdiction, and it was practically certain that this court, on the then pending appeal of the People's Company, would, as the decree then stood, limit the point which it would consider to the naked question of jurisdiction, and reverse, with instructions to the lower court to decide upon the merits.

Huntington v. Laidley, 176 U. S. 668, 669 44 L. ed. 630, 635, 20 Sup. Ct. Rep. 52; Illinois C. R. Co. v. Adams, 180 U. S. 28, 4 45 L. ed. 410, 415, 21 Sup. Ct. Rep. 251 Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 295, 46 L. ed. 910, 917, 2 Sup. Ct. Rep. 681; Doctor v. Harrington, 1 U. S. 579, 589, 49 L. ed. 606, 610, 25 Sup Ct. Rep. 355.

A decree in the prior suit, moreover, has definitely settled nothing upon the merits even as to the alleged contract right, s a decree dismissing a bill for want of juri diction does not constitute *res judicata*, and in no way concludes the right of action.

Smith v. McNeal, 109 U. S. 426, 428, L. ed. 986, 987, 3 Sup. Ct. Rep. 319; Illinois C. R. Co. v. Adams, 180 U. S. 28, 35, 45 ed. 410, 412, 21 Sup. Ct. Rep. 251.

Diversity of citizenship was not essenti

or controlling as the basis of the jurisdiction of the circuit court to hear and determine the controversy, and, so far as jurisdiction as a Federal court was concerned, there was really no occasion or motive for collusion.

Simpson v. Union Stock Yards Co. 110 Fed. 799; Illinois C. R. Co. v. Adams, 180 U. S. 28, 33–37, 45 L. ed. 410, 412, 413, 21 Sup. Ct. Rep. 251; Ball v. Rutland R. Co. 93 Fed. 513; Kimball v. Cedar Rapids, 99 Fed. 130.

The question of collusion is, of course, to be determined by the conditions existing when Mr. Mills requested the board of directors and the stockholders of the People's Company to institute a new suit, and when he filed his bill,—June 8, 1903,—and not by subsequent developments.

Mollan v. Torrance, 9 Wheat. 537, 539, 6 L. ed. 154, 155; Kirby v. American Soda Fountain Co. 194 U. S. 141, 145, 48 L. ed. 911, 912, 24 Sup. Ct. Rep. 619; Hardenbergh v. Ray, 151 U. S. 112, 118, 38 L. ed. 93, 94, 14 Sup. Ct. Rep. 305; Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 144, 37 L. ed. 1030, 1032, 14 Sup. Ct. Rep. 35; Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 200, 37 L. ed. 699, 701, 13 Sup. Ct. Rep. 859.

The desire of the officers of the company in January, 1906, that complainant should succeed in this suit, and thereby establish the invalidity of the ordinance of 1900, does not establish collusion.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 113, 46 L. ed. 92, 110, 22 Sup. Ct. Rep. 30; Delaware Railroad Tax, 18 Wall. 206, 210, 21 L. ed. 888, 893; Simpson v. Union Stock Yards Co. 110 Fed. 801; Bowdoin College v. Merritt, 63 Fed. 213.

The fact that the counsel of the People's Company saw fit to delay filing any pleading, or subsequently filed an answer praying for a dismissal, which was, by consent, amended so as to pray that the complainant be granted the relief prayed for, cannot prove collusion at the time the suit was originally brought.

Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The propriety of Mr. Brady, as the second largest stockholder, contributing to the expenses of a suit in which he was vitally interested, ought to be clear and indisputable. Certainly it does not constitute evidence of collusion.

New Albany Waterworks Co. v. Louisville Bkg. Co. 58 C. C. A. 576, 122 Fed. 776; Consumers' Gas Trust Co. v. Quinby, 70 C. C. A. 20, 137 Fed. 882.

If Mr. Mills desired to sue in order to have the questions decided in a court of the United States rather than in a state court, it would establish nothing tending to prove the existence of a collusive agreement on his part with the company fraudulently to impose upon the court by a sham demand and sham refusal to sue on the part of the directors and stockholders of the People's Company.

Davis v. Gray, 16 Wall. 203, 221, 21 L. ed. 447, 453; Smyth v. Ames, 169 U. S. 466, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418.

*Mr. Justice Day delivered the opinion of [325] the court:

This case is here upon a question of jurisdiction of the circuit court of the United States for the northern district of Illinois to entertain the suit. 26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488. The case originated in a bill filed in that court by the complainant, Darius O. Mills, a citizen of California, as a stockholder in the People's Gas, Light, & Coke Company, a corporation of the state of Illinois, to restrain the city of Chicago from enforcing a certain ordinance limiting the right of the gas company as to charges for furnishing gas.

Complainant averred a demand of the directors that an action be brought by the company to restrain the city from enforcing the ordinance, and alleged compliance with the ninety-fourth equity rule, and the refusal of the company to bring the action.

The original bill alleged that the ordinance impaired the obligation of the contract contained in the charter of the gas company, in contravention of the contract clause of the Federal Constitution; and, also, that the ordinance was illegal in that the city had no power to pass it.

The ordinance thus complained of was adopted by the city of Chicago, October 15, 1900, and provided that charges for gas in excess of 75 cents per 1,000 cubic feet should be illegal, and fixed a penalty of not less than $25 or more than $200 for each and every violation of the ordinance.

The objection made to the jurisdiction of the circuit court, and which is said to be established in the record and duly presented here, is based upon the allegation that the suit by Mills was brought in the Federal court by collusion between him and the gas company, and for the fraudulent purpose of invoking the jurisdiction of the Federal court concerning a controversy which was really between the company and the city of Chicago,—parties lacking the requisite diversity of citizenship to maintain the suit in the Federal courts.

The record discloses that the appeal was

[326]allowed to this *court solely upon the question of the jurisdiction of the court as a circuit court of the United States. A certificate entered the same term at which the appeal was allowed sets forth that the city objected to the jurisdiction of the court as a Federal court, and that the appeal was prayed solely upon the question of jurisdiction of the court as a circuit court of the United States, and that the appeal was granted solely upon the question of jurisdiction.

Portions of the proceedings, including the testimony on the question of jurisdiction, duly signed and sealed and made part of the record, are certified to this court by a certificate in the form of a bill of exceptions. Re Lehigh Min. & Mfg. Co. 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375; G. H. Nichols Lumber Co. v. Fransom (decided at this term), 203 U. S. 278, ante,181, 27 Sup. Ct. Rep. 102.

A preliminary objection is made that the certificate does not show whether the jurisdictional question arose from insufficient amount, want of diversity of citizenship, collusion, or otherwise. But we are of the opinion that an examination of the record, aided by the opinion of the court contained therein, and made part thereof, distinctly shows that the question of jurisdiction passed upon concerned the collusive character of the action of the complainant.

We think this brings the case within the ruling in Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490, in which the court, looking into the character of the appeal, the certificate of the court, and the certified copy of the opinion, made part of the record, sustained the court's jurisdiction, citing, with approval, Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570, and Re Lehigh Min. & Mfg. Co. supra.

The circuit court, after an examination of the testimony, reached the conclusion that the action was not collusive, and, upon final decree, granted a perpetual injunction against the enforcement of the ordinance in question. On this appeal we are only concerned with the correctness of the conclusion reached in the circuit court as to the question of jurisdiction. This question is before us upon this record. Wetmore v. Rymer, [327]*169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293. In order to determine it it is necessary to consider briefly as may be the facts shown in this record.

The ordinance in question was passed October 15, 1900. The People's Gas, Light, & Coke Company, on the 21st of December, 1900, brought a suit in the circuit court of the United States for the northern district of Illinois, seeking to enjoin enforcement of the ordinance, upon the ground that it impaired the obligation of its charter contract, denied equal protection of the laws, and amounted to a confiscation of its property; and upon the further ground that no power had been conferred upon the city of Chicago by the legislature of Illinois to thus regulate the price of gas.

It is unnecessary to recite all of the proceedings of that suit in detail. The history of the litigation will be found in the opinion of the chief justice when the case came here from the circuit court on appeal (194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. Rep. 520).

To the bill as originally filed in that case the city of Chicago filed a general demurrer, and the circuit court, holding that no constitutional right of the company was impaired, decided that its jurisdiction would not extend to the question of the power of the council to pass the ordinance in question, and that such a question was one primarily for the state courts; thereupon the company filed an amended bill, limiting its rights to the alleged impairment of its contract. The city of Chicago also demurred to the amended bill, and, upon the hearing of the demurrer, it was sustained and the bill dismissed for want of jurisdiction, and a final decree was entered to that effect. An appeal was thereupon taken to this court.

When the litigation had progressed thus far, complainant, Mills, who was the largest stockholder in the company, consulted counsel in New York with a view to protecting his interests. Counsel, having examined the record, prepared a letter dated December 16, 1902, addressed to the directors of the gas company, and signed by complainant, in which he set forth that the proceedings in the suit concerning the ordinance reducing the price of gas to 75 cents per 1,000 cubic feet had been submitted *to his counsel, to-[328] gether with a copy of the opinion of the circuit court, and that an appeal was then pending in the Supreme Court of the United States; the advice of his counsel that that suit might not adequately protect his interests, as the bill was dismissed for want of jurisdiction, and that the Supreme Court might limit the decision of the case to the question of jurisdiction. And, further, that it did not involve the question of the power of the council of the city of Chicago to reduce the rates of the company. He then requested the institution of a suit against the city of Chicago at the earliest practicable moment for the purpose of preventing the enforcement of the ordinance, upon the ground that it impaired its charter contract and that the council had no power to pass it. The letter further expounded the necessity of resorting to a court of equity for protection of the company's rights.

The record discloses that the company's

unsel came to New York, where a conference was had with the counsel retained by ills, and a difference of opinion was developed as to the propriety and advisability a new suit which would cover the points difference. The result of this conference as that the company's counsel notified ounsel for Mills that he should advise the oard to decline the request to bring a new uit.

On January 29, 1903, the company wrote o Mills, declining to begin the suit, and sent copy of the resolution reciting the belief f the board that for the company to institute further legal proceedings to test the alidity of the ordinance of October 15, 1900, would excite public prejudice against the ompany, which at that time it was deemed f great importance to avoid, and afterwards, at the annual meeting of the stockholders of the company, a resolution directing the beginning of the suit was defeated.

The question of jurisdiction must be decided, having reference to the attitude of the ase at the date the bill was filed, on June 8, 1903. Kirby v. American Soda Fountain Co. 194 *U. S. 141, 145, 146, 48 L. ed. 911, 912, 913, 24 Sup. Ct. Rep. 619. As to the refusal of the company to institute a new suit, there is nothing in the record to show any concert of action between complainant and the company. At that time his counsel in New York was not concerned in the litigation in Chicago or in the appeal to this court. As the case brought by the gas company then stood, it had been dismissed for want of jurisdiction, and an appeal taken from that decree of dismissal. The case did not necessarily involve the question of contract rights, and did not embrace the question of power of the city.

In this attitude of affairs counsel might well advise that the protection of the stockholders' interest required the beginning of a suit which should embrace the vital questions in issue. There was a sharp difference of views between the representatives of Mills and those of the company's solicitors as to the advisability of bringing an action.

For the prudential reasons outlined in their letter of January 29, 1903, above referred to, the directors of the company declined to bring the suit. After the judgment of the circuit court was affirmed in this court, the question of the power of the city to pass the ordinance was left undecided, and was subsequently litigated to a final decree in favor of the contention made in the suit begun by Mills.

It is true that upon the hearing of the demurrer in this action the circuit court ordered a decree correcting its former decree in the gas company suit so as to show that the court decided the case upon the merits as to the allegations as to contract, and dismissed the bill without prejudice to the bringing of any other suit to test the power of the city.

The corrected decree was brought before this court in the then pending appeal of the gas company. 194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. Rep. 520.

After the decision in this court, affirming the decree in the gas company suit, an amended bill was filed by complainant Mills, based solely upon the alleged want of power of the city council of Chicago to pass the ordinance in controversy, which resulted in the decree to which we have referred, enjoining *the enforcement of the ordinance for [330] the reason that the city council of Chicago had no power to pass the same.

As we have said, we think the record establishes that complainant and his counsel honestly believed that such new suit was necessary to protect the stockholder's interests. There is an entire lack of testimony to show any collusive action at the time of the beginning of the suit.

It is true that subsequent events made it to the interest of the company to make common cause with Mills against the enforcement of the ordinance in question, but when he began his suit no proceedings were pending which involved the important question of the power of the city upon which the complainant ultimately prevailed.

It is true that an officer of the company, who was the next largest stockholder to Mills, contributed to the expenses in this suit; but he testified, and there is nothing in the record to contradict him, that he paid this money from his own resources, without actual repayment, or any understanding with the company that he should be reimbursed.

It is true that Mills' counsel was retained in the suit in this court after the beginning of his suit in Chicago.

It is also true that, in answering to a question put in the language of the ninety-fourth rule, as to whether the suit was brought to confer upon the circuit court of the United States jurisdiction in a case of which it would not otherwise have cognizance, complainant answered that he so understood it, but subsequently said that he did not understand the question. This admission, intentionally made, would not necessarily show collusion. But we think it was not the purpose of the complainant to say more than that he expected his action to be brought in the United States court. When a citizen of one state has a cause of action against a citizen of another state which he may prosecute lawfully in a Federal court, and when the suit is free from fraud or collusion, his motive in preferring a Federal

tribunal is immaterial. Blair v. Chicago, 201 U. S. 400, 408, 50 L. ed. 801, 805, 26 Sup. Ct. Rep. 427, and previous cases in this court therein cited.

[331] *Upon the whole record we agree with the circuit court that the testimony does not disclose that the jurisdiction of the Federal court was collusively and fraudulently invoked, and the judgment below will be affirmed.

Dissenting: Mr. Chief Justice Fuller and Mr. Justice Harlan.

STATE OF KANSAS, Complainant,
v.
UNITED STATES OF AMERICA et al., Defts.

(See S. C. Reporter's ed. 331-343.)

Supreme Court of the United States—original jurisdiction—suit by state.

1. The original jurisdiction of the Supreme Court of the United States does not extend to a bill filed by the attorney general of Kansas on behalf of the state as trustee for the Missouri, Kansas, & Texas Railway Company of certain lands in the Indian territory, alleged to have been granted by Congress to the state for the benefit of the railway company, where the name of the state is being used simply for the prosecution of the claim of the railway company.

United States—immunity from suit.

2. The United States may not, without its consent, be sued by a state.

[No. 11, Original.]

Submitted November 12, 1906. Decided February 25, 1907.

ORIGINAL BILL filed by the attorney general of Kansas on behalf of the state as trustee for the Missouri, Kansas, & Texas Railway Company of certain lands in the Indian territory, alleged to have been granted to the state for the benefit of the railway company. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Solicitor General Hoyt, Attorney General Moody, and Assistant Attorney General Russell submitted the cause for defendants in support of motion to dismiss:

By the terms of the granting act the legal title passed to the railroad company, if to anyone, at the date of the grant; or at least upon the construction of the road.

Rice v. Minnesota & N. W. R. Co. 1 Black, 358, 17 L. ed. 147.

It is a well-settled principle that a c veyance to trustees for certain purpose uses carries the legal estate to the b ficiaries, unless there are duties imposed the trustees the performance of which quires the legal estate to be vested in th in which event they would take an est commensurate with the exigencies of th trust.

Webster v. Cooper, 14 How. 488, 499, 1 ed. 510, 515; Long v. Long, 62 Md. 65; P ry, Tr. §§ 351, 352, 520, 521.

This is the rule in Kansas.

Bayer v. Cockerill, 3 Kan. 292.

It is equally established that when an tate is given to trustees for a certain p pose, or until the happening of a cert event, the intermediate estate of trustee is terminated upon the accompl ment of the purpose or occurrence of event. Felgner v. Hooper, 80 Md. 262 Atl. 911; Perry, Tr. § 351.

The granting act, § 3, provides that p ents shall issue, not to the state, as in case of Rice v. Minnesota & N. W. R. supra, but to the railroad company di

Under such circumstances title vest the company, and not in the state.

Sioux City & St. P. R. Co. v. Un States, 159 U. S. 349, 363, 40 L. ed. 182, 16 Sup. Ct. Rep. 17; Knepper v. Sa 194 U. S. 476, 481, 48 L. ed. 1083, 1084 Sup. Ct. Rep. 744.

A patent is not essential to a transfe the legal title. It is simply evidence the condition of the grant has been com with.

Deseret Salt Co. v. Tarpey, 142 U. S. 35 L. ed. 999, 12 Sup. Ct. Rep. 158.

Apparently the proceeding is under control of the railroad company, and name of the state is used simply for purpose of prosecuting the claim of company to the lands in question, the pense of the action being borne by railroad.

Under these circumstances it is well tled that this court does not possess o inal jurisdiction.

New Hampshire v. Louisiana, 108 U. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176.

The United States, the real party in terest as defendant, has not consented to sued, and cannot be sued without its co sent.

Minnesota v. Hitchcock, 185 U. S. 3 387, 46 L. ed. 954, 962, 22 Sup. Ct. R 650; Oregon v. Hitchcock, 202 U. S. 60, L. ed. 935, 26 Sup. Ct. Rep. 568; Unit States v. Lee, 106 U. S. 196, 207, 27 L. 171, 177, 1 Sup. Ct. Rep. 240.

It does not appear that all the lands controversy have been allotted. That t courts will not interfere with the La

NOTE.—On suits against the United States —see note to Beers v. Arkansas, 15 L. ed. U. S. 991.

Department in the disposal of land so long as the title in any sense remains in the United States is well settled.

Bockfinger v. Foster, 190 U S. 116, 47 L. ed. 975, 23 Sup. Ct. Rep. 836; Oregon v. Hitchcock, supra.

Messrs. Joseph H. Choate, Chiles C. Coleman, James Hagerman, Adrian H. Joline, A. B. Browne, and Joseph M. Bryson submitted the cause for complainant in opposition. Mr. John Madden was on the brief:

The United States and each one of the separate states may sustain the character of trustee, and have the legal capacities to take and execute trusts for every purpose.

Perry, Tr. § 41; McDonogh v. Murdoch, 15 How. 400, 14 L. ed. 746; United States v. Michigan, 190 U. S. 379, 47 L. ed. 1103, 23 Sup. Ct. Rep. 742; Van Wyck v. Knevals, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336.

The title to the granted lands is vested in the state of Kansas.

Van Wyck v. Knevals, supra.

In St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389, the words "that there be and hereby is granted to the Northern Pacific Railroad company" were held to be a grant *in præsenti*, and passed the title direct to the railroad company, although, by the 4th section of that act of Congress, it was provided that patents should be issued to the company as the road was constructed, in 25-mile sections.

There is no Federal statute of uses, nor is there any Federal common law. The lands in question are not situated in Kansas or any other state. Under the decisions of the courts, both English and American, the statute of uses was never held to execute the trust or pass the legal title to the *cestui que trust* where the trust created was such that it was necessary that the trustee should continue to hold the legal title in order to carry out and effectuate the purposes of the trust. The statute of uses has never been considered to execute the trust where the trust was created for the express purpose of preserving a contingent remainder.

Perry, Tr. §§ 305, 309; Biscoe v. Perkins, 1 Ves. & B. 485; Barker v. Greenwood, 4 Mees. & W. 431; Vanderheyden v. Crandall, 2 Denio, 9; Laurens v. Jenney, 1 Speers, L. 365; Co. Litt. 265a, 2, 337, a, n, 2.

The act of July 25, 1866, was not only a grant of the lands to the state of Kansas, but it is also a law, and the only law of this case; and that law, as gathered from the four corners of the act of Congress, governs the grant, and not the technical rules of the common law nor the statute of uses.

Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; Missouri, K. & T. R. Co. v. Kansas, P. R. Co. 97 U. S. 491, 497, 24 L. ed. 1095, 1097.

The provisions of § 3, even though they apply to the lands in the Indian territory, in no way affect the grant to the state.

Wright v. Roseberry, 121 U. S. 488, 30 L. ed. 1039, 7 Sup. Ct. Rep. 985; Van Wyck v. Knevals, 106 U. S. 360, 364, 27 L. ed. 201, 202, 1 Sup. Ct. Rep. 336; St. Paul & P. R. Co. v. Northern P. R. Co. supra; Langdeau v. Hanes, 21 Wall. 521, 22 L. ed. 606.

This suit of the state of Kansas against the United States can be maintained in this court under the original jurisdiction clause of the Constitution, upon the authority of United States v. Texas, 143 U. S. 621, 36 L. ed. 285, 12 Sup. Ct. Rep. 488, and United States v. Michigan, supra.

Recognition of the obligation of the United States to respond as defendant in suits *ex contractu* may well be held to include the suit of the sovereign state in this court where money recovery is so sought in the alternative.

United States v. Foreman, 5 Okla. 237, 48 Pac. 92; Johnson v. United States, 6 Utah, 403, 24 Pac. 256, 677.

Mr. Chief Justice Fuller delivered the opinion of the court:

On April 30, 1906, the state of Kansas applied for leave to file a bill of complaint against the United States and others, to which the United States objected on the ground of want of jurisdiction. May 21 leave was granted, without prejudice, and the bill was accordingly filed. As such an application by a state is usually granted as of course, we thought it wiser to allow the bill to be filed, but reserving to the United States the right to object to the jurisdiction thereafter, and hence the words, "without prejudice," were inserted in the order. October 9 leave was granted to the United States to file a demurrer, and, in lieu of this, a motion to dismiss was substituted, which was submitted November 12 on printed briefs on both sides.

The bill was filed by the attorney general of Kansas, on behalf of the state, as trustee for the Missouri, Kansas, & Texas Railway Company, of certain lands in the Indian territory, alleged to have been granted to the state for the benefit of the railway company.

It is stated by counsel for complainant, as appearing from the bill, that in 1866 "there were three Kansas railroad companies running through the state to the Indian territory line. The first was the Union Pacific Railway Company, Southern Branch, since the Missouri, Kansas, & Texas Rail-

way Company, extending from Fort Riley, now Junction City, Kansas, in a southeasterly direction, down the valley of the Neosho river to the southern line of the state of Kansas, near Chetopa, Kansas; the second [338] was the Leavenworth, Lawrence, & *Fort Gibson Railway Company, since conveyed to the Atchison, Topeka, & Santa Fé Railroad Company, extending from Leavenworth, through Lawrence, to the northern line of the Indian territory, near Coffeyville, Montgomery county, Kansas, in the direction of Galveston bay, in Texas; and the third was the Kansas & Neosho Valley Railway Company, since the Kansas City, Fort Scott, & Memphis, and now a part of the St. Louis & San Francisco Railroad Company, extending from a point of connection with the Union Pacific Railroad at or near the mouth of the Kansas river, thence southeasterly, through the eastern tier of counties, to the northern line of the Indian territory, at or near Baxter Springs, in Cherokee county, Kansas."

On July 25, 1866, an act of Congress was passed entitled "An Act Granting Lands to the State of Kansas to Aid in the Construction of the Kansas & Neosho Valley Railroad and Its Extension to Red River." 14 Stat. at L. 236, chap. 241. On the next day, July 26, an act was passed, using the same language, except as to the routes, entitled "An Act Granting Lands to the State of Kansas to Aid in the Construction of a Southern Branch of the Union Pacific Railway and Telegraph, from Fort Riley, Kansas, to Fort Smith, Arkansas" (14 Stat. at L. 289, chap. 270), which provided as follows:

"That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the state of Kansas, to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho river to the southern line of the state of Kansas, with a view to an extension of the same through a portion of the Indian territory to Fort Smith, Arkansas, there is hereby granted to the state of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof designated by odd numbers to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile; . . .

[339] *"Sec. 3. . . . And the lands hereby granted shall inure to the benefit of said company, as follows: When the governor of the state of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land herein granted within the limits above named, and coterminous with said completed section hereinbefore granted; . . .

"Sec. 8. *And be it further enacted*, That said Pacific Railroad Company, Southern Branch, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas, south through the Indian territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas rivers, to Fort Smith, in the state of Arkansas; and the right of way through said Indian territory is hereby granted to said company, its successors and assigns, to the extent of one hundred feet on each side of said road or roads, and all necessary grounds for stations, buildings, workshops, machine shops, switches, side tracks, turntables, and water stations.

"Sec. 9. *And be it further enacted*, That the same grant [s] of lands through said Indian territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States."

The bill averred that the road was constructed through the Indian territory, and set forth at length Indian treaties and congressional legislation with reference to that territory, under which it was alleged that the Creek Indian Nation had ceased to occupy or claim the lands in question as a tribe or nation, and that some of the lands had been allotted in severalty to individual members of the Creek Nation; and that thereby *said lands passed to the state under the provisions of the grant mentioned. [340] It was prayed that a decree be entered adjudging the state to be the owner, as trustee for the railway company, of all odd-numbered sections of land to the extent of the grant along the line of the road through the Creek Nation, in the Indian territory, and that the allottees be directed to surrender the possession to the state as trustee, and be enjoined from disposing of said lands, or "in the event that, from any equitable considerations, the court shall entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy," and that the United States be adjudged to pay to the state, as trustee, the sum of such value, estimated at more than $10,000,000.

In our opinion it appears upon the face f the bill that the state of Kansas is only ominally a party, and that the real party n interest is the railroad company. Sec- ion 3 provided that patents should be is- ued not to the state, but to the company irect, which made the state nothing but mere conduit for the passage of title. And this is so even if it were ruled that he state of Kansas was made trustee under 9, because it would only be trustee of he bare legal title. In very many cases in which the grant was directly to the railroad company, or in which the act of Congress required that the patents for lands earned should be issued not to the state, for the benefit of the railroad company, but directly to the company itself," it has been held that the title vested absolutely in the railroad company. Sioux City & St. P. R. Co. v. United States, 159 U. S. 349, 364, 40 L. ed. 177, 182, 16 Sup. Ct. Rep. 17, 23.

Title passed by the grant on the perform- ance of its conditions and to the grantees to whom the patents were to be issued, and here § 3 provided that patents should is- sue not to the state, but to the railroad company direct.

And if the lands in the Indian territory could be held in any view to have been granted *in præsenti*, such grant was cer- tainly not to the state of Kansas.

*The road, in aid of which the grant was made to the state, extended no farther than the southern boundary thereof, and the patents were to be issued to the company. True, as declared in § 1, the road was to be constructed "with a view to an extension of the same through a portion of the In- dian territory to Fort Smith, Arkansas," and that extension was authorized by § 8, but the lands referred to in § 9 were not lands in the state of Kansas, nor was that state mentioned in the section. It seems clear that those lands were not intended to be granted to that state for the construction of a road beyond its boundaries.

Moreover, the bill sets forth many com- munications and protests by the railroad company to the Dawes Commission, the townsite commission, the Indian agent, and the Secretary of the Interior, in all of which the tracts in controversy were claimed by the railroad company as its own without reference to any interest of the state of Kansas therein.

In these circumstances we think it ap- parent that the name of the state is being used simply for the prosecution in this court of the claim of the railroad company, and our original jurisdiction cannot be maintained.

Again, the United States is the real par- ty in interest as defendant, and has not consented to be sued, which it cannot be without its consent. Minnesota v. Hitch- cock, 185 U. S. 373, 387, 46 L. ed. 954, 962, 22 Sup. Ct. Rep. 650, 656; Oregon v. Hitch- cock, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568; United States v. Lee, 106 U. S. 196, 207, 27 L. ed. 171, 177, 1 Sup. Ct. Rep. 240.

"If whether a suit is one against a state is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered."

In the present case the parties defendant other than the United States and its officers are Creek Indian allottees and *persons[342] claiming under them, and, if their allotments should be taken from them, which is part of the relief sought by the bill, the United States would be subject to a demand from them for the value thereof or for other lands, while the bill prays in the alternative that, "in the event that from any equitable con- siderations the court should entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy at the time of the respective allotments, and the defendants, the United States of America, be ordered, adjudged, and decreed to pay to your oratrix, as trustee, the sum of such values."

It does not follow that because a state may be sued by the United States without its consent, therefore the United States may be sued by a state without its consent. Public policy forbids that conclusion.

In United States v. Texas, 143 U. S. 621, 646, 36 L. ed. 285, 293, 12 Sup. Ct. Rep. 488, 494, it was held that the exercise by this court of original jurisdiction "in a suit brought by one state against another to determine the boundary line between them, or in a suit brought by the United States against a state to determine the boundary between a territory of the United States and that state, so far from infrin- ging, in either case, upon the sovereignty, is with the consent of the state sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other states." That case was quoted from with approval in Minnesota v. Hitchcock, supra, where Mr. Justice Brewer, delivering the opinion, pointed out that the judicial power of the United States extends to cases in which

the United States is a party plaintiff as well as to cases in which it is a party defendant, for "while the United States, as a government, may not be sued without its consent, yet, with its consent, it may be sued, and the judicial power of the United States extends to such a controversy."

We are not dealing here with the merits of the controversy raised by the bill, but [343] solely with the question of the original *jurisdiction of this court. And, as the United States has not consented to be sued, it results that, on this ground also, the bill must be dismissed.

And it is so ordered.

Mr. Justice Moody took no part in the disposition of this case.

UNITED STATES, Appt.,
v.
JOHN M. HITE.

(See S. C. Reporter's ed. 343-649.)

Navy—extra pay of naval officers after discharge.

The two months' extra pay provided for by the act of March 3, 1899 (30 Stat. at L. 1214, chap. 427), in favor of "officers and enlisted men comprising the temporary force of the Navy during the war with Spain who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged," should be computed, when awarded to a naval officer appointed under the act of May 4, 1898 (30 Stat. at L. 369, chap. 234, U. S. Comp. Stat. 1901, p. 1056), to serve only during the continuance of the exigency under which his services were required in the existing war, on the basis of the pay he was receiving when he was detached from duty, after the treaty of peace was signed, and was ordered home preliminary to his discharge.

[No. 276.]

Submitted December 18, 1906. Decided February 25, 1907.

APPEAL from the Court of Claims to review a judgment awarding extra pay to a naval officer after his discharge, on the basis of sea service. Affirmed.

The facts are stated in the opinion.

Assistant Attorney General Van Orsdel and Mr. John Q. Thompson submitted the cause for appellant.

Mr. Edward S. McCalmont submitted the cause for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court:

This was a petition for the recovery of $116.66. The case having been he the court of claims, that court, u evidence, filed the following findings and conclusion of law:

Findings of Fact.

1. The claimant, John M. Hite, pointed assistant engineer in the States Navy, with the relative rank sign, for temporary service during t war with Spain, on May 14, 1898; ported for duty on board the U. "Massachusetts," in obedience to or the Navy Department, on June 1, 18 served creditably as such officer ship until December 17, 1898, at whi he was detached and ordered to his and on December 22, 1898, was ho discharged from the naval service.

*The order referred to is in the following:

"Navy Department
"Washington, D. C., Dec. 12, 1
"Sir:—
"You are hereby detached from board the U. S. S. "'Massachusetts will proceed to your home.
"Immediately upon your arrival your local address in full to the Bu Navigation, Navy Department, Wash D. C. See article 224, U. S. Navy tions, 1896.
"Report also the date of your deta and inform the Department of the of your accounts, and whether you debted to the government by reason vances drawn by you.
"Respectfully,
"John D. Long, Secr
"Assistant Engineer John M. Hit N.,
"U. S. S. Massachusetts."

2. The U. S. S. "Massachusetts" commission and cruised beyond the of the United States (in Cuban wate ing the time of the claimant's ser board.

3. In settlement of claimant's cl extra pay authorized by the act of M 1899 [30 Stat. at L. 1214, chap. 4 was allowed by the accounting officer Treasury Department two months' the rate of pay of an assistant eng the Navy on waiting orders only, $166.66.

If entitled to two months' pay u basis of sea service the difference is

Conclusion of Law.

Upon the foregoing findings of f court decides, as a conclusion of la the claimant is entitled to judgment sum of one hundred and sixteen dol sixty-six cents ($116.66).

The case is reported 41 Ct. Cl. 2

The act of March 3, 1899 (30 Stat. at L. 1228, chap. 427), among other things, provides:

*"The officers and enlisted men comprising he temporary force of the Navy during he war with Spain, who served creditably eyond the limits of the United States, and 'ho have been or may hereafter be disharged, shall be paid two months' extra ay; and all such officers and enlisted men f the Navy who have so served within the mits of the United States, and who have een or may hereafter be discharged, shall e paid one month's extra pay."

Appellee's counsel say that the issue is orrectly stated by counsel for the United tates as follows:

"The claimant contends that the two onths' extra pay provided for in the foreoing statute should be at the rate of pay e received while *doing sea service*, to wit, 1,700 per year.

"The contention of the government is that nder the ruling of this court in United tates v. North, 112 U. S. 510, 28 L. ed. 08, 5 Sup. Ct. Rep. 285, the claimant has een paid all that was due him, inasmuch s he was paid two months' extra pay proided for in the statute at the rate of ay he was receiving *at the time of his dishargе*,—to wit, at the rate of $1,000 per nnum."

Appellee was appointed an officer in the Navy, May 14, 1898, by authority of the ct of Congress of May 4 of that year (30 tat. at L. 369, chap. 234, U. S. Comp. Stat. 901, p. 1056), which provided:

"Whenever, within the next twelve nonths, an exigency may exist which, in he judgment of the President, renders their ervices necessary, he is hereby authorized o appoint from civil life and commission uch officers of the line and staff, not above he rank or relative rank of commander, nd warrant officers including warrant mahinists, and such officers of the Marine 'orps not above the rank of captain, to be ppointed from the noncommissioned officers f the corps and from civil life, as may e requisite: *Provided*, That such officers hall serve only during the continuance of he exigency under which their services are equired in the existing war."

The war with Spain began April 21, 1898, nd the treaty *of Paris was signed December 10, 1898. [30 Stat. at L. 1754.] Appelee served until December 17, 1898, at which me he was detached from the vessel on hich he was serving and ordered home, here, on December 22, he was honorably scharged from the naval service. It seems have been thought reasonable that the vernment should pay the expenses of the journey home and for the time in getting there.

The act of March 3, 1899, provided for extra pay for active service. Hite was detached because it became the Department's duty to discharge him under the proviso of the act of 1898, and the detachment was manifestly preliminary to his discharge. The order detaching him did not prescribe that on arrival home he was to hold himself "on waiting orders" or for further assignment to duty. On the other hand, it required him to inform the Department of the status of his accounts, obviously in order that they might be settled on his leaving the service.

The two months' extra pay is given, as Chief Justice Peele, delivering the opinion of the court of claims, says, "because of creditable service beyond the limits of the United States during the war with Spain, and, therefore, upon discharge such officers become entitled to the same pay they were receiving while so serving beyond the limits of the United States." "To hold, because the claimant was ordered to his home, where he was discharged five days later, instead of being discharged on the day he was detached, that therefore he is entitled only to the lesser pay, would be a construction too narrow to harmonize with the purpose of Congress as disclosed by the act." Notwithstanding the considered dissenting opinion in the court below, we agree with the conclusion that, his engagement having ended, and he having been discharged, the two months' extra pay should have been given him upon the basis of the pay he was receiving when detached.

The contention of the government is that this case is governed by the ruling in United States v. North, 112 U. S. 510, 28 L. ed. 808, 5 Sup. Ct. Rep. 285. In that case it was held that officers of the Navy and of the *regular Army, who were employed in [348] the prosecution of the war with Mexico, were entitled to the three months' extra pay provided for by the act of Congress of July 19, 1848, chap. 104, § 5, 9 Stat. at L. 248, and the act of February 19, 1879, chap. 90, 20 Stat. at L. 316.

The act of 1848 provided: "That the officers, etc., engaged, etc., in the war with Mexico, and who served out the term of their engagement, or have been or may be honorably discharged, . . . shall be entitled to receive three months' extra pay."

North was an officer in the Navy of the United States from May 29, 1829, to January 14, 1861, when he resigned. He served in the war with Mexico, as lieutenant, on board the frigate Potomac, from February 10, 1846, until July, 1847, when his vessel

sailed for the United States. And Chief Justice Waite said:

"Those of the regular Army or Navy who were 'engaged in the military service of the United States in the war with Mexico' may be said to 'have served out the term of their engagement,' or to have been 'honorably discharged,' within the meaning of 'those terms as used in the act of 1848, when the war was over, or when they were ordered or mustered out of that service. Being in the Army and Navy, their 'engagement' was to serve wherever they were ordered for duty. Their engagement to serve in the war with Mexico ended when they were taken away from that service by proper authority.

"The pay they were to receive was evidently that which they were receiving at the end of their engagement, or when they were honorably discharged. The language is, 'shall be entitled to receive three months' extra pay,' evidently meaning the same pay they would have received if they had remained in the same service three months longer. It follows that, as North was serving at sea when he was ordered away, he was entitled to three months' sea pay."

In the present case, appellee was taken [349] away from the service *when he was detached from his vessel, as he was appointed to serve "only during the continuance of the exigency under which their services were required in the existing war," and was entitled, in the circumstances of the case, to extra pay on the basis of that which he was receiving when detached, as we have said above.

Emory's Case was also considered by the court in the same opinion and the same conclusion reached, and reference was there made to that case as reported in 19 Ct. Cl. 254.

The judgment of the Court of Claims was right, and it is affirmed.

Mr. Justice Moody took no part in the disposition of this case.

UNITED STATES FIDELITY & GUARANTY COMPANY, Plff. in Err.,
v.
UNITED STATES OF AMERICA, Suing for the Benefit of James S. Kenyon, Doing Business as Burrows & Kenyon.

(See S. C. Reporter's ed. 349-359.)

Courts—jurisdiction of Federal circuit court—United States as plaintiff.

The United States is the real, and not merely the nominal, plaintiff, so as to sustain the original jurisdiction of a Federal circuit court under the judiciary acts of 1887, 1888 (24 Stat. at L. 552, chap. 373, 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), without regard to the amount in dispute, in a suit authorized by the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), to be brought in its name, for the use and benefit of a material man, upon the bond of a contractor for a public work, which the statute requires shall contain the specific, special obligation directly to the United States that the contractor shall promptly make payments to all persons supplying him labor and materials in the prosecution of the work.

[No. 173.]

Argued January 18, 1907. Decided February 25, 1907.

IN ERROR to the Circuit Court of the United States for the District of Rhode Island to review a judgment for the plaintiff in an action brought by the United States, for the use and benefit of the material man, upon the bond of a contractor for a public work. Affirmed.

See same case below, 132 Fed. 82.

The facts are stated in the opinion.

Mr. Seeber Edwards argued the cause, and, with Messrs. George S. Cooper and James E. Smith, filed a brief for plaintiff in error:

This is not a controversy in which the United States is plaintiff within the contemplation of the statute which confers on the circuit court jurisdiction irrespective of the amount involved.

United States use of Anniston Pipe & Foundry Co. v. National Surety Co. 34 C. C. A. 526, 92 Fed. 551; United States Fidelity & G. Co. v. Golden Pressed & F. Brick Co. (United States Fidelity & G. Co. v. United States) 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142; Browne v. Strode, 5 Cranch, 303, 3 L. ed. 108; McNutt v. Bland, 2 How. 9, 11 L. ed. 159; Susquehanna & W. Valley R. & Coal Co. v. Blatchford, 11 Wall. 172, 20 L. ed. 179; Huff v. Hutchinson, 14 How. 586, 14 L. ed. 553; Walden v. Skinner, 101 U. S. 577, 589, 25 L. ed. 963, 967; Wade v. Wortsman, 29 Fed. 754; New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; Missouri ex rel. Ranch v. Bowles Mill. Co. 80 Fed. 161; Arkansas v. Ball, Hempst. 541, Fed. Cas. No. 530; United States v. Beebe, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; Maryland use of Markley v. Baldwin, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. Rep. 278; Burrell v. United States, 77 C. C. A. 308, 147 Fed. 44.

t is a commonplace of Federal practice t the acts of March 3, 1887, chap. 373, l August 13, 1888, chap. 866, were the ression of a policy to restrict the juris- ion of the Federal courts.

haw v. Quincy Min. Co. (Ex parte Shaw) U. S. 444, 449, 36 L. ed. 768, 771, 12 . Ct. Rep. 935; Re Pennsylvania Co. 137 S. 451, 454, 34 L. ed. 738, 740, 11 Sup. Rep. 141; Fisk v. Henarie, 142 U. S. 459, , 35 L. ed. 1080, 1082, 12 Sup. Ct. Rep. ; Martin v. Baltimore & O. R. Co. (Ger- v. Baltimore & O. R. Co. 151 U. S. 673, , 38 L. ed. 311, 316, 14 Sup. Ct. Rep. 533; nnessee v. Union & Planters' Bank, 152 S. 454, 462, 38 L. ed. 511, 514, 14 Sup. Ct. p. 654.

The identical question of jurisdiction has eady been decided in accordance with the tention of the plaintiff in error in three actly similar cases.

United States use of Edward Hines Lum- r Co. v. Henderlong, 102 Fed. 2; United ates use of Salem-Bedford Stone Co. v. eridan, 119 Fed. 236; United States ex l. Maxwell v. Barrett, 135 Fed. 189.

Mr. Edward D. Bassett argued the cause d filed a brief for defendant in error:

In suits at law the legal interest alone regarded in testing the jurisdiction of the nited States courts.

Colson v. Lewis, 2 Wheat. 377, 4 L. ed. 36; Irvine v. Lowry, 14 Pet. 293, 10 L. ed. 32; Dodge v. Tulleys, 144 U. S. 451, 36 L. l. 501, 12 Sup. Ct. Rep. 728.

The rights of the materialman arising by irtue of an act of Congress can only be nforced in the courts of the United States.

Martin v. Hunter, 1 Wheat. 330, 4 L. ed. 03; Ellis v. Norton, 4 Woods, 399, 16 Fed. ; United States v. Lathrop, 17 Johns. 4; ew Orleans, M. & T. R. Co. v. Mississippi, 02 U. S. 135, 26 L. ed. 96; Bock v. Perkins, 39 U. S. 628, 35 L. ed. 314, 11 Sup. Ct. Rep. 77.

The United States might at any time ish to intervene in suits of this kind (as a fact it did intervene in the case of Amer- an Surety Co. v. Lawrenceville Cement Co. 6 Fed. 25), which it could do only in the ourts of the United States. In that case he United States would sue in one court nd the materialman would be obliged to ue in a state court; thus proper adjust- nent of the equities could not be accom- lished.

The fact that Congress, by act of Febru- ry 24, 1905, 33 Stat. at L. 811, chap. 778, U. Comp. Stat. Supp. 1905, p. 493, has amend- d chap. 280 so as to read that the suit ould be brought in the circuit court of the nited States, must be given great weight determining its intention.

United States use of Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168.

The United States has a real, not merely a nominal, interest in the bond, and the United States, having obtained the benefit of material furnished and prompt service, permits parties to be subrogated to its rights.

American Surety Co. v. Lawrenceville Cement Co. 96 Fed. 26; United States use of Anniston Pipe & Foundry Co. v. National Surety Co. 34 C. C. A. 529, 92 Fed. 549; United States use of Hill v. American Surety Co. 200 U. S. 197, 199, 50 L. ed. 437, 439, 26 Sup. Ct. Rep. 168.

Even if the statute had not expressly given the right to sue on the contractor's bond, a materialman injured by a breach could have sued in the name of the United States as irrevocable trustees for the injured party.

Stephenson v. Monmouth Min. & Mfg. Co. 28 C. C. A. 292, 54 U. S. App. 499, 84 Fed. 114; Horn v. Whittier, 6 N. H. 94; Devers v. Howard, 144 Mo. 671, 46 S. W. 625; Sample v. Hale, 34 Neb. 220, 51 N. W. 837; Baker v. Bryan, 64 Iowa, 562, 21 N. W. 83.

Jurisdiction of the United States courts has been sustained in analogous cases where the United States permits parties, where bonds are taken in the name of the United States, to bring suit upon them.

Adler v. Newcomb, 2 Dill. 45, Fed. Cas. No. 83; United States v. Davidson, 1 Biss. 433, Fed. Cas. No. 14,921; Bock v. Perkins, supra; Howard v. United States, 184 U. S. 676, 681, 46 L. ed. 754, 757, 22 Sup. Ct. Rep. 543.

An action on the bond of a contractor, furnished under the provisions of the act of Congress of August 13, 1894, chap. 280, has been entertained in the following cases:

American Surety Co. v. Lawrenceville Cement Co. 96 Fed. 25, 110 Fed. 718, 913; United States use of Brady v. O'Brien, 120 Fed. 447; United States v. Churchyard, 132 Fed. 82.

Mr. Justice **Harlan** delivered the opinion of the court:

By an act of Congress approved August 13th, 1894, entitled "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works," it was provided: "That hereafter any person or persons entering into *a form- [350] al contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligations

that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties, and to prosecute the same to final judgment and execution: *Provided*, That such action and its prosecutions shall involve the United States in no expense. Sec. 2. Provided, that in such case the court in which such action is brought is authorized to require proper security for costs in case judgment is for the defendant." 28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523.

On the same day—August 13th, 1894—Congress passed an act providing that whenever any recognizance, stipulation, bond, or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing anything in such recognizance, stipulation, bond, or undertaking specified, is, by the laws of the United States, required or permitted to be given with one or more sureties, it should be lawful to accept such instrument from a corporation having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judi-
[351] cial proceedings. The act provided that *any surety company doing business under the provisions of that act "may be sued in respect thereof in any court of the United States which has now or hereafter may have jurisdiction of actions or suits upon such recognizance, stipulation, bond, or undertaking, in the district in which such recognizance, stipulation, bond, or undertaking was made or guaranteed, or in the district in which the principal office of such company is located." 28 Stat. at L. 279, § 5, chap. 282, U. S. Comp. Stat. 1901, p. 2316.

Proceeding under the above acts the United States, in 1899, made a written contract with one Churchyard to furnish labor, materials, tools, and appliances for the construction of a public building, taking from him the required bond with the United States Fidelity & Guaranty Company, a corporation, as surety.

The present action, brought in the circuit court on that bond, was by the United States, "suing herein for the benefit and on behalf of James S. Kenyon," who furnished a contractor, for use in the construction of the proposed government building, materials of the value of $66.05, for which the latter neglected and refused to pay. Damages to the amount of $500 were claimed in the declaration.

The defendant, the United States Fidelity & Guaranty Company, pleaded that it did not owe the sum demanded. The plaintiff introduced testimony, but the defendant introduced none, and it appearing upon the face of the declaration that the value of the matter in dispute was less than $2,000, it moved that the action be dismissed for want of jurisdiction in the circuit court. That motion was denied, and judgment for $206.47 was entered against the Fidelity & Guaranty Company for the use and benefit of Kenyon. United States v. Churchyard, 132 Fed. 82.

This case is here upon a certificate as to the original jurisdiction of the circuit court of the United States of this action.

A circuit court of the United States, as provided in the judiciary acts of 1887, 1888, may take original cognizance of any suit, at common law or in equity, arising under the laws of the United States, if the value of the matter in dispute exceeds $2,000, exclusive of interest and costs. [24 Stat. at L. 552, chap. 373] 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508. But if, within the meaning of that act, the United States is the plaintiff in the action, then jurisdiction exists in a circuit court without regard to such value. United States v. Sayward, 160 U. S. 493, 40 L. ed. 508, 16 Sup. Ct. Rep. 371; United States v. Shaw, 3 L.R.A. 232, 39 Fed. 435; United States v. Kentucky River Mills, 45 Fed. 273; United States v. Reid, 90 Fed. 522.

The contention of the Fidelity Company is that the government, in this case, is to be deemed a nominal party only, its name being used as plaintiff simply under the authority of the above act of 1894, chap. 282. In support of this position our attention is called to the following, among other cases: Browne v. Strode, 5 Cranch, 303, 3 L. ed. 108; McNutt v. Bland, 2 How. 9, 14, 11 L. ed. 159, 161; Maryland use of Markley v. Baldwin, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. Rep. 278; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.

Browne v. Strode was a suit in the circuit court for the district of Virginia in which the persons named in the declaration

fs were justices of the peace, all citi- Virginia. The suit was on a bond y an executor in conformity with nia statute, and was for the recovery bt due from the testator in his life- an alien, a British subject. The de- was a citizen of Virginia. This eld that the circuit court had juris- notwithstanding the justices and endant were all citizens of the same This was, we assume, upon the that the justices were nominal par- y, while the beneficial party was an and the defendant a citizen of the which the suit was brought.

itt v. Bland was a suit upon a bond y a sheriff and running to the gov- the state, conditioned for the faith- formance of the duties of his office. tute authorized suit to be brought secuted from time to time at the any party injured, until the whole of the penalty was recovered. The s brought in the name of the govern- he use of certain parties who were of New York. The court held that riff and his sureties, citizens of ppi, could be sued by the parties in in their own name, and that no eason could be perceived "for deny- right of prosecuting the same cause n against the sheriff and his sure- he bond, by and in the name of the , who is a purely naked trustee for ty injured. He is a mere conduit whom the law affords a remedy to on injured by the acts or omissions heriff; the governor cannot prevent itution or prosecution of the suit, he any control over it. The real and intiffs are the plaintiffs in the ex- who have a legal right to make the ailable for their indemnity, which uld not be contested in a suit in a urt of Mississippi, nor in a cir- rt of the United States, in any ode of proceeding than on the sher- d."

and use of Markley v. Baldwin, 112 0, 492, 28 L. ed. 822, 823, 5 Sup. 278, 279, was an action in a state n an administrator's bond in the the *state for the benefit of one , a citizen of New Jersey, the obli- the bond being citizens of Maryland. on was removed to the circuit court United States. After referring to s of Browne v. Strode and McNutt l, the court said: "The justices of e in the one case and the governor other were mere conduits through he law afforded a remedy to per- grieved, who alone constituted the ing parties. So, in the present case, the state is a mere nominal party; she could not prevent the institution of the action, nor control the proceedings or the judgment therein. The case must be treated, so far as the jurisdiction of the circuit court of the United States is concerned, as though Markley was alone named as plaintiff; and the action was properly removed to that court."

Stewart v. Baltimore & O. R. Co. was an action against a railroad company by an administrator to recover damages for the benefit of a widow whose husband's death was alleged to have been caused by the negligence of the defendant company. In the course of the discussion of the controlling questions in that case, the court observed, in passing, that, "for purposes of jurisdiction in the Federal courts, regard is had to the real rather than to the nominal party," and that, even in an action of tort, "the real party in interest is not the nominal plaintiff, but the party for whose benefit the recovery is sought."

This case differs from those just cited, and stands, we think, on exceptional grounds. The United States is not here a merely nominal or formal party. It has the legal right, was a principal party to the contract, and, in view of the words of the statute, may be said to have an interest in the performance of all its provisions. It may be that the interests of the government, as involved in the construction of public works, will be subserved if contractors for such works are able to obtain materials and supplies with certainty and promptly. To that end Congress may have deemed it important to assure those who furnish such materials and supplies that the government would exert its power directly for their protection. It *may well have thought that the government [357] was under some obligation to guard the interests of those whose labor and materials would go into a public building. Hence, the statute required that, in addition to a penal bond in the usual form, one should be taken that would contain the specific, special obligation directly to the United States that the contractor or contractors "shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work." The government is a real party here because the declaration opens, "The United States, suing herein for the benefit of and on behalf of James Kenyon . . . comes and complains," and alleges that the "defendants became and are indebted to the United States for the benefit of the said James S. Kenyon." In a large sense the suit has for its main object to enforce that provision in the bond that requires prompt payments by the contractor to material men and laborers. The bond is

not simply one to secure the faithful performance by the contractor of the duties he owes directly to the government in relation to the specific work undertaken by him. It contains, as just stated, a special stipulation with the United States that the contractor shall promptly make payments to all persons supplying labor and materials in the prosecution of the work specified in his contract. This part of the bond, as did its main provisions, ran to the United States, and was therefore enforceable by suit in its name. We repeat, the present action may fairly be regarded as one by the United States itself to enforce the specific obligation of the contractor to make prompt payment for labor and materials furnished to him in his work. There is, therefore, a controversy here between the United States and the contractor in respect of that matter. The action is none the less by the government as a litigant party, because only one of the persons who supplied labor or materials will get the benefit of the judgment. We are of opinion, in view of the peculiar language of the act of 1894 for the protection as well of the United States as of all persons furnishing materials and labor [358]*for the construction of public works, that it is not an unreasonable construction of the words in the judiciary act of 1887, 1888, "or in which controversy the United States are plaintiffs or petitioners," to hold that the United States is a real, and not a mere nominal, plaintiff in the present action, and therefore that the circuit court had jurisdiction.

This interpretation of the statute finds some support in the above act of 1894, chap. 282, passed the same day as the act chap. 280, for the protection of material men and laborers, and which provides that suits against a fidelity or guaranty corporation, accepted as surety in any recognizance, stipulation, bond, or undertaking given to the United States, may be sued in any court of the United States having jurisdiction of suits upon such instrument. There is in that act no express limitation as to the amount involved in suits of that character in either of the acts passed in 1894. Taking the two acts together, there is reason to say that Congress intended to bring all suits embraced by either act, when brought in the name of the United States, within the original cognizance of the circuit courts of the United States, without regard to the amount in dispute. And this view as to the intention of Congress is strengthened by an examination of the act of February 24th, 1905 (33 Stat. at L. 811, chap. 778, U. S. Comp. Stat. Supp. 1905, p. 493), which amends the above statute of 1894, chap. 280. After providing that persons supplying labor and materials for t[illegible] struction of a public work shall h[illegible] right to intervene in any suit bro[illegible] the United States against the con[illegible] that act declares that, if no such [illegible] brought by the United States wit[illegible] months after completion of the c[illegible] then the person supplying labor or n[illegible] to the contractor "shall have a r[illegible] action, and shall be and are here[illegible] thorized to bring suit in the name [illegible] United States in the circuit court [illegible] United States in the district in whi[illegible] contract was to be performed and ex[illegible] *irrespective of the amount in contro[illegible] such suit*, and not elsewhere, for his [illegible] use and benefit, against said contract[illegible] his sureties, "and to prosecute the s[illegible] final judgment and execution."

It is true that this statute can h[illegible] direct application here, because the [illegible] action was instituted long prior to i[illegible] sage and after the trial court had [illegible] the question of the jurisdiction of t[illegible] cuit court. As the act of 1905 d[illegible] refer to cases pending at its passa[illegible] question of jurisdiction depends up[illegible] law as it was when the jurisdiction [illegible] circuit court was invoked in this [illegible] Nevertheless, that act throws some l[illegible] the meaning of the act of 1894, cha[illegible] for the protection of material men an[illegible] ers, and tends to sustain the view b[illegible] the latter act, namely, that, in suits [illegible] in the name of the government fo[illegible] benefit, the United States is a real [illegible] not a mere nominal party, and t[illegible] such suits, the government being p[illegible] therein, and having the legal right, [illegible] cuit court may take original co[illegible] without regard to the value of the [illegible] in dispute. There are cases which t[illegible] opposite view, but the better view, w[illegible] is the one expressed herein.

The judgment is affirmed.

Mr. Justice Brewer dissents.

WESTERN TURF ASSOCIATION, [illegible]
Err.,
v.
HYMAN GREENBERG.

(See S. C. Reporter's ed. 359-3[illegible]

Error to state court—Federal questio[illegible]

1. The judgment of the highest c[illegible] a state, sustaining, as a legitimate e[illegible] of the police power of the state, a [illegible] the validity of which was challenged

NOTE.—On the general subject o[illegible] of error from the United States S[illegible] Court to state courts—see notes to [illegible] v. Hunter, 4 L. ed. U. S. 97; Ha[illegible] Western Land Co. 37 L. ed. U. S. [illegible]

o the Federal Constitution, is in the Supreme Court of the tes by writ of error.

nal law—equal protection of the gulating admission to places of nusement.

lessee in possession of a race ot denied the equal protection of y a state statute under which it d to recognize its own tickets on in the hands of persons who the time, under the influence of oisterous in conduct, or of lewd character, where the statute is alike to all persons, corporations, ions conducting places of public or entertainment.

nal law—privileges and immuniporation not a citizen.

orporation cannot claim the prohe clause of the 14th Amendment leral Constitution which secures es and immunities of citizens of States against abridgment or by the law of a state.

nal law—due process of law—y.

liberty guaranteed by the 14th t of the Federal Constitution privation without due process of liberty of natural, not artificial,

nal law—due process of law—g admission to places of public nt.

perty rights of the lessee in posa race course are not taken withocess of law by a state statute it to recognize its own tickets on in the hands of persons who the time, under the influence of boisterous in conduct or of lewd character.

[No. 189.]

January 29, 1907. Decided February 25, 1907.

R to the Supreme Court of the California to review a judgment med a judgment of the Superior e City and County of San Franor of plaintiff, in an action to reages for being excluded from a kept as a place of public amusearmed.

See same case below, 148 Cal. 126, 82 Pac. 684.

The facts are stated in the opinion.

Mr. William S. Goodfellow submitted the cause for plaintiff in error:

The supreme court of California erred in holding to be constitutional and valid the statute of California approved March 23d, 1893, entitled "An Act Making it Unlawful to Refuse Admission to Places of Amusement."

District of Columbia v. Saville, 1 MacArth. 581, 29 Am. Rep. 616; Sharp v. Whiteside, 19 Fed. 156; Gibbs v. Tally, 133 Cal. 373, 60 L.R.A. 815, 65 Pac. 970; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75.

Mr. William G. Burke submitted the cause for defendant in error:

The legislature of a state has the right to supervise or regulate the conduct of a place of public amusement or entertainment.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Civil Rights Cases, 109 U. S. 3-62, 27 L. ed. 835-856, 3 Sup. Ct. Rep. 18; Grannan v. Westchester Racing Asso. 16 App. Div. 8, 44 N. Y. Supp. 790; Baylies v. Curry, 128 Ill. 287, 21 N. E. 595; People v. King, 110 N. Y. 418, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245; Messenger v. State, 25 Neb. 674, 41 N. W. 638; Greenberg v. Western Turf Asso. 140 Cal. 360, 73 Pac. 1050.

The writ of error in this case should be dismissed, because the record fails to show that any claim was ever made that a Federal question was involved, or that the statute upon which this action was commenced violated any provision of the Federal Constitution.

Otis v. Oregon S. S. Co. 116 U. S. 548, 29 L. ed. 719, 6 Sup. Ct. Rep. 523.

Mr. Justice Harlan delivered the opinion of the court:

The plaintiff in error is a corporation of California, and the lessee, in possession, of a race course kept as a place of public entertainment and amusement, and to which

39 L. ed. U. S. 884; and Kipley 42 L. ed. U. S. 998.

adjudications of state courts can t up for review in the Supreme he United States by writ of erose courts—see note to Apex . v. Garbade, 62 L.R.A. 513.

he validity of class legislation— to State v. Goodwill, 6 L.R.A. tate v. Loomis, 21 L.R.A. 789.

nstitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

As to what constitutes due process of law —see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

it was accustomed to issue tickets of admission. The defendant in error, Greenberg, purchased one of such tickets, and was admitted to the race course. After being admitted he was ejected from the premises against his will by police officers, acting, it was alleged in the complaint, by the direction of the defendant. The defendant denied responsibility for the acts of those officers. It was sued by Greenberg in one of the courts of California, and there was a verdict and judgment against the association for the sum of $1,000. The case was taken to the supreme court of the state and the judgment was affirmed. 148 Cal. 126, 82 Pac. 684.

At the trial a question was raised as to the applicability to this case of a statute of California relating to the admission of persons holding tickets of admission to places [362]of public *entertainment and amusement. That statute is as follows: "It shall be unlawful for any corporation, person, or association, or the proprietor, lessee, or the agents of either, of any opera house, theater, melodeon, museum, circus, caravan, race course, fair, or other place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years who presents a ticket of admission acquired by purchase, and who demands admission to such place, provided that any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement. § 2. Any person who is refused admission to any place of amusement, contrary to the provisions of this act, is entitled to recover from the proprietors, lessees, or their agents, or from any person, association, corporation, or the directors thereof, his actual damage and $100 in addition thereto."

1. The record sufficiently shows that in the supreme court of the state the defendant questioned the validity of the statute in question under the 14th Amendment, in that it "seeks to abridge the privileges and immunities of citizens of the United States, and to deprive them of liberty and property without due process of law, and to deny to them, being within its jurisdiction, the equal protection of the laws." By the judgment below the validity of the statute was sustained, the court holding that it was a legitimate exertion of the police power of the state. The contention that this court is without jurisdiction to review that judgment is, therefore, overruled.

2. The supreme court of the state, in a previous decision between the same parties, —Greenberg v. Western Turf Asso. 140 Cal. 357, 360, 73 Pac. 1050,—held the statute to be constitutional as a valid regulation imposed by the state in its exercise of police power. That decision, we assume, from the opinion of the court, had reference only to the Constitution of California. But this court can only pass upon the validity of *the statute with reference to the Constitution of the United States. We perceive no reason for holding it to be invalid under that instrument. The contention that it is unconstitutional as denying to the defendant the equal protection of the laws is without merit, for the statute is applicable alike to all persons, corporations, or associations conducting places of public amusement or entertainment. Of still less merit is the suggestion that the statute abridges the rights and privileges of citizens; for a corporation cannot be deemed a citizen within the meaning of the clause of the Constitution of the United States which protects the privileges and immunities of citizens of the United States against being abridged or impaired by the law of a state.

The same observation may be made as to the contention that the statute deprives the defendant of its liberty without due process of law; for the liberty guaranteed by the 14th Amendment against deprivation without due process of law is the liberty of natural, not artificial, persons. Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 243, ante, 168, 27 Sup. Ct. Rep. 126. Does the statute deprive the defendant of any property right without due process of law? We answer this question in the negative. Decisions of this court, familiar to all, and which need not be cited, recognize the possession, by each state, of powers never surrendered to the general government; which powers the state, except as restrained by its own Constitution or the Constitution of the United States, may exert not only for the public health, the public morals, and the public safety, but for the general or common good, for the well-being, comfort, and good order of the people. The enactments of a state, when exerting its power for such purposes, must be respected by this court, if they do not violate rights granted or secured by the supreme law of the land. In view of these settled principles, the defendant is not justified in invoking the Constitution of the United States. The statute is only a regulation of places of public entertainment and amusement upon terms of equal and exact justice to everyone holding a ticket of admission, *and who is not, at the time, under the influence of liquor, or boisterous in conduct, or of lewd and immoral character. In short, as applied to the plaintiff in error, it is only a regulation compelling it to perform its own contract as evidenced by tickets of admission issued and sold to

ishing to attend its race course. egulation, in itself just, is like- motive of peace and good order ose who attend places of public nent or amusement. It is neither ary exertion of the state's inher- vernmental power, nor a violation ight secured by the Constitution nited States. The race course in being held out as a place of pub- ainment and amusement, is, by the defendant, so far affected with a terest that the state may, in the f good order and fair dealing, re- endant to perform its engagement blic, and recognize its own tickets sion in the hands of persons en- claim the benefits of the statute. a regulation violates any right ty secured by the Constitution of d States cannot, for a moment, be The case requires nothing further d.

lgment is affirmed.

BRIDGE COMPANY, Plff. in Err.,
v.
UNITED STATES.

S. C. Reporter's ed. 364-403.)

onal law—delegation of power.

gislative and judicial powers are stitutionally delegated to the Sec- War by the provision of the river or act of March 3, 1899 (30 Stat. , 1153, chap. 425, U. S. Comp. Stat. 3545), § 18, empowering that of- n satisfied, after a hearing of the terested, that bridge over a navi- er way of the United States is an ble obstruction to navigation, to ich changes or alterations as will vigation reasonably safe, easy, and ted.

domain—what is a taking—remov- truction to navigation—consequen- ry.

e making of the alterations or a bridge erected under the sanc- state over an interstate water h the Secretary of War, acting authority of the act of March 3, 8, requires to secure navigation against an unreasonable obstruction, is not a taking of private property for public use for which the Federal Constitution requires compensation to be made, but is merely incidental to the exercise by the government of its power to regulate commerce among the states.

[No. 431.]

Argued December 5 and 6, 1906. Decided February 25, 1907.

IN ERROR to the District Court of the United States for the Western District of Pennsylvania to review a conviction for failing to make the alterations in a bridge over an interstate waterway which the Secretary of War requires to secure navigation against an unreasonable obstruction. Affirmed.

See same case below, 143 Fed. 377.

The facts are stated in the opinion.

Messrs. **D. T. Watson** and **Johns McCleave** argued the cause, and, with Messrs. John S. Wendt and W. B. Rodgers, filed a brief for plaintiff in error:

Prior to the organization of the United States as a distinct sovereignty Pennsylvania had exclusive jurisdiction over the streams that ran inside of its territorial limits, and this included the Allegheny, the Monongahela, and the Ohio rivers. A portion of each of these rivers did traverse the territory of other sovereignties, but it is still true that the portion within the state of Pennsylvania was under the absolute control of that state.

Pennsylvania could then authorize bridges over any of these rivers to any height and of any kind of construction that it saw proper.

People v. Rensselaer & S. R. Co. 15 Wend. 131, 30 Am. Dec. 33; Wilson v. Black Bird Creek Marsh Co. 2 Pet. 250, 7 L. ed. 414; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 2, 31 L. ed. 630, 8 Sup. Ct. Rep. 811; Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Monongahela Nav. Co. v. United States, 148 U. S. 325, 37 L. ed. 467, 13 Sup. Ct. Rep. 622.

As to what legislation of Congress is necessary to evince a determination of Congress to exercise its jurisdiction over any given river, see

Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 620, 14 L. ed. 292; Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357; Gilman v. Philadelphia, 3 Wall. 727, 18 L. ed. 100.

As Congress had not legislated and assumed jurisdiction of the Allegheny river

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As to what constitutes a "tak- roperty by eminent domain—see Memphis & C. R. Co. v. Birming- & T. River R. Co. 18 L.R.A. 166; t v. Rechel, 40 L. ed. U. S. 188.

what injuries are consequential— to D. M. Osborne & Co. v. Mis- Co, 37 L. ed. U. S. 156; A. Backus s v. Fort Street Union Depot Co. U. S. 853; and High Bridge Lum- United States, 16 C. C. A. 468.

prior to 1875, the absence of such legislation was really affirmative action by Congress that the state might freely legislate on the subject of the erection of bridges across the streams within its borders.

Mobile County v. Kimball, 102 U. S. 697, 26 L. ed. 239; Huse v. Glover, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313; Monongahela Nav. Co. v. United States, 148 U. S. 332, 37 L. ed. 470, 13 Sup. Ct. Rep. 622.

The charter of the Union Bridge Company was granted in 1873, and the bridge was erected in 1874, and it thereby became under its charter the private property of the Union Bridge Company.

It then was a lawful structure,—the lawful property of the Union Bridge Company.

Newport & C. Bridge Co. v. United States, 105 U. S. 507, 26 L. ed. 1149.

The question whether the Union Bridge Company had complied with the provisions of its charter in the erection of its bridge so as not to interfere with passing boats, etc., was not a question, and could not be a question, in the Federal courts. In the absence of any complaint on the part of Pennsylvania that the bridge had not been constructed in accordance with the terms of its charter, the Federal courts would be powerless to raise that question. That was a question between the state of Pennsylvania and the Union Bridge Company. It was a state question, and not a Federal question. True, Pennsylvania by her acquiescence in the construction of the bridge, affirmatively asserts its approval of said bridge; but whether it did or not could not aid the government in this case. The Federal government may not enforce the terms of the state charter.

Willamette Iron Bridge Co. v. Hatch, 125 U. S. 2, 31 L. ed. 630, 8 Sup. Ct. Rep. 811; Monongahela Nav. Co. v. United States, 148 U. S. 325, 37 L. ed. 467, 13 Sup. Ct. Rep. 622; Gilman v. Philadelphia, 3 Wall. 714, 18 L. ed. 96.

The Union Bridge, when erected in 1874, was a lawful structure. It was directly authorized by the state of Pennsylvania, and approved of by that state acquiescing in its construction for over thirty years. It was indirectly, but affirmatively, authorized by the United States government, because that government, by its inaction as to the Allegheny river, authorized affirmative action by the state of Pennsylvania in the erection of bridges over that river.

Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 628, 14 L. ed. 249, 295; Newport & C. Bridge Co. v. United States, 105 U. S. 470, 480, 26 L. ed. 1143, 1147; Miller v. New York, 109 U. S. 392, 27 L. ed. 972, 3 Sup. Ct. Rep. 228; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 2, 31 L. ed. 630, 8 Sup. Ct. Rep. 811; Cardwell v. Am ican River Bridge Co. 113 U. S. 208, 28 ed. 959, 5 Sup. Ct. Rep. 423; Monongal Nav. Co. v. United States, 148 U. S. 325, L. ed. 467, 13 Sup. Ct. Rep. 622.

As the bridge was, then, erected un state authority with the consent of United States government, it became was the private property of the Un Bridge Company; and not even the Uni States government, claiming its soverei right under the commerce clause, could ta that bridge for public use without due co pensation, or deprive the Union Bridge Co pany of it without due process of law.

Monongahela Nav. Co. v. United Stat 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Re 622; United States v. Lynah, 188 U. S. 4 47 L. ed. 548, 23 Sup. Ct. Rep. 349; Yat v. Milwaukee, 10 Wall. 497, 19 L. ed. 9 Scranton v. Wheeler, 179 U. S. 146, 45 L. e 129, 21 Sup. Ct. Rep. 48; Northern Tran Co. v. Chicago, 99 U. S. 635, 25 L. e 336; Newport & C. Bridge Co. United States, 105 U. S. 492, 26 L. e 1151; Crenshaw v. Slate River Co. 6 Ran (Va.) 245; Pumpelly v. Green Bay & I Canal Co. 13 Wall. 166, 20 L. ed. 557; Com New Bedford Bridge, 2 Gray, 339; Unit States ex rel. Turner v. Williams, 194 U. 279, 48 L. ed. 979, 24 Sup. Ct. Rep. 71 Woodward v. Central Vermont R. Co. 1 Mass. 602, 62 N. E. 1051.

The power of Congress to regulate co merce is restricted by the provision of t Federal Constitution that private proper shall not be taken for public use witho just compensation, nor shall one be depriv of property without due process of la No power is given to any department of t United States government to destroy p vate property without giving the owner opportunity to be heard on the question to whether it is or is not a nuisance or su ject to such destruction. Admitting, for t sake of argument, that Congress might cree, by an explicit and express act, a bridge over any river a nuisance and unlawful obstruction, it is submitted th before Congress could carry into effect t judgment, the owner of the property ha right to be heard on the question wheth as a fact, it is a nuisance, and interfe with navigation. Unless as a fact it such a nuisance and interference, even C gress cannot destroy it and remove it wi out compensation.

Sinking Fund Cases, 99 U. S. 718, 25 ed. 501; Den ex dem. Murray v. Hobo Land & Improv. Co. 18 How. 272, 15 L. 372; Palairet's Appeal, 67 Pa. 488, 5 Rep. 450; Public Clearing House v. Co

134 U. S. 510, 48 L. ed. 1099, 24 Sup. Ct. Rep. 789; Cooley, Const. Lim. p. 434; Davidson v. New Orleans, 96 U. S. 101, 24 L. ed. 618.

The question whether the Union Bridge is an unreasonable obstruction to navigation which makes it a nuisance is a judicial one which entitles the Bridge Company to a hearing on the merits before it can be deprived of its life.

Com. v. New Bedford Bridge, supra; Com. ex rel. Atty. Gen. v. Pittsburg & C. R. Co. 58 Pa. 26; Baltimore v. Pittsburgh & C. R. Co. 1 Abb. (U. S.) 9, Fed. Cas. No. 827; Fisher v. McGirr, 1 Gray, 36, 61 Am. Dec. 381; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; Newport & C. Bridge Co. v. United States, 105 U. S. 470, 26 L. ed. 1143; People ex rel. Copcutt v. Board of Health, 140 N. Y. 1, 23 L.R.A. 481, 37 Am. St. Rep. 522, 35 N. E. 320; Stone v. Heath, 179 Mass. 385, 60 N. E. 975; Cooley, Const. Lim. 5th ed. 722, 6th, p. 741; Dill. Mun. Corp. 4th ed. ¶ 374; Wood, Nuisances, § 740, 3d ed. § 22; 2 Tiedeman, State & Federal Control of Persons & Property, § 146; Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203; Chicago v. Van Ingen, 152 Ill. 634, 43 Am. St. Rep. 285, 38 N. E. 894; Teass v. St. Albans, 38 W. Va. 19, 19 L.R.A. 802, 17 S. E. 400; Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 363, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Covington & L. Turnp. Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 688, 43 L. ed. 860, 19 Sup. Ct. Rep. 565; Miller v. New York, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228; Deming v. Cleveland, 22 Ohio C. C. 11; Health Department v. Trinity Church, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; United States v. Rider, 50 Fed. 406; Baldwin v. Smith, 82 Ill. 162; Darst v. People, 51 Ill. 286, 2 Am. Rep. 301; American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33; Interstate Commerce Commission v. Brimson, 154 U. S. 449, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

Section 18 of the act of March 3, 1899, under which these proceedings were had, does not provide for "due process of law."

Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; Springer v. United States, 102 U. S. 586, 26 L. ed. 253; McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335; Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Davidson v. New Orleans, 96 U. S. 104, 24 L. ed. 619; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841.

If the act of 1899 is properly construed by the court below, Congress sought by that act to use the judicial power of the government merely and solely for the purpose of enforcing a decree or decision arrived at by the legislative departments of the government, and without giving to the courts the power to investigate the facts and determine the merits of the controversy as between the Secretary of War, representing the United States, on the one hand, and the Union Bridge Company as defendant, on the other. This it is beyond the power of Congress to do, as it would compel the courts to perform duties that were not judicial.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Hayburn's Case, 2 Dall. 409, 1 L. ed. 436; United States v. Ferreira, 13 How. 40, 14 L. ed. 42; United States v. Todd, 13 How. 52, note, 14 L. ed. 47, note; Gordon v. United States, 117 U. S. 697, Appx.; Re Sanborn, 148 U. S. 228, 37 L. ed. 431, 13 Sup. Ct. Rep. 577; La Abra Silver Min. Co. v. United States, 175 U. S. 457, 44 L. ed. 235, 20 Sup. Ct. Rep. 168.

Assistant to the Attorney General **Purdy** argued the cause and filed a brief for defendant in error:

Congress has plenary power to require the Union Bridge Company either entirely to remove its bridge across the Allegheny river at Pittsburg, or to compel it to make the alterations specified in the order of the Secretary of War.

Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 12, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 683, 27 L. ed. 442, 445, 2 Sup. Ct. Rep. 185; Gilman v. Philadelphia, 3 Wall. 713, 731, 18 L. ed. 96, 101.

Due process of law in each particular case means such an exercise of the power of the government as the settled maxims of law permit and sanction, and under such

safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.

Cooley, Const. Lim. 6th ed. 434.

Administrative process, which has been regarded as necessary by the government, and sanctioned by long usage, is as much due process of law as any other.

Wulzen v. San Francisco, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353; Atty. Gen. ex rel. Rich v. Jochim, 99 Mich. 358, 23 L.R.A. 699, 41 Am. St. Rep. 606, 58 N. W. 611; Eames v. Savage, 77 Me. 212, 52 Am. Rep. 751; Holmes v. Seely, 19 Wend. 507; Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281.

Due process of law does not necessarily require that a judicial hearing shall be accorded before any preliminary action can be taken by the administrative officers of the government which may result in a temporary deprivation of certain rights of a citizen. If the law contemplates that the citizen whose rights are affected by certain administrative acts and processes shall finally be accorded an opportunity to have those rights passed upon in a judicial proceeding, then and in such case due process of law has not been denied within the meaning of the Constitution.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 280, 284, 15 L. ed. 372, 376, 377.

While it is manifest that a law cannot withdraw from judicial determination a controversy with respect to private rights which from its nature is the subject of a suit at common law or in equity or in admiralty, it is likewise clear that, in respect to matters involving public rights as distinguished from private rights, the legislature may provide that, so far as the determination of facts is concerned, the action of the administrative officers may be made final and conclusive.

Kennedy v. Gibson, 8 Wall. 498, 19 L. ed. 476; Casey v. Galli, 94 U. S. 673, 24 L. ed. 168; United States v. Knox, 102 U. S. 422, 26 L. ed. 216; Bushnell v. Leland, 164 U. S. 684, 41 L. ed. 598, 17 Sup. Ct. Rep. 209; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789.

In this class of cases the courts will, however, always take jurisdiction for the purpose of ascertaining whether the administrative officer acted within or without the statute; and if the court should determine that such officer was acting within the purview of the statute, then his findings of fact upon such matters as have been committed to his discretion will not be reviewed by the court; but if it should appear to the court that he acted wholly the statute, and without authority a court of equity will grant relief.

American School of Magnetic H McAnnulty, 187 U. S. 94, 47 L. e Sup. Ct. Rep. 33.

There is yet another class of cas involve the private rights of the with reference to which it would se Congress is without authority to w from judicial determination the fi make the finding of the administra ficers of the government final and sive. With respect to this class however, it is clear that, prelimina judicial determination, the legislati er may confer upon administrative authority to ascertain and determi facts respecting purely private righ ing to the private citizen, should he himself aggrieved by such finding, t to go into court and have those f considered and determined *de novo*.

Chicago, M. & St. P. R. Co. v. Mi 134 U. S. 418, 33 L. ed. 970, 3 Inte Rep. 209, 10 Sup. Ct. Rep. 462, 702.

This law does not operate to ta vate property for public use wit meaning of the 5th Amendment to t eral Constitution.

New Orleans Gaslight Co. v. D Commission, 197 U. S. 453, 49 L. 25 Sup. Ct. Rep. 471; Chicago, B. Co. v. Illinois, 200 U. S. 561, 50 L. 26 Sup. Ct. Rep. 341; West Chicago R. Co. v. Illinois, 201 U. S. 506, 5 845, 26 Sup. Ct. Rep. 518.

Section 18, under which the plai error was convicted, does not dele the Secretary of War legislative or powers.

Buttfield v. Stranahan, 192 U. 496, 48 L. ed. 525, 535, 24 Sup. Ct. R Marshall Field & Co. v. Clark, 14 649, 692, 36 L. ed. 294, 309, 12 Sup. 495.

The act in question does not autho Secretary of War to act arbitrarily party whose rights are affected is to a hearing, to receive notice and a cation of the alterations required, have a reasonable time in which t the prescribed changes. Not until a steps have been taken does a wilful to comply with the order of the Se of War become a punishable offense. can be no doubt as to the power gress to attach such consequence to ure to observe the requirements of t retary. Regulations prescribed by tive officials under authority gra Congress, as has been frequently h regulations prescribed by law, and h force of law. The only question

has ever been raised where such authority has been granted was as to the intention of Congress to make the violation of such regulations a criminal offense.

United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; Re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; United States v. Breen, 40 Fed. 402; United States v. Ormsbee, 74 Fed. 207.

In the following cases the constitutionality of this law has been sustained:

United States v. Moline, 82 Fed. 592; E. A. Chatfield Co. v. New Haven, 110 Fed. 788.

Mr. Justice **Harlan** delivered the opinion of the court:

This is a proceeding in the nature of a criminal information in the district court of the United States for the western district of Pennsylvania against the Union Bridge Company, a corporation of Pennsylvania, owning and controlling a bridge across the Allegheny river near where it joins the Monongahela river to form the Ohio river,—the Allegheny river being a navigable waterway of the United States, having its source in New York and being navigable in both New York and Pennsylvania.

Stating the matter generally, the Secretary of War found the bridge to be an unreasonable obstruction to the free navigation of the Allegheny river, and required the Bridge Company to make certain changes or alterations in order that navigation be rendered reasonably free, easy, and unobstructed. These alterations, it was charged, the [366]company wilfully failed *and refused to make. Hence the present information against it. There was a verdict of guilty, followed by a motion in arrest of judgment, which motion being overruled, the company was sentenced to pay a fine of $5,000. To review that order this writ of error is prosecuted.

The information was based on § 18 of the river and harbor act of March 3d, 1899, which provides: "That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable water ways of the United States, is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge, so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes, recommended by Chief of Engineers, that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If, at the end of such time, the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, wilfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars; and every month such persons, corporation, *or association shall remain in [367] default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: *Provided*, That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court, either by the United States or by the defendants." 30 Stat. at L. 1121, 1153. chap. 425, U. S. Comp. Stat. 1901, p. 3545.

Legislation similar in its general character can be found in river and harbor acts passed at previous sessions of Congress. Act of 1884 (23 Stat. at L. 133, 148, chap. 229, U. S. Comp. Stat. 1901, p. 3532); act of April 11th, 1888 (25 Stat. at L. 400, 424, 425, chap. 860, §§ 9, 10); and act of September 19th, 1890 (26 Stat. at L. 426, 453, chap. 907, §§ 4, 5). Finally, we have the act of March 23d, 1906 (34 Stat. at L. 84, chap. 1130, §§ 4, 5), which covers the same ground as the act of 1899 under which the present information was filed.

It appears that the Bridge Company was incorporated by an act of the Pennsylvania legislature, approved March 13th, 1873, with authority to construct a bridge over the Allegheny river, in the city of Allegheny. That act contains this proviso: "That the erection of said bridge shall not obstruct the navigation of said river, so as to endanger the passage of rafts, steamboats, or other water crafts; and the piers shall not be so placed as to interfere with tow boats proceeding out with their tows made up, and

shall be constructed in such manner as to meet the requisitions of the law in regard to the obstructions of navigation."

The bridge was constructed in 1874 and 1875, and has been in use since 1875.

In 1902 a petition was sent to the Secretary of War by persons, corporations, and companies in and about Pittsburg, which contained, among other things, these statements: "There can be no doubt whatever that this bridge is an unreasonable obstruction to the free navigation of the Ohio, Monongahela, and Allegheny rivers on ac-
[368] count of insufficient *height and the filling in of the river or rivers over which it passes in order to provide approaches for it. We respectfully request that you will investigate this matter, having full confidence that, after making such investigation, you will find it to be your duty to take action against its owners, the Union Bridge Company, under the provisions of § 18 of the river and harbor act, approved March 3, A. D. 1899. . . . It was built of such a low height above the water as to cause the almost complete obstruction of all the packet and tow-boat trade passing from the Allegheny river into the Ohio and Monongahela rivers, and from these rivers into the Allegheny. In building it, the width of the river was very materially narrowed, as already stated, by the fills made for the approaches. The river commerce of Pittsburg, as you are aware, is of very great magnitude and importance, and is rapidly increasing in volume. For the last calendar year it amounted to 10,916,489 tons, being about equal to that of the harbor of New York. The extension of the manufacturing industries of Pittsburg up the Allegheny river is making it of much greater importance than heretofore that the navigation to and from that river should not be obstructed. The present time is peculiarly appropriate for action by you. The Union bridge is an old, wooden structure, and will soon need—in fact, it already needs—extensive repairs to make it safe for public use. Therefore, as the bridge in question deprives the community of a reasonable use of the Allegheny river in connection with the river business of this great harbor, we appeal to you to exercise the powers committed to you to abate, or to at least mitigate, this great public nuisance, as you shall find yourself justified by the law and the facts of the case."

The matter was referred by the Secretary of War to the proper officers of the Engineer Corps of the Army for examination and report. Such examination was had upon notice to the Bridge Company, and, under date of December 8th, 1902, Capt. Sibert, captain of engineers, who conducted the examination, reported and recommended to the Chief of Engineers *that the company be given notice to make certain alterations in its bridge.

On December 16th, 1902, the Chief of Engineers trannsmitted that report to the Secretary of War, saying: "As required by the law and the instructions of the War Department, a public hearing has been held, after due advertisement, and all interested parties have been afforded an opportunity to present their views. Attention is respectfully invited to the accompanying report on the subject, dated the 8th instant, by Captain Sibert, and to its accompanying papers. In this report Captain Sibert fully discusses all phases of the question, and shows that, without reference to the use of the Allegheny river for through navigation, the bridge in question is an unreasonable obstruction, and practically a bar to the use of that portion of Pittsburg harbor situated on the river. He states that none of the boats engaged in interstate commerce from Pittsburg, south and west, can reach, at low water, a single manufacuring plant or wharf in the cities of Pittsburg and Allegheny on the Allegheny river. He submits a photograph to show that the portion of Pittsburg harbor in the Monongahela river is crowded with shipping, while that portion in the Allegheny has none, all due to the existence of the Union bridge. It is also shown by the evidence that the lower portion of the Allegheny river would be of great importance as a harbor of refuge when ice is running out of the Monongahela river, if it were not obstructed by the Union bridge. He reaches the conclusion, based on the facts developed at the hearing, that, in order to give the shipping at Pittsburg increased harbor room, and to enable it to connect with wharves and manufacturing plants in that part of the harbor located on the Allegheny river, the Union bridge should be so raised as to provide a channel-span with a clear height of 70 feet, the same as exists under the bridge known as the 'Point bridge' on the Monongahela river, and the same that will exist under the Wabash Railroad bridge just being built, immediately above the Point bridge. It appears that this *bridge was built in 1873, 1874 by the Union Bridge Company, incorporated under authority of an act of the Pennsylvania legislature of March 13, 1873, and that it has been the subject of complaint on the part of the navigation interests practically ever since its completion. Numerous investigations have been made by different engineer officers, who have held public hearings on the subject, and who have concurred in expressing the opinion that the bridge was an unreasonable obstruction to navigation, and that it should

so as to give a headroom equal, to that of the aforesaid Point t the mouth of the Monongahela he Union bridge is situated at the f the Allegheny river, and there be no room for doubt that the al- of the bridge is essential to the rea- use for navigation and commercial of that portion of the river form- art of Pittsburg harbor. Captain commends that the bridge in ques- o altered as to give two navigable tending riverwards from the left t, of not less than 394 feet clear ch; the second span from the Pitts- re to give a clear headroom over s Island pool of not less than 70 the first span from the same shore headroom of not less than 70 feet ier and 62 feet at the abutment; the piers of the altered structure e no riprapping or other pier pro- bove an elevation of 10 feet below ice of Davis Island pool, and that of the old structure not comprised w construction, and in conformity above requirements, shall be whol- ed. The period of eighteen months ered by him ample time within make these alterations. I concur ews and recommend that notice be the Bridge Company, requiring the ns to be made and completed as by him."

date of 20th of January, 1903, Mr. n Secretary of War, issued a for- ce to the Bridge Company, stating nd good reason to believe that its as an unreasonable obstruction to igation. The *notice informed the of the alterations of its bridge nded by the Chief of Engineers as ', and concluded: "And whereas, months from the date of service of e is a reasonable time in which to said bridge as described above; refore, in obedience to, and by vir- 18 of an act of the Congress of the tates entitled 'An Act Making Ap- ons for the Construction, Repair, ervation of Certain Public Works s and Harbors, and for Other Pur- pproved March 3, 1899, I, Elihu cretary of War, do hereby notify Union Bridge Company to alter the lge as described above, and pre- at said alterations shall be made leted on or before the expiration n months from the date of service

request of the Bridge Company, the d by Secretary Root for altering, and elevating the bridge was ex- r his successor, Secretary Taft, to

December 1st, 1904. By order of the latter officer the time was extended to January 1st, 1905.

Subsequently, a rehearing was asked for by the Bridge Company, but the rehearing was refused and Secretary Taft made the following order: "The Union bridge is an unreasonable obstruction to commerce of the Allegheny river. If the bridge were not there, the winter refuge which the stretch of the Allegheny river up to the next bridge would offer for the flet of boats which usually are moored in the Monongahela would be a very great advantage for navigation and commerce on the Ohio river and its tributaries. The two rivers, the Allegheny and the Monongahela, because they rise in different sections of the country, have their ice breaks at different times in the early spring. The mouth of the one offers very desirable refuge to the vessels that are exposed to danger from the breaking up of ice in the headwaters of the other. The Union bridge, at the mouth of the Allegheny, was erected at a time when the Secretary of War was not given specific control over navigable streams, and was not authorized *to [372] inhibit the construction of bridges which were likely to obstruct navigation; but it appears that an army engineer, Colonel Merrill, in charge of the district, publicly announced that this bridge was an obstruction to navigation when it was erected. It was erected, therefore, in the face of the information given by the best authority that could be consulted in that matter in the government. These are the facts that I find independently of any previous adjudication; but, added to this is the finding of my predecessor, Mr. Root, to exactly the same effect, upon which he based an order that the bridge, as an obstruction to navigation, be abated. This matter is now before me on a petition for rehearing of Mr. Root's order. As an original question I should have ruled as Mr. Root ruled, and *a fortiori* because the orders of this Department are not to be lightly set aside, and are to be treated as a decree in equity would be, and be set aside only upon a showing of a palpable error or mistake. The petition for rehearing is denied, and the order suspending the operation of Mr. Root's order is now revoked. The order will be put in full force and executed by the proper officers, and the Union Bridge will be notified accordingly."

In the opinion of the district court, delivered on a motion in arrest of judgment, it was said: "The obstruction here involved consists of a bridge over the Allegheny river just above its junction with the Monongahela at Pittsburg. The Allegheny river rises in Pennsylvania, flows north into New York state, and thence back into Pennsylvania.

The latter state, by act of March 21, 1798 (3 Smith's Laws, p. 320), enacted the Allegheny, from the New York state line to its mouth, a navigable stream, and the state of New York, by act of March 31, 1807, did likewise in its counties of Genesee and Allegheny. The Allegheny is the principal branch of the Ohio, its volume being six times greater than that of the Monongahela. It is included in the general plan for the improvement by the national government of local interstate waterways and the harbor of Pittsburg. The government has built, or has now in process of construction, [373] *a system of locks and dams on the Allegheny which will slackwater the stream for 27 miles from its mouth. The Davis Island dam, situate 5 miles below Pittsburg, on the Ohio river, raises the water in the Allegheny and Monongahela at their junction 6 feet above their normal depths, and backs its water to the first dams of the Allegheny and Monongahela slackwater systems respectively. These waters form the harbor of Pittsburg, the importance of which harbor will be appreciated from the fact that the tonnage in water transportation passing from it the past year exceeded that of the Suez canal for the same period. From its size, interstate relation, and its being a part of this really great harbor, it will be seen that the Allegheny answers the requirement of a navigable stream (The Montello [United States v. The Montello], 11 Wall. 411, 20 L. ed. 191), and is also one over which the national government has assumed jurisdiction. The Union bridge is a pier-supported, wooden structure; it crosses from Pittsburg to Allegheny City; and is the first bridge on the Allegheny." [143 Fed. 378.]

The first principal question raised by the defendant is whether the 18th section of the river and harbor act of March 3d, 1899, is in violation of the Constitution of the United States as delegating legislative and judicial [378] powers *to the head of an executive department of the government. This question, the government contends, has been determined in its favor by the principles heretofore announced by this court, and need not be discussed as if now presented for the first time. In its judicial as well as legal aspects the question is of such importance as to justify a full reference to prior decisions.

The earliest case is that of The Aurora v. United States, 7 Cranch, 382, 3 L. ed. 378, which involved the question whether Congress could make the revival of a law (which had ceased to be in force) depend upon the existence of certain facts, to be ascertained by the President and set forth in a proclamation by him. The court said: "We can see no sufficient reason why the legislature should not exercise its discretion in reviving the act of March 1st, 1809 [2 Stat. at L. 528, chap. 24], either expressly or conditionally, as their judgment should direct. The 19th section of that act, declaring that it should continue in force to a certain time, and no longer, could not restrict their power of extending its operation without limitation upon the occurrence of any subsequent combination of events." Referring to this language, we said in the subsequent case of Marshall Field & Co. v. Clark, 143 U. S. 649, 683, 36 L. ed. 294, 307, 12 Sup. Ct. Rep. 495, 501: "This certainly is a decision that it was competent for Congress to make the revival of an act depend upon the proclamation of the President, showing the ascertainment by him of the fact that the edicts of certain nations had been so revoked or modified that they did not violate the neutral commerce of the United States. The same principle would apply in the case of the suspension of an act upon a contingency to be ascertained by the President and made known by his proclamation."

In Wayman v. Southard, 10 Wheat. 1, 43, 45, 46, 6 L. ed. 253, 262, 263, Chief Justice Marshall, delivering the unanimous judgment of the court, said that although Congress could not delegate to the courts or to any other tribunals powers strictly and exclusively legislative, and although the line had not been exactly drawn that separates the important subjects which must be entirely *regulated by the legislature itself [379] from those of less interest "in which a general provision may be made, and powers given to those who are to act under such general provisions to fill up the details," yet "Congress may certainly delegate to others powers which the legislature may rightly exercise itself," and "the maker of the law may commit something to the discretion of the other departments."

In Marshall Field & Co. v. Clark, just cited, 143 U. S. 649, 680, 683, 691, 692, 36 L. ed. 294, 306, 307, 309, 310, 12 Sup. Ct. Rep. 495, 500, 501, 504, 505, the question arose as to the constitutionality of that section of the McKinley tariff act of 1890 [26 Stat at L. 612, chap. 1244, § 3] which provided for the imposition, in a named contingency (to be determined by the President and manifested by his proclamation), of duties upon sugar, molasses, and other specified articles, which the act had placed in the free list. By that section it was declared that "with a view to secure reciprocal trade with countries producing the following articles and for this purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever, and so often as the President shall be satisfied that the government of any

intry producing and exporting sugars, mo-
ses, coffee, tea, and hides, raw and un-
red, or any of such articles, imposes du-
s or other exactions upon the agricul-
ral or other products of the United States,
hich, in view of the free introduction of
ch sugar, molasses, coffee, tea, and hides
to the United States, he may deem to be
ciprocally unequal and unreasonable, he
hall have the power, and it shall be his
ity, to suspend, by proclamation to that
fect, the provisions of this act relating
the free introduction of such sugar, mo-
sses, coffee, tea, and hides, the production
such country, for such time as he shall
eem just, and in such case and during such
uspension duties shall be levied, collected,
nd paid upon sugar, molasses, coffee, tea,
nd hides, the product of or exported from
ich designated country, as follows, name-
:" Here follows in the act provisions in-
cating the particular duties to be collected,
fter the President's proclamation upon sug-
rs, molasses, coffee, tea, hides, etc. It was
ntended in the Field Case that the *above
ction, so far as it authorized the President
suspend by proclamation the provisions
the act relating to the free introduction
sugar, molasses, coffee, etc., was uncon-
itutional, as delegating to him both legis-
tive and treaty-making powers. In its
nsideration of this question the court,
fter referring to the case of The Aurora,
bove cited, examined the numerous prece-
nts in legislation showing to what extent
e suspension of certain provisions and the
ing into operation of other provisions of
n act of Congress had been made to depend
ntirely upon the finding or ascertainment
y the President of certain facts, to be made
nown by his Proclamation. The acts of
ongress which underwent examination by
he court are noted in the margin.† The re-
ult of that examination of legislative prec-
dents was thus stated: "The authority
iven to the President by the act of June
, 1794 [1 Stat. at L. 372, chap. 41], to lay

†Act of June 13th, 1798, chap. 53, 1 Stat.
t L. 565, 566; of February 9th, 1799, chap.
1 Stat. at L. 613; of April 18th, 1806,
hap. 29, 2 Stat. at L. 379; of December 19th,
806, chap. 1, 2 Stat. at L. 411; of March
1, 1815, chap. 77, 3 Stat. at L. 224; of
larch 3d, 1817, chap. 39, 3 Stat. at L. 361;
f January 7th, 1824, chap. 4, 4 Stat. at L.
; of May 24th, 1828, chap. 111, 4 Stat. at L.
98, U. S. Comp. Stat. 1901, p. 2856; of act
f May 31st, 1830, chap. 219, 4 Stat. at L.
5, U. S. Comp. Stat. 1901, p. 2848; of Au-
ust 5th, 1854, chap. 269, 10 Stat. at L. 587;
Stat. at L. 790; of March 6th, 1866, chap.
, 14 Stat. at L. 3, 26 Stat. at L. 616, chap.
44; of act June 26th, 1884, chap. 121, 23
at. at L. 57, U. S. Comp. Stat. 1901, p.
51.

an embargo on all ships and vessels in the ports of the United States, 'whenever, in his opinion, the public safety shall so require,' and under regulations, to be continued or revoked, 'whenever he shall think proper;' by the act of February 9, 1799, to remit and discontinue, for the time being, the restraints and prohibitions which Congress had prescribed with respect to commercial intercourse with the French Republic, 'if he shall deem it expedient and consistent with the interest of the United States,' and 'to revoke such order whenever, in his opinion, the interest of the United States shall require;' by the act of December 19, 1806, to suspend, for a named time, the operation of the nonimportation act of the same year, 'if, in his judgment, the public interest should require it;' by the act of May 1, 1810 [2 Stat. at L. 606, chap. 39, § 4], to revive a former act, as to Great Britain or France, if either country had not, by a *named day, so revoked or modified its edicts [381] as not 'to violate the neutral commerce of the United States;' by the acts of March 3, 1815, and May 31, 1830, to declare the repeal, as to any foreign nation, of the several acts imposing duties on the tonnage of ships and vessels, and on goods, wares, and merchandise imported into the United States, when he should be 'satisfied' that the discriminating duties of such foreign nations, 'so far as they operate to the disadvantage of the United States,' had been abolished; by the act of March 6, 1866, to declare the provisions of the act forbidding the importation into this country of neat cattle and the hides of neat cattle, to be inoperative, 'whenever, in his judgment, their importation 'may be made without danger of the introduction or spread of contagious or infectious disease among the cattle of the United States,'—must be regarded as unwarranted by the Constitution, if the contention of the appellants in respect to the 3d section of the act of October 1, 1890, be sustained."

Touching the general question the court said: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea, and hides, Congress itself determined that the provisions of the act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any coun-

try producing and exporting them that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed, that is, which he found to be, reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected, and paid, on sugar, molasses, coffee, tea, or hides, produced by or exported from such designated country, while the suspension [382] *lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words, 'he may deem,' in the 3d section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea, and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that, in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea, and hides, from particular countries, should be suspended, in a given contingency, and that, in case of such suspensions, certain duties should be imposed." Again: "'The true distinction,' as Judge Ranney, speaking for the supreme court of Ohio, has well said, 'is between the [383] delegation of power to make the law, *which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St. 88. In Moers v. Reading, 21 Pa. 188, 202, the language of the court was: 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So, in Locke's Appeal, 72 Pa. 491, 498, 13 Am. Rep. 716, 721: 'To assert that a law is less than a law because it is made to depend on a future event or act is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.' The proper distinction, the court said, was this: 'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.' What has been said is equally applicable to the objection that the 3d section of the act invests the President with treaty-making power. The court is of the opinion that the 3d section of the act of October 1, 1890, is not liable to the objection that it transfers legislative and treaty-making power to the President."

The latest case bearing on the general question is Buttfield v. Stranahan, 192 U. S. 470, 496, 48 L. ed. 525, 535, 24 Sup. Ct. Rep. 349, 355. That case involved the constitutionality of the act of Congress of March 2d, 1897 (29 Stat. at L. 604, chap. 358, U. S. Comp. Stat. 1901, p. 3194), relating to the "importation of impure and unwholesome tea." The act provided for the appointment by *the Secretary of the Trea- [384] ury of a board of seven tea experts, who should prepare and submit to him standard samples of that article. One section of the act provided: "That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom houses of the ports of New York, Chicago, San Francisco, and such other ports as he may determine,

plicate samples of such standards; that d Secretary shall procure a sufficient mber of other duplicate samples of such ndards to supply the importers and deal- in tea at all ports desiring the same at t. All teas, or merchandise described as , of inferior purity, quality, and fitness consumption to such standards shall be med within the prohibition of the 1st tion hereof." [§ 3.] In that case it was ntended that the act was unconstitution- as making the right to import tea de- nd upon the arbitrary action of the Sec- ary of the Treasury and a board ap- nted by him; as excluding from import olesome, genuine and unadulterated tea; d, as discriminating unequally in the ad- ssion of the different kinds of teas for im- rt, as well as in the right to sell and pur- se that article. The act conferred, it was jected, upon the Secretary and the board, e uncontrolled power of fixing standards purity, quality, and fitness for consump- n, and thus to prescribe arbitrarily what s may be imported and dealt in. The estion of constitutional law so raised was s disposed of by the court: "The claim at the statute commits to the arbitrary scretion of the Secretary of the Treasury e determination of what teas may be im- rted, and therefore in effect vests that icial with legislative power, is without erit. We are of opinion that the statute, hen properly construed, as said by the rcuit court of appeals, but expresses the rpose to exclude the lowest grades of tea, hether demonstrably of inferior purity, or nfit for consumption, or presumably so be- use of their inferior quality. *This, in ef- ct, was the fixing of a primary standard, nd devolved upon the Secretary of the Treas- y the mere executive duty to effectuate e legislative policy declared in the stat- e. The case is within the principle of arshall Field & Co. v. Clark, 143 U. S. 9, 36 L. ed. 294, 12 Sup. Ct. Rep. 495, here it was decided that the 3d section the tariff act of October 1, 1890, was not pugnant to the Constitution as confer- ng legislative and treaty-making power on e President, because it authorized him to spend the provisions of the act relating the free introduction of sugar, molasses, ffee, tea, and hides. We may say of the gislation in this case, as was said of the gislation considered in Marshall Field & v. Clark, that it does not, in any real nse, invest administrative officials with e power of legislation. Congress legis- ed on the subject as far as was reason- y practicable, and, from the necessities the case, was compelled to leave to ex- tive officials the duty of bringing about result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."

It would seem too clear to admit of serious doubt that the statute under which the Secretary of War proceeded is in entire harmony with the principles announced in former cases. In no substantial, just sense does it confer upon that officer, as the head of an executive department, powers strictly legislative or judicial in their nature, or which must be exclusively exercised by Congress or by the courts. It has long been the policy of the government to remove such unreasonable obstructions to the free navigation of the water ways of the United States as were caused by bridges maintained over them. That such an object was of common interest and within the competency of Congress, under its power to regulate commerce, everyone must admit: for commerce comprehends navigation, and therefore to free navigation from unreasonable obstructions is a legitimate exertion of that power. Gibbons v. Odgen, 9 Wheat. 1, 189, 190, 6 L. ed. 23, 68, 69. As appropriate to the object *to be accomplished, as a means [386] to an end within the power of the national government, Congress, in execution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the water ways of the United States, were unreasonable obstructions to free navigation. Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could, by direct legislation, have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the water way in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation, and direct legislation covering each case, separately, would be impracticable, in view of the vast and varied interests which require national legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule, and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as

well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly-expressed will of Congress, and will not, in any true sense, exert legislative or judicial power. He could not be said to exercise strictly legislative or judicial power any more, for instance, than it could be said that executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of presons who, under the general rules prescribed by Congress, are entitled to pensions. If the principle for which the defendant *contends received our approval the conclusion could not be avoided that executive officers, in all the departments, in carrying out the will of Congress, as expressed in statutes enacted by it, have, from the foundation of the national government, exercised, and are now exercising, powers as to mere details, that are strictly legislative or judicial in their nature. This will be apparent upon an examination of the various statutes that confer authority upon executive departments in respect of the enforcement of the laws of the United States. Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends, would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.

[387]

To this may be added the consideration that Congress, by the act of 1899, did not invest the Secretary of War with any power in these matters that could reasonably be characterized as arbitrary. He cannot act in reference to any bridge alleged to be an unreasonable obstruction to free navigation without first giving the parties an opportunity to be heard. He cannot require any bridge of that character to be altered, even for the purpose of rendering navigation through or under it reasonably free, easy, and unobstructed, without giving previous notice to the persons or corporations owning or controlling the bridge, specifying the changes recommended by the Chief of Engineers, and allowing a reasonable time in which to make them. If, at the end of such time, the required alterations have not been made, then the Secretary is required to bring the matter to the attention of the United States district attorney in order that criminal proceedings may be instituted to enforce the act of Congress. In the present case all the provisions of the statute were complied with. The parties concerned were duly notified and were fully heard. Nor is there any reason to say that the Secretary of War was not entirely justified, if not compelled, by the evidence, in finding *that the bridge in question was an unreasonable obstruction to commerce and navigation as now conducted.

[388]

We are of opinion that the act in question is not unconstitutional as conferring upon the Secretary of War powers of such nature that they could not be delegated to him by Congress.

The next principal contention of the Bridge Company is that the act of 1899 is unconstitutional, in that it makes no provision, and the United States has not offered, to compensate it for the sum that will necessarily be expended in order to make the alterations or changes required by the order of the Secretary of War. In other words, the defendant insists that what the United States requires to be done in respect of defendant's bridge is a taking of private property for public use, which the government is forbidden by the Constitution to do without making just compensation to, or without making provision to justly compensate, the owner. Stating the question in another way, the contention is, in effect, that even if the United States did not expressly assent to the construction of this bridge as it is, and even if the bridge has become an unreasonable obstruction to the free navigation of the water way in question, the exertion of the power of the United States to regulate commerce among the states is subject to the fundamental condition that it cannot require the defendant, whose bridge was lawfully constructed, to make any alterations, however necessary to secure free navigation, without paying or securing to it compensation for the reasonable cost of such alterations.

The propositions are combated by the government, which contends that the alterations or changes required to secure navigation against an unreasonable obstruction is not a *taking* of private property for public use within the meaning of the Constitution, and that the cost of such alterations or changes is to be deemed incidental only to the exercise of an undoubted function of the United States, when exerting, through Congress, its power to regulate commerce among the states, *and therefore navigation upon the water ways on and over which such commerce is conducted.

It would seem clear that this issue has likewise been determined by the principles announced in the previous cases of this court. Let us see whether such be the fact.

A leading case upon this subject is Gibson v. United States, . 166 U. S. 269, 271, 41 L. ed. 996, 998, 17 Sup. Ct. Rep. 578, 579, et seq. Congress, by the river and harbor acts of 1884 and 1886 (23 Stat. at L. 133, 147, chap. 296 U. S.

9, U. S. Comp. Stat. 1901, p. 3524, 24 at. at L. 316, 327, chap. 929), authorized d directed the improvement of the Ohio ver, and made appropriations to effect at object. Under the authority of the cretary of War, and the Engineer Corps the Army, a dike was constructed in at river for the purpose of concentrating e water-flow in the main channel of the ver, near Neville island. The dike began a certain point on the island. Its construction substantially destroyed the land-g on and in front of a farm, owned by rs. Gibson, on that island, preventing, iring most of the year, free egress and gress from and to such farm to the main navigable channel of the river. At the me of the construction of the dike that rm was in a high state of cultivation, well proved, with a dwelling house, barn, and tbuildings. It had a frontage of a thousand feet on the main navigable channel, d the owner had a landing there which as used in the shipping of products from d supplies to her farm, and was the only e from which such products and supplies uld be shipped. Before the construction the dike the farm, by reason of the use which it was put, was worth $600 per re. The obstruction caused by the dike duced its value to $150 or $200 per acre, sulting in damages to the owner in excess $3,000. Suit was brought against the nited States in the court of claims to recover such damages. That court found, as conclusion of law, that the owner was t entitled to recover.

The Chief Justice of this court, delivering its unanimous judgment, said: "All avigable waters are under the control *of e United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged il is in the various states and individual wners under them, it is always subject to e servitude in respect of navigation creed in favor of the Federal government by e Constitution. South Carolina v. Georia, 93 U. S. 4, 23 L. ed. 782; Shively v. owlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. t. Rep. 548; Eldridge v. Trezevant, 160 . S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 45." After referring to several adjudged ses the court proceeded: "The 5th Amendent to the Constitution of the United ates provides that private property shall t 'be taken for public use without just mpensation.' Here, however, the damage which Mrs. Gibson complained was not e result of the taking of any part of her operty, whether upland or submerged, or direct invasion thereof, but the incidental sequence of the lawful and proper exer-e of a governmental power. The applicable principle is expounded in Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336. In that case, plaintiff, being an owner of land situated at the intersection of La Salle street in Chicago, with the Chicago river, upon which it had valuable dock and warehouse accommodations, with a numerous line of steamers accustomed to land at that dock, was interrupted in his use thereof by the building of a tunnel under the Chicago river by authority of the state legislature, in accomplishing which work it was necessary to tear up La Salle street, which precluded plaintiff from access of his property for a considerable time; also to build a coffer dam in the Chicago river, which excluded his vessels from access to his docks; and such an injury was held to be *damnum absque injuria*. The court said, again speaking through Mr. Justice Strong: 'But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any *right of [391] action. This is supported by an immense weight of authority.' . . . Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes. In short, the damage resulting from the prosecution of this improvement of a navigable highway for the public good was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject."

The Gibson Case was referred to with approval in Scranton v. Wheeler, 179 U. S. 141, 153, 162, 45 L. ed. 126, 133, 137, 21 Sup. Ct. Rep. 48, 53, 57. The latter case involved the question whether the owner of land on the St. Mary's river, in Michigan, was entitled, under the Constitution of the United States, to be compensated for the injury or damage done him, as a riparian owner, by certain work done in that river under the authority of the United States. The controlling question was whether the prohibition in the Constitution of the United States

of the taking of private property for public use without just compensation has any application to the case of an owner of land bordering on a public navigable river whose access from his land to navigability is permanently lost by reason of the construction of a pier resting on submerged lands in front of his upland, and which pier was erected by the United States for the purpose only of improving the navigation of such river. After observing that when that which is done amounts, within the meaning of the Constitution, to a taking of private property for public use, and that Congress may not, in the exercise of its power to regulate commerce, override the provision for just compensation when private prop-
[392]erty is so taken, the court entered *upon a review of some of the adjudged cases. Among other things it said: "All the cases concur in holding that the power of Congress to regulate commerce, and therefore navigation, is paramount, and is unrestricted except by the limitations upon its authority by the Constitution. Of course, every part of the Constitution is as binding upon Congress as upon the people. The guaranties prescribed by it for the security of private property must be respected by all. But whether navigation upon waters over which Congress may exert its authority requires improvement at all, or improvement in a particular way, are matters wholly within its discretion; and the judiciary is without power to control or defeat the will of Congress, so long as that branch of the government does not transcend the limits established by the supreme law of the land. Is the broad power with which Congress is invested burdened with the condition that a riparian owner whose land borders upon a navigable water of the United States shall be compensated for his right of access to navigability whenever such right ceases to be of value solely in consequence of the improvement of navigation by means of piers resting upon submerged lands away from the shore line? We think not." "The primary use," the court said, "of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. In Lorman v. Benson, 8 Mich. 18, 22, 77 Am. Dec. 435, the supreme court of Michigan, speaking *by Justice[393]
Campbell, declared the right of navigation to be one to which all others were subservient. . . . But the contention is that compensation must be made for the loss of the plaintiff's access from his upland to navigability incidentally resulting from the occupancy of the submerged lands, even if the construction and maintenance of a pier resting upon them be necessary or valuable in the proper improvement of navigation. We cannot assent to this view. If the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction away from the shore line of works in a public navigable river or water, and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the Constitution, a taking of private property for public use, but only a consequential injury to a right which must be enjoyed, as was said in Yates v. Milwaukee, 10 Wall. 497, 504, 505, 19 L. ed. 984, 986, 987, 'in due subjection to the rights of the public,'—an injury resulting incidentally from th exercise of a governmental power for the benefit of the general public, and from which no duty arises to make or secure compensation to the riparian owner. The riparian owner acquired the right of access to navigability subject to the contingency that such right might become valueless in consequence of the erection under competent authority of structures on the submerged lands in front of his property for the purpose of improving navigation. When erecting the pier in question, the government had no object in view except, in the interest of the public, to improve navigation. It was not designed arbitrarily or capriciously to destroy rights belonging to any riparian owner. What was done was manifestly necessary to meet the demands of international and interstate commerce." The court further said: "In our opinion, it was not intended that the paramount authority of Congress to improve the navigation of the public navigable waters of the United States should be crippled by compelling the government to make compensation for the injury to a riparian owner's right of access to navigability that might incidentally result from *an improve-[394]
ment ordered by Congress. The subject with which Congress dealt was navigation. That which was sought to be accomplished was simply to improve navigation on the waters in question so as to meet the wants of the

t commerce passing and to pass over m. Consequently the agents designated perform the work ordered or authorized Congress had the right to proceed in all per ways without taking into account injury that might possibly or indirectly ilt from such work to the right of ac- by riparian owners to navigability. .

We are of opinion that the court be- correctly held that the plaintiff had no h right of property in the submerged ds on which the pier in question rests entitles him, under the Constitution, to compensated for any loss of access from upland to navigability resulting from erection and maintenance of such pier the United States in order to improve, l which manifestly did improve, the nav- tion of a public navigable water."

In New Orleans Gaslight Co. v. Drainage mmission, 197 U. S. 453, 461, 462, 49 L. ed. l, 835, 25 Sup. Ct. Rep. 471, 473, 474, it peared that, under contract with the city New Orleans, and at its own expense, gaslight company had lawfully laid its es at certain places in the public ways d streets of that city. Subsequently, the inage commission of New Orleans adopt- a plan for the drainage of the city, which de it necessary to change the location in me places of the mains and pipes thereto- e laid by the gaslight company. That npany contended that to require such nges was a taking of its property for blic use, for which it was entitled, under Constitution, to compensation. That w was rejected by this court. We said: he gas company did not acquire any spe- c location in the streets; it was content th the general right to use them, and en it located its pipes it was at the k that they might be, at some future e, disturbed, when the state might re- re, for a necessary public use, that nges in location be made. . . . The d of occupation of the *soil beneath the eets in cities is constantly increasing, for supply of water and light and the con- uction of systems of sewerage and drain- and every reason of public policy re- res that grants of rights in such sub- face shall be held subject to such rea- able regulation as the public health and ety may require. There is nothing in grant to the gas company, even if it ld legally be done, undertaking to limit right of the state to establish a system lrainage in the streets. We think what- right the gas company acquired was ject, in so far as the location of its pipes concerned, to such future regulations as ht be required in the interest of the ic health and welfare. These views are ly sustained by the authorities. National Waterworks Co. v. Kansas City, 28 Fed. 921, in which the opinion was delivered by Mr. Justice Brewer, then circuit judge; Columbus Gaslight & Coke Co. v. Columbus, 50 Ohio St. 65, 19 L.R.A. 510, 40 Am. St. Rep. 648, 33 N. E. 292; Jamaica Pond Aqueduct Corp. v. Brookline, 121 Mass. 5; Re Deering, 93 N. Y. 361; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 254, 41 L. ed. 979, 990, 17 Sup. Ct. Rep. 581. In the latter case it was held that uncompensated obedience to a regulation enacted for the public safety under the police power of the state was not taking property without due compensation. In our view, that is all there is to this case. The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*."

In Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, *582, 593-595, 50 L. ed. 596, 605, [396] 609, 610, 26 Sup. Ct. Rep. 341, 345, 350, 351, the above cases were cited with approval, and the principles announced in them were applied against a railway company owning a bridge that had been lawfully constructed by it over a non-navigable creek running through certain swamp or slough lands which the drainage commissioners were required by statute to drain in order to make them tillable and fit for cultivation. The commissioners, in executing the work of draining, found it necessary that the creek over which the railway bridge was constructed should be deepened and enlarged, and a greater opening made under the bridge for the passage of the increased amount of water caused by the deepening and enlarging of the bed of the creek. The railway company was required, at its own cost, to construct such a bridge over the creek as would meet the necessities of the situation as it was or would be under the drainage plan of the commissioners. The company refused to obey the order. The contention of the railway company was that, as the bridge was lawfully constructed under its general corporate powers, and as the depth and width of the channel under it was sufficient, at the time, to carry off the water

of the creek as it then and subsequently flowed, the foundation of the bridge could not be removed and its use of the bridge disturbed, unless compensation be first made or secured to the company in such amount as would be sufficient to meet the expense of removing the timbers and stones from the creek and of constructing a new bridge of such length and with such opening under it as the plan of the commissioners would make necessary. The company insisted that to require it to meet these expenses out of its own funds would be, within the meaning of the Constitution, a *taking* of its property for public use without compensation, and, therefore, without due process of law. The court, after a review of authorities, said: "The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If, in the execution of any power, no matter [397] what it is, the government, *Federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner. Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 659, 34 L. ed. 295, 303, 10 Sup. Ct. Rep. 965; Sweet v. Rechel, 159 U. S. 380, 399, 402, 40 L. ed. 188, 196, 197, 16 Sup. Ct. Rep. 43; Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349. If the means employed have no real substantial relation to public objects which government may legally accomplish,—if they are arbitrary and unreasonable, beyond the necessities of the case,—the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt. Minnesota v. Barber, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862. Upon the general subject there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be, in the particular case, within the true meaning of the Constitution, a 'taking' of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no *taking* of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case." The opinion concluded: "Without further discussion we hold it to be the duty of the railway company, at its own expense, to r move from the creek the present bridge, c vert, timbers, and stones placed there i it, and also (unless it abandons or surre ders its right to cross the creek at or the vicinity of the present crossing) erect, at its own expense, and maintain, new bridge for crossing that will confor to the regulations established by the drai age commissioners, under the authority the state; and such a requirement, if e forced, will not amount to a taking of pr vate property for public use within th meaning of the Constitution, nor to a d nial of the equal protection of the laws."

The latest adjudication by this court w in West Chicago *Street R. Co. v. Chicag 201 U. S. 506, 524, 50 L. ed. 845, 852, 1 Sup. Ct. Rep. 518, 523. In that case th principal question related to the duty of street railroad company, which had lawful constructed a tunnel under the Chicag river, to obey an ordinance of the city, r quiring the company, at its own cost an expense, to lower its tunnel, so as to pr vide for a certain depth under it, which ha been ascertained by competent Federal an local authority to be necessary for the i creased demands of navigation. This cou held, upon the adjudged cases, that th rights of the company, as the owner of th fee of the land on either side of the riv or in its bed, were subject to the paramou right of navigation over the waters of th river. It said: "If, then, the right of th railroad company to have and maintain tunnel under the Chicago river is subject t the paramount public right of navigation if its right to maintain a tunnel in th river is a qualified one, because subject t the specific condition in the act of 1874 th no tunnel should interrupt navigation; i the present tunnel is an obstruction to nav igation, as, upon this record, we must tak it to be; and if the city, as representin the state and public, may rightfully insi that such obstruction shall not longer r main in the way of free navigation,—it ne essarily follows that the railway compan is under a duty to comply with the demand made upon it to remove, at its own e pense, the obstruction which itself has cr ated and maintains. If the obstruction ca not be removed except by lowering the tu nel to the required depth and (if a tunn is to be maintained) providing one th will not interrupt navigation, then the ex attendant upon such work must be met b the company. The city asks nothing mo than that the railroad company shall what is necessary to free navigation fro an obstruction for which it is responsib and (if it intends not to abandon its rig to maintain a tunnel at or near Van Bu

that it shall itself provide a new with the necessary depth of water it." Again: "In the case before us blic demands nothing to be done by lroad company except to remove the ction which itself placed and *main- n the river under the condition that tion should not at any time be there- errupted. The removal of such ob- on is all that is needed to protect tion. So that whatever cost attends moval of the obstruction must be by the railroad company. The condi- nder which the company placed its in the river being met by the com- the public has no further demands t. This cannot be deemed a taking ate property for public use, or a de- the equal protection of laws within aning of the Constitution, but is only ult of the lawful exercise of a gov- ital power for the common good. ppears from the authorities cited in o, B. & Q. R. Co. v. Illinois, supra, cided. The state court has well said o maintain the navigable character stream in a lawful way is not, with- meaning of the law, the taking of property or any property right of ner of the soil under the river, such hip being subject to the right of free obstructed navigation. People ex rel. v. West Chicago Street R. Co. 203 , 557, 68 N. E. 78. What the city nd all that it asks, is that the rail- ompany be required, in the exercise rights and in the use of its property, pect the public needs as declared npetent authority, upon reasonable s, to exist. This is not an arbitrary easonable demand. It does not, in gal sense, take or appropriate the ry's property for the public benefit, ly insists that the company shall its property so as to interrupt navi- "

he principles announced in the above equire us to hold, in the present case, he making of the alterations of its specified in the order of the Secre- f War will be a taking of the prop- f the Bridge Company for public use? ink not. Unless there be a taking, the meaning of the Constitution, no ion arises upon the United States to compensation for the cost to be in- in making such alterations. The that will accrue to the Bridge Com- as the result of compliance *with the ry's order, must, in such case, be incidental to the exercise by the nent of its power to regulate com- among the states, which includes, as e seen, the power to secure free navigation upon the water ways of the United States against unreasonable obstructions. There are no circumstances connected with the original construction of the bridge, or with its maintenance since, which so tie the hands of the government that it cannot exert its full power to protect the freedom of navigation against obstructions. Although the bridge, when erected under the authority of a Pennsylvania charter, may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce and navigation *as then carried on*, it must be taken, under the cases cited, and upon principle, not only that the company, when exerting the power conferred upon it by the state, did so with knowledge of the paramount authority of Congress to regulate commerce among the states, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions. Even if the bridge, in its original form, was an unreasonable obstruction to navigation, the mere failure of the United States, at the time, to intervene by its officers or by legislation and prevent its erection, could not create an obligation on the part of the government to make compensation to the company if, at a subsequent time, and for public reasons, Congress should forbid the maintenance of bridges that had become unreasonable obstructions to navigation. It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a state, place unreasonable obstructions in the water ways of the United States, cannot have the effect to cast upon the government an obligation not to exert its constitutional power to regulate interstate commerce except subject to the condition that compensation be *made or [401] secured to the individuals or corporation who may be incidentally affected by the exercise of such power. The principle for which the Bridge Company contends would seriously impair the exercise of the beneficent power of the government to secure the free and unobstructed navigation of the water ways of the United States. We cannot give our assent to that principle. In conformity with the adjudged cases, and in order that the constitutional power of Congress may have full operation, we must adjudge that Congress has power to protect navigation on all water ways of the United States against unreasonable obstructions, even those created under the sanction of a state, and that an order to so alter a bridge over a water way of the United States that

it will cease to be an unreasonable obstruction to navigation will not amount to a taking of private property for public use for which compensation need be made.

Independent of the grounds upon which we thus place our decision, it is appropriate to observe that the conclusion reached finds support in the charter of the Bridge Company and in the law of Pennsylvania, as declared by its highest court. The charter of the company, as we have seen, expressly warned the company that its bridge must not obstruct navigation,—that is, in legal effect, navigation as it then was, or might be, at any subsequent time. In Dugan v. Bridge Co. 27 Pa. 303, 309, 311, 67 Am. Dec. 464, we have the case of a bridge company on which was conferred the franchise to erect and maintain a toll-bridge across Monongahela river, coupled, however, with the condition that such bridge should not be erected "in such manner as to injure, stop, or interrupt the navigation of such river by boats, rafts, or other vessels." The supreme court of Pennsylvania interpreted these words as meaning that "the bridge was to be so built as not to injure, stop, or interrupt the navigation, either then or now, whether in its infancy or full growth." The same general question arose in Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 589, 50 L. ed. 607, 26 Sup. Ct. Rep. 348. This court held that the adjudged cases "nega-
[402] tive the *suggestion of the railway company that the adequacy of its bridge and the opening under it for passing the water of the creek at the time the bridge was constructed determine its obligations to the public at all subsequent periods. In Cooke v. Boston & L. R. Corp. 133 Mass. 185, 188, it appeared that a railroad company had statutory authority to cross a certain highway with its road. The statute provided that if the railroad crossed any highway it should be so constructed as not to impede or obstruct the safe and convenient use of the highway. And one of the contentions of the company was that the statute limited its duty and obligation to provide for the wants of travelers at the time it exercised the privilege granted to it. The court said: 'The legislature intended to provide against any obstruction of the safe and convenient use of the highway for all time; and if, by the increase of population in the neighborhood, or by an increasing use of the highway, the crossing, which, at the outset, was adequate, is no longer so, it is the duty of the railroad corporation to make such alteration as will meet the present needs of the public who have occasion to use the highway.' In Lake Erie & W. R. Co. v. Cluggish, 143 Ind. 347, 42 N. E. 743, the court said (quoting from Lake Erie & W. R. Co. v. Smith, 61 Fed. 885): 'The duty of a railroad to restore a stream or highway which is crossed by the line of its road is a continuing duty; and if, by the increase of population or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public.' So, in Indiana ex rel. Muncie v. Lake Erie & W. R. Co. 83 Fed. 284, 287, which was the case of an overhead crossing lawfully constructed on one of the streets of a city, the court said: 'If, by the growth of population or otherwise, the crossing has become inadequate to meet the present needs of the public, it is the duty of the railroad company to remedy the defect by restoring the crossing so that it will not unnecessarily impair the usefulness of the highway.'"

*Some stress was laid in argument upon [403] the fact that compliance with the order of the Secretary of War will compel the Bridge Company to make a very large expenditure in money. But that consideration cannot affect the decision of the questions of constitutional law involved. It is one to be addressed to the legislative branch of the government. It is for Congress to determine whether, under the circumstances of a particular case, justice requires that compensation be made to a person or corporation incidentally suffering from the exercise by the national government of its constitutional powers.

These are all the matters which require notice at our hands; and, perceiving no error of law on the record, the judgment must be affirmed.

It is so ordered.

Mr. Justice Brewer and Mr. Justice Peckham dissent.

Mr. Justice Moody did not participate in the consideration or decision of the case.

GULF, COLORADO, & SANTA FE RAILWAY COMPANY, Plff. in Err.,
v.
STATE OF TEXAS.

(See S. C. Reporter's ed. 403-414.)

Interstate commerce—continuous shipment—local transportation.

The intention or purpose of the owners of an interstate shipment of a car load

NOTE.—Local transportation of goods as part of interstate or foreign shipment.

An agency in transportation operating on

f grain to forward such car from the orig-nal terminal point to another point in the ame state does not make the shipment be-ween such two points, when performed by connecting carrier to which the car was elivered by the original terminal carrier in bedience to the instructions of the owner, n interstate one, and, as such, exempt from he regulations of the state railroad commis-ion.

[No. 2.]

Argued October 11, 1906. Decided February 25, 1907.

IN ERROR to the Supreme Court of the State of Texas to review a judgment which affirmed a judgment of the Court of Civil Appeals, which had, in turn, affirmed a judgment of the District Court of Tarrant County, in that state, in favor of plaintiff in a suit to recover a penalty from a common carrier for extortion. Affirmed.

See same case below, 97 Tex. 274, 78 S. W. 495.

Statement by Mr. Justice Brewer:

*In the district court of Tarrant county, [404] Texas, on July 28, 1902, the state of Texas recovered a judgment against the Gulf, colorado, & Santa Fé Railway Company for $100 as a penalty for extortion in a charge for the transportation of a car load of corn from Texarkana, Texas, to Goldthwaite, Texas. This judgment was sustained by both the court of civil appeals (32 Tex. Civ. App. 1, 73 S. W. 429) and the supreme court

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tirely within the limits of a state may nevertheless be engaged in interstate or foreign commerce. The Daniel Ball (The Daniel Ball v. United States) 10 Wall. 557, 19 L. ed. 999; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Moran v. New Orleans, 112 U. S. 69, 28 L. ed. 653, 4 Sup. Ct. Rep. 38; Sinnot v. Davenport, 22 How. 227, 16 L. ed. 243; Foster v. Davenport, 22 How. 244, 16 L. ed. 248; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 679; Ex parte Koehler, 1 Inters. Com. Rep. 28, 30 Fed. 867; Augusta Southern R. Co. v. Wrightsville & T. R. Co. 74 Fed. 522; Harmon v. Chicago (Ill.) 26 N. E. 697; Texas & P. R. Co. v. Clark, 4 Tex. Civ. App. 611, 23 S. W. 498; Mexican Nat. R. Co. v. Savage (Tex. Civ. App.) 41 S. W. 663; Texas & P. R. Co. v. Avery (Tex. Civ. App.) 33 S. W. 704. And see note to Missouri P. R. Co. v. Sherwood, T. & Co. 17 L.R.A. 643.

Limitations on the liability of the several carriers to their own lines do not prevent transportation between intrastate points from being interstate or foreign commerce, where the goods are being transported under a through rate. Houston & T. C. R. Co. v. Williams (Tex. Civ. App.) 31 S. W. 663; Gulf, W. T. & P. R. Co. v. Barry (Tex. Civ. App.) 45 S. W. 814; Missouri P. R. Co. v. Sherwood, T. & Co. 84 Tex. 125, 17 L. R. A. 643, 4 Inters. Com. Rep. 240, 19 S. W. 455.

If Heiserman v. Burlington, C. R. & N. R. Co. 63 Iowa, 732, 18 S. W. 903, holding that shipment between points in Iowa, though destined to a point in another state, is local, and, as such, subject to state regulation when made under a contract by which the initial carrier's liability was to cease upon delivery to a connecting carrier within the state, and which was performed by delivery to such connecting carrier, can be distinguished from the cases just cited, it must be for the reason suggested in Missouri P. R. Co. v. Sherwood, T. & Co. 84 Tex. 125, 17 L.R.A. 643, 4 Inters. Com. Rep. 240, 19 S. W. 455, *viz.*, that the initial carrier did not contract either to carry the goods or to have them carried to a point outside the state. And this is in line with Ft. Worth & D. C. R. Co. v. Whitehead, 6 Tex. Civ. App. 595, 26 S. W. 172, which in effect holds that something more than the mere fact that the initial carrier had undertaken a through shipment from a point outside the state must be shown to make the transportation by a connecting carrier between points within the state interstate, and, as such, exempt from state regulation.

A shipment from one point to another within the same state is interstate commerce, although a bill of lading is given which provides that liability shall cease upon delivery to a connecting line at a point within the state, and charges are collected to the latter point only, where the destination of the property is in a foreign state, to which a continuous voyage is contemplated, with only a stop to change cars at the terminal point mentioned in the bill of lading. Houston Direct Nav. Co. v. Insurance Co. of N. A. 89 Tex. 1, 30 L.R.A. 713, 59 Am. St. Rep. 17, 32 S. W. 889.

If the original intention when making the shipment was to make a point in another state the final destination, and such purpose is not abandoned, transportation in pursuance of such intention between two points in such other state is interstate, although this local transportation was not under a through bill of lading. Gulf, C. & S. F. R. Co. v. Fort Grain Co. (Tex. Civ. App.) 72 S. W. 419, 73 S. W. 845.

Where transportation of goods destined for a point without the state has been actually begun, temporary stoppage within the state, without the intention of abandoning the original movement, which is ultimately completed, will not deprive the transportation of the character of interstate commerce. Delaware & H. Canal Co. v. Com. 1 Monaghan (Pa.) 36, 1 L.R.A. 232, 2 Inters. Com. Rep. 222, 17 Atl. 175.

Billing a shipment of coal from a point in Tennessee to a point in Kentucky does not make such shipment an interstate one,

as, of one car of sacked corn consigned to shippers, with orders to deliver to Saylor & Burnett, at Goldthwaite, Texas. This car of corn was transported by the Texas & Pacific Railway Company to Fort Worth, there delivered to the defendant railway company, and by it transported to Goldthwaite, where it arrived on the 17th day of January, 1902.

way track at Goldthwaite, and was accepted for two car loads of c offer and acceptance was by telegr munication between the parties at spective places of business. The Ha Company did not at that time have but on December 24th, *1901, to fill it contracted with the Harroun C

where such coal in fact was mined in Kentucky and was there loaded and taken charge of by the carrier for transportation. Louisville & N. R. Co. v. Vancleave, 110 Ky. 968, 63 S. W. 22.

Neither can the character of local transportation as part of an interstate or foreign shipment be changed by interrupting the shipment within a state to secure the benefit of the local rate established by the state railroad commission. Cutting v. Florida R. & Nav. Co. 3 Inters. Com. Rep. 665, 46 Fed. 641; State v. Gulf, C. & S. F. R. Co. (Tex. Civ. App.) 44 S. W. 542; State v. Southern Kansas R. Co. (Tex. Civ. App.) 49 S. W. 252; Porter v. St. Louis Southwestern R. Co. 78 Ark. 182, 95 S. W. 453.

In such a case the entire shipment must be regarded as an interstate one in view of the provision of the act to regulate commerce, which prohibits the carrier from resorting to similar tactics to evade the interstate rate. Porter v. St. Louis Southwestern R. Co. supra.

When the products of the farm or the forest are collected and drawn, floated, or otherwise brought into a town or station, whether on a river or a line of railroad, they are not exports or in process of exportation until committed to a common carrier for transportation out of the state or started on such ultimate passage. Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

Logs which have been cut and floated down a stream and its tributaries to a

signee after arrival in the "break- to a connecting carrier to be tran another point in or near the nicipality is not a regulation of commerce, since such transpor purely local. Louisville & N. Central Stockyards Co. (Ky.) 97

A somewhat similar question is in cases in which the controvers what constitutes the "arrival" of ing liquors in the state, within th of the Wilson act of August 8, jecting all intoxicating liquors up in the state to the laws of such acted in the exercise of its poli Upon this question it is sufficie that the local transportation in delivering the shipments to the conformably to the contract of is a part of their interstate trans and until such delivery they are to state regulation even under t act. Any uncertainty on this been removed by Heymann v. So Co. 203 U. S. 270, ante, 178, 27 Rep. 104. State v. Intoxicating L Me. 430, 64 Atl. 812, is to the sa It is difficult to see how any diff clusion could be reached after the in Rhodes v. Iowa, 170 U. S. 412, 1088, 18 Sup. Ct. Rep. 664; Vance Vandercook Co. 170 U. S. 438, 1100, 18 Sup. Ct. Rep. 674; Amer Co. v. Iowa, 196 U. S. 133, 49 L 25 Sup. Ct. Rep. 182.

The question as to what com

Company of Kansas City for the purchase,—two 66,000-pound cars of No. 2 mixed corn at 75½ cents per bushel, to be delivered at Texarkana, Texas, to the Hardin Grain Company. Previously to this the Harroun Commission Company had contracted for the purchase of two cars of corn to be delivered to it at Texarkana, Texas, and with these two cars it expected to and did fill the order of the Hardin Grain Company. These cars had originated in Hudson, South Dakota. The receiving carrier at Hudson was the Chicago, Milwaukee, & St. Paul Railway company, who issued bills of lading limiting its liability to losses occurring on its road, with a like limitation of liability of all other carriers who should handle said corn in transit to its destination. By the terms of said bills of lading the corn was consigned to 'Forrester Bros., Texarkana, Texas,' and shipment made in cars of C. M. & St. P. Ry. Co., care of Kansas City Southern Ry. at Kansas City, Missouri, with the privilege to stop the corn at Kansas City for inspection and transfer. The corn reached Kansas City on December 17th, 1901, was there unloaded, sacked, and transferred to the Kansas City Southern Railway Co., who, on December 31st, 1901, issued bills of lading reciting that the corn was loaded in cars No. 3845 P. G. and No. 4189 P. G., that same was received of Forrester Bros. and consigned as follows: 'Shipper's order, notify Harroun Commission Company, Texarkana, Texas,' and reciting further that freight 14 cents per hundred pounds was prepaid, and one of these cars, to wit, car 'No. 3845 P. G., is the car in controversy in this suit.

"9. The Harroun Commission Company paid no freight on the corn from Hudson, South Dakota, to Texarkana, Texas, as it had purchased it to be delivered at Texarkana.

"10. The freight on the corn from Hudson to Texarkana was as follows: 18 cents per 100 pounds from Hudson to Kansas City, and 14 cents from Kansas City to Texarkana, all of which was paid by the vendors of Harroun Commission Company. The minimun interstate rate from Hudson, South Dakota, to Goldthwaite, Texas, was 46 cents per 100 pounds, which would have been apportioned as follows: 18 cents from Hudson to Kansas City, and 28 cents from Kansas City to Goldthwaite, Texas. The G. C. & S. F. Ry. Co., the T. & P. Ry. Co. and the Kansas City Southern Ry. Co., together with other connecting lines from Kansas City, Missouri, to Goldthwaite, Texas, had established a joint tariff of 35 cents per 100 pounds on shipments from Kansas City to Goldthwaite *via* Texarkana and originating in Kansas City, had agreed on a division of that rate between them, and had filed tariffs establishing such rate with the Interstate Commerce Commission, and by such steps had brought itself within the provisions of the interestate commerce laws.

"11. The Hardin Grain Company's officers kept themselves informed of interstate commission freight rates and of the state commission rates; and the reason why they contracted for the corn to be delivered to them at Texarkana was because they could fill their contract with Saylor & Burnett at Goldthwaite at about 1½ cents per bushel cheaper than they could if they bought the corn for delivery to them at Kansas City and had it shipped from Kansas City to Goldthwaite.

"12. At the time of the purchase contract between the Hardin Grain Company and the Harroun Commission Company, Hardin, the manager of the former company, intended that the corn to be thereby acquired should go to Saylor & Burnett and should be shipped to Goldthwaite, from Texarkana, as soon as practicable, and, on December 26th, 1901, two days after this contract for purchase had been made, Hardin was informed that the corn with which Harroun Commission Company expected to fill his order would be sacked in Kansas City and be shipped out of Kansas City to Texarkana, but at the time of making the contract he did not know from whence the corn would come.

"13. On December 31st, 1901, the date of shipment from Kansas City to Texarkana, Harroun Commisssion Company informed the Hardin Grain Company that the corn to fill the *latter's order had been loaded to [407] start to Texarkana, and requested instruction as to how the corn should be shipped from Texarkana for the guidance of F. L. Atkins, their agent at that place, who would attend to such reshipping for the Hardin Grain Company, as per former understanding. Thereupon and in compliance with such request blank bills of lading were made out by the Hardin Grain Company in Kansas City and furnished to the Harroun Commission company, to be forwarded to F. L. Atkins. These bills of lading were to be executed by the Texas & Pacific Railway Company, and F. L. Atkins, as agent for the Hardin Grain Company, and were for shipment of the corn to Goldthwaite, Texas, consigned to 'Shipper's order, notify etc.,' giving the numbers and initials of cars, which information had been furnished by the Harroun Commission Company; and on January 14, 1902, the reshipment having been made as per instructions, the bills of lading duly executed by the Texas & Pacific Ry. Co. were by Harroun delivered to Hardin Grain Company, who there-

upon paid the Harroun Commission Company $1,779.64, the purchase price previously agreed upon for the corn, and the receipt of said blank bills of lading by the Harroun Commission Company was the first information had by that company of the intended final destination and disposition of the corn.

"14. Neither Hardin Grain Company nor Harroun Commission Company had any store or warehouse at Texarkana, but, under the agreement between the two companies (Hardin and Harroun), one F.L. Atkins, who was the agent of the Harroun Commission Company, and stationed at Texarkana, reshipped the corn at Texarkana for the Hardin Grain Company. That shipment was to Goldthwaite, Texas, over the Texas & Pacific Ry. Co. and the G. C. & S. F. Ry. Co., by bill of lading reciting its receipt from Hardin Grain Company, and consigned to 'Shipper's order, notify Saylor & Burnett, Goldthwaite, Texas,' and was transferred under original seals and without breaking packages, to the Texas & Pacific Ry. Co., after having remained in Texarkana five [408]days; the only *thing done by F. L. Atkins was to surrender the Kansas City Southern bill of lading, have the cars set over on the T. & P. Ry., and take a bill of lading from the latter company. The corn reached Texarkana January 7th, 1902, and was shipped out from Texarkana January 13th, 1902; the defendant was not a party to the bill of lading executed at Texarkana.

"15. On December 31st, 1901, Hardin Grain Co. mailed to Saylor & Burnett an invoice of the corn in the form of an account, stating the car numbers and initial, the amount of corn, and price to be paid by Saylor & Burnett."

Mr. Gardiner Lathrop argued the cause, and, with Messrs. A. B. Browne and J. W. Terry, filed a brief for plaintiff in error:

Transportation of freight from a point in one state to a point in another is of itself interstate commerce, without reference to any question of intended sale of the freight.

United States v. Trans-Missouri Freight Asso. 166 U.S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540. See also McCall v. California, 136 U. S. 108, 34 L. ed. 392, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 570, 573, 574, 30 L. ed. 248-250, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321.

Such a shipment does not become interstate commerce when it reaches the state line, but continues interstate commerce until delivery at the final place of destination in the state.

Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182.

Mere temporary interruption in the transit will not change the nature of the shipment.

Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259.

The origin and destination of freight controls, and the fact that one or more of the carriers in the route transport wholly within the state of destination is not material.

The Daniel Ball (The Daniel Ball v. United States) 10 Wall. 557, 19 L. ed. 999; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Cutting v. Florida R. & Nav. Co. 3 Inters. Com. Rep. 665, 46 Fed. 641; Houston Direct Nav. Co. v. Insurance Co. of N. A. 89 Tex. 1, 30 L.R.A. 713, 59 Am. St. Rep. 17, 32 S. W. 889; State v. Gulf, C. & S. F. R. Co. (Tex. Civ. App.) 46 S. W. 542; State v. Southern Kansas R. Co. (Tex. Civ. App.) 49 S. W. 252; Fielder v. Missouri, K. & T. R. Co. 92 Tex. 176, 46 S. W. 633; Gulf, C. & S. F. R. Co. v. Fort Grain Co. (Tex. Civ. App.) 72 S. W. 419.

Property may, under some circumstances, be subject to state taxation and still remain interstate commerce.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; Hanley v. Kansas City Southern R. Co. supra.

Where property has arrived in a state from another state and is held indefinitely for sale at some future and contingent time, the taxation of the same on terms of equality with other property in the state will not amount to a regulation of interstate commerce. On the other hand, if the state undertakes to levy a discriminating tax against such property in favor of property produced or manufactured in the state, the same would be a regulation of interstate commerce. Of the first class are such cases as Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; Hinson v. Lott, 8 Wall. 148, 19 L. ed. 387; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; while of the other class are Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454.

From the beginning it was not the pur-se of the parties that this corn should identified in any way with the mass of operty in the state of Arkansas, but that should go through the state of Arkansas d be identified only with property in gen-al on its arrival at Goldthwaite, Texas. here is an analogy between a case so ated and Norfolk & W. R. Co. v. Sims, 1 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 51.

Mr. **Robert Vance Davidson** argued the use and filed a brief for defendant in er-r:

The shipment in controversy from Tex-rkana, Texas, to Goldthwaite, Texas, was t an interstate shipment, but originated d terminated in the state of Texas.

Interstate Commerce Commission v. rimson, 154 U. S. 457, 38 L. ed. 1050, 4 ters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; ncinnati, N. O. & T. P. R. Co. v. Inter-ate Commerce Commission, 162 U. S. 191, L. ed. 937, 5 Inters. Com. Rep. 391, 16 p. Ct. Rep. 700; New York ex rel. Penn-lvania R. Co. v. Knight, 192 U. S. 21, 48 ed. 325, 24 Sup. Ct. Rep. 202; Brown v. uston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Rep. 1091; Diamond Match Co. v. On-nagon, 188 U. S. 82, 92, 47 L. ed. 394, 398, Sup. Ct. Rep. 266; Coe v. Errol, 116 U. S. 7, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Chi-go & N. W. R. Co. v. Osborne, 3 C. C. A. 7, 4 Inters. Com. Rep. 257, 10 U. S. App. 0, 52 Fed. 912; Kentucky & I. Bridge Co. Louisville & N. R. Co. 2 L.R.A. 289, 2 ters. Com. Rep. 351, 37 Fed. 613; Gulf, & S. F. R. Co. v. State, 32 Tex. Civ. App. 73 S. W. 429; Gulf, C. & S. F. R. Co. v. ate, 97 Tex. 274, 78 S. W. 495; Ft. Worth D. C. R. Co. v. Whitehead, 6 Tex. Civ. pp. 595, 26 S. W. 172.

Transportation from a point in one state a point in another state constitutes in-rstate commerce; but when the commod-y transported has reached the termina-n of its journey and has been delivered the consignee, it ceases to be a subject interstate commerce, and the subsequent ipment from the point at which it has en delivered to another point in the state an intrastate shipment.

Coe v. Errol and Ft. Worth & D. C. R. v. Whitehead, supra; Cincinnati, N. O. T. P. R. Co. v. Interstate Commerce Com-ssion, 162 U. S. 184, 40 L. ed. 935, 5 In-s. Com. Rep. 391, 16 Sup. Ct. Rep. 700, 4 ers. Com. Rep. 332, 56 Fed. 925; Chicago N. W. R. Co. v. Osborne, supra; Inter-te Commerce Commission v. Bellaire, Z. C. R. Co. 77 Fed. 942; Interstate Com-rce Commission v. Detroit, G. H. & M. R. 167 U. S. 642, 42 L. ed. 309, 17 Sup. Ct. 986; United States ex rel. Interstate mmerce Commission v. Chicago, K. & S. R. Co. 81 Fed. 783; Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; Missouri & I. R. Tie & Lumber Co. v. Cape Girardeau & S. W. R. Co. 1 Inters. Com. Rep. 607.

When the corn arrived at Texarkana and was delivered to the consignee it became a part of the property situated within the state of Texas and subject to the laws of that state.

17 Am. & Eng. Enc. Law, 2d ed. p. 71; Robbins v. Taxing District, 120 U. S. 497, 30 L. ed. 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

The Texas & Pacific Railway Co., the carrier which transported the corn from Texarkana to Fort Worth, and the plaintiff in error, which transported it from Fort Worth to Goldthwaite, were not shown by the evidence to have had any agreement with other carriers to transport said corn, by through bill of lading or in any other manner, and upon the receipt of said corn at Texarkana, Texas, by the Texas & Pacific, it had the right to demand and receive its Texas state rate to Fort Worth, and the plaintiff in error its Texas state rate from Fort Worth to Goldthwaite, and neither of said railroads had the right to charge more or any other rate, or voluntarily convert a local shipment into an interstate shipment, especially when such interstate shipment from Hudson, South Dakota, to Texarkana, Texas, had terminated at Texarkana, and the corn had been there delivered; and it is immaterial what might have been the motives or intentions of any of the parties to the transaction in the shipment of the corn to Texarkana.

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 332, 56 Fed. 925; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 192, 40 L. ed. 938, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 553, 50 L. ed. 593, 26 Sup. Ct. Rep. 330; Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 37; Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745; United States v. E. C. Knight Co. 156 U. S. 13, 39 L. ed. 329, 15 Sup. Ct. Rep. 249; Chicago & N. W. R. Co. v. Osborne, supra.

Mr. Justice **Brewer** delivered the opinion of the court:

The single question in the case is whether, as between Texarkana and Goldthwaite, this was an interstate shipment. If so the regulations of the state railroad commission do not control, and the court erred in enforcing the penalty. If, however, it was a

The corn was carried from Texarkana, Texas, to Goldthwaite, Texas, upon a bill of lading which, upon its face, showed only a local transportation. It is, however, contended by the railway company, that this local transportation was a continuation of a shipment from Hudson, South Dakota, to Texarkana, Texas; that the place from which the corn started was Hudson, South Dakota, and the place at which the transportation ended was Goldthwaite, Texas; that such transportation was interstate commerce, and that its interstate character [412] was not *affected by the various changes of title or issues of bills of lading intermediate its departure from Hudson and its arrival at Goldthwaite.

It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed by a transfer of title during the transportation. But whether it be one or the other may depend on the contract of shipment. The rights and obligations of carriers and shippers are reciprocal. The first contract of shipment in this case was from Hudson to Texarkana. During that transportation a contract was made at Kansas Cityq for the sale of the corn, but that did not affect the character of the shipment from Hudson to Texarkana. It was an interstate shipment after the contract of sale as well as before. In other words, the transportation which was contracted for, and which was not changed by any act of the parties, was transportation of the corn from Hudson to Texarkana,—that is, an interstate shipment. The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the transportation in another thing, and follows the contract of shipment, until that is

kana. Whatever may have been
or purpose of the Hardin compan
to the further disposition of th
a matter immaterial so far a
pleted transportation was conce

In this respect there is no di
tween an interstate passenger a
state transportation. If Hard
stance, had purchased at Hudson
interstate carriage to Texarkan
all the while after he reached Te
go on to Goldthwaite, he would
titled, on his arrival at Texarkan
ticket from Texarkana to Gold
the proportionate fraction of th
scribed by the Interstate Comm
mission for carriage from Huds
thwaite. The one contract of
companies having been finished
make a new contract for his
Goldthwaite, and that would be
the law of the state within whi
riage was to be made.

The question may be looked
other point of view. Supposing
of goods was shipped from Gol
Texarkanna under a bill of lading
only that transportation, and sup
the laws of Texas required, subj
alty, that such goods should be
particular kind of car,—can th
doubt that the carrier would be
the penalty, although it should
the shipper intended, after the
reached Texarkana, to forward th
other place outside the state? T
question in other words,—if th
tract of shipment was for local
tion, would the state law in re
mode of transportation be set o
Federal law in respect to inter

t, and unloaded and used that car n Texarkana. It must be remem- t the corn was not paid for by the ompany until its receipt in Tex- It was paid for on receipt and de- the Hardin company. Then, and hen, did the Hardin company have to and control of the corn, and after the first contract of trans- had been completed.

t further be remembered that no ding was issued from Texarkana waite until after the arrival of the Texarkana, the completion of the ract for transportation, the accept- payment by the Hardin company. cases it would work the grossest to a carrier if it could not rely on act of shipment it has made, know it was bound to obey the state or aw, or, obeying the former, find dicted in penalties for not obeying f the other jurisdiction, simply be- shipper intended a transportation hat specified in the contract. It remembered that there is no pre- that a transportation when com- to be continued beyond the state d the carrier ought to be able to on the contract which it has made, conform to the liability imposed contract.

no error in the proceedings, and nent of the Supreme Court of Tex- rmed.

WALLACE, Will Wallace, Verge odwin, et al., Plffs. in Err.,

v.

LA ADAMS, for Herself and as l Guardian and Next Friend of McSwain and Roma McSwain, Her Children.

S. C. Reporter's ed. 415–426.)

new remedy by review in citizen- ses—vested rights.

ngress could constitutionally em- e Choctaw and Chickasaw citizen- t, created by the act of July 1, Stat. at L. 641, chap. 1362), to re- annul, for irregularities, the judg- the United States courts of the rritory in Indian citizenship cases, by the terms of the act of June 10, 1896 (29 Stat. at L. 339, 340, chap. 398), those judgments had become final.

Judgments—test case—effect as to persons not parties.

2. A decree of the Choctaw and Chickasaw citizenship court in the test case against ten persons who had been admitted to citizenship or enrolment by the United States courts in the Indian territory, vacating, for certain irregularities, the judgments of those courts, is binding on a person similarly situated who was not made a party, but who did not avail himself of his privilege, under the act of July 1, 1902, to transfer his individual case from the territorial court to the citizenship court, but chose to abide the outcome of the case against the ten representatives of his class.

[No. 260.]

Argued December 21, 1906. Decided February 25, 1907.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the United States Court of Appeals of the Indian Territory, which had, in turn, affirmed a judgment of the United States Court for the Southern District of that territory, in favor of plaintiffs in an action to recover the possession of real property. Affirmed.

See same case below, 74 C. C. A. 540, 143 Fed. 716.

The facts are stated in the opinion.

Mr. A. C. Cruce argued the cause, and, with Messrs. W. I. Cruce and W. R. Bleakmore, filed a brief for plaintiffs in error:

The citizenship court was not a court, but a commission; it was but an arm of the administrative branch of the government; it could not exercise judicial functions, and therefore could not vacate a decree entered by the regularly established courts.

Ex parte Joins, 191 U. S. 93, 48 L. ed. 110, 24 Sup. Ct. Rep. 27; Re Vidal, 179 U. S. 126, 45 L. ed. 118, 21 Sup. Ct. Rep. 48; Gordon v. United States, 2 Wall. 561, 17 L. ed. 921, 117 U. S. 697, 702.

If it should be conceded that the citizenship court was a judicial body, then its decree, wherein it sought to set aside the decrees admitting parties to citizenship, is insufficient to accomplish that purpose as to any other than the ten defendants in that case.

On the constitutionality of retro- vs—see notes to Franklin County School v. Bailey, 10 L.R.A. 407; nty v. Baldwin, 28 L. ed. U. S. parte Medley, 33 L. ed. U. S. 835; itz v. Beverly, 41 L. ed. U. S. 94. lusiveness of judgments generally es to Sharon v. Terry, 1 L.R.A. 3. 572; Bollong v. Schuyler Nat. Bank, 3 L. R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

The Mollie Hamilton v. Paschal, 9 Heisk. 203; 1 Black, Judgm. § 116; Harwood v. Cincinnati & C. Air-Line R. Co. 84 U. S. 78, 21 L. ed. 558.

Congress cannot, constitutionally, submit the opinions of the Supreme Court to review by other and subordinate tribunals.

Re Vidal, 179 U. S. 126, 45 L. ed. 118, 21 Sup. Ct. Rep. 48; Gordon v. United States, supra; La Abra Silver Min. Co. v. United States, 175 U. S. 423, 44 L. ed. 223, 20 Sup. Ct. Rep. 168; United States v. O'Grady, 22 Wall. 641, 22 L. ed. 772.

It would be difficult to find a case illustrating more forcibly the importance of the doctrines of *res judicata* than the one at bar.

United States v. California & O. Land Co. 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266; Werlein v. New Orleans, 177 U. S. 390, 44 L. ed. 817, 20 Sup. Ct. Rep. 682; Davis v. Brown, 94 U. S. 428, 24 L. ed. 206; United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; Dukes v. Goodall, 5 Ind. Terr. 145, 82 S. W. 702; Cooley, Const. Lim. 7th ed. pp. 79–81; 2 Black, Judgm. §§ 500, 503.

Judgments and decrees are immune from legislative attack.

McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134.

The power to vacate judgments is an entirely different matter from the power to reverse judgments. It is a power inherent in, and to be exercised by, the court which renders a judgment, and to that court, and no other, applications to set aside judgments should be made.

1 Black, Judgm. § 207.

The act providing for the creation of the citizenship court was class legislation, and therefore unconstitutional.

Cooley, Const. Lim. 7th ed. pp. 556, 560.

The methods adopted by Congress in establishing the court of private land claims and vesting it with jurisdiction, and in establishing United States courts in the Indian territory, and vesting them with jurisdiction to determine matters of citizenship, and in providing, in both cases, for appeals to this court, are strikingly similar. In each case the court was a creature of Congress. In each case the matters submitted to it for determination were questions over which Congress had plenary power, and which it might have determined by direct enactment, without the intervention of any other agency. In both cases appeals were allowed to this court.

It was distinctly held in the Coe Case, that the court of private land claims, as well as this court, on appeal, was exercising judicial power, and that Congress derived its power to create such court and vest it with judicial power from the Constitution. So far as the principle under discussion is involved, it is impossible to differentiate the two cases.

United States v. Coe, 155 U. S. 76, 39 L. ed. 76, 15 Sup. Ct. Rep. 16. See also United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; United States v. Old Settlers, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650.

Congress may relinquish or surrender its plenary power over political questions, and this power, once surrendered, may never be resumed.

Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; Astiazaran v. Santa Rita Land & Min. Co. 148 U. S. 80, 37 L. ed. 376, 13 Sup. Ct. Rep. 457; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; United States v. Duell, 172 U. S. 573, 43 L. ed. 559, 19 Sup. Ct. Rep. 286.

The cases cited by the circuit court of appeals do not sustain the statement of that court that the legislative department of the government has the right to grant a new trial.

Sampeyreac v. United States, 7 Pet. 222, 8 L. ed. 665; Freeborn v. Smith, 2 Wall. 160, 17 L. ed. 922; Garrison v. New York, 21 Wall. 196, 22 L. ed. 612; Freeland v. Williams, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. Rep. 763; Grisar v. McDowell, 6 Wall. 363, 18 L. ed. 863; La Abra Silver Min. Co. v. United States, 175 U. S. 423, 44 L. ed. 223, 20 Sup. Ct. Rep. 168; Frelinghuysen v. Key (Frelinghuysen v. United States) 110 U. S. 63, 28 L. ed. 71, 3 Sup. Ct. Rep. 462; Emblen v. Lincoln Land Co. 42 C. C. A. 499, 102 Fed. 559.

The proceedings in the citizenship court, whereby it undertook to vacate the decrees of the United States courts, were not due process of law.

Den ex dem. Murray v. Hoboken Land & Improv. Co. and Freeland v. Williams, supra.

Can it be that, because the Dawes Commission, for more than four years, failed in the discharge of its duty, Hill's title to the land is to be defeated, when he had discharged every duty incumbent upon him to perfect that title?

Lytle v. Arkansas, 9 How. 314, 13 L. ed. 153.

Allotment is a setting apart and apportioning of the property formerly held by joint owners, so that each one may hold in severalty his own specific share.

2 Am. & Eng. Enc. Law, 2d ed. 151; Glenn v. Glenn, 41 Ala. 577.

The treaty converts the tribal property into individual property, and the members of the tribe take, at the date of the treaty, a fee simple title to their share of the land,

which title becomes definite and fixed as soon as the land is located.

United States v. Brooks, 10 How. 442, 13 L. ed. 489; Doe ex dem. Mann v. Wilson, 23 How. 457, 16 L. ed. 584; Crews v. Burcham, 1 Black, 353, 17 L. ed. 91; Best v. Polk (Best v. Doe) 18 Wall. 112, 21 L. ed. 805; New York Indians v. United States, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

The defendant took a vested interest to the land in controversy, and this interest could not be devested without compensation.

4 Kent, Com. 202; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162.

Mr. Jackson H. Ralston also argued the cause, and, with Messrs. Frederick L. Siddons and William E. Richardson, also filed a brief for plaintiffs in error:

Was it within the power of the court, under any theory of chancery powers, to summon ten defendants as representatives of the separate rights of three thousand people?

Hichens v. Congreve, 4 Russ. Ch. 576; Baker v. Rogers, Sel. Cas. t. King, 34; Thornton v. Hightower, 17 Ga. 1; Baker v. Portland, 5 Sawy. 566, Fed. Cas. No. 777; Ayres v. Carver, 17 How. 591, 15 L. ed. 179; Smith v. Swornstedt, 16 How. 288, 14 L. ed. 942; Bank of United States v. White, 2 Pet. 262, 8 L. ed. 938.

A bill to impeach a decree for fraud is termed generally an original bill in the nature of a bill of review, partaking of the character of both classes of bills, though, in its essential features, it is an original and independent proceeding.

3 Enc. Pl. & Pr. p. 610.

In Harwood v. Cincinnati & C. Air-Line R. Co. 17 Wall. 78, 21 L. ed. 558, it was stated that an attempt to impeach a decree not joining the original party plaintiff was against authority and principle.

In its essence a judgment of citizenship is to be compared to a judgment of naturalization, dealing, as both do, with the relations between the man and the government under which he would place himself.

When the courts have undertaken to deal with matters of naturalization, they have treated their power as judicial, and their judgments are entitled to the same degree of sanctity in such cases as are their judgments in any other cases within their jurisdiction.

Spratt v. Spratt, 4 Pet. 406, 7 L. ed. 901; The Acorn, 2 Abb. (U. S.) 434, Fed. Cas. No. 29; United States v. Gleason, 78 Fed. 7; Pintsch Compressing Co. v. Bergin, 84 id. 141; Scott v. Strobach, 49 Ala. 488; Ex parte Knowles, 5 Cal. 301; State ex rel. Brown v. Macdonald, 24 Minn. 59; McCarthy v. Marsh, 5 N. Y. 284; People v. Snyder, 41 N. Y. 409; Com. v. Towles, 5 Leigh, 746; State ex rel. Kickbush v. Hoeflinger, 35 Wis. 400; State ex rel. Lacy v. Brandhorst, 156 Mo. 457, 79 Am. St. Rep. 538, 56 S. W. 1094; United States v. Norsch, 42 Fed. 417; 3 Moore's Dig. of International Law, title "Nationality," p. 500.

Mr. George A. Mansfield, by special leave of court argued the cause, and, with Messrs. J. F. McMurray and Melven Cornish, filed a brief for the Choctaw and Chickasaw Nations:

Congress, after a careful examination and consideration of the matter, and after recommendations by the officers charged with that duty, decided that the establishment of the Choctaw and Chickasaw citizenship court was necessary and desirable; necessary to do justice to the nations, and desirable from the standpoint of the government, as permitting the administration of the estate of its wards, and enabling it to bring to a final and correct conclusion all matters intrusted to its care as guardian.

This was a necessary and proper exercise of the power of Congress. It was necessary to save the nations from fraud and wrong, and Congress had the power to determine what means were necessary to that end.

M'Culloch v. Maryland, 4 Wheat. 316-344, 4 L. ed. 579-586; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109.

The manner of its exercise is a matter of legislative direction, and cannot be controlled by the courts.

Cherokee Nation v. Hitchcock, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 115; Lone Wolf v. Hitchcock, 187 U. S. 565, 47 L. ed. 306, 23 Sup. Ct. Rep. 216.

Congress is no more bound, when convinced of wrongs such as those shown in these cases, to let an act of the commission or the court stand without further investigation, than it would be by its own act. Congress not only has the power, but it is clothed with the duty, of taking whatever steps seem proper and right to it to insure a fair and just administration of this estate.

Stephens v. Cherokee Nation, 174 U. S. 477, 478, 43 L. ed. 1052, 1053, 19 Sup. Ct. Rep. 722; Cherokee Nation v. Hitchcock and Lone Wolf v. Hitchcock, supra.

Doubts as to the validity of legislation should be resolved in favor of constitutionality.

Cooley, Const. Lim. 6th ed. 216, 217;

Fletcher v. Peck, 6 Cranch. 87, 128, 3 L. ed. 162, 175.

In this case it appears that the legislation has been carefully considered by Congress, that the need for such legislation was fully recognized, and that it embraced a deliberate conclusion of a co-ordinate branch of the government, which is entitled to great weight by the courts.

M'Culloch v. Maryland, 4 Wheat. 316, 423, 4 L. ed. 579, 605.

In all cases where it appears that Congress had the power to legislate, the courts are not at liberty to inquire into the proper exercise of the power, but will assume that it has been properly exercised.

United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 544, 35 L. ed. 1099, 1109, 12 Sup. Ct. Rep. 308; Cooley, Const. Lim. 5th ed. 222; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 18, 38 L. ed. 55, 64, 14 Sup. Ct. Rep. 240; Lindsey & P. Co. v. Mullen, 176 U. S. 126, 146, 44 L. ed. 400, 408, 20 Sup. Ct. Rep. 325; Luther v. Borden, 7 How. 1, 47, 12 L. ed. 581, 601; Taylor v. Beckham, 178 U. S. 548, 580, 44 L. ed. 1187, 1201, 20 Sup. Ct. Rep. 890, 1009.

Mr. Justice Brewer delivered the opinion of the court:

This was an action commenced in Sep-
[419] tember, 1904, by *Mrs. Ella Adams, for herself and her minor children, defendants in error, in the United States court for the southern district of the Indian territory, to recover possession of a tract of land in that territory. Defendants answered, and, upon trial, judgment was rendered in favor of plaintiffs. This judgment was sustained by the United States court of appeals of the Indian territory, and, on further appeal, reaffirmed by the United States circuit court of appeals for the eighth circuit. 143 Fed. 716.

The case arises out of the legislation of Congress designed to secure the disintegration of the tribal organization of the Five Civilized Tribes in the Indian territory, and the distribution of the property of those tribes among the individual Indians. A full *résumé* of this legislation and the general litigation following it is to be found in Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722, and a full statement of the facts in this case is to be found in the opinion of the United States circuit court of appeals. An entire restatement of these matters is, therefore, unnecessary.

There is but a single matter to be determined. As counsel for plaintiffs in error say:

"The assignment of errors presents but one question. If the decree of the Choctaw-Chickasaw citizenship court, in the known as the Riddle Case, vacate cree that defendant, Hill, had, the procured in the United States cour southern district of the Indian t wherein he was adjudged to be a m the Choctaw tribe of Indians, t should be affirmed. If it did not, i be reversed."

To properly appreciate and rightl this single question some things in tory of the legislation and litigatio so some of the facts in this case noticed.

In order to divide the lands of t dian nations an enumeration of t viduals entitled thereto became n By the act of March 3, 1893 (27 L. 645, chap. 209, § 16), the commi the Five Civilized Tribes, generall as the *Dawes Commission, was em to negotiate and extinguish the tril to the lands and to make an allotme of to the members of the tribe in se By that of June 10, 1896 (29 Sta 339, 340, chap. 398), the commis authorized to hear the application termine the right of each applic citizenship in either of these trib act also granted an appeal to the United States district court in the territory to any party aggrieved ruling of the commission, and decla the judgment of that court should It required the commission to make plete roll of the citizens of each tribes, to be "hereafter held and co to be the true and correct rolls of entitled to the rights of citizenship several tribes." Hill, who is the p defendant, applied to be enrolled a zen of the Choctaw Nation, and his tion was finally sustained by the co he was, on March 8, 1898, adjudge a member of the Choctaw tr blood and entitled to be enrol such. The land in controversy lected and taken possession of by hi liance upon this adjudication of ship. On July 1, 1898, Congress p act (30 Stat. at L. 591, chap. 545) ing to the tribes an appeal to the Court from the judgments of the States courts of the Indian terri citizenship cases. Under the auth this act many of these cases were a to this court, which affirmed the jud Stephens v. Cherokee Nation, sup March 21, 1902, an agreement wa between the United States and the and Chickasaw Nations, which w firmed by act of Congress July 1, 1 Stat. at L. 641, chap. 1362). This ag and act were substantially that

known as the Choctaw and Chickasaw citizenship court should be created, and that that court should have power, in a suit in equity brought by either or both of these tribes against any ten persons who had been admitted to citizenship or enrolment by the terms of the judgments of the several United States courts in the Indian territory, as representatives *of all persons similarly situated, to determine whether the judgments of those courts should be annulled on account of certain alleged irregularities. The agreement and act also provided that, in case the citizenship courts should decide that those judgments should be annulled the papers in any action in those courts, wherein such a judgment had been rendered, should, upon seasonable application of either party, be transferred to the citizenship court, which should proceed to a hearing and determination of the question of citizenship. Under this agreement and act the court was established and test suit brought, in which a decree was entered to the effect that the judgments of the United States courts in the Indian territory, whereby persons were admitted to citizenship in the Choctaw and Chickasaw Nations under the act of June 10, 1896, were annulled and vacated. Hill was not named a party in that test suit, nor did he thereafter apply for a transfer of his case to the citizenship court. The above statement of facts is sufficiently full for an understanding of the single question presented for determination.

That single question may be divided into two. First, was the decree in the Indian territory court declaring Hill a citizen a finality, beyond the power of Congress to in any manner disturb? This was answered in the Stephens Case, supra. In that case we held that Congress could authorize a review of the judgments of the United States courts of the Indian territory in citizenship cases, and this although, by the terms of prior legislation, those judgments had become final. While sustaining the act authorizing such review and providing for appeals to this court, we construed it as limiting the appeals to the question of the constitutionality or validity of the legislation, and not as bringing before us the facts in the instances of all applications for citizenship. In the opinion (page 477, L. ed. page 1052, Sup. Ct. Rep. page 734) we said:

"The contention is that the act of July 1, 1898, in extending the remedy by appeal to this court, was invalid because retrospective, an invasion of the judicial domain, and destructive *of vested rights. By its terms the act was to operate retrospectively, and as to that it may be observed that while the general rule is that statutes should be so construed as to give them only prospective operation, yet, where the language expresses a contrary intention in unequivocal terms, the mere fact that the legislation is retroactive does not necessarily render it void.

"And while it is undoubtedly true that legislatures cannot set aside the judgments of courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances. Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Sampeyreac v. United States, 7 Pet. 222, 8 L. ed. 665; Freeborn v. Smith, 2 Wall. 160, 17 L. ed. 922; Garrison v. New York, 21 Wall. 196, 22 L. ed. 612; Freeland v. Williams, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. Rep. 763; Essex Public Road Board v. Skinkle, 140 U. S. 334, 35 L. ed. 446, 11 Sup. Ct. Rep. 790.

"The United States court in Indian territory is a legislative court and was authorized to exercise jurisdiction in these citizenship cases as a part of the machinery devised by Congress in the discharge of its duties in respect of these Indian tribes; and, assuming that Congress possesses plenary power of legislation in regard to them, subject only to the Constitution of the United States, it follows that the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument.

"In its enactment Congress has not attempted to interfere in any way with the judicial department of the government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review; and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court *beyond the power of re-examination [423] by a higher court, though subsequently authorized by general law to exercise jurisdiction."

This decision established that no such vested right was created by the proceedings of the Dawes Commission or the judgments of the courts of the Indian territory on appeal from the findings of the commission as prevented subsequent investigation. The power of Congress over the matter of citizenship in these Indian tribes was plenary, and it could adopt any reasonable means to ascertain who were entitled to its privi-

leges. If the result of one measure was not satisfactory it could try another. The fact that the first provision was by an inquiry in a territorial court did not exhaust the power of Congress or preclude further investigation. The functions of the territorial courts in this respect were but little more than those of a commission. While the act of July 1, 1898, provided for an appeal to this court, and appeals were taken in many cases, yet our inquiry stopped with the question of the constitutionality of the legislation. In other words, we entertained and decided the purely judicial question of the validity of the means Congress had adopted for determining the matter of citizenship. We did not attempt to pass upon the question of citizenship in any particular case, nor determine whether the applicant was or was not entitled to be enrolled as a citizen. It is unnecessary to consider what would have been the effect of a judgment of this court, a court provided for in the Constitution, on the question of the right of a litigant to citizenship. The distinction between this court and the courts established by act of Congress in virtue of its power to ordain and establish inferior courts is shown in Gordon v. United States, 117 U. S. 697, Appx. in which we held that while Congress could give to the court of claims jurisdiction to inquire and report upon claims against the government, it could not authorize an appeal from such report to this court unless our decision was made a final judgment, not subject to congressional review. In the opinion Mr. Chief Justice Taney said (pp. 699, 702):

[424] *"Congress may undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress, or a head of any of the executive departments. In this respect the authority of the court of claims is like to that of an auditor or comptroller, with this difference only: that in the latter case the appropriation is made in advance, upon estimates furnished by the different executive departments, of their probable expenses during the ensuing year; and the validity of the claim is decided by the officer appointed by law for that purpose, and the money paid out of the appropriation afterwards made. In the case before us the validity of the claim is to be first decided, and the appropriation made afterwards. But in principle there is no difference between these two special jurisdictions created by acts of Congress for special purposes, and neither of them possesses judicial power in the sense in which those words are used in the Constitution. The circumstance that one is called a court and its decisions called judgments cannot alter its character nor enlarge its power. . . . Congress cannot extend the appellate power of this court beyond the limits prescribed by the Constitution, and can neither confer nor impose on it the authority or duty of hearing and determining an appeal from a commissioner or auditor, or any other tribunal exercising only special powers under an act of Congress; nor can Congress authorize or require this court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect."

This decree was followed by legislation which, in a general way, provided that the rulings of this court on appeals from the judgments of the court of claims should be in effect judgments. While that case is not entirely parallel to this, yet the line of thought pursued in the opinion is suggestive. *We do not feel called upon to enlarge upon it. It is enough now to hold that Congress, in giving to the Indian territory courts jurisdiction of appeals from the action of the Dawes Commission, did not place the decisions of these courts beyond the reach of further investigation. Hence the act of Congress of July 1, 1902, creating the Choctaw and Chickasaw citizenship court, and giving to it power to examine the judgments of the Indian territory courts, and determine whether they should not be annulled on account of irregularities, was a valid exercise of power.

The other question is one of procedure, and not of power. It is objected that the defendant Hill was not made a party to the proceeding instituted in the citizenship court, but there were a multitude, according to the report of the Dawes Commission, probably one thousand, in whose favor judgments of citizenship have been entered in the Indian territory courts, and the act provided that ten should be selected as representatives of the class. It further authorized any individual, in case of an adverse judgment by the citizenship court, to transfer his case from the territorial to that court. Now, it is undoubtedly within the power of a court of equity to name as defendants a few individuals who are in fact the representatives of a large class having a common interest or a common right,—a class too large to be all conveniently brought into court,—and make the decree effective not merely upon those individuals, but also upon the class represented by them. Mandeville v. Riggs, 2 Pet. 482, 7 L. ed. 493; Smith v. Swormstedt, 16 How. 288, 14 L. ed.

942; Bacon v. Robertson, 18 How. 480, 489, 15 L. ed. 499, 504; United States v. Old Settlers, 148 U. S. 427, 480, 37 L. ed. 509, 529, 13 Sup. Ct. Rep. 650. It was by way of extra precaution, and in order to more effectually secure the rights of the individuals other than those named as parties defendant in that suit, that Congress provided that anyone might transfer his individual case from the territorial court to the citizenship court, and there have the merits of his claim decided. Hill, as every other citizen, was bound to take notice of the legislation of Congress, and it is not to be doubted that 6]he, as well as others similarly situated, was cognizant of the proceedings that were being had in pursuance of such legislation. He made no application to transfer his case, but chose to abide by the outcome of the case against the ten representatives of his class. The answers to these subordinate questions fully dispose of the main question. Without further discussion, we refer to the exhaustive opinion of Circuit Judge Sanborn, in delivering the judgment of the court of appeals, with which, in the main, we fully concur.

We find no error in the record, and the judgment of the Court of Appeals is affirmed.

TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
ABILENE COTTON OIL COMPANY.

(See S. C. Reporter's ed. 426–448.)

Error to state court—Federal question.

1. The question whether a state court, consistently with the act to regulate commerce, can grant relief to a shipper because of the exaction by a common carrier of an alleged unreasonable freight rate for an interstate shipment, when such rate has been filed with the Interstate Commerce Commission and promulgated as provided by the act to regulate commerce, and has not been found to be unreasonable by the Commission, will sustain a writ of error from the Federal Supreme Court to a state court, where such question was presented by the pleadings, was passed upon by the trial court, was expressly and necessarily decided by the highest state court, and is essentially involved in the case.

Error to state court—question reviewable.

2. The question whether a schedule of interstate freight rates filed with the Interstate Commerce Commission was posted as required by the act to regulate commerce is not open in the Supreme Court of the United States on writ of error to a state court, where the latter court in effect declared that such schedule was conceded to have been filed and published in conformity with the statute, and it does not appear that if the court, having the evidence before it, had not treated the case as presented, it might not have considered the facts in relation to the publication of the schedule, and affirmatively found facts compelling the conclusion that the statute had been complied with, even if such inference was not sufficiently sustained by the findings of the trial court which the appellate court adopted.

Carriers—remedy for exacting unreasonable interstate rate—necessity of action by Interstate Commerce Commission.

3. A shipper cannot maintain an action against a common carrier to obtain relief from an alleged unreasonable freight rate exacted from him for an interstate shipment, without reference to any previous action by the Interstate Commerce Commission, where such rate has been filed with that Commission and promulgated as provided by the act to regulate commerce, and is the rate which it is the duty of the carrier, under that act, to enforce against shippers until changed in accordance with the provisions of that statute, since the independent right of an individual originally to maintain actions to obtain pecuniary redress for violations of the act, conferred by § 9 (24 Stat. at L. 382, chap. 104, U. S. Comp. Stat. 1901, p. 3159) must be confined to such wrongs as can, consistently with the context of the act, be redressed without previous action by the Commission; and the provision of § 22, that nothing therein "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," cannot be construed as continuing in ship-

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to appellate review in the Federal Supreme Court of state court decisions involving questions of interstate commerce—see note to American Exp. Co. v. Iowa, 49 L. ed. U. S. 417.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On the construction of statutes in derogation of common law—see note to Beeson v. Busenbark, 10 L.R.A. 839.

pers a common-law right the continued existence of which would be absolutely inconsistent with the provisions of the statute.

[No. 78.]

Argued November 2, 1906. Decided February 25, 1907.

IN ERROR to the Court of Civil Appeals for the Second Supreme Judicial District for the State of Texas to review a judgment which reversed a judgment of the District Court of Taylor County, in that state, in favor of defendant in a suit to obtain relief from an alleged unreasonable interstate freight rate exacted by a common carrier from a shipper, and rendered judgment in favor of the plaintiff for the recovery of the excessive charges. Reversed and remanded for further proceedings.

See same case below (Tex. Civ. App.) 85 S. W. 1052.

The facts are stated in the opinion.

Mr. David D. Duncan argued the cause, and, with Messrs. John F. Dillon, Winslow S. Pierce, and Thomas J. Freeman, filed a brief for plaintiff in error:

The interstate commerce act providing that remedies thereunder must be sought in the Federal courts or before the Interstate Commerce Commission, but not in both, by necessary implication excludes the idea of jurisdiction in any other tribunals. The act confers the right and provides the remedy and means of enforcement.

Copp v. Louisville & N. R. Co. 43 La. Ann. 514, 12 L.R.A. 725, 26 Am. St. Rep. 198, 9 So. 441; Gulf, C. & S. F. R. Co. v. Moore, 98 Tex. 302, 83 S. W. 362; Van Patten v. Chicago, M. & St. P. R. Co. 74 Fed. 981; Ex parte McNiel, 13 Wall. 236, 20 L. ed. 624; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Swift & Co. v. Philadelphia & R. R. Co. 4 Inters. Com. Rep. 633, 58 Fed. 858; Claflin v. Houseman, 93 U. S. 130, 137, 23 L. ed. 833, 838; The Moses Taylor (The Moses Taylor v. Hammons) 4 Wall. 411, 425-431, 18 L. ed. 397, 400-402; Story, Const. §§ 436-447.

The only lawful rate that can be charged and collected by a common carrier upon an interstate shipment is the legally filed, published, and posted rate under the act to regulate commerce; and no cause of action for damages or otherwise will lie against a carrier for collecting its duly published, filed, and posted rates. If this rate be unreasonable, the only remedies the shipper has are those provided in § 9 of the interstate commerce act.

Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Southern R. Co. v. Harrison, 119 Ala. 539, 43 L.R.A. 385, 72 Am. St. Rep. 936, 24 So. 552; Missouri, K. & T. R. Co. v. Trinity County Lumber Co. 1 Tex. Civ. App. 563, 21 S. W. 290; Texas & P. R. Co. v. Clark, 4 Tex. Civ. App. 611, 23 S. W. 698; Missouri, K. & T. R. Co. v. Stoner, 5 Tex. Civ. App. 9, 23 S. W. 1020; Dillingham v. Fischl, 1 Tex. Civ. App. 546, 21 S. W. 554; San Antonio & A. P. R. Co. v. Clements, 20 Tex. Civ. App. 498, 49 S. W. 913.

Mr. Hannis Taylor argued the cause and filed a brief for defendant in error:

The highest court of a state may administer the common law according to its own understanding and interpretation.

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132.

Statutes in derogation of the common law are to be strictly construed, and hence, while a statute which is plainly inconsistent with the common law will prevail, yet statutes are not presumed to make any alteration in the common law further or otherwise than the clear import of the statutory language necessarily requires.

26 Am. & Eng. Enc. Law, p. 662; Brown v. Barry, 3 Dall. 365, 1 L. ed. 638; Wilson v. Lenox, 1 Cranch, 211, 2 L. ed. 85; McCool v. Smith, 1 Black, 459, 47 L. ed. 218; Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 557, 25 L. ed. 892.

Affirmative words without negative words do not annul the common law. Unless the intent of a statute is manifest,—irresistible,—the constructive repeal of the common law, by implication, cannot be inferred.

Jennings v. Com. 17 Pick. 82; State v. Norton, 23 N. J. L. 39.

A new remedy is cumulative.

26 Am. & Eng. Enc. Law, pp. 614, 671.

A legislative construction of an act embodied in the act itself is binding on the courts.

6 Am. & Eng. Enc. Law, 2d ed. p. 165; Smith v. State, 28 Ind. 321.

A statutory declaration contained in the body of an act, declaring the meaning thereof as well as the intent of the legislature in enacting it, is mandatory and controlling on the courts.

Farmers' Bank v. Hale, 59 N. Y. 53; Com. v. Curry, 4 Pa. Super. Ct. 356; Snyder v. Compton, 87 Tex. 374, 28 S. W. 1061; Rosmiller v. State, 114 Wis. 169, 58 L.R.A. 98, 91 Am. St. Rep. 910, 89 N. W. 839.

No right, title, privilege, or immunity under a Federal statute, specially pleaded and set up in the state court, was denied by that court.

Kizer v. Texarkana & Ft. S. R. Co. 170 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100.

There was no testimony showing or tend-
g to show that the law as to publications
joint schedules had been complied with.
Chicago & N. W. R. Co. v. Osborne, 3 C.
. A. 347, 4 Inters. Com. Rep. 257, 10 U.
. App. 430, 52 Fed. 912; Atlanta, K. &
I. R. Co. v. Horne, 106 Tenn. 73, 59 S. W.
34.

Mr. Justice White delivered the opinion of
he court :

The oil company, the defendant in error,
ued to recover $1,951.83. It was alleged
hat, on shipments of car loads of cotton
eed, made in September and October, 1901,
ver the line of the defendant's road from
arious points in Louisiana east of Alex-
ndria, in that state, to Abilene, Texas, the
arrier had exacted, over the protest of the
il company, on the delivery of the cotton
eed, the payment of an unjust and unrea-
nable rate, which exceeded, in the aggre-
ate, by the sum sued for, a just and rea-
nable charge. There were, moreover, aver-
ents that the rate exacted was discrim-
atory, constituted an undue preference,
nd amounted to charging more for a shorter
an for a longer haul. Besides a general
averse, the railway company defended on
e ground that the shipments were inter-
ate, and were, therefore, covered by the
t of Congress to regulate commerce. It
as averred that, as the rate complained of
as the one fixed in the rate *sheets which
e company had established, filed, pub-
shed, and posted, as required by that act,
e state court was without jurisdiction to
ntertain the cause, and, even if such court
ad jurisdiction, it could not, without dis-
garding the act to regulate commerce,
rant relief upon the basis that the estab-
shed rate was unreasonable, when it had
ot been found to be so by the Interstate
ommerce Commission.

The trial court made findings of fact.
hose relating to the subject of the estab-
shing, filing, and publishing by the rail-
ay company of rate sheets containing the
ate which was complained of were as fol-
ws:

"7th. That the Western Classification Com-
ittee, agent and representative of numerous
ailways and of defendant, filed with the
terstate Commerce Commission what is
own as the Western Classification, giving
assifications of different articles or items
merchandise, and in same cotton seed is
assed as 'A;' that this was the joint act
a number of roads, and the defendant
opted said joint classification; that on
y 30, 1901, the Southwestern Freight
mmittee, agent of a number of roads and
nt of defendant, filed with the said Com-
sion a supplement for numerous roads
in connection with defendant, whereby the
rate on cotton seed from all points in
Louisiana east of Alexandria was fixed at
67 cents per 100 pounds to all points in
Texas from all points in Louisiana east of
Alexandria and west of Alexandria.

"8th. That said classification and said
rate schedule was adopted by defendant and
was filed by said S. W. Freight Committee
with said Interstate Commerce Commission
in behalf of defendant.

"9th. That copies of said schedule and
said tariffs and classifications were kept in
the office of said defendant at said points
of shipment and at said Abilene, that is,
in the freight office and depots, for the
inspection of the public, as admitted by
plaintiff, which admission is found in the
statement of facts.

"10th. That, other than said schedule and
classification, nothing has been filed with
the Interstate Commerce Commission *by or [432]
in behalf of defendant in the way of clas-
sifications, schedules, or rates on cotton seed
from points on its road in Louisiana to
points on its road in Texas."

From the facts found the court stated the
following as its conclusions:

"1st. The facts so found show that this
was an interstate shipment.

"2d. The facts so found show that the de-
fendant complied with the interstate com-
merce law, and said rates and classifications
were thereby properly established and in
force, except that the rate charged on cot-
ton seed in car load lots was unreasonable
and excessive.

"3d. I find that the rate charged by the
defendant was that established under the
interstate commerce law."

As nothing in these conclusions relates to
the averments of discrimination, undue pref-
erence, or a greater charge for a shorter than
for a longer haul, those subjects, it may be
assumed, were considered to have been elimi-
nated in the course of the trial.

There was judgment for the railway com-
pany. When the controversy came to be
disposed of by the court of civil appeals, to
which the cause was taken, that court
deemed there was only one question pre-
sented for decision; that is, whether, con-
sistently with the act to regulate commerce,
there was power in the court to grant re-
lief upon the finding that the rate charged
for an interstate shipment was unreason-
able, although such rate was the one fixed
by the duly published and filed rate sheet,
and when the rate had not been found to
be unreasonable by the Interstate Commerce
Commission. In opening its opinion the
court said (85 S. W. 1052):

"Adopting the construction of the plead-

ings evidently given them in the briefs, and treating it as presented, the case, briefly stated, is an action by appellant for damages for a violation of an alleged common-law right, in that appellee demanded and coercively collected from appellant freight charges in excess of a reasonable compen-
[433] sation, for the transportation *of a number of car loads of cotton seed from the town of Cottonport and other designated towns in the state of Louisiana to the city of Abilene in the state of Texas."

After referring to the findings as to the unreasonableness of the charge exacted, and after pointing out that the railway company had not, by a cross assignment, challenged the correctness of the findings of the trial court as to the unreasonableness of the rate, it was said:

"So that we are relieved from a consideration of the difficulties discussed in some of the cases in ascertaining the fact, and therefore now have squarely before us the questions whether, in a state court, a shipper in cases of interstate carriage can, by the principles of the common law, be accorded relief from unjust and unreasonable freight rates exacted from him, or shall relief in such cases be denied merely because such unreasonable rate has been filed and promulgated by the carrier under the interstate commerce act?"

Proceeding in an elaborate opinion to dispose of the question thus stated to be the only one for consideration, the conclusion was reached that jurisdiction to grant relief existed, and that to do so was not repugnant to the act to regulate commerce. Applying these conclusions to the findings of fact, the relief prayed was allowed. The court said:

"We therefore adopt the trial court's findings of fact, and, applying thereto the principles of law we have deduced, reverse the judgment, and here render judgment in appellant's favor for the said sum of $1,951.83, excessive freights charged, together with interest. . . ."

The assigned errors are addressed exclusively to the operation of the act to regulate commerce upon the jurisdiction of the court below to entertain the controversy, and its power in any event to afford relief to the oil company, based upon the alleged unreasonableness of the rate under the circumstances disclosed. Before we take up the consideration of that subject, however, two questions must be disposed of: First, it is insisted that this court is without juris-
[434] diction, because no *Federal question is presented. We think it suffices to say that it obviously results from the statements previously made that a question of that char-

acter was presented by the plead passed upon by the trial court, pressly and necessarily decided by below, and is also essentially in the cause as it is before us. Sec urged that the effect of the act tc commerce upon the right of the oil to recover need not be passed up even if error on that subject was c below, a review of the decision in gard is unnecessary, because, if tl legal inference be drawn from found by the trial court, which wer by the appellate court, it will resul railway company had not establish schedule of rates in compliance act to regulate commerce, and the jurisdiction of the court and its afford relief was not at all affect provisions of the act. We do not stop to consider whether the consec to jurisdiction and right to reco are asserted would result if th was well founded, because we premise is either shown by the f be unfounded or it is not open tention on the record. The pre upon two propositions of fact: a. findings of the trial court show rate sheet filed was joint and the not necessarily relate to a shipme over the road of the railway comp contention, we think, is shown by ings to be without merit, since tho clearly point out that the rate filed by an agent of the defendan was by it adopted, and constitute rate sheet embracing the traffic i b. Although it is conceded that th showed that the schedule of rat tablished and filed with the Inter merce Commission, and was ke stations of the railway company inspection, and that the oil co knowledge of the fact, it is insist facts found do not justify the that there was a compliance wi quirements of the act to regulat *as to the posting of the establishe We think this contention is n this record. As we have seen, court expressly concluded that t company had complied with the a late commerce in the matter of its schedule of rates, and the app opened its opinion by the statem course of the trial and the briefs confined the issue for determina question of the effect of the act commerce upon the rights of t manifestly upon the assumptio correctness of the conclusion o court as to compliance with t conceded by both parties. In o

as the court below, in deciding the case, expressly declared that the course of the argument and briefs of counsel before it had confined the case to the issue of whether there was a right to recover upon the hypothesis that a schedule of rates had been filed and published, we do not think that it is now open to contend that that which the court below in effect declared was conceded in the briefs of counsel to be a lawful schedule of rates was not such. *Non constat*, that if the court of civil appeals, having the evidence before it, had not treated the case as presented, it might not have considered the facts in relation to the publication of the schedule and affirmatively found facts inevitably compelling the conclusion that the act to regulate commerce had been fully complied with, even if such inference was not sufficiently sustained by the findings of the trial court which the appellate court adopted. Because we thus find the question not open for consideration we must not be considered as conceding the correctness of the conclusion attempted to be drawn from the supposed failure to post.

We are thus brought to the underlying proposition in the case,—*viz.*, the effect of the act to regulate commerce upon the claim asserted by the oil company. As presented below and pressed at bar, the question takes a seemingly two-fold aspect,—the jurisdiction of the court below as affected by the act to regulate commerce and the right to [436] the relief sought consistently *with that act, even if jurisdiction existed. We say that these questions are only seemingly different, because they present but different phases of the fundamental question, which is the scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the requirements of the act to regulate commerce, and which it was the duty of the carrier under the law to enforce as against shippers. We come, therefore, first, to the consideration of that subject.

Without going into detail, it may not be doubted that, at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that, when a carrier accepted goods, without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted, either in advance or at the completion of the service, an action may be maintained to recover the overcharge. 2 Kent, Com. 599, and note a; 2 Smith, Lead. Cas. pt. 1, 8th ed. (Hare & W. notes) p. 457.

As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not, in so many words, abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we *concede that we must be guided by the [437] principle that repeals by implication are not favored, and, indeed, that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.

Both parties concede that the question for decision has not been directly passed upon by this court, and that its determination is only persuasively influenced by adjudications of other courts. They both, hence, mainly rely upon the text of the act to regulate commerce as it existed at the time the shipments in question were made. The case, therefore, must rest upon an interpretation of the text of the act and is measurably one of first impression.

Let us, without going into detail, give an outline of the general scope of that act, with the object of fixing the rights which it was intended to conserve or create, the wrongs which it proposed to redress, and the remedies which the act established to accomplish the purposes which the lawmakers had in view.

The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments

which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machination or device, in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade. It was made [438]the duty of carriers subject to the act *to file with the Interstate Commerce Commission created by that act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules. The Commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts, and their methods of dealing, and generally to enforce the provisions of the act. To that end it was made the duty of the district attorneys of the United States, under the direction of the Attorney General, to prosecute proceedings commenced by the Commission to enforce compliance with the act. The act specially provided that whenever any common carrier subject to its provisions "shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act. . . ." [24 Stat. at L. 382, chap. 104, § 8, U. S. Comp. Stat. 1901, p. 3159.] Power was conferred upon the Commission to hear complaints concerning violations of the act, to investigate the same, and, if the complaints were well founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission, that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out in the statute, prima facie effect in such courts being given to the findings of fact made by the Commission. By the 9th section of the act it was provided as follows:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in [439]his or their own behalf for the recovery *of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must, in each case, elect which one of the two methods of procedure herein provided for he or they will adopt. . . ."

And by § 22, which we shall hereafter fully consider, existing appropriate common-law and statutory remedies were saved.

When the act to regulate commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was, in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another. Parsons v. Chicago & N. W. R. Co. 167 U. S. 447, 455, 42 L. ed. 231, 234, 17 Sup. Ct. Rep. 887; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 275, 36 L. ed. 699, 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844. That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 494, 42 L. ed. 243, 251, 17 Sup. Ct. Rep. 896. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all, and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700, 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896.

When the general scope of the act is enlightened by the *considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity, between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because, unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preference and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided

by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the unreasonableness of an established rate, it would follow that, unless all courts reached identical conclusion, a uniform standard of rates in the future would be impossible, the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is *wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of giving to it that the statutory requirement as to uniformity and equality of rates is preserved. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision allowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, as compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.

Nor is there merit in the contention that § 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is *that the general terms of [442] the section, when taken alone, might sanction such a conclusion, but, when the provision of that section is read in connection with the context of the act, and in the light of the considerations which we have enumerated, we think the broad construction contended for is not admissible. And this becomes particularly cogent when it is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act; in other words, to command a correction of the established schedules, which power, as we have shown, is conferred by the act upon the Commission in express terms. In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act, conferred by the 9th section, must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the

Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of, and awarding reparation to, individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.

And the conclusion to which we are thus constrained by an original consideration of the text of the statute finds direct support, first, in adjudged cases in lower Federal [443] courts, and *in the construction which the act has apparently received from the beginning in practical execution; and, second, is persuasively supported by decisions of this court, which, whilst not dealing directly with the question here presented, yet necessarily concern the same.

1. In Swift & Co. v. Philadelphia & R. R. Co. 5 Inters. Com. Rep. 116, 64 Fed. 59, it was held that, in an action at law to recover damages for the exaction of an alleged unreasonable freight charge, the rate established in conformity with the act to regulate commerce must be treated by the courts as binding upon the shipper until regularly corrected in the mode provided by the statute. And in Kinnavey v. Terminal R. Asso. 81 Fed. 802, in an able opinion, the question was carefully considered and the same doctrine was announced and applied. When it is considered that the act to regulate commerce was enacted in 1887, and that neither the diligence of counsel nor our own researches have brought into view any case except the one now under consideration holding that a court could, compatibly with the terms of that act, grant relief upon the basis that the established rate could be disregarded as unreasonable, it would seem to follow that the terms of the act had generally been treated in practical execution as incompatible with the existence of such power or right.

And this is greatly fortified when it is borne in mind that the reports of the decisions of the Interstate Commerce Commission show that many cases have been passed upon by that body concerning the unreasonableness of a rate fixed in an established schedule, which have resulted in awarding reparation to shippers and to the making of orders directing carriers to desist from future violation of the act; that is to say, in necessary legal effect, correcting established schedules.

2. The cases of Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; a Interstate Commerce Commission v. Lou ville & N. R. Co. 190 U. S. 275, 47 L. 1048, 23 Sup. Ct. Rep. 687, involved t enforcement against carriers *of orders the Commission. After deciding that t orders of the Commission were not entitle to be enforced because of errors of law com mitted by that body, this court declined t consider the question of the reasonablene *per se* of the rates as an original questio in other words, the correction of the e tablished schedule without previous con sideration of the subject by the Commission It was pointed out that by the effect of th act to regulate commerce it was peculiarl within the province of the Commission t primarily consider and pass upon a contro versy concerning the unreasonableness *per se* of the rates fixed in an established schedule. It was, therefore, declared to be th duty of the courts, where the Commission had not considered such a disputed question, to remand the case to the Commission to enable it to perform that duty,—a conclusion wholly incompatible with the conception that courts, in independent proceedings, were empowered by the act to regulate commerce, equally with the Commission, primarily to determine the reasonableness of rates in force through an established schedule.

In Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802, the facts were these: A rate had been fixed by a carrier in a bill of lading for an interstate shipment, which rate was less than that established under the provisions of the act to regulate commerce. On arrival of the goods at destination the carrier refused to deliver on tender of payment of the bill of lading rate, and demanded payment of and collected the higher established schedule rate. For so doing, the carrier was proceeded against under a statute of the state of Texas, imposing a penalty upon a carrier for charging more than the rate fixed in a bill of lading. A judgment of the state court, enforcing the penalty, was reversed, upon the ground that the state statute, as applied, was repugnant to the act to regulate commerce, the court saying (p. 102, L. ed. p. 911, Sup. Ct. Rep. p. 803):

"The carrier cannot obey one statute without sometimes exposing itself to the penalties prescribed by the other. Take the case before us: If, in disregard of the joint tariff established *by the defendant and the St. Louis & San Francisco Railway Company and filed with the Interstate Commerce Commission, the latter company, as a matter of favoritism, had issued this bill of lading at a rate less than the tariff rate, both the defendant company and its agent

would, by delivering the goods upon the receipt of only such reduced rate, subject themselves to the penalties of the national law; while, on the other hand, if the tariff rate was insisted upon, then the corporation would become liable for the damages named in the state act. In case of such a conflict the state law must yield."

In Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628, the facts were as follows: On an interstate shipment a given rate, less than the lawful schedule rate, was quoted to the shipper by the agent of the railroad at the point of shipment. On the arrival of the goods at their destination the road exacted the schedule rate, whilst the shipper insisted he was entitled to the lower and quoted rate. And a recovery of the excess collected over the quoted rate was allowed by a court of the state of Texas. Reversing the judgment, it was here held that the rate fixed in the schedule filed pursuant to the act to regulate commerce was controlling, that it was beyond the power of the carrier to depart from such rates in favor of any shipper, and that the erroneous quotation of rates made by the agent of the railroad did not justify recovery, since to do so would be, in effect, enabling the shipper, whose duty it was to ascertain the published rate, to secure a preference over other shippers, contrary to the act to regulate commerce.

In view of the binding effect of the established rates upon both the carrier and the shipper, as expounded in the two decisions of this court just referred to, the contention now made, if adopted, would necessitate the holding that a cause of action in favor of a shipper arose from the failure of the carrier to make an agreement, when, if the agreement had been made, both the carrier and the shipper would have been guilty of a criminal offense and the agreement would have been so absolutely void as to be impossible of enforcement. Nor is there force in the suggestion that a like dilemma arises from the recognition of power in the Commission to award reparation in favor of an individual because of a finding by that body that a rate in an established schedule was unreasonable. As we have shown, there is a wide distinction between the two cases. When the Commission is called upon, on the complaint of an individual, to consider the reasonableness of an established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complainant alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which, on the one hand, would arise from destroying the uniformity of rates which it was the object of the statute to secure, and, on the other, from enforcing of that equality which the statute commands.

But it is insisted that, however, cogent may be the views previously stated, they should not control, because of the following provision contained in § 22 of the act to regulate commerce, *viz.:* ". . . Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate *common-law or [447] statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act.

The proposition that, if the statute be construed as depriving courts generally, at the instance of shippers, of the power to grant redress upon the basis that an established rate was unreasonable without previous action by the Commission, great harm will result, is only an argument of inconvenience which assails the wisdom of the legislation or its efficiency, and affords no justification for so interpreting the statute as to destroy it. Even, however, if, in any case, we were at liberty to depart from the obvious and necessary intent of a statute upon considerations of expediency, we are admonished that the suggestions of expediency here advanced are not shown on this record to be justified. As we have seen, although the act to regulate commerce has been in force for many years, it appears that, by judicial exposition and in practical execution, it has been interpreted and applied in accordance with the construction which we give it. That the result of such long-continued, uniform construction has not been considered as harmful to the public interests is persuasively demonstrated by the fact that the amendments which have

been made to the act have not only not tended to repudiate such construction, but, on the contrary, have had the direct effect of strengthening and making, if possible, more imperative, the provisions of the act requiring the establishment of rates and the adhesion by both carriers and shippers to the rates as established until set aside in pursuance to the provisions of the act. Thus, by § 1 of the act approved February 19, 1903, commonly known as the Elkins act [32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1905, p. 599], which, although enacted since the shipments in question, is yet illustrative, the wilful failure upon the part of any carrier to file and publish "the tariffs or rates and charges," as required by the act to regulate commerce and the acts amendatory thereof, "or strictly to observe such tariffs until changed according to law," was made a misdemeanor, and it was also made a misdemeanor to [448] offer, grant, *give, solicit, accept, or receive any rebate from published rates, or other concession or discrimination. And in the closing sentence of § 1 it was provided as follows:

"Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate, as against such carrier, its officers, or agents, in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any departure from such rate or any offer to depart therefrom shall be deemed to be an offense under this section of this act."

And, by § 3, power was conferred upon the Interstate Commerce Commission to invoke the equitable powers of a circuit court of the United States to enforce an observance of the published tariffs.

Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce. It follows, from what we have said, that the court below erred in the construction which it gave to the act to regulate commerce.

The judgment below is, therefore, reversed, and the case remanded for further proceedings not inconsistent with this opinion.

*TEXAS & PACIFIC RAILWAY COMPANY
Plff. in Err.,
v.
CISCO OIL MILL.

(See S. C. Reporter's ed. 449-452.)

Carriers—interstate freight rates—posting.

Interstate freight rates are established when a schedule thereof is filed by a carrier with the Interstate Commerce Commission and copies are furnished by the railway company to its freight offices, although such rates may not be "posted" as required by § 6 of the act to regulate commerce, as amended March 2, 1889 (25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158), which is not made a condition precedent to the establishment and putting in force of the tariff of rates, but is a provision based upon the existence of an established rate, which has for its object the affording of special facilities to the public for ascertaining the rates actually in force.

[No. 79.]

Submitted November 2, 1906. Decided February 25, 1907.

IN ERROR to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas to review a judgment which reversed a judgment of the District Court for Eastland County, in that state, in favor of defendant in a suit to obtain relief from an alleged unreasonable interstate freight rate exacted by a common carrier from a shipper, and rendered judgment in favor of the plaintiff for the recovery of the excessive charges. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Messrs. John F. Dillon, Winslow S. Pierce, and David D. Duncan submitted the cause for plaintiff in error. Mr. Thomas J. Freeman was on the brief. For their contentions see their brief as reported in Texas & P. R. Co. v. Abilene Cotton Oil Co. ante, 553.

Mr. John J. Butts submitted the cause for defendant in error:

While it is true that the legislative control of commerce between the states is vested in Congress, it does not thereby follow that state courts may not hear and determine controversies between their citizens, and between their citizens and citizens of other states, growing out of such business, and involving Federal laws enacted in pursuance of the Constitution by Congress, governing the same.

Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 100-103, 45 L. ed. 765, 769-771, 21 Sup. Ct. Rep. 561; Plaquemines Tropical Fruit Co. v. Henderson, 170 U. S. 511, 515, 516, 42 L. ed. 1127-1129, 18 Sup. Ct. Rep. 685.

The fact that, by the terms of the interstate commerce law, a right of action is

en in the Federal courts, does not raise presumption that the jurisdiction of the te courts over the subjects therein re-rred to is excluded.

Plaquemines Tropical Fruit Co. v. Hen-rson, 170 U. S. 513-515, 42 L. ed. 1127, 28, 18 Sup. Ct. Rep. 685.

Mr. Justice White delivered the opinion the court:

This writ of error is prosecuted to ob-in the reversal of a judgment for $641.69, ith interest, entered in favor of the Cisco il Mill by the court of civil appeals of Tex-s upon the reversal of a judgment of a istrict state court in favor of the Texas Pacific Railway Company. The action as *brought by the oil company to recover the railway company the principal sum ust stated. because of alleged overcharges y the railway company, paid by the oil ompany under protest at the time of the elivery of four cars of cotton seed, shipped the month of September, 1901, from owns in Louisiana east of Alexandria, in hat state, to Cisco, Texas. The appellate ourt, after excluding as surplusage aver-ments in the petition "evidently designed to ring the case within the provisions of the Interstate Commerce Act," was of opinion nd decided the case upon the hypothesis hat the petition stated a valid cause of ac-ion at common law for the recovery of the ums coercively collected upon the delivery f the merchandise, in excess of a reasonable ate, and adopted the finding of the trial ourt as to the amount of the unreasonable xaction

In its opinion the court of civil appeals xpressly declared that the trial court had endered judgment in favor of the railway ompany because the rate demanded and ollected of the oil company "was in accord ith appellee's rate sheets and freight sched-le which had been filed with the Interstate ommerce Commission and promulgated as rovided by the act of Congress." Deciding, owever, that the case before it presented ubstantially the same questions, upon sub-antially the same state of facts," which d been passed on in the case of Abilene tton Oil Co. v. Texas & P. R. Co. [(Tex. v. App.) 85 S. W. 1052], the court, for e reason given by it in that case, reversed e trial court and rendered judgment in vor of the Cisco Oil Mill.

The considerations which made necessary r decision, just announced, reversing the dgment of the court of civil appeals in e Abilene Case, equally apply in the in-nt case and compel like action. And this ult follows despite the contention that right of action existed because it is as-med no schedule rate was in existence when the shipments were made. This was based on the claim that it was not affirmatively found below that the schedule of rates applicable to the *shipments in question had [451] been posted as required by § 6 of the act to regulate commerce, noted in margin.†

The assumption, it is insisted, is authorized because, it is asserted, the conclusion that the schedule of rates became legally operative was not justified by the finding that such schedule had been filed with the Interstate Commerce Commission and copies thereof furnished to the freight officers of the railroad company at Cisco and other points. The contention is without merit. The filing of the schedule with the Commission and the furnishing by the railroad company of copies to its freight offices incontrovertibly evidenced that the tariff of rates contained in the schedule had been established and put in force as mentioned in the first sentence of the section, and the railroad company could not have been heard to assert to the contrary. The requirement that schedules should be "posted in two public and conspicuous places in every depot," etc., was not made a condition precedent to the establishment and putting in force of the tariff of rates, but was a provision based upon the existence of an established rate, and plainly had for its object the affording of special facilities to the public for ascertaining the rates *actually in force*. To hold that the clause had the far-reaching effect *claimed would be to say that it was the in- [452] tention of Congress that the negligent post-

†First paragraph of § 6 of the act to regulate commerce, as amended March 2, 1889 (25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158):

"That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected."

ing by an employee of but one instead of two copies of the schedule, or the neglect to post either, would operate to cancel the previously established schedule,—a conclusion impossible of acceptance. While § 6 forbade an increase or reduction of rates, etc., "which have been established and published as aforesaid," otherwise than as provided in the section, we think the publication referred to was that which caused the rates to become operative; and this deduction is fortified by the terms of § 10 of the act, making it a criminal offense for a common carrier or its agent or a shipper or his employee improperly "to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier."

Whether, by the failure to post an established schedule, a carrier became subject to penalties provided in the act to regulate commerce, or whether, if damage had been occasioned to a shipper by such omission, a right to recover on that ground alone would have obtained, we are not called upon in this case to decide.

The judgment below is reversed and the case remanded for further proceedings not inconsistent with this opinion.

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[453]*AMERICAN RAILROAD COMPANY OF PORTO RICO, Plff. in Err.,
v.
JULIO P. CASTRO.

(See S. C. Reporter's ed. 453-458.)

Error to district court of Porto Rico—frivolousness of Federal question.

The contention that, because the district court of the United States for the district of Porto Rico is required, by the act of April 12, 1900 (31 Stat. at L. 77, chap. 191), § 34, to proceed in the same manner as a Federal circuit court, a term of that court held at Mayaguez, under the authority of the further provision of that section that regular terms of such court shall be held at stated times in San Juan and Ponce, and special terms at Mayaguez at such other times as the judge may deem expedient, is a "special," as contradistinguished from a "regular," term, within the meaning of U. S. Rev. Stat. § 670, U. S. Comp. Stat. 1901, p. 545, forbidding jury trials at special terms of the circuit courts, except in certain specified districts, is too clearly lacking in merit to sustain a writ of error from the Federal Supreme Court, in view of the substantially uniform requirement of U. S. Rev. Stat. §§ 664-669, U. S. Comp. Stat. 1901, pp. 543-545, that special terms of the circuit courts are to be held where the regular sessions are held.

[No. 151.]

Argued and submitted January 14, 1907. Decided February 25, 1907.

IN ERROR to the District Court of the United States for the District of Porto Rico to review a judgment for plaintiff in an action against a railway company to recover damages for the alleged negligent killing of plaintiff's daughter at a highway crossing. Dismissed for want of jurisdiction.

Statement by Mr. Justice White:

Julio P. Castro, defendant in error, was plaintiff in the court below, and the plaintiff in error, the American Railroad Company, a New York corporation doing business in Porto Rico, was defendant. The action was commenced by the filing of a complaint in the office of the clerk of the court at Mayaguez, Porto Rico. Damages in the sum of $15,000 were prayed, because of the alleged negligent killing of the daughter of the plaintiff by a train of the company, whilst she, with other persons, was attempting to pass, in a vehicle, over the railroad of the defendant, at a point where it intersected a public highway leading from the town of San German to the town of Mayaguez.

A demurrer to the complaint was filed, and also the following plea to the jurisdiction of the court:

"Defendant, in the above-entitled action, comes now, by its attorney, F. H. Dexter, and objects to the jurisdiction *of this court[454] to try this cause under the terms and provisions of § 670 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 545), for the reason that all terms of this court held in the city of Mayaguez, under and by virtue of the terms and provisions of the act of April 12, 1900 [31 Stat. at L. 77, chap. 191], creating a civil government in Porto Rico, and particularly the present term, at which the above cause is set for trial, is a special term of this court, and, therefore, this court is without jurisdiction to try the issues in this cause by a jury.

"Wherefore, defendant prays for an order either dismissing this cause or transferring the same for trial at a regular term of this court to be held at either San Juan or Ponce."

After the entry of an order overruling the demurrer and the plea to jurisdiction, an answer was filed and the case was tried by a jury. A verdict was rendered in favor of

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over Porto Rican courts—see note to Garrozi v. Dastas, ante, 369.

the plaintiff for the sum of $1,600. The objection to jurisdiction was renewed in a motion to arrest the judgment, and, after the overruling thereof, a bill of exceptions was settled by the trial judge, containing exceptions taken during the trial to the admission and rejection of evidence and to instructions given and refused. The case was then brought to this court.

Mr. Frederic D. McKenney argued the cause, and, with Messrs. Francis H. Dexter and John Spalding Flannery, filed a brief for plaintiff in error.

Mr. Frederick L. Cornwell submitted the cause for defendant in error.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

By the act of April 12, 1900 (31 Stat. at L. 85, chap. 191), the general rule governing the right of this court to review by writs of error or appeal final decisions of the district court of the United States for [455] Porto Rico was made, as to amount, *to conform to that obtaining as to the territories of the United States, *viz.*, $5,000. As this case does not involve the requisite jurisdictional amount, it follows that the right of review does not exist unless the case is within the provision of the statute conferring jurisdiction to review in this court "in all cases where . . . an act of Congress is brought in question and the right claimed thereunder is denied."

It has been settled that where, in the course of litigation pending in the court just referred to, a party asserts a right under an act of Congress, the act "is brought in question," and when the right so claimed is denied the case can be brought here. Serralles v. Esbri, 200 U. S. 103, 50 L. ed. 391, 26 Sup. Ct. Rep. 176; Rodriguez v. United States, 198 U. S. 156, 49 L. ed. 994, 25 Sup. Ct. Rep. 617; Crowley v. United States, 194 U. S. 466, 48 L. ed. 1078, 24 Sup. Ct. Rep. 731.

It is undoubted that the plea to the jurisdiction filed and insisted upon below asserted on the record a right under an act of Congress, which right was denied. But, in harmony with the rule which governs where a right under the Constitution, etc., of the United States is asserted in a case which is brought to this court from a state court, and in accord with the same rule which also governs cases originally brought in a court of the United States (New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691, and cases cited; Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 L. ed. 795, 24 Sup. Ct. Rep. 553), we are of opinion that the mere assertion of a Federal right and its denial do not justify our assuming jurisdiction where it indubitably appears that the Federal right asserted is frivolous, that is, without color or merit. We think the case at bar is of this character.

As appears in the Revised Statutes, it has been the uniform practice of Congress to fix both the time and place for holding sessions of the district and circuit courts of the United States, which, for convenience of expression, have been styled the regular terms of court. Rev. Stat. §§ 572, 658, U. S. Comp. Stat. 1901, pp. 464, 530. Upon the district judge has also been conferred the power of designating the time and place of holding special terms of the district *court, [456] in which any business might be transacted which might be disposed of at a regular term. Id. § 581, U. S. Comp. Stat. 1901, p. 477. The asserted application to the district court of Porto Rico of the provision as to special terms of the circuit courts is that upon which was rested the claim of statutory right to exemption from a trial of the cause by jury at Mayaguez, which was denied by the court below, and forms the basis for the contention that this court must exercise jurisdiction to pass upon the assigned errors. The section reads as follows:

"Sec. 670. At any special term of a circuit court in any district in Indiana, Kentucky, Missouri, North Carolina, Virginia, and Wisconsin any business may be transacted which might be transacted at any regular term of such court. At any special term of a circuit court in any other district it shall be competent for the court to entertain jurisdiction of, and to hear and decide, all cases in equity, cases in error or on appeal, issues of law, motions in arrest of judgment, motions for a new trial, and all other motions, and to award executions and other final process, and to do and transact all other business and direct all other proceedings in all causes pending in the circuit court, except trying any cause by a jury, in the same way and with the same effect as the same might be done at any regular session of said court."

The application of this section, it is contended, results from the concluding words of the following portion of § 34 of the act of April 12, 1900.

"The district court of the United States for Porto Rico . . . shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court."

Rev. Stat. § 670 is to be interpreted in the

light of § 669 (U. S. Comp. Stat. 1901, p. 545), reading as follows:

"Section 669. In the districts not mentioned in the five preceding sections [California, Oregon, Nevada, Kentucky Indiana, [457]*Tennessee, North Carolina, Virginia, and Wisconsin being the districts mentioned] the presiding judge of any circuit court may appoint special sessions thereof, to be held at the places where the regular sessions are held."

Keeping in mind that the substantially uniform rule stated in Rev. Stat. §§ 664 to 669 (U. S. Comp. Stat. 1901, pp. 543–545) requires the holding of special terms of a circuit court at the place where the regular sessions are authorized to be held, it follows that a special term of a circuit court of the United States, as the expression is employed in Rev. Stat. § 670, is a session ordered for the disposal of business, supplementary to a regular term, and to be held at the place fixed by Congress for holding such regular term. When the plain result of the legislation just referred to is noted it is apparent that there is no color whatever for the pretension that Rev. Stat. § 670 had any possible application to the term at which this case was tried. That term was held under authority conferred by that portion of § 34 of the act of April 12, 1900, where, referring to the district court of Porto Rico, it was provided:

"Regular terms of said court shall be held in San Juan, commencing on the second Monday in April and October of each year, and also at Ponce on the second Monday in January of each year, and special terms may be held at Mayaguez at such other stated times as said judge may deem expedient."

On the face of this provision it is apparent that it was the intention of Congress to authorize the holding of sessions of the court at Mayaguez at times to be *specially* designated by the district judge. It cannot be said that the word "special" in the act was intended to affix to the terms authorized by Congress to be held at Mayaguez the character of special terms, as contradistinguished from regular terms, within the purview of Rev. Stat. § 670, without reducing the statute to an absurdity, for unless the act authorized the holding of regular terms at Mayaguez it would be impossible to conceive of the holding of special terms at that place in the sense of Rev. Stat. § 670. What the provision in ques- [458]tion plainly *meant was that regular terms should be held at Ponce and San Juan at the times fixed by Congress in the statute and that the same character of term might be held at Mayaguez at a time to be specially designated by the district judge.

Dismissed for want of jurisdiction.

WILLIAM McKAY (Substituted for M Kalyton) et al., Plffs. in Err.,
v.
AGNES KALYTON, by Louise Kalyton, E Guardian *ad Litem*.

(See S. C. Reporter's ed. 458–470.)

Error to state court—Federal question—when raised in time.

1. A claim of immunity from suit i the state court under the laws of the Unite States is in time to sustain a writ of erro from the Federal Supreme Court, thoug first claimed in a petition for rehearing i the state court, if necessarily involved, a pressly considered, and decided adversely b such court.

Courts—exclusive jurisdiction of Feder courts—disputes over Indian allotments.

2. State courts were not given jurisdic tion of controversies necessarily involvin a determination of the title, and, incident ally, of the right to the possession, of Indian allotments while the same were held i trust by the United States, by the pro vision of the act of August 15, 1894 (28 Stat. at L. 286, chap. 290), delegating to th Federal circuit courts the power to de termine such questions, since the purpos of that act to continue the exclusive Fed eral control over disputes concerning allot ments which, prior to that act, could only have been decided by the Secretary of th Interior, is manifested by its provision tha a judgment or decree in any such contro versy shall be certified by the court to th Secretary of the Interior, and by the pro vision of the act of February 6, 1901 (31 Stat. at L. 760, chap. 217), that in such suits "the parties thereto shall be the claim ant as plaintiff and the United States a party defendant."

[No. 181.]

Argued January 25, 1907. Decided Febru ary 25, 1907.

IN ERROR to the Supreme Court of th State of Oregon to review a judgment which, reversing a judgment of the Circui Court of Umatilla County, in that state awarded the possession of an Indian allot

NOTE.—On the general subject of writ of error from the United States Supreme Court to state courts—see notes to Mar tin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 334; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On how and when questions must be raised and decided in a state court in or der to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On state jurisdiction over lands of the United States within the state—see note to Barrett v. Palmer, 17 L.R.A. 728.

ment to the appellant. Reversed and remanded for further proceedings.

See same case below, 45 Or. 116, 74 Pac. 491; on rehearing, 45 Or. 127, 78 Pac. 332.

Statement by Mr. Justice White:

This suit was commenced in the circuit court of Umatilla county, Oregon, by the filing of a complaint in the name of Agnes Kalyton, suing by her mother, Louise Kalyton, as guardian *ad litem*. Mary Kalyton and six other persons were made defendants, one such (Charles Wilkins) being sued as the acting United States Indian agent at the Umatilla reservation.

It was alleged in substance as follows: By virtue of an act of Congress approved March 3, 1885 (23 Stat. at L. 340, chap. [459] 319), and the amendments *thereto, a tract of land in the Umatilla Indian reservation was duly allotted on April 21, 1891, to one Joe Kalyton, a member of the Cayuse tribe, residing on said reservation. It was alleged that in or about the year 1893 Joe Kalyton, the allottee, in accordance with the customs of the Cayuse tribe, married Louise ———, an Indian woman of that tribe, and the plaintiff, Agnes Kalyton, was issue of the marriage. In 1898 Joe Kalyton died intestate, leaving the plaintiff as his sole heir, and, under the laws of Oregon and the provisions of the act of Congress referred to, she became entitled to the land allotted to her father, and to the possession and enjoyment thereof. It was charged that Mary Kalyton and four of the defendants, all insolvent, claiming to be the heirs of the deceased, had taken and held possession of the land in question, which had a rental value of $274.75 per annum. It was alleged that one of the defendants, named Glasscock, claimed to have some interest in the land, and was confederating with the other defendants, who were wrongfully alleging themselves to be the heirs of Joe Kalyton, with the object of depriving plaintiff of the use of the land and the enjoyment of the rents and profits thereof. Averring that, under the rules and regulations of the Department of the Interior, in order that plaintiff might obtain the use and enjoyment of the land, it was requisite that her status as legal heir of the deceased should be adjudged by a court of competent jurisdiction, the court was asked to so decree and to perpetually restrain the defendants from interfering with her possession and use of the land. General relief was also prayed.

An answer was filed on behalf of the defendant Mary Kalyton. It was therein denied in substance that there had been a marriage between Joe and Louise Kalyton, and that the plaintiff was their child, and, averring that Joe Kalyton was a resident and citizen of Oregon and had died intestate, unmarried, and without any lineal descendant, it was alleged that the defendant, as the sister of Joe Kalyton, was his sole heir, and as such was the owner of, and entitled to the possession *of, the land in con- [460] troversy and to its enjoyment. A decree was prayed quieting her alleged title.

The others of the defendants, who were alleged to be confederating with Mary Kalyton, filed a disclaimer of any interest in the lands in controversy. The cause was heard by the court. Deciding that, if Joe Kalyton and Louise Kalyton had been married according to the custom of the Indians of the Cayuse tribe, such marriage would have been void, and that there had been no marriage between the parties, because none had been solemnized in accordance with the laws of the state of Oregon, the plaintiff was held to be an illegitimate child of the deceased, and to have no right, title, or interest in or to the lands in question, and a decree was entered in favor of the defendant Mary Kalyton.

The cause was appealed to the supreme court of the state of Oregon. That court, having found that Joe and Louise Kalyton were married according to the custom and usage of the Indian tribe to which they belonged, and that the plaintiff was the issue of such marriage, held, in view of the legislation of Congress, "that the plaintiff herein was born in lawful wedlock and is the sole heir of Joe Kalyton, deceased, and, as such, entitled to the possession of the real property of which he died seised." The decree of the trial court was, therefore, reversed, and a decree was entered in favor of the appellant in accordance with the opinion. A motion for a rehearing was made and overruled. This motion was based upon the contention that the court had erred in taking jurisdiction of the cause, for the reason that it involved the title and right to possession of public land held in trust by the United States for the benefit of Indians, and hence the United States was a necessary party defendant, and not subject to the jurisdiction of a state court. We say the petition for a rehearing was based upon the grounds just stated, although the petition is not in the record, because it is manifest that such was the case from the opinion which the court delivered in refusing the rehearing. 45 Or. 116, 74 Pac. 491, 78 Pac. 332. In that opinion *the question [461] whether the matter was one of exclusive Federal cognizance was elaborately considered, and it was decided that it was not, because a decree as to the right of possession would not interfere with the title or trust interest of the United States. And the court declared that, for the purposes of determining its jurisdiction, it was wholly irrelevant to consider whether it would have

the power to enforce its decree for the possession of the allotted land against the officer of the United States in charge of the Indian reservation in case that official should decline to give effect to the decree for possession.

The case was then brought to this court.

Mr. Samuel Herrick argued the cause for plaintiffs in error. Messrs. T. G. Hailey and R. J. Slater filed a brief for plaintiffs in error:

The only authority for such suit as this is the act of Congress of August 15, 1894, 28 Stat. at L. 305, chap. 290, which confers jurisdiction therefor upon the United States circuit courts, and such jurisdiction is exclusive.

Patawa v. United States, 132 Fed. 894; Parr v. United States, 132 Fed. 1004; Smith v. United States, 142 Fed. 226; Wisconsin R. Co. v. Price County, 133 U. S. 496-504, 33 L. ed. 687-690, 10 Sup. Ct. Rep. 341.

Prior to the passage of the act of August 15, 1894, supra, the authority to determine the rights of claimants to allotments upon the Umatilla Indian reservation was vested in the Secretary of the Interior.

Mosgrove v. Harper, 33 Or. 252, 54 Pac. 187.

Mr. William Frye White argued the cause, and, with Mr. John B. Cotton, filed a brief for defendant in error:

This court has no jurisdiction to review this cause on writ of error because no title, right, or immunity specially set up or claimed under any Federal statute has been denied.

Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 182, 50 L. ed. 143, 26 Sup. Ct. Rep. 41; Mallett v. North Carolina, 181 U. S. 592, 45 L. ed. 1017, 21 Sup. Ct. Rep. 730; Loeber v. Schroeder, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; McMillen v. Ferrum Min. Co. 197 U. S. 347, 49 L. ed. 787, 25 Sup. Ct. Rep. 533.

The jurisdiction exercised by state courts over citizens of the state in matters involving the right to possession of lands entered under the homestead laws is precisely the same as that exercised over Indians claiming the right to possession of allotments held in trust by the United States. In both cases before final patent is issued the title to the property is in the United States, and there is only a right of entry to the possession in one or the other of the claiming parties. That the state courts have exercised jurisdiction over these matters is well known.

Kitcherside v. Myers, 10 Or. 21.

An unlawful interference with the possession of a person entitled to possession of land to which the United States hold title will be prevented by the state courts.

Jackson v. Jackson, 17 Or. 110, 19 Pac. 847; Hindman v. Rizor, 21 Or. 112, 27 Pac. 13; Allen v. Dunlap, 24 Or. 229, 33 Pac. 675; Bishop v. Baisley, 28 Or. 119, 41 Pac. 936; Pacific Livestock Co. v. Gentry, 38 Or. 275, 61 Pac. 422, 65 Pac. 597; Browning v. Lewis, 39 Or. 11, 64 Pac. 304; Moore v. Halliday, 43 Or. 243, 99 Am. St. Rep. 724, 72 Pac. 801; Bird v. Winver, 24 Wash. 269, 64 Pac. 178; Swartzel v. Rogers, 3 Kan. 374; Felix v. Patrick, 145 U. S. 317, 332, 36 L. ed. 719, 726, 12 Sup. Ct. Rep. 862; Wa-La-Note-Tke-Tynin v. Carter, 6 Idaho, 85, 53 Pac. 106.

The state courts also have jurisdiction to determine who are the heirs of deceased persons; this jurisdiction cannot be questioned.

Kalyton v. Kalyton, 45 Or. 116, 74 Pac. 491, 78 Pac. 332.

The state courts have repeatedly exercised jurisdiction in cases involving rights to allotted lands.

Mosgrove v. Harper, 33 Or. 252, 54 Pac. 187; Carter v. Wann, 6 Idaho, 556, 57 Pac. 314; McBean v. McBean, 37 Or. 195, 61 Pac. 418; Wa-La-Note-Tke-Tynin v. Carter, supra.

A tribal Indian, whether he be a citizen or not, may maintain actions in the state courts to redress any wrong committed against either himself or his property.

Selkirk v. Stephens, 72 Minn. 335, 40 L.R.A. 759, 75 N. W. 386; Swartzel v. Rogers, supra; Wiley v. Keokuk, 6 Kan. 94; Ingraham v. Ward, 56 Kan. 550, 44 Pac. 14; Whirlwind v. Von der Ahe, 67 Mo. App. 628; Felix v. Patrick, 36 Fed. 457; Y-ta-tah-wah v. Rebock, 105 Fed. 257; Felix v. Patrick, 145 U. S. 317, 36 L. ed. 719, 12 Sup. Ct. Rep. 862; Bem-way-bin-ness v. Eshelby, 87 Minn. 108, 91 N. W. 291; 16 Am. & Eng. Enc. Law, p. 216; Stacey v. La Belle, 99 Wis. 520, 41 L.R.A. 419, 67 Am. St. Rep. 879, 75 N. W. 60; Missouri P. R. Co. v. Cullers, 81 Tex. 382, 13 L.R.A. 542, 17 S. W. 19.

State courts have jurisdiction over controversies respecting land lying within the state and belonging to, or claimed by, Indians.

22 Cyc. Law & Proc. p. 149; Wright v. Marsh, 2 G. Greene, 94; Telford v. Barney, 1 G. Greene, 575; Bem-way-bin-ness v. Eshelby, 87 Minn. 108, 91 N. W. 291; Bird v. Winyer, 24 Wash. 269, 64 Pac. 178.

In cases where jurisdiction depends upon the subject-matter of the controversy, the weight of authority seems to favor the right of an Indian to a standing in both the

United States court and the courts of the state.

10 Am. & Eng. Enc. Law, p. 441.

A state court can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties of the United States, where it is not excluded by express provisions, or by incompatibility in its exercise arising from the nature of the particular case.

Bailey, Jurisdiction, § 93; Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833.

Statutes which merely give jurisdiction affirmatively to one court do not oust that already existing in another.

Black, Constr. & Interpretation of Laws, p. 123.

The United States was not a necessary party defendant.

Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, 48 L. ed. 1039, 24 Sup. Ct. Rep. 676.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

It is contended that we are without jurisdiction because no title, right, or immunity was specially set up or claimed under any Federal statute and denied. But, leaving aside for a moment all other considerations, it is plain that the defendant below set up a claim of immunity from suit in the state court under the laws of the United States, and that the right to the immunity so asserted under an act or acts of Congress was expressly considered and denied by the state court. True it is that the immunity which was asserted was first claimed in a petition for rehearing; but, as the question was raised, was necessarily involved, and was considered and decided adversely by the state court, there is jurisdiction. Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390.

[465] *At the threshold lies the question raised and decided below relative to the jurisdiction of the state court over the controversy.

Allotments of land in severalty to Indians residing upon the Umatilla reservation, in Oregon, were authorized by the act of Congress of March 3, 1885, chap. 319 (23 Stat. at L. 340), which contained the following provision:

"The President shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the state of Oregon, and that, at the expiration of said period, the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust, and free of all charge or encumbrance whatsoever. *Provided*, That the law of alienation and descent in force in the state of Oregon shall apply thereto after patents have been executed, except as herein otherwise provided."

The allotment to Joe Kalyton was made on April 21, 1891. Before that allotment, Congress, on February 8, 1887 (chap. 119, 24 Stat. at L. 388), passed what is known as the general allotment act. By that act, as said in United States v. Rickert, 188 U. S. 432, 435, 47 L. ed. 532, 535, 23 Sup. Ct. Rep. 478, provision was made for the allotment of lands in severalty to Indians on the various reservations, and for extending the protection of the laws of the United States and the territories over the Indians. To that end the President was authorized, whenever, in his opinion, a reservation or any part thereof was advantageous for agriculture and grazing purposes, to cause it, or any part thereof, to be surveyed, or resurveyed, if necessary, and to allot the lands in the reservation in severalty to any Indian located thereon, in certain quantities specified in the statute, the allotments to be made by special agents appointed for that purpose, and by the *agents in charge of the special reservations on which the allotments were made. In one of the provisos of the 1st section of the act it was declared—

"That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act."

A provision of like nature to that heretofore excerpted from the act of March 3, 1885, was embodied in § 5 of the general allotment act of 1887, reading as follows (24 Stat. at L. 389, chap. 119):

"Sec. 5. That, upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare, that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the state or territory where such land is located, and that, at the expiration of said period, the United States will convey the same by patent to said Indian, or his heirs, as afore-

said, in fee, discharged of said trust, and free of all charge or encumbrance whatsoever: *Provided*, That the President of the United States may, in any case, in his discretion, extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided."

[466] *The supervisory power possessed by the United States over allotted lands while the title remains in the United States was pointed out in the opinion in United States v. Rickert, supra, a case which came to this court upon questions certified from a circuit court of appeals. The suit was instituted under the direction of the Attorney General of the United States for the purpose of restraining the collection of taxes alleged to be due the county of Roberts, South Dakota, in respect of certain permanent improvements on, and personal property used in the cultivation of, lands in that county occupied by members of the Sisseton band of Sioux Indians in the state of South Dakota. The lands referred to had been allotted under the provisions of an agreement made in 1889, ratified by an act of Congress in 1891 [26 Stat. at L. 1036, chap. 543], and more particularly under § 5 of the act of February 8, 1887, heretofore referred to. Discussing the interest which the Indians primarily acquired in the allotted land, it was concluded that "the United States retained the legal title, giving the Indian allottee a paper or writing improperly called a patent, showing that, at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee. . . . These lands are held by the United States in execution of its plans relating to the Indians—without any right in the Indians to make contracts in reference to them, or to do more than to occupy and cultivate them—until a regular patent conveying the fee was issued to the several allottees." And the court approvingly quoted the following passage from an opinion of the Attorney General, delivered in 1888, advising that allotments of lands provided for in an act of Congress were exempt from state or territorial taxation, "that the lands covered by the act are held by the United States for the period of twenty-five years in trust for the Indians, such trust being an agency for the exercise of a Federal power, and therefore outside the province of state or territorial authority." 19 Ops. Atty. Gen. 169.

It was decided, in view of the object to be accomplished* by allotting Indian lands in[467] severalty, that it was not within the power of a state to tax either the permanent improvements made on allotted lands or the personal property consisting of cattle, horses, and other property of like character which might be furnished to Indians for use upon such land. And, answering a question as to whether the United States had such an interest in the controversy or in its subjects as entitled it to maintain the suit, the court declared (p. 444, 188 U. S., p. 538, 47 L. ed., p. 483, 23 Sup. Ct. Rep.) that no argument to establish that proposition was necessary. Nor are the principles which were thus announced as to the nature and character of an allotment of Indian lands and the interest of the United States therein as trustee before the expiration of the period for their final disposition in any way affected by the decision in Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506, dealing with the subjection of allottee Indians in their personal conduct to the police regulations of the state of which they had become citizens.

The present suit was commenced in 1899. At that time there was in force an act approved August 15, 1894, chap. 290 (28 Stat. at L. 286), in which it was provided *inter alia*, as follows (p. 305):

"That all persons who are, in whole or in part, of Indian blood or descent, who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit court of the United States."

And it was provided that "the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him."

*Considering the act of 1894 in Hy-Yu-[468] Tse-Mil-Kin v. Smith, 194 U. S. 413, 48 L. ed. 1045, 24 Sup. Ct. Rep. 681, the court said:

"Under this statute there is no provision rendering it necessary, in a private litigation between two claimants for an allotment, to make the United States a party. The statute itself provides that the judgment or decree of the court, upon being properly certi-

ted to the Secretary of the Interior, is to have the same effect as if the allotment had been allowed and approved by the Secretary. This provision assumes that an action may be maintained without the government being made a party, and provides for the filing of a certificate of the judgment and its effect; and the government thereby, in substance and effect, consents to be bound by the judgment, and to issue a patent in accordance therewith."

The Rickert Case settled that, as the necessary result of the legislation of Congress, the United States retained such control over allotments as was essential to cause the allotted land to inure during the period in which the land was to be held in trust "for the sole use and benefit of the allottees." As observed in the Smith Case, 194 U. S. 408, 48 L. ed. 1043, 24 Sup. Ct. Rep. 676, prior to the passage of the act of 1894, "the sole authority for settling disputes concerning allotments resided in the Secretary of the Interior." This being settled, it follows that, prior to the act of Congress of 1894, controversies necessarily involving a determination of the title, and, incidentally, of the right to the possession, of Indian allotments while the same were held in trust by the United States, were not primarily cognizable by any court, either state or Federal. It results, therefore, that the act of Congress of 1894, which delegated to the courts of the United States the power to determine such questions, cannot be construed as having conferred upon the state courts the authority to pass upon Federal questions over which, prior to the act of 1894, no court had any authority. The purpose of the act of 1894 to continue the exclusive Federal control over the subject is manifested by the provision of that act which commands that a judgment or decree rendered *in any such controversy shall be certified by the court to the Secretary of the Interior. By this provision, as pointed out in the Smith Case, supra, the United States consented to submit its interest in the trust estate and the future control of its conduct concerning the same to the result of the decree of the courts of the United States,—a power which such courts could alone exercise by virtue of the consent given by the act. The subsequent legislation of Congress, instead of exhibiting a departure from this policy, confirms it. By the amendments to the act of 1894, approved February 6, 1901, chap. 217 (31 Stat. at L. 760) it is expressly required that in suits authorized to be brought in the circuit courts of the United States respecting allotments of Indian lands, "the parties thereto shall be the claimant as plaintiff and the United States as party defendant." Nothing could more clearly demonstrate than does this requirement, the conception of Congress that the United States continued, as trustee, to have an active interest in the proper disposition of allotted Indian lands, and the necessity of its being made a party to controversies concerning the same, for the purpose of securing a harmonious and uniform operation of the legislation of Congress on the subject.

The suggestion made in argument that the controversy here presented involved the mere possession, and not the title, to the allotted land, is without merit, since the right of possession asserted of necessity is dependent upon the existence of an equitable title in the claimant under the legislation of Congress to the ownership of the allotted lands. Indeed, that such was the case plainly appears from the excerpt which we have made from the concluding portion of the opinion of the supreme court of Oregon.

Because, from the considerations previously stated, we are constrained to the conclusion that the court below was without jurisdiction to entertain the controversy, we must not be considered as intimating an opinion that we deem that the principles applied by the court in disposing of the merits of the case were erroneous.

*The judgment of the Supreme Court of [470] Oregon is reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion.

The CHIEF JUSTICE, Mr. Justice Brewer, and Mr. Justice Peckham dissent.

VICENTE SERRA and Maria Obleno, Plffs. in Err.,
v.
ADRIANO MORTIGA.

(See S. C. Reporter's ed. 470–477.)

Constitutional law—due process of law on criminal appeal—Bill of Rights in Philippine Islands.

The refusal of the supreme court of the Philippine Islands, on an appeal in a criminal case, to entertain an objection to the sufficiency of the complaint, because such objection was not raised before final judgment in the trial court, does not amount

NOTE.—On the constitutional rights of a person charged with a felony—see note to Gore v. State, 5 L.R.A. 833.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

to a conviction of the accused without informing them of the nature and character of the offense charged, or to a conviction without due process of law, in violation of the Bill of Rights enacted by Congress for the Philippine Islands in the act of July 1, 1902 (32 Stat. at L. 691, 692, chap. 1369, U. S. Comp. Stat. Supp. 1905, p. 391), although that court, on appeal, has power to re-examine both the law and the facts, where, as a necessary consequence of the facts found, the testimony offered at the trial, without objection or exception in any form, established every ingredient of the crime.

[No. 202.]

Submitted February 1, 1907. Decided February 25, 1907.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed, with a modification of the sentence imposed, a conviction of the crime of adultery in the Court of First Instance of Albay, Eighth Judicial District. Affirmed.

The facts are stated in the opinion.

Messrs. Aldis B. Browne, Alexander Britton, and Maurice Kelly submitted the cause for plaintiffs in error:

Conviction on a complaint so defective as this violates the fundamental constitutional guaranties which this court has held in Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797, apply to the Philippine Islands, and which were expressly enacted as a Bill of Rights in the Philippine civil government act of July 1, 1902 (32 Stat. at L. 691, 692, chap. 1369, U. S. Comp. Stat. Supp. 1905, p. 391).

1 Bishop, Crim. Proc. 4th ed. § 98a, 77–88; United States v. Cruikshank, 92 U. S. 542, 557, 23 L. ed. 588, 593; The Hoppet v. United States, 7 Cranch, 389, 394, 3 L. ed. 380, 382.

Defects in substance, such as exist in this complaint, are not cured by statute of jeofails.

United States v. Carll, 105 U. S. 611, 26 L. ed. 1135; Markham v. United States, 160 U. S. 319, 40 L. ed. 441, 16 Sup. Ct. Rep. 288; United States v. Morrissey, 32 Fed. 153.

Nor are defects of this nature cured by verdict or by judgment.

The Hoppet v. United States, supra; United States v. Hess, 124 U. S. 483, 488, 31 L. ed. 516, 518, 8 Sup. Ct. Rep. 571.

And objections based on such defects may first be raised on appeal or writ of error.

Cochran v. United States, 157 U. S. 286, 39 L. ed. 704, 15 Sup. Ct. Rep. 628; United States v. Cook, 17 Wall. 168, 174, 21 L. ed. 538, 539; Dunbar v. United States, 156 U. S. 185, 192, 39 L. ed. 390, 393, 15 Sup. Ct. Rep. 325.

Especially is this true in the supreme court of the Philippine Islands, where, on appeal, the case is opened up *de novo*, with full power to enlarge the judgment and increase the punishment, as was done in the case at bar.

Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797; Trono v. United States, 199 U. S. 521, 534, 50 L. ed. 292, 297, 26 Sup. Ct. Rep. 121.

No appearance for defendant in error.

Mr. Justice White delivered the opinion of the court:

Articles 433 and 434, found in chapter 1 of title 9 of the Penal Code of the Philippine Islands, define and punish the crime of adultery. The articles referred to are in the margin.†

*It is conceded at bar that, under the Philippine law, the offense of adultery, as defined by the articles in question, is classed as a private offense, and must be prosecuted, not on information by the public prosecutor, but by complaint on behalf of an injured party. In the court of first instance of Albay, eighth judicial district, Philippine Islands, Adriano Mortiga, the defendant in error, as the husband of Maria Obleno, filed a complaint charging her with adultery committed with Vicente Serra, the other plaintiff in error, who was also charged. The complaint is in the margin.‡ [472]

*The defendants were arraigned, pleaded not guilty, were tried by the court without a jury, and were convicted. The court stated its reasons in a written opinion, analyzing the testimony, and pointing out that all the essential ingredients of the crime of adultery, as defined by the articles of the [473]

†Art. 433. Adultery shall be punished with the penalty of *prisión correccional* in its medium and maximum degrees.

Adultery is committed by the married woman who lies with a man not her husband, and by him who lies with her *knowing that she is married*, although the marriage be afterwards declared void.

Art. 434. No penalty shall be imposed for the crime of adultery except upon the complaint of the aggrieved husband.

The latter can enter a complaint against both guilty parties, if alive, and never, if he has consented to the adultery or pardoned either of the culprits.

‡The United States of America,
Philippine Islands, Eighth Judicial District:
In the Court of First Instance of Albay.
The United States and Macario Merendas, in Behalf of Adriano Mortiga,
v.
Vicente Serra and Maria Obleno.
The undersigned, a practising attorney, in

enal Code already referred to, were shown have been committed. The accused were ntenced to pay one half of the costs and imprisonment for two years, four months, nd one day. The record does not disclose at any objection was taken to the suffiency of the complaint before the trial. ideed, it does not appear that, by objecon in any form, directly or indirectly, was ny question raised in the trial court conrning the sufficiency of the complaint. An ppeal was taken to the supreme court of e Philippine Islands. In that court error as assigned on the ground, first, that "the omplaint is null and void because it lacks he essential requisite provided by law;" nd, second and third, because it did not ppear from the proof that guilt had been stablished beyond a reasonable doubt. The onviction was affirmed. The assignment f error which was based on the contention at the conviction was erroneous because e complaint did not sufficiently state the essential ingredients of the offense charged as thus disposed of by the court in its pinion: "The objections to the complaint, ased upon an insufficient statement of the acts constituting the offense, cannot be conidered here, because they were not preented in the court below. United States v. Sarabia, 3 Off. Gaz. No. 29."

The assignments based on the insufficiency of the proof to show guilt beyond a reasonable doubt were disposed of by an analysis of the evidence, which the court deemed ed to the conclusion that all the statutory lements of the crime were proven beyond reasonable doubt. An application for a ehearing, styled an exception, was made, n which it was insisted that it was the uty of the court to consider the assignent based on the insufficiency of the comlaint, since not to do so would be a denial of ue process of law. The rehearing *was reised, and the sentence imposed below was creased to three years, six months, and renty-nine days, on the ground that this as the minimum punishment provided for e offense.

The errors assigned on this writ of error, d the propositions urged at bar to support them, are confined to the assertion that the refusal of the court below to consider the assignment of error concerning the insufficiency of the complaint amounted to a conviction of the accused without informing them of the nature and character of the offense with which they were charged, and was, besides, equivalent to a conviction without due process of law. It is settled that, by virtue of the Bill of Rights enacted by Congress for the Philippine Islands (32 Stat. at L. 691, 692, chap. 1369, U. S. Comp. Stat. Supp. 1905, p. 391), that guaranties equivalent to the due process and equal protection of the law clause of the 14th Amendment, the twice in jeopardy clause of the 5th Amendment, and the substantial guaranties of the 6th Amendment, exclusive of the right to trial by jury, were extended to the Philippine Islands. It is further settled that the guaranties which Congress has extended to the Philippine Islands are to be interpreted as meaning what the like provisions meant at the time when Congress made them applicable to the Philippine Islands. Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797.

For the purpose, therefore, of passing on the errors assigned, we must test the correctness of the action of the court below by substantially the same criteria which we would apply to a case arising in the United States and controlled by the Bill of Rights expressed in the Amendments to the Constitution of the United States. Turning to the text of the articles of the Philippine Penal Code upon which the prosecution was based, it will be seen that an essential ingredient of the crime of adultery, as therein defined, is knowledge on the part of the man charged of the fact that the woman with whom the adultery was committed was a married woman. Turning to the complaint upon which the prosecution was begun, it will be at once seen that it was deficient, because it did not specify the place where the crime *was committed, nor does [475] it expressly state that Vicente Serra, the accused man, knew that Maria Obleno, the woman accused, was, at the time of the guilty cohabitation, a married woman. It

half of Adriano Mortiga, the husband of aria Obleno, accuses Vicente Serra and e said Maria Obleno of the crime of adulry, committed as follows:

That on or about the year 1899, and up the present time, the accused, being both arried, maliciously, criminally, and illelly lived as husband and wife, and conued living together up to the present ne, openly and notoriously, from which gal cohabitation two children are the is-, named Elias and José Isabelo, without consent of the prosecuting witness, and contrary to the statute in such cases made and provided.

(Signed) Macario Mercades,
Attorney at Law.
(Signed) Adriano Mortiga.

Albay, February 24, 1904.

Sworn and subscribed to before me this 24th day of February, 1904.

(Signed) F. Samson, Clerk.

Witnesses: Adriano Mortiga.
Bernardo Mortiga.
Eulalio Mortiga.
Placido Solano.
Casimira Marias.

results that there were deficiencies in the complaint which, if raised in any form in the trial court before judgment, would have required the trial court to hold that the complaint was inadequate. But the question for decision is not whether the complaint, which was thus deficient, could have been sustained, in view of the constitutional guaranties, if a challenge as to its sufficiency had been presented in any form to the trial court before final judgment, but whether, when no such challenge was made in the trial court before judgment, a denial of the guaranties of the statutory Bill of Rights arose from the action of the appellate court in refusing to entertain an objection to the sufficiency of the complaint because no such ground was urged in the trial court. Thus reducing the case to the real issue enables us to put out of view a number of decisions of this court referred to in the margin.† as well as many decided cases of state courts referred to in the brief of counsel, because they are irrelevant, since all the former, and, if not all, certainly all of the latter, concern the soundness of objections made in the trial court, by the accused, to the sufficiency of indictments or informations.

In Ex parte Parks, 93 U. S. 18, 23 L. ed. 787, the case was this: The petitioner, Parks, applied to this court for a writ of habeas corpus. He had been convicted and sentenced for the crime of forgery in a district court of the United States. The ground relied upon for release was that the indictment stated no offense. The writ was discharged. Speaking through Mr. Justice Bradley, it was said:

"But the question whether it was or was not a crime within the statute was one which the district court was competent to decide. It was before the court and within its jurisdiction.

. . . . . .

[476] *"Whether an act charged in an indictment is or is not a crime by the law which the court administers [in this case the statute law of the United States] is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy, after final judgment, unless a writ of error lies to some superior court, and no such writ lies in this case."

In United States v. Ball, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192, an attempt was made to prosecute for the second time one Millard H. Ball, who had been acquitted upon a defective indictment, which had been held bad upon the proceedings in error prosecuted by others, who had been convicted and who had been jointly prosecuted with Ball. Reversing the court below, the plea of *autrefois acquit*, relied on by Ball, was held good. It was pointed out that the acquittal of Ball upon the defective indictment was not void, and, therefore, the acquittal on such an indictment was a bar. This case was approvingly cited in Kepner v. United States, 195 U. S. 100, 129, 49 L. ed. 114, 124, 24 Sup. Ct. Rep. 797. It being, then, settled that the conviction on a defective indictment is not void, but presents a mere question of error, to be reviewed according to law, the proposition to be decided is this: Did the court below err in holding that it would not consider whether the trial court erred because it had not decided the complaint to be bad, when no question concerning its sufficiency was, either directly or indirectly, made in that court? Thus to understand the proposition is to refute it. For it cannot be that the court below was wrong in refusing to consider whether the trial court erred in a matter which that court was not called upon to consider and did not decide. Undoubtedly, if a judgment of acquittal had resulted, it would have barred a further prosecution, despite the defective indictment. Kepner v. United States, supra.

But it is said the peculiar powers of the supreme court in *the Philippine Islands* take this case out of the general rule, since in that court on appeal a trial de novo is had even in a criminal case. But, as pointed out in the Kepner Case, whilst that court on appeal has power to re-examine the law and facts, it does so on the record, and does not retry in the fullest sense. Indeed, when the power of the court below to review the facts is considered, that power, instead of sustaining, refutes the proposition relied on. Thus the proposition is that the court should have reversed the conviction because of the contention as to the insufficiency of the complaint, when no such question had been raised before final judgment in the trial court, and when, as a necessary consequence of the facts found by the court, the testimony offered at the trial without objection or question in any form established every essential ingredient of the crime. In other words, the contention is that reversal should have been ordered for

†United States v. Cook, 17 Wall. 168, 174, 21 L. ed. 538, 539; United States v. Carll, 105 U. S. 611, 26 L. ed. 1135; Dunbar v. United States, 156 U. S. 185, 39 L. ed. 390, 15 Sup. Ct. Rep. 325; Cochran v. United States, 157 U. S. 286, 39 L. ed. 704, 15 Sup. Ct. Rep. 628; Markham v. United States, 160 U. S. 319, 40 L. ed. 441, 16 Sup. Ct. Rep. 288.

not committed, and when the ex- injury was impossible to be con- view of the opinion which the med on the facts, in the exercise ithority vested in it on that sub- rmed.

itice Harlan dissents.

F. IGLEHART and Mary I. Polk, Appts.,

v.

ARD IGLEHART, Executor of the Vill and Testament of Annie E. I. s, Deceased.

S. C. Reporter's ed. 478–488.)

–repeal by implication—general cial legislation.

e trusts for the perpetual mainte- cemetery lots and of monuments r structures erected thereon, ex- uthorized by D. C. Code, § 669, are dden because § 1023 of such Code, r perpetuities and restraints upon , does not in terms make an ex- a favor of the trusts provided for rlier section.

f laws—perpetuities—comity.

testamentary trust in favor of the d Cemetery Company of Brooklyn, by the laws of New York, for the maintenance of a cemetery lot and t, will, on principles of comity, be the courts of the District of Co- although the testatrix was domi- the District at the time of her d the funds to be applied to such se from property owned by her in ict at that time, since, under D. § 669, grants on similar trusts are to domestic corporations.

costs in suit to construe will.

sts on the affirmance by the Fed- eme Court of a decree of the court s of the District of Columbia which a decree of the supreme court of ict in a suit to construe a will, up- ll the disputed provisions, will be ainst the unsuccessful appellants, e executor did not appeal from the decree nor from the decree of af- by the court of appeals.

[No. 158.]

anuary 15, 16, 1907. Decided Feb- ruary 25, 1907.

-On repeal of statute by implica- notes to State v. Massey, 4 L.R.A. st Nat. Bank v. Weidenbeck, 38 136; and United States v. 356 Cad- 'obacco, 20 L. ed. U. S. 235.

flict of laws as to wills—see note y v. Wilson, 2 L.R.A.(N.S.) 408.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District in a suit to construe a will, upholding all the disputed provisions. Affirmed.

See same case below, 26 App. D. C. 209.

Statement by Mr. Justice Peckham:

This is an appeal from a decree of the court of appeals of the District of Columbia, affirming a decree of the supreme court of the District construing a will. 26 App. D. C. 209. The bill was filed by the executor of the will of Annie E. I. Andrews, who was a resident of the District at the time of her death, and whose will was there duly admitted to probate March 28, 1904. The supreme court held that all disputed provisions of the will were valid, and entered a decree to that effect, which was affirmed by the court of appeals, on an appeal taken by these appellants separately from the other parties defendant, by leave of the supreme court of the District. All necessary persons were made party to the suit. The deceased left an estate of about $10,000, of which $3,000 consisted of real estate in the city of Washington.

The disputed portions of the will are clauses 1, 10, and 12, and they are set forth in the margin.†

*J. Howard Iglehart, the executor, is the [479] son of a deceased brother of the testatrix (mentioned in the first clause of the will), and the two appellants are, respectively, her brother and sister.

The executor, in his bill, alleged his readiness to distribute the estate as directed by the will, but he said that some of the heirs at law disputed the validity of some of its provisions, and hence his appeal to the court for a construction of those clauses.

The grounds of the dispute are stated to

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†First, I give, devise, and bequeath unto the Greenwood Cemetery Company, of Brooklyn, New York, as trustees, my real property, consisting of a house and lot, known and designated as house No. 88 M. street, northwest, in the city of Washington, District of Columbia, to be held by them in trust for and to the use of my brother, J. H. Iglehart, and his wife, Jennie Iglehart, of Baltimore, Maryland, during their life or the life of either of them; provided, they shall keep the said property in repair and pay the taxes thereon. At their death, or upon their failure to comply with the condition to keep said property in repair and pay the taxes thereon, it is my will and desire that the said property shall be sold, and the proceeds of such sale shall be invested in United States securities, the interest or income from such said investment to be used by the Greenwood Cemetery Company, aforesaid, as trustees, for the purpose

be that the trusts created in the 1st and 12th clauses of the will are void, as in violation of the statute of the District of Columbia prohibiting perpetuities and restraints upon alienation. D. C. Code, § 1023 [31 Stat. at L. 1351, chap. 854]. The devise of the real estate is alleged to be void on that ground, as is also the residuary bequest to the cemetery company, while the [480]direction to erect a monument, *as provided in § 10 of the will, it is alleged, must fall with the destruction of the trust, as it is part of the general scheme of the will, and is inseparable from the trust provisions. The executor submitted the questions to the court and did not appeal from the original decree nor from the decree of affirmance by the court of appeals, and he now asks that this court should make proper provision for his protection and that of the estate, in regard to the costs involved by the contention between the defendant and the appellants.

Messrs. **Noel W. Barksdale** and **Andrew Wilson** argued the cause and filed a brief for appellants:

The validity of the bequest and devise is to be determined by the laws of the District of Columbia.

Jones v. Habersham, 107 U. S. 174-179, 27 L. ed. 401-403, 2 Sup. Ct. Rep. 336; Vidal v. Philadelphia, 2 How. 127, 11 L. ed. 205; Wheeler v. Smith, 9 How. 55, 13 L. ed. 44; McDonogh v. Murdoch, 15 How. 367, 14 L. ed. 732; Fontain v. Ravenel, 17 How. 369, 15 L. ed. 80; Perin v. Carey, 24 How. 465, 16 L. ed. 701; Loring v. Marsh, 6 Wall. 337, 18 L. ed. 802; United States v. Fox, 94 U. S. 315, 24 L. ed. 192; Kain v. Gibboney, 101 U. S. 362, 25 L. ed. 813; Russell v. Allen, 107 U. S. 163, 27 L. ed. 397, 2 Sup. Ct. Rep. 327; De Vaughn v. Hutchinson, 165 U. S. 566, 570, 41 L. ed. 827, 829, 17 Sup. Ct. Rep. 461; Ford v. Ford, 70 Wis. 19, 5 Am. St. Rep. 117, 33 N. W. 188; Fellows v. Miner, 119 Mass. 541; Handley v. Palmer, 43 C. C. A. 100, 103 Fed. 40; Parkhurst v. Roy, 7 Ont. App. Rep. 618; Penfield v. Tower, 1 N. D. 216, 46 N. W. 413; Whitney v. Dodge, 105 Cal. 192, 38 Pac. 636; Readman v. Ferguson, 13 App. D. C. 60.

Decisions to the contrary on this subject are confined to cases of foreign charities.

Hope v. Brewer, 136 N. Y. 126, 18 L.R.A. 458, 32 N. E. 558; Chamberlain v. Chamberlain, 43 N. Y. 424; Vansant v. Roberts, 3 Md. 119; Robb v. Washington & J. College, 103 App. Div. 327, 93 N. Y. Supp. 92; Congregational Unitarian Soc. v. Hale, 29 App. Div. 396, 51 N. Y. Supp. 704; Holland v. Alcock, 108 N. Y. 337, 2 Am. St. Rep. 429, 16 N. E. 305; Cross v. United States Trust Co. 131 N. Y. 330, 15 L.R.A. 606, 27 Am. St. Rep. 597, 30 N. E. 125.

The case cited by the court of appeals excepts from its broad sweep (a) bequests expressly prohibited by the law of the testator's domicil, or (b) in contravention of its public policy.

Chamberlain v. Chamberlain, 43 N. Y. 424. See also Re Huss, 126 N. Y. 537, 12 L.R.A. 620, 27 N. E. 784; Congregational Unitarian Soc. v. Hale, supra; Hill. Tr. § 454.

It is not for the court to say, where the language of a statute is clear, that it shall be so construed as to embrace other cases because no good reason can be assigned, or the court fails to see, why they were excluded from its provisions.

Denn ex dem. Scott v. Reid, 10 Pet. 524, 9 L. ed. 519.

The courts have no function of legislation, and simply seek to ascertain the will of the legislator; and no mere omission, no mere failure to provide for contingencies which it may seem wise to have specifically provided for, justifies any judicial addition to the letter of the statute.

United States v. Goldenberg, 168 U. S. 95, 102, 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3.

It is the duty of courts, in the interpretation of statutes, to declare the law as it is; and the interests of society are best subserved by a close adherence by courts to what they find to be the plain meaning, neither narrowing the application, on the one hand, nor extending the meaning, on the other, to meet cases not specified which may seem to be within the reason of the law.

Re Prime, 136 N. Y. 347, 18 L.R.A. 713, 32 N. E. 1091.

When Congress says "every estate," there

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of keeping the Andrews cemetery lot in perpetual good order and condition.

Tenth. It is my will, and I order and direct, that $5,000 be raised out of my estate, to be expended in erecting a suitable monument at the grave of my dearly beloved husband, E. L. Andrews, in Greenwood Cemetery, Brooklyn, New York.

Twelfth. It is my will, and I order and direct, that all the rest and residue of my estate, real, personal, and mixed, wheresoever it may be found, and of whatsoever it may consist, shall be converted into cash, and said cash invested in United States securities, the interest and income from such securities shall be used by the said Greenwood Cemetery Company, of Brooklyn, New York, as trustees, in addition to and together with the trust fund hereinbefore mentioned in clause 1 of this my last will, for the purposes and to the benefit of beautifying and keeping the aforesaid Andrews cemetery lot in perpetual good order and condition.

ver in the courts, if they correctly the statute, to except from its ı estates devised to foreign cor-ı, thereby substituting the word for "every." If Congress had in-hat this statute should not apply n corporations it would have said instead of doing this it has said and this word of universality em-oth domestic and foreign corpora-he case at bar is not unlike United Trans-Missouri Freight Asso. 166 , 41 L. ed. 1007, 17 Sup. Ct. Rep. 540. can be no better indication of the of Congress toward foreign ceme-orations taking property for per-ses than the positive and express ry clause in § 1023 of the Code; rule of law is that whatever the ondemns or prohibits is against the licy of the state.

v. Drew Theological Seminary, 95); United States v. Trans-Missouri sso. 166 U. S. 340, 41 L. ed. 1027, Ct. Rep. 540; St. Paul, M. & M. Phelps, 137 U. S. 536, 34 L. ed. 769, Ct. Rep. 168; Hadden v. The Col-(adden v. Barney) 5 Wall. 111, 18 9.

urt attempts to gauge the public the District of Columbia towards orporations by the statute enacted rganization and management of its corporations. Such standard is based on false reckoning, but it is d by the courts, hazardous and in its results, and is not the law. poel v. Gorman, 140 N. Y. 563, 24 8, 37 Am. St. Rep. 601, 35 N. E. also United States v. Trans-Mis-ight Asso. supra.

hough there is equitable conversion ty to personalty, yet the bequests rtheless fall within the prohibition tute.

ank v. Home for the Friendless, . 337, 4 L.R.A. 140, 21 N. E. 64; erly, 108 Cal. 627, 49 Am. St. Rep. 772; Underwood v. Curtis, 127 N. 8 N. E. 585; Penfield v. Tower, 1 6, 46 N. W. 413; Fifield v. Van Va. 557, 64 Am. St. Rep. 745, 27 ; Harrington v. Pier, 105 Wis. 485, 307, 76 Am. St. Rep. 922, 82 N. Read v. Williams, 125 N. Y. 560, t. Rep. 748, 26 N. E. 730.

trine of comity has no application, o recognize the foreign cemetery would violate the settled policy of ict of Columbia distinctly marked ssional legislation.

means general reciprocity, and a favor what cannot be claimed as a right. It persuades, but does not command, and its obligation is not imperative. It is the recognition which one state allows within its territory to the legislative, executive, or judicial acts of another state, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U. S. 113, 164, 40 L. ed. 95, 108, 16 Sup. Ct. Rep. 139.

Comity is not a rule of law, but one of practice, convenience, and expediency.

Mast, F. & Co. v. Stover Mfg. Co. 177 U. S. 488, 44 L. ed. 858, 20 Sup. Ct. Rep. 708

Recognition of foreign corporations is not a public policy to be established by the courts. It would be a bold claim for anyone to make that the courts, in the enforcement of a supposed public policy, could apply any limitation to the numerous domestic corporations to which the statute law had not applied it, and no more can it be applied to foreign corporations without the sanction of law.

Hollis v. Drew Theological Seminary, 95 N. Y. 176.

Comity is the comity of states, and not the comity of courts.

Thomp. Corp. § 7884.

The power of determining whether and how far, or with what modification, or upon what conditions, the laws of one state or any rights dependent upon them shall be recognized in another is a legislative one; and the judiciary must be guided in deciding the question upon the principle and policy adopted by the legislature.

Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243.

Every nation must be the final judge for itself, not only of the nature and extent of the duty of comity, but of the occasions on which its exercise may be justly demanded.

Story, Confl. L. § § 33, 38.

It is the legislative, and not the judicial, power of the state that must control and give shape to its public policy and apply it to cases that arise, and this public policy must be determined by reference to its general legislation, either by prohibitory or enabling acts or by its general course of legislation on the given subject.

Carroll v. St. Louis, 67 Ill. 568, 16 Am. Rep. 632.

The courts seem to be of one accord that comity will not be extended when to do so would violate the public policy as indicated by statute. Comity gives way where the established policy of the legislature indicates to its courts a different rule.

Walworth v. Harris, 129 U. S. 364, 32 L. ed. 714, 9 Sup. Ct. Rep. 340.

Comity does not permit the exercise of a power by a corporation when the policy of that state, distinctly marked by legislative enactment or constitutional provision, forbids it.

McDonogh v. Murdoch, 15 How. 367, 14 L. ed. 732; Paul v. Virginia, 8 Wall. 168–181, 19 L. ed. 357–360.

Courts, out of comity, will enforce the law of another state when, by such enforcement, they will not violate their own laws or inflict an injury on some one of their citizens, as these courtesies are extended when they are not pretended by some positive law of the state.

Franzen v. Zimmer, 90 Hun, 103, 35 N. Y. Supp. 612.

Mere comity can never compel courts to give effect to laws of another state which directly conflict with the laws of their own state and are contrary to its known public policy.

Wharton, Confl. L. § 598.

A state statute granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply to domestic corporations only.

United States v. Fox, 94 U. S. 315–321, 24 L. ed. 192, 193; Hartson v. Elden, 50 N. J. Eq. 522, 26 Atl. 561; Re Prime, 136 N. Y. 347, 18 L.R.A. 713, 32 N. E. 1091; Vanderpoel v. Gorman, 140 N. Y. 563, 24 L.R.A. 548, 37 Am. St. Rep. 601, 35 N. E. 932; White v. Howard, 46 N. Y. 144; Re Balleis, 144 N. Y. 132, 38 N. E. 1007; Whitcomb v. Robbins, 69 Vt. 477, 38 Atl. 233; Falls v. United States Sav. Loan & Bldg. Co. 97 Ala. 417, 24 L.R.A. 174, 38 Am. St. Rep. 194, 13 So. 25; Holbert v. St. Louis, K. C. & N. R. Co. 45 Iowa, 23; South Yuba Water Co. v. Rosa, 80 Cal. 333, 22 Pac. 222; Rumbough v. Southern Improv. Co. 106 N. C. 461, 11 S. E. 528; Hollis v. Drew Theological Seminary, 95 N. Y. 166.

Section 669 of the Code, being inconsistent with § 1023, and irreconcilable, the former is absolutely void.

Sutherland, Stat. Constr. § 268; 26 Am. & Eng. Enc. Law, p. 619; Hand v. Stapleton, 135 Ala. 156, 33 So. 689.

Messrs. Hugh B. Rowland and Walter V. R. Berry argued the cause, and, with Messrs. Charles H. Stanley and Benjamin S. Minor, filed a brief for appellee:

Under the general law of comity obtaining among the states, the Greenwood cemetery can take the property, whether real or personal, provided by the will.

American & F. Christian Union v. Yount, 101 U. S. 352, 356, 359, 360, 25 L. ed. 888, 890–892; Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547; McDonogh v. Murdoch, 15 How. 367, 14 L. ed. 732; Taylor, Priv. Corp. 3d ed. §§ 387, 388; 6 Thomp. Corp. § 7919; Bank of Augusta v. Earle, 13 Pet. 520, 10 L. ed. 274; Runyan v. Coster, 14 Pet. 122, 10 L. ed. 382; Philadelphia Baptist Asso. v. Smith, 3 Pet. 488, 500, Appx., 7 L. ed. 750, 775, Appx.; Eastern Trust & Bkg. Co. v. Willis, 6 App. D. C. 375; Wilson v. Perry, 29 W. Va. 169, 1 S. E. 302; University v. Tucker, 31 W. Va. 621, 8 S. E. 410; American Bible Soc. v. Marshall, 15 Ohio St. 537; Santa Clara Female Academy v. Sullivan, 116 Ill. 375, 56 Am. Rep. 776, 6 N. E. 183; Thompson v. Waters, 25 Mich. 215, 12 Am. Rep. 243; Thompson v. Swoope, 24 Pa. 474; Boyce v. St. Louis, 29 Barb. 650; Sherwood v. American Bible Soc. 4 Abb. App. Dec. 227.

The Greenwood cemetery takes the interest in the real estate as personal property, and taxes a vested interest as legatee, under the doctrine of equitable conversion.

Cropley v. Cooper, 19 Wall. 167, 22 L. ed. 109; Peter v. Beverly, 10 Pet. 532, 9 L. ed. 522; Craig v. Leslie, 3 Wheat. 563, 4 L. ed. 460; Given v. Hilton, 95 U. S. 591, 24 L. ed. 458; Holcomb v. Wright, 5 App. D. C. 76; 1 Jarman, Wills, 6th ed. chap. 19, note 3, p. 578; Allen v. Watts, 98 Ala. 384, 11 So. 646; Rumsey v. Durham, 5 Ind. 71; Reiff v. Strite, 54 Md. 298; Thomman's Estate, 161 Pa. 444, 29 Atl. 84; Ropp v. Miner, 33 Gratt. 97; Ford v. Ford, 70 Wis. 19, 5 Am. St. Rep. 117, 33 N. W. 188; Lent v. Howard, 89 N. Y. 169; Sickles v. New Orleans, 26 C. C. A. 204, 52 U. S. App. 147, 80 Fed. 869; Chamberlain v. Chamberlain, 43 N. Y. 424; Doty v. Hendrix, 16 N. Y. Supp. 284; Manice v. Manice, 43 N. Y. 303; Hope v. Brewer, 136 N. Y. 126, 18 L.R.A. 458, 32 N. E. 558; Kurzman v. Lowy, 23 Misc. 380, 52 N. Y. Supp. 83; 2 Wharton, Confl. L. 3 ed. pp. 1318, 1322; Vansant v. Roberts, 3 Md. 119; Brown v. Thompkins, 49 Md. 423; Church Extension of M. E. Church v. Smith, 56 Md. 362; Re Stickney (Congregational Church Bldg. Soc. v. Everitt) 85 Md. 79, 35 L.R.A. 603, 60 Am. St. Rep. 308, 36 Atl. 654; Roy v. Rowzie, 25 Gratt. 599; Missionary Soc. of M. E. Church v. Calvert, 32 Gratt. 357; General Assembly v. Guthrie, 86 Va. 125, 6 L.R.A. 321, 10 S. E. 318; Wilson v. Perry, 29 W. Va. 170, 1 S. E. 302; Taylor v. Bryn Mawr College, 34 N. J. Eq. 101; Fowler's Appeal, 125 Pa. 388, 11 Am. St. Rep. 902, 17 Atl. 431; Fordyce v. Bridges, 2 Phill. Ch. 497; 5 Thomp. Corp. § 5829; Page, Wills, § 35; Minor, Confl. L. 337.

Where the testator directs a fund to be transmitted to another jurisdiction and there applied to a trust, the courts of the testator's domicil will uphold the bequest when the trust is lawful in the jurisdiction where it is to be performed, even though it could not be enforced in the jurisdiction of testator's domicil.

Mount v. Tuttle, 2 L.R.A.(N.S.) 428 and note, 183 N. Y. 358, 76 N. E. 873.

When the New York cases are considered

together, it is clear that, in order to bring a bequest of personalty within the New York statutes against perpetuities or the suspension of absolute ownership, the testator must not only have been domiciled in New York, but the will must also contemplate that the trust shall be administered there; or, at least, it must not provide for its administration elsewhere.

Dammert v. Osborn, 140 N. Y. 30, 35 N. E. 407; Despard v. Churchill, 53 N. Y. 192; Re Huss, 126 N. Y. 537, 12 L.R.A. 620, 27 N. E. 784; Roosevelt v. Porter, 36 Misc. 441, 73 N. Y. Supp. 800; Congregational Unitarian Soc. v. Hale, 29 App. Div. 396, 51 N. Y. Supp. 704; Re Sturgis, 48 App. Div. 624, 62 N. Y. Supp. 1148; Robb v. Washington & J. College, 103 App. Div. 327, 93 N. Y. Supp. 92; Re Lang, 9 Misc. 521, 30 N. Y. Supp. 388; Kennedy v. Palmer, 1 Thomp. & C. 581; Sherwood v. American Bible Soc. 1 Keyes, 564; Harris v. American Bible Soc. 4 Abb. Pr. N. S. 421; Mapes v. American Home Missionary Soc. 33 Hun, 360.

A general code is one system of law, and sections dealing with the same subject are construed as one statute.

Groff v. Miller, 20 App. D. C. 357; Petri v. Commercial Nat. Bank, 142 U. S. 644, 650, 35 L. ed. 1144, 1146, 12 Sup. Ct. Rep. 325; Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The first inquiry is in regard to the law existing in the District of Columbia upon the subject of trusts of this nature. There are two sections of the Code of the District of Columbia (§§ 669 and 1023 [31 Stat. at L. 1295 and 1351, chap. 854]) which are involved in the question before us. Section 669 (subchapter 6, relating to "Cemetery Associations," of chapter 18, relating to Corporations") provides in substance that it shall be lawful for cemetery associations incorporated under the laws of the District to *take and hold any grant, etc., upon trust, to apply the income thereof under the direction of the association for the embellishment, preservation, renewal, or repair of any cemetery lot or any tomb or monument or other structure thereon, according to the terms of such grant; and the supreme court of the District is given the power and jurisdiction to compel the due performance of such trusts, or any of them, upon a bill filed by the proprietor of any lot in such cemetery for that purpose. Section 1023 (subchapter 1 of chapter 24, relating to "Estates") provides that, except in the case of gifts or devises to charitable uses, every future estate, whether of freehold or leasehold, whether by way of remainder or without a precedent estate, and whether vested or contingent, shall be void in its creation, which suspends the absolute power of alienation of the property, so that there shall be no person or persons in being by whom an absolute fee in the same, in possession, can be conveyed, for a longer period than during the continuance of not more than one or more lives in being and twenty-one years thereafter. The provisions of the section are (at the end of the subchapter) made applicable to personal property generally, except where, from the nature of the property, they are inapplicable.

The appellants assert that § 669 is nullified by § 1023. They urge that the last section, being the last expression of the legislative will, and being inconsistent with § 669, the last section must prevail. This, although § 669 makes special provision in regard to trusts of this nature and permits their creation, yet, because the latter section does not in terms make exception of the trusts provided for in the earlier section, these trusts, it is urged, are thereby prohibited.

This is not a case for the application of that doctrine, which is, in any event, very seldom applicable. The true rule is to harmonize the whole Code, if possible, and to that end the letter of any particular section may sometimes be disregarded in order to accomplish the plain intention of the legislature. *Effect must be given to all the [485] language employed, and inconsistent expressions are to be harmonized to reach the real intent of the legislature. Petri v. Commercial Nat. Bank, 142 U. S. 644, 650, 35 L. ed. 1144, 1146, 12 Sup. Ct. Rep. 325; Bernier v. Bernier, 147 U. S. 242, 246, 37 L. ed. 152, 154, 13 Sup. Ct. Rep. 244; Groff v. Miller, 20 App. D. C. 353, 357. These two sections can be easily harmonized, and the undoubted intention of the legislature be thus carried out, by considering the latter section as applying to cases other than those specially provided for in § 669. That section must be regarded as in full force.

Assuming, however, that the section is not affected by § 1023,—it is then contended by the appellants that § 669 does not apply to this case, and that the trusts are not valid as a gift or devise to a charitable use within the exception mentioned in § 1023. It may be assumed for the purposes of this case that the gifts contained in the 1st and 12th clauses of the will do not constitute a valid trust for a charitable use (Jones v. Habersham, 107 U. S. 174, 183, 27 L. ed. 401, 405, 2 Sup. Ct. Rep. 336), and that those clauses would be illegal if dependent upon the exception mentioned in that

section. But the earlier section is referred to for the purpose of ascertaining the policy of Congress within the District upon the general subject of trusts for the perpetual maintenance of cemetery lots, and of monuments and other structures erected thereon.

That policy, as indicated in the section, permits in the District exactly what is provided for in this will,—namely, a trust to a cemetery (incorporated) association for the maintenance of a lot and a monument in perpetual good order and condition.

The law in New York in regard to Greenwood cemetery permits the same kind of a trust. Section 6 of chapter 156 of the Laws of New York for 1839, passed April 11, 1839. The law of the District of Columbia, where the testatrix died and where the property was situated, and the law of the state of New York, where the moneys are to be applied by a corporation created by the laws [486] of that state, concur in permitting *such trusts as are created in this will, and, under those circumstances, such a trust will be permitted by the courts of the District to be carried out in the state of New York, although the testatrix was domiciled in the District at the time of her death, and the funds to be applied to such trust arise from property owned by her in the District at that time.

This is in pursuance of the general comity existing between the states of the Union, and under that the cemetery association can take and hold the property for the purposes mentioned in the will, which are permitted both by the law of the District of Columbia and the law of the state of New York.

But it is contended that the law of the District prohibits the creation of such trusts and refuses to permit them to be carried out within that District, and that there is no rule of comity which obtains in such case by which these trusts might be held valid when affecting property within the District owned by a testator residing therein at the time of his death, even though the party to carry out the terms is a foreign corporation and the trusts are to be carried out in another state. This claim is made upon the assertion that § 669 of the Code, even if in force at all, refers only to domestic associations, and that foreign corporations, not being within the exception, receive no power from that section, and cannot take or hold property situated in the District upon these trusts.

It may be that § 669 referred only to domestic corporations when the power was therein granted them to take such gifts upon the trusts mentioned, and carry them out in the District. The section is cited, as has been already mentioned, for the purpose of determining the general policy of Congress in relation to this class of trusts, and whether, under the law, trusts similar to those under discussion are permitted in the District. If so, then the result follows from the rule of comity already stated, that a trust of that nature, permitted in the District, will not be interfered with when it is to be operative in a foreign state whose laws also permit it. The *statute is not re- [487] lied upon as a direct grant to a foreign corporation of the right to carry out a trust in a foreign state regarding property situated in the District and owned at the time of his death by a resident therein. If the statute granted such a right, of course there would be no question of its validity, nor would there be any in regard to comity.

Trusts of the same kind, although to be carried out in a foreign state by a foreign corporation in regard to property within the District, cannot be said to violate any policy or statute of the District, so long as the statute permits therein grants on similar trusts, although to its own corporations. The prohibition of § 1023 would not extend to such a trust so provided for.

Ever since the case of Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274, this doctrine of comity between states in relation to corporations has been steadily maintained, and it has been recognized by this court in many instances. See, specially, Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547; American & F. Christian Union v. Yount, 101 U. S. 352, 25 L. ed. 868. These cases cover, as we think, the principle involved herein.

In the opinion delivered in the court of appeals it was well said that "it cannot be successfully contended that something which the District of Columbia permits to its own corporations is so far against its public policy that it will not permit persons domiciled within its territory to devise their property to be used for the same purpose by a foreign corporation authorized by its own charter to receive and administer such bequests." [26 App. D. C. 216.] In our opinion the 1st and 12th clauses of the will are valid.

The objection to the 10th clause is based upon the assumption that the 1st and 12th clauses are invalid, and that the 10th clause is so interwoven with the 1st and 12th clauses that, if they are pronounced void, the whole scheme of the will falls, and the 10th clause goes down with it. Holding the 1st and 12th clauses valid, the contention in regard to the 10th clause also fails.

*The appellee also urges that, by reason of the direction contained in the will to sell the real estate, it thereby became construed

rely converted into personalty at the time f the testatrix's death, and that, regarding as personalty, the trusts created are still ss open to any objection set up by the ppellants. Although the provisions of the ubchapter containing § 1023 apply to perbnal property generally, as well as to real state, except where, from the nature of the roperty, they are inapplicable, yet, when t is seen that, even in regard to real esate granted to a domestic corporation or the purposes mentioned in this will, a erpetuity may be created, it seems to be till plainer, if possible, that it would not e against the policy of the District, as evilenced by the statute, to affirm the legalty of a trust of this kind in relation to ersonal property which is to be sold and he proceeds taken to another state by a foreign corporation for the purpose of administration in that state. In any aspect in which we can view the case, we think the disputed provisions of the will are valid.

In regard to costs, the courts below have charged the appellants with costs, and we think the same rule should obtain here. The executor may apply to the Supreme Court for such allowance out of the fund as it may think is, under all the circumstances, proper.

Judgment affirmed.

9]*J. CHARLES McGUIRE and William McGuire, Plffs. in Err.,

v.

LOUIS GERSTLEY and William Gerstley, Surviving Partners of the Firm Trading as Rosskam, Gerstley, & Company.

(See S. C. Reporter's ed. 489-503.)

Bonds—securing sales on credit—construction.

1. Sales of merchandise for which the purchasers have not been called upon to pay until four months have elapsed are covered, whether made on four months' credit or not, by a bond conditioned that the purchasers will pay the moneys due and to become due on merchandise sold and to be sold by the obligees which the purchasers "have bound and hereby bind themselves to pay for in four months after the date of each respective purchase."

Pleading — indefiniteness — allegations of damage.

2. The particulars of the alleged resulting damages from the breach by the obligees in a bond given to secure sales on credit, of an alleged special agreement respecting prices, pleaded as an offset to the claim on such bond, should be so far set forth that the court may be able to see therefrom that such alleged damages are neither obscure, vague, or shadowy, but might, and probably would, naturally result from the act complained of.

Pleading—sufficiency of plea in action on bond—breach of parol agreement.

3. Pleas in an action on a bond given to secure sales of merchandise on credit, which set up a breach by the obligees of a parol agreement respecting prices are insufficient where there is nothing in the declaration or bond which shows the existence of any such separate agreement, or that an alteration in the prices could or would have any effect upon the liability of the sureties.

Pleading—sufficiency of plea as set-off, recoupment, or cause of action.

4. Facts sufficient to constitute a valid set-off, recoupment, or independent cause of action are not set up by a plea in an action on a bond given to secure sales of merchandise on credit, which avers that the obligees induced one of the principals to dissolve the partnership existing between them, and to enter the employment of the obligees for the purpose of ruining the partnership business, but contains no allegation as to how long the partnership was to continue.

[No. 168.]

Argued January 17, 18, 1907. Decided February 25, 1907.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of plaintiffs in an action on a bond given to secure sales of merchandise on credit. Affirmed.

See same case below, 26 App. D. C. 193.

Statement by Mr. Justice **Peckham**:

The defendants in error, who were the plaintiffs below, and are hereafter so called, brought an action in the supreme court of the District of Columbia on December 10, 1904, against the plaintiffs in error and others, hereafter called the defendants, on a bond, and obtained a judgment, which was entered February 24, 1905, for $5,000 and interest thereon from that date. On appeal the court of appeals of the District affirmed the judgment (26 App. D. C. 193), and the defendants (the two McGuires) brought the case here by writ of error.

The declaration in the action alleged the execution of a bond by all of the defendants in the action, dated the 11th day of September, 1903, which bound the defendants in the *sum of $5,000, to be paid to the [490] plaintiffs, subject to the condition therein stated. The recital in the bond was that Monaghan and J. Charles McGuire were desirous of purchasing merchandise from plaintiffs, "now and from time to time hereafter, which the said John F. Monaghan and

J. Charles McGuire have bound and hereby bind themselves to pay for in four months after the date of each respective purchase," and the condition was as follows:

"That if the said John F. Monaghan and J. Charles McGuire shall strictly and faithfully pay or cause to be paid to said Rosskam, Gerstley, & Company for merchandise now and hereafter so purchased, the moneys due and to become due thereon when and as the same shall become due and payable, then this obligation shall be null and void, otherwise it shall remain in full force and virtue."

The defendants John F. Monaghan and J. Charles McGuire were principals, and the other defendants, William McGuire and John W. Clark, were sureties. Clark sued out a separate writ of error, which is hereafter disposed of. It was further alleged in the declaration that, on the days set forth in the particulars of demand annexed, and which formed part of the declaration, the defendants Monaghan and J. Charles McGuire purchased from the plaintiffs merchandise aggregating to sum of $14,497.16; that they had paid on account thereof, at various times, as shown in said particulars of demand above mentioned, the sum of $9,100.48, leaving a balance overdue and unpaid amounting to $5,396.68, which it was averred the defendants had not paid or caused to be paid to the plaintiffs, and that the whole balance was still due to the plaintiffs, to their damage of $5,000, with interest, besides costs.

The statement annexed to the declaration showed merchandise sold to the defendants by the plaintiffs, commencing September 24, 1903, through almost every month from that time up to and including July 27, 1904, and amounting to the total sum stated in the [491] declaration. The credit side of the *demand also showed payments by the defendants from and including October 27, 1903, up to and including November 11, 1904, and amounting to the sum stated in the declaration, and leaving a balance due as stated therein.

Judgment by confession was obtained against the defendant Monaghan for $5,000, with interest and costs. The defendants J. Charles McGuire, one of the principals in the bond, and William McGuire, one of the sureties therein, filed two joint pleas to the declaration, and the defendant William McGuire subsequently filed three separate pleas, and, still later, three additional pleas.

The plaintiffs first demurred to the joint pleas of the defendants J. Charles McGuire and William McGuire, and to the three separate pleas of the defendant William McGuire. They thereafter filed a demurrer to the three additional pleas of defendant William McGuire which had subsequently been filed. Both demurrers were sustained, and, the defendants refusing to amend their pleas, final judgment was entered against them.

The first (so numbered in the record) joint plea of defendants J. Charles McGuire and William McGuire alleged the indebtedness of the plaintiffs to the defendants John F. Monaghan and J. Charles McGuire in the sum of $10,000, because that, on the 25th of August, 1903, the plaintiffs entered into an agreement with Monaghan and J. Charles McGuire (the two principals in the bond), by which the plaintiffs agreed that if the principals would form a copartnership for carrying on, in the District of Columbia, a wholesale liquor dealer's business, and deal in spirituous liquors, to be furnished by the plaintiffs, and would also furnish to plaintiffs a bond in the sum of $5,000, with the defendants Clark and William McGuire as sureties, conditioned for the payment to the plaintiffs of the amount of the indebtedness to be incurred by Monaghan and McGuire in the purchase by them from the plaintiffs, from time to time, of such merchandise, that then, in consideration thereof, the plaintiffs would sell and furnish to *Monaghan and McGuire, whenever requested by them, from time to time, at and for certain prices then specified and agreed upon by the parties to that agreement, the merchandise required in said business and so to be requested, and would allow to them for the goods so requested and required a continuous credit of $10,000, and that they should sell such merchandise to their customers in said business upon such terms as to time and otherwise as they should find and believe to be the best terms obtainable, having in view the establishment and maintenance in said District of a demand for the plaintiffs' goods, and that the said Monaghan and McGuire would not be required to pay for the goods so sold to their customers until they could make collections therefor from their said customers. It was then further understood by and between all the parties to the said agreement, and as part thereof, that said Monaghan and McGuire would enter upon said business without means or capital to sustain the same other than the continuous credit aforesaid, and that, in order to perform their part of said agreement, they would be required to make sales of said merchandise to their customers on credit, to be paid for by said customers in periods varying according to circumstances, as stated. The plea then set up that, on the date first mentioned (August 25, 1903), the said Monaghan and McGuire formed a copartnership for the purpose stated, and thereafter furnished to the

plaintiffs a bond (the one in suit) prepared by the plaintiffs, and which the plaintiffs accepted, and the defendants then entered upon and fully established the business mentioned, and in all respects performed their said agreement, so far as they were permitted by the plaintiffs to perform the same. That they had obtained a large number of customers, to wit, from seventy to eighty, at great labor and expense, to whom they sold on the terms mentioned goods purchased by them from the plaintiffs, and that, from the 24th day of September, 1903, to the 10th day of December, 1903, the plaintiffs furnished to Monaghan and McGuire, from time to time under said *agreement, merchandise amounting in the aggregate to $10,617.55, which they in turn sold to their customers, excepting only a portion of said merchandise, which they returned to, and which was accepted by, the plaintiffs. That the plaintiffs, on the 10th day of December, 1903, wrongfully, and with the intent to destroy the business so established, and to sell goods directly to said customers, drew on said Monaghan and McGuire for the sum of $1,500 on their said account, and sent through various banks the draft to them, and on the 11th of December, 1903, the plaintiffs wrongfully refused to furnish merchandise to the above-named defendants at the price stated, but demanded a large increase over those prices, and, on the 13th day of January, 1904, wrongfully refused to furnish more goods under said agreement or further to perform said agreement, and forced the said Monaghan and McGuire to abandon their said business, which they had established at great expense, to wit, an expense of not less than $10,000 and in which their profits were very great; whereby the plaintiffs wrongfully destroyed the credit and business of said Monaghan and McGuire and violated the agreement of August 25, 1903, and the said Monaghan and McGuire were and each of them was thereby injured and damaged in the sum of $10,000, for which sum the said J. Charles McGuire claims judgment against the plaintiffs; and the defendants aver that they are willing that the same may be set off against the plaintiffs' demand.

The second joint plea of the same defendants (so numbered in the record) set up in substance the same agreement as the first, except that agreement was alleged to have been made September 11, 1903, and the bond was conditioned for the payment by the principals for all merchandise to be furnished by the plaintiffs on four months' credit. The plea also omitted the agreement that the principals (Monaghan and McGuire) would not be required to pay the plaintiffs until they (the principals in the bond) could make collections from their customers. The plea also alleged that the plaintiffs, shortly *after the execution of the [494] bond in suit, wrongfully refused to sell to the principals therein merchandise on credit to the amount of $10,000 at and for the prices stated in the agreement, and wholly neglected and refused to perform the agreement between them and the principals in the bond, whereby Monaghan and McGuire were forced to abandon their said business and lose all the money and time expended by them in and about the same, and amounting to not less than $10,000, and were, and each of them was, injured and damaged in the sum of $10,000, for which sum the said J. Charles McGuire claimed judgment against the plaintiffs, and the defendants were willing that the same should be set off against the claim of plaintiffs.

Thereafter the defendant William McGuire filed three separate pleas. The first separate plea (numbered 1 in the record) alleged an indebtedness of the plaintiffs to William McGuire in the sum of $5,000, for that, on the 11th day of September, 1903, and in consideration of plaintiffs agreeing to sell merchandise to Monaghan and McGuire at and for certain prices named in the agreement, and to give them a continuous credit of $10,000 for merchandise sold to them by plaintiffs, the defendants did agree to and did sign the bond mentioned in the declaration, but the plaintiffs wrongfully refused to perform the agreement, or to sell to Monaghan and McGuire merchandise at the prices named in the agreement, or to allow them the continuous credit mentioned therein, whereby they were prevented from paying for the merchandise purchased and mentioned in the declaration, and the defendant thereby incurred great liability, and was injured and damaged in the sum of $5,000, and claimed judgment therefor, and was willing that the same might be set off against the demand of plaintiffs.

The second separate plea (numbered 2 in the record) set forth the same agreement and bond and consideration therefor that is mentioned in the first separate plea, and added that the plaintiffs, on December 11, 1903, and, again, on the 23d day of March, 1904, without the knowledge or consent *of [495] the defendant, entered into other agreements with Monaghan and McGuire to sell to them, at different prices and terms of sale, the merchandise purchased from plaintiffs by them, and that since December 11, 1903, the plaintiffs have refused to sell merchandise to Monaghan and McGuire at the prices named in the agreement, though requested to do so, whereby the defendant was discharged from his liability.

The third separate plea (numbered 3 in the record) alleged that the merchandise mentioned in the declaration as having been sold was purchased by the defendants Monaghan and McGuire under an agreement not under seal, entered into before and since the 11th day of September, 1903, between them and the plaintiffs, and not according to the terms of the bond mentioned in the declaration, wherefore the defendant prayed judgment if he ought to be charged with the said debt by virtue of said bond.

Subsequently the same defendant filed three additional pleas. By the first additional plea (which is numbered 4 in the record) he alleges that prior to signing the bond plaintiffs agreed with the principals therein to sell the merchandise referred to in the bond at and for certain prices specified in a letter dated August 25, 1903, sent by the plaintiffs to the principals in the bond. The plaintiffs represented to the defendant that the agreement was applicable to all merchandise to be purchased under the bond, and plaintiffs thereby intended to induce defendant to sign the bond, which he did in reliance upon that statement. Thereafter the principals purchased from the plaintiffs merchandise amounting to $14,477.16 and no more, and the sum of $10,617.55 was for merchandise purchased at the prices agreed upon, and the balance, $3,859.61, was for merchandise purchased at greatly enhanced prices, made under an agreement entered into on or about the 11th day of December, 1903, without the knowledge or consent of defendant; that the principals paid plaintiffs on account of said sum of $10,617.55 the sum of $9,100.48, leaving due to the plaintiffs under the bond $1,517.07 and no more.

[496] *By the second additional plea (numbered 5 in the record) the defendant set up substantially the same agreement as to signing the bond and the consideration therefor, and then made the additional averment that the agreement was that the plaintiffs would not at any time exceed the sum of $10,000 in their sales to the principals, but the plaintiffs failed to perform the conditions, or any of them, and refused to sell at the agreed prices, and also permitted the indebtedness of the principals to continue from December 10, 1903, to January 21, 1904, to be greatly in excess of $10,000, by all of which defendant was discharged.

By the third additional plea (numbered 6 in the record) the defendant alleged the partnership agreement between the principals in the bond, but did not allege that there had been any time ever agreed upon for the continuance of such partnership, and further alleged that during the year 1903 the principals in the bond had established a good business, and the bond was exec and delivered to the plaintiffs for the pose of establishing and maintaining credit of the principals with the plainti but that, on or about January 12, 1904, plaintiffs, for the purpose of securing customers which the principals in the b had obtained for themselves, and for purpose of selling directly to those cust ers, wrongfully induced Monaghan to w draw from the partnership and enter employ of plaintiffs, which Monaghan and that thereby the business of the p cipals was wholly destroyed, and by re thereof they were unable to pay for merchandise referred to in the bond declaration, all of which was without knowledge or consent of the defendant reason whereof defendant was discha from all liability under the bond.

Mr. Lorenzo A. Bailey argued the c and filed a brief for plaintiffs in error:

The agreement mentioned in each of pleas of set-off is pleaded according to legal effect, which is proper and sufficien

1 Chitty, Pl. 334.

The breaches are set out with suffici certainty.

The damages claimed are such as m be presumed to result from the brea Such damages are matter of evidence, a need not be alleged, and are scarcely ev stated but in a general manner.

Barruso v. Madan, 2 Johns. 149; 1 Chitt Pl. 371.

Profits of such a business may be co sidered in damages.

1 Sedgw. Damages, § 182.

Statutes of set-off are to be liberally co strued.

25 Am. & Eng. Enc. Law, 2d ed. p. 491.

A defendant may set off his interest i a promissory note held by himself and a other who is not a party to the suit.

Smith v. Myler, 22 Pa. 36; 25 Am. Eng. Enc. Law, 2d ed. p. 523 and note Mott v. Mott, 5 Vt. 111.

The fourth separate plea of the surety a plea of discharge, and rests upon t theory that if the representations made him by the plaintiffs as to the fact and t effect of the former agreement were tru the subsequent agreement so affected liability as to discharge him.

1 Brandt, Suretyship, 3d ed. §§ 255, 6 Marchman v. Robertson, 77 Ga. 40; Hick v. Farmers' & M. Bank, 35 Vt. 476; Wi kins v. Worthington, 2 Bland, Ch. 5

On the other hand, if such representatio were untrue, they operated as a fraud up him and he would be thereby discharged.

Marchman v. Robertson, supra.

The second separate plea of the sure

sets up an agreement, preceding the bond, fixing the prices and terms; that this agreement was the consideration for giving the bond; that the prices and terms were changed by subsequent agreements made without his consent or knowledge. The consideration was thereby destroyed and the surety discharged. This may be established by parol evidence.

Marchman v. Robertson and Hickok v. Farmers' & M. Bank, supra; Campbell v. Gates, 17 Ind. 126; Moroney v. Coombes (Tex. Civ. App.) 88 S. W. 430; Dicken v. Morgan, 54 Iowa, 684, 7 N. W. 145; 1 Brandt, Suretyship, 454; 5 Cyc. Law & Proc. pp. 742, 744, 818.

The third separate plea of the surety denies that the goods were sold on the terms provided in the bond (as to four months' credit), and alleges that they were sold on other terms and under certain agreements, not under seal, to which he was not a party. As to such goods, not sold on four months' credit, and therefore not contemplated by the bond, the surety was never liable. They were not within his contract.

Bacon v. Chesney, 1 Starkie, 192; Leeds v. Dunn, 10 N. Y. 469; 1 Brandt, Suretyship, 140, 467.

In M'Minn v. Owen, 2 Dall. 173, 1 L. ed. 336, proof was admitted of a contemporaneous parol agreement that the instalment to be paid under the bond in suit should be paid in money current, when due.

Any dealings with the principal by the creditor which amount to a departure from the contract by which the surety is bound or which may affect his liability will discharge him.

1 Brandt, Suretyship, 439.

A creditor discharges a surety by any dealing or arrangement with the principal debtor without the surety's consent which at all varies the situation, rights, or remedies of the surety.

Ibid.; Watkins v. Worthington, supra.

It is immaterial whether or not the change be beneficial to the surety.

Martin v. Thomas, 24 How. 315, 16 L. ed. 689; Reese v. United States, 9 Wall. 13, 19 L. ed. 541.

The fifth separate plea of the surety alleged delivery upon conditions therein set forth, which were "known to and accepted by the plaintiffs," but which have never been performed. This operated as a discharge.

1 Brandt, Suretyship, 454; Campbell v. Gates and Hickok v. Farmers' & M. Bank, supra.

There is nothing in the pleas to justify the finding, or an inference that the surety was without written evidence to sustain the pleas. But parol evidence is admissible to show matter discharging a surety.

Moroney v. Coombes; Campbell v. Gates; and Dicken v. Morgan,—supra.

The sixth separate plea of the surety is based upon the proposition that such misconduct on the part of the obligees in a bond, wilfully and maliciously preventing the performance of the condition of the bond, and tantamount to fraud, will discharge a surety.

Trustees of Section 16 v. Miller, 3 Ohio, 261; Marchman v. Robertson, 77 Ga. 40.

The claim as against a surety is *strictissimi juris*, and it is incumbent on the plaintiff to show that the terms of the guaranty have been strictly complied with. If I engage to guarantee, provided eighteen months credit be given, the party is not at liberty to give twelve only, and, after the expiration of six more, to call upon me.

Bacon v. Chesney, supra.

In United States v. Freel, 186 U. S. 309, 316, 46 L. ed. 1177, 1181, 22 Sup. Ct. Rep. 875, this court adopted the statement of Mr. Justice Story, in Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189, that the liability of a surety is not to be extended by implication beyond the terms of his contract; that his undertaking is to receive a strict interpretation, and not to extend beyond the fair scope of its terms; and that the whole series of authorities proceeded upon this ground. To this the court added, as an elementary proposition, that when the surety's undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance without his consent, his liability is extinguished.

The engagement of a surety may be founded upon a consideration variant from that which induced its execution by his principal. If such consideration be a condition subsequent, to be performed by the creditor, his failure to perform it would operate as a fraud upon the surety, and, on that ground, release him from all liability. Such defense, of failure of consideration, may be established by parol evidence, and is not in conflict with the legal effect of his contract.

Campbell v. Gates, 17 Ind. 126.

Breach of a contemporaneous verbal agreement which constituted part of the consideration of a promissory note secured by mortgage may be shown in defense, as failure of consideration, in a suit to foreclose the mortgage.

Dicken v. Morgan, 54 Iowa, 684, 7 N. W. 145.

A surety signed a promissory note upon the payee's promising that as soon as the note became due he would immediately pro-

ceed against the principal. For more than a year after the note became due the payee failed to sue the principal or to notify the surety, and meantime the principal became insolvent. Surety discharged.

Hickok v. Farmers' & M. Bank, 35 Vt. 476.

In a suit to foreclose a mortgage to secure payment of a note made by one Cook, the defendant, Mrs. Marchman, set up in her answer that she was merely a surety for Cook; that she was induced to sign by false and fraudulent representations of the plaintiffs that they would furnish Cook with a certain fertilizer to sell in certain territory; that Cook had placed orders for 250 tons of the fertilizer, but the plaintiffs had failed and refused to furnish Cook with the fertilizer, while, if they had done so, he would have been enabled to pay the note and save her harmless. Held, that this either increased her risk or showed fraud, and, in either view, released her.

Marchman v. Robertson, supra.

A lessee was required by the lease to make certain improvements. To secure performance of his covenants, he gave bond with surety. The condition of the bond contained a proviso that if the lessee should complete the improvements within four years the surety should be bound for the rent of the first year only. In a suit on the bond the defendant, surety, proved that after the expiration of the lease, but within the four years, the lessee was dispossessed by the plaintiffs, the lessors. Held, that the surety was liable for the first year's rent only, and it was immaterial whether or not the improvements were completed before the lessee was dispossessed, because (within the time to perform) the obligees prevented performance.

Trustees of Section 16 v. Miller, supra.

A surety on a note may show, as matter of discharge, that part of the consideration for a mortgage, given by the principal debtor to secure payment of the note, was a contemporaneous parol agreement between the creditor and the principal debtor, unknown to the surety, that payment of the note should be extended for one year and the surety discharged. There was nothing on the face of the mortgage disclosing such an agreement. In such case it is not necessary to allege fraud, accident, or mistake in order to render such evidence admissible.

Moroney v. Coombes (Tex. Civ. App.) 88 S. W. 430.

A surety may show by parol evidence the consideration upon which he signed the bond, and the failure of such consideration. Such failure will discharge the surety.

1 Brandt, Suretyship, § 454.

The application for a license implied an agreement, and imposed a duty to continue the partnership during the term of the license, unless both partners consented to an earlier dissolution.

17 Am. & Eng. Enc. Law, p. 1096 and note 3; Potter v. Moses, 1 R. I. 430.

Even in a partnership at will, a dissolution by the act of one partner must be done in good faith and seasonably.

3 Kent, Com. 53, note d; 22 Am. & Eng. Enc. Law, 2d ed. p. 205.

An action at law will lie for a premature dissolution in violation of the partnership. In such a suit the claim will be for the wrong done the plaintiff personally, as distinguished from a breach of duty owing to the firm.

17 Am. & Eng. Enc. Law, pp. 1264, 1265.

And if there be collusion between a third person and a partner to injure the firm they or either of them may be sued at law by the injured partner.

17 Am. & Eng. Enc. Law, pp. 1266, 1267; Longman v. Pole, Moody & M. 223; Sweet v. Morrison, 103 N. Y. 235, 8 N. E. 396.

In Bowen v. Hall, L. R. 6 Q. B. Div. 333 the broad principle is laid down that a man who induces one of the parties to a contract to break it, intending thereby to injure the other party, is liable in an action. This principle is amply supported by American cases, and is not confined to contract for service.

Walker v. Cronin, 107 Mass. 555; Jones v. Stanly, 76 N. C. 355; Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30; Benton v. Pratt, 2 Wend. 385, 20 Am. Dec. 623; Lawson, Contr. § 115.

The fact, in such a case, that the contract is not binding under the statute of frauds, is immaterial.

Rice v. Manley and Benton v. Pratt, supra.

Mr. Eugene A. Jones argued the cause, and, with Messrs. Simon Wolf and Myer Cohen, filed a brief for defendants in error:

The declaration not only states a cause of action, but states it with all the technical accuracy of Chitty.

1 Chitty, Pl. p. 363; 2 Chitty, Pl. p. 437.

The damages recoverable under a contract must be the natural and proximate result of the breach of the contract, or such as are in contemplation of the parties at the time the contract is made.

Sedgw. Damages, 8th ed. § 146; Levy v. Sayle, 52 Ark. 246, 12 S. W. 474; Coleman v. Galbreath, 53 Miss. 303.

The withdrawal of credit by one merchant does not necessarily or naturally result in commercial disaster to the merchant from whom it is withdrawn; the failure might be attributable to a multitude of co-operating causes. It would be a result

too remote to be regarded as the normal consequence of the withdrawal of credit.

Sedgw. Damages, § 123.

Loss of custom, credit, and business are too conjectural and remote to be considered as proper elements of damage.

Sedgw. Damages, §§ 127, 175, 1261.

The measure of damages for breach of a contract to deliver merchandise is the difference between the contract price and the price paid on open market.

Liljengren Furniture & Lumber Co. v. Mead, 42 Minn. 420, 44 N. W. 306; Hitchcock v. Turnbull, 44 Minn. 475, 47 N. W. 153.

The prices and terms upon which the merchandise was to have been sold are not set forth, and the pleas are vague and indefinite in all their allegations. A plea of set-off must disclose a state of facts such as would entitle the party pleading to an action if he were suing as plaintiff; and must contain the substance, at least, of a declaration.

Crawford v. Simonton, 7 Port. (Ala.) 110; Waterman, Set-off, §§ 646, 648; Garrett v. Love, 89 N. C. 205; 19 Enc. Pl. & Pr. p. 754.

A plea of set-off containing facts which would entitle the defendant to nominal damages only is insufficient; it will not even affect the matter of costs.

Hitchcock v. Turnbull, supra.

Where a promise is made to two or more jointly, all the promisees must join as plaintiffs in an action for the breach thereof.

15 Enc. Pl. & Pr. p. 528.

The demand set off must be due to the defendant only.

25 Am. & Eng. Enc. Law, 2d ed. p. 520.

A cause of action in favor of a surety alone cannot be set off in a suit against principal and surety.

Corbett v. Hughes, 75 Iowa, 281, 39 N. W. 500; 25 Am. & Eng. Enc. Law, 2d ed. p. 540.

The allegation of the pleader as to the effect of a contract which is not set forth in the pleading is the allegation of a conclusion of law.

12 Enc. Pl. & Pr. p. 1038.

A bond cannot be delivered to the obligee in escrow, or upon a condition not expressed in the instrument itself.

Newman v. Baker, 10 App. D. C. 187.

No action lies for terminating a partnership at will.

Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. Rep. 135.

A defense by way of recoupment must arise out of the same contract or suit on which the plaintiff relies to make his case.

Van Buren v. Digges, 11 How. 461, 13 L. ed. 771.

When a contract is couched in terms which import a complete legal obligation, with no uncertainty as to the object or extent of the engagement, it is (in the absence of fraud, accident, or mistake) conclusively to be presumed that the whole engagement of the parties and the extent and manner of their undertaking were reduced to writing. Whether the written contract in this case fully expressed the terms of the agreement between the parties was a question for the court; and silence on a point that might have been embodied in it does not open the door to parol evidence in that regard.

Seitz v. Brewers' Refrigerating Mach. Co. 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46.

An alteration or modification of an independent or subsidiary agreement cannot affect the surety's liability.

Domestic Sewing Mach. Co. v. Webster, 47 Iowa, 357; Amicable Mutual L. Ins. Co. v. Sedgwick, 110 Mass. 163; Stuts v. Strayer, 60 Ohio St. 384, 71 Am. St. Rep. 723, 54 N. E. 368; United States Glass Co. v. Mathews, 32 C. C. A. 364, 61 U. S. App. 542, 89 Fed. 828.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The declaration in this case is attacked by the defendants under the rule that the court will go back to the first substantial defect appearing in the pleadings before the filing of the demurrer. The criticism made by the defendants upon the declaration is that it does not sufficiently show a violation of the terms of the bond. The defendants say the bond limits the liability of the sureties to pay for such merchandise *only as [500] was sold on a four months' credit, and that the declaration does not show that the terms of the sale of the merchandise were those which were set forth in the bond. The declaration shows a failure to pay for certain merchandise alleged to have been sold to the defendants, amounting to a stated sum on the date set forth in the particulars of demand, which demand was annexed to and forms a part of the declaration. This demand showed that the last item of sale was made July 27 prior to December 11, 1904. The condition of the bond meant that the defendants should not be called upon to pay until after the expiration of four months from the date of each of the respective purchases. The defendants had, as the pleadings show, paid for all the merchandise purchased, except the balance therein stat-

ed, and four months had in fact elapsed since the last sale. The defendants have, therefore, obtained four months after the purchase before they were called upon to pay. We think the declaration was sufficient.

We are also of opinion that the two joint pleas of J. Charles McGuire and William McGuire, and the first separate plea of the latter, which, it is contended, set up offsets to the plaintiffs' claim, did not allege facts with sufficient distinctness to constitute a defense to the action. Neither of these pleas is sufficiently distinct to constitute a good pleading What the special agreement was that is alleged to have been made between the principals in the bond and the plaintiffs, in consideration of which the bond was signed by the surety, is not stated with any degree of particularity. It simply states that the agreement in this respect was that the merchandise should be sold to the principals in the bond at and for certain prices specified in the agreement, but the pleas do not set them forth, nor do they state for how long a time such agreement was to remain in existence, nor how the defendants suffered damage to the extent named in the pleas, or to any extent. It is impossible for a court to see how these damages would necessarily or probably flow [501] from a violation of said *agreement, or that they could form a basis for any legal demand flowing from not longer fulfilling the terms of the alleged contract. The damages alleged in the pleas are most remote, vague, and shadowy in their nature, such as could not have been contemplated by any party to the alleged agreement, as the probable result of its violation. While rules of pleading have become more liberal in modern days, yet, in order to found a cause of action on the alleged shortcomings of another, they must at least be so far plainly set up as to show actual damage and the wrongful act of the other party as the proximate and natural cause. The particulars of the alleged resulting damages should be so far set forth that the court may be able to see therefrom that such alleged damages are neither obscure, vague, nor shadowy, but might, and probably would, naturally result from the acts complained of. Within such limitations, which have always existed, the three pleas are insufficient.

The next succeeding plea is marked in the record the second separate plea of the defendant William McGuire. The court below treated this plea, together with the third separate plea of the defendant, and his fifth (in truth, the second) additional plea, as together resting upon common ground. We think they may be properly so regarded. It is seen from the whole record that the principals in the bond sued on w expecting to have business transactions w the plaintiffs, by purchasing from them quors, which they expected to sell to oth at profit, but the plaintiffs did not ear sell the goods to these principals with some security for payment of the goods when cash payment was not exacted. bond in suit was thereupon agreed to given as security for the payment of merchandise to be sold by the plaintiff the principals, and which the principals w bound to pay for in four months after date of each respective purchase. Thi a clear and separate contract between plaintiffs and the signers of the bond, there is nothing in the declaration or b which shows the existence of any oth agreement than that mentioned therein, than an alteration in the prices of the goo sold to the principals by the plaintiffs con or would, have any effect upon the liabili of the sureties. The bond being compl in itself on its face, it cannot be seen th any future alteration of the prices for th sale of the merchandise, arrived at betwe the plaintiffs and the principals in the bon would be material to or alter the liability the sureties for the payment of the me chandise sold and delivered at the pric agreed upon, after four months from th date of purchase. There is no allegation i these pleas that any separate agreeme was in writing, and the bond itself does no show the existence of any other agreeme or the sale of the property upon any oth conditions than those mentioned in the bon itself. Under such circumstances evidenc by parol going to show any other agreeme between the principals of the bond and th plaintiffs would not be admissible. Seitz Brewers' Refrigerating Mach. Co. 141 U. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46: D mestic Sewing Mach. Co. v. Webster. Iowa, 357. In holding these pleas insuf cient we think the court below was right.

This leaves the fourth (the first ad tional) and the sixth (the third additiona pleas. The fourth plea alleges that the me chandise referred to in the bond was to sold at and for certain prices specified a letter dated August 25, 1903, and sent plaintiffs to Monaghan and McGuire. Wh those prices were is not stated in the pl while the representations alleged in the pl to have been made, that the agreement w applicable to all merchandise to be pu chased under the bond, would require pa evidence, as there is no pretense that the representations were made in writing. that the letter referred to them in any wa The same consideration existing in rega to the pleas last mentioned would opera here and render the plea insufficient.

The third additional plea (marked 6 in the record) attempts to set up a cause of action against the plaintiffs because, as alleged, they induced the defendant Mona-
[503] ghan to dissolve *the partnership between him and McGuire and to enter the plaintiffs' employ, for the purpose, on plaintiffs part, of increasing the plaintiffs' profits and with intent to wrongfully destroy the business of the defendants Monaghan and McGuire. As the court below well says, there is in this plea no allegation as to how long the partnership was to continue, and no action would lie for terminating or inducing the termination of a partnership at will. Karrick v. Hannaman, 168 U. S. 328, 333, 42 L. ed. 484, 488, 18 Sup. Ct. Rep. 135. We do not see how any legal damage to the sureties under such circumstances can be said to be the proximate, natural, or probable result of such action on the part of the plaintiffs. After the dissolution of the partnership of course no sales could thereafter be made, and in relation to sales already made with credit according to the terms of the bond, it is impossible to see how it could be said that the ruin of the business of the principals of the bond, and hence the damage to the sureties, could be regarded as the probable consequence of the act of the plaintiffs in procuring Monaghan to dissolve the partnership and enter their employ. Whether treated as an offset or recoupment, or simply as an independent cause of action, the plea does not set up facts sufficient to constitute a valid set-off, recoupment, or cause of action.

The judgment of the Court of Appeals was right and is affirmed.

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[504] JOHN W. CLARK, Plff. in Err.,

v.

LOUIS GERSTLEY and William Gerstley, Surviving Partners of the Firm Trading as Rosskam, Gerstley, & Company.

(See S. C. Reporter's ed. 504, 505.)

This case is governed by the decision in McGuire v. Gerstley, ante. 581.

[No. 169.]

Argued January 17, 18, 1907. Decided February 25, 1907.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of plaintiffs in an action on a bond given to secure sales of merchandise on credit. Affirmed.

See same case below, 26 App. D. C. 205.

The facts are stated in the opinion.

Mr. Lorenzo A. Bailey argued the cause and filed a brief for plaintiff in error.

Mr. Eugene A. Jones argued the cause, and, with Messrs. Simon Wolf and Myer Cohen, filed a brief for defendants in error:

For contentions of counsel see their briefs as reported in McGuire v. Gerstley, ante, 581.

Mr. Justice Peckham delivered the opinion of the court:

The defendants in error, plaintiffs below, obtained judgment against the plaintiff in error for $5,000 and interest in April, 1905, in the supreme court of the District of Columbia, which judgment was affirmed by the court of appeals (26 App. D. C. 205), and the plaintiff in error has brought the case here for review.

It is the same action as the foregoing case, just decided, but the plaintiff in error, who was one of the sureties in the bond, separately filed special pleas to the declaration, which were separately demurred to, and the supreme court sustained the demurrer. On appeal to the court of appeals the demurrer was not disposed of at the same time as the demurrers to the other pleas in the case, but was postponed to a subsequent time,—April 7, 1905. On that date the demurrer *was sustained and the [505] judgment previously entered affirmed against this plaintiff in error, who then brought the case here on a separate writ of error.

The special pleas filed by the plaintiff in error were seven in number, the first six being the same as filed by the other plaintiffs in error in the case. The seventh set up the failure of the plaintiffs to give notice to the sureties that the principals in the bond had not paid for the goods at the expiration of the term of credit allowed them, and also that the time had been extended by the plaintiffs in which the principals in the bond might pay for the goods sold to them. No definite term of extension was stated. What has already been said in regard to the other six pleas in the case determines the decision in regard to the same pleas hereinabove set forth. In regard to the seventh plea the plaintiff in error says in his brief in this court that he makes no point concerning the same.

Judgment affirmed.

W. A. ARTHUR and John C. Ware, Partners as W. A. Arthur & Co., Plffs. in Err.,

v.

TEXAS & PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 505-521.)

Carriers—limiting liability—loss by fire.

1. A clause in a bill of lading exempting a carrier from liability for loss by fire is valid although the regular freight rates were charged and no option was given to the shipper to receive any other form of bill of lading.

Carriers—delivery to—negligence of agent.

2. A carrier which issues bills of lading to a shipper in return for receipts given by a compress company for cotton in the latter's custody is liable for loss by fire due to the negligence of the servants of the compress company in caring for the cotton while awaiting the compression and loading which the railway company had ordered done for its own convenience and at its own cost, where such company, if it did not regard the presentation of the receipts as a tender of the cotton, or if it were not a valid tender, could, notwithstanding the rules of the Texas state railroad commission as well as its own rules, have refused to sign the bills of lading.

[No. 176.]

Argued January 24, 1907. Decided February 25, 1907.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western District of Arkansas, Texarkana Division, entered on a directed verdict in favor of defendant in an action to charge a carrier with liability for a loss by fire. Ju ments of both courts reversed and the ca remanded for a new trial.

See same case below, 71 C. C. A. 391, 1 Fed. 127.

Statement by Mr. Justice Peckham:

The plaintiffs in error, who were plai tiffs below, filed their complaint against t railway company in the circuit court of t United States for the western district Arkansas, Texarkana division. The ca arose under the laws of the United Stat as the defendant was incorporated under act of Congress passed March 3, 1871 [Stat. at L. 573, chap. 122], which act w amended by one passed May 2, 1872 [1 Stat. at L. 59, chap. 132], among oth things changing the name of the corpora tion to that under which it was sued i this case. Upon the trial the court di rected a verdict for the defendant, which was affirmed by the circuit court of appeals (139 Fed. 127), and the plaintiffs have com here by writ of error.

The action was to recover damages against the defendant for loss by fire of 50 bales of cotton, which were burned at Texarkana, Texas, September 19, 1900, and which the plaintiffs allege had been duly delivered to the defendant at that place, under a through bill of lading for transportation to Utica, New York. In the third clause of the conditions stated in the bill of lading was a provision "that neither the Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damages to or destruction of said cotton by fire." In the fifth clause of the bill of lading it was provided that "each carrier over whose road the cotton is to be carried hereunder shall have the privilege, at its own cost, to compress the same for greater convenience in handling and forwarding, and shall not be responsible for deviation or unavoidable delays in procuring such compression."

Although the cotton was destroyed by fire, plaintiffs alleged that they were not concluded by the fire clause, which they allege was void "because (1) said bill of lading was executed by said plaintiffs under duress; (2) said provision is unreasonable; and (3) was without a consideration." The freight rates charged in the bill were the regular rates for the shipment of cotton over all lines of railway between Texarkana and Utica, New York, and no option was given to said plaintiffs, as they allege in their complaint, to receive any other form of bill of lading than that exempting the defendant from liability for loss of the cotton by fire and plaintiffs allege they did not assent thereto.

It was also alleged that the place where

NOTE.—On the validity of agreements to restrict carrier's liability—see notes to Deming v. Merchants' Cotton-Press & Storage Co. 13 L.R.A. 518; Missouri P. R. Co. v. Ivey, 1 L.R.A. 500; Hartwell v. Northern Pacific Exp. Co. 3 L.R.A. 342; Richmond & D. R. Co. v. Payne, 6 L.R.A. 849; Adams Exp. Co. v. Harris, 7 L.R.A. 214; Duntley v. Boston & M. R. Co. 9 L.R.A. 452; Gulf, C. & S. F. R. Co. v. Gatewood, 10 L.R.A. 419; Pacific Exp. Co. v. Foley, 12 L.R.A. 799, and Chicago, M. & St. P. R. Co. v. Solan, 42 L. ed. U. S. 688.

On the right of a common carrier to limit its common-law liability by contract in the absence of negligence—see note to Little Rock & Ft. S. R. Co. v. Cravens, 18 L.R.A. 527.

On carrier's power to limit liability in cases of negligence—see note to Ballou v. Earle, 14 L.R.A. 433.

On the liability of a carrier for goods in transit—see note to Bennett v. American Exp. Co. 13 L.R.A. 33.

cotton was stored after its delivery the railway company by the plaintiffs not a safe place, being on the plat-n of the Union Compress Company; t the platform was not inclosed, and that re was no proper provision made to pre-it the destruction of the cotton by fire, l that the cotton was at such place ex-sed to the sparks of passing engines, and it the employees of the Union Compress mpany, which was the agent of the de-ndant, neglected to care for the cotton, ich caught fire from sparks from a pass-g engine and was destroyed, September 19, 00, whereby defendant became liable to plaintiffs in the sum of $2,605, the value the cotton. The defendant, by answer, t in issue all the allegations as to negli-nce by its own servants or by the serv-ts or agents of the compress company, d also denied that the plaintiffs had ever livered the cotton to the railway com-ny; and alleged that at the time it was stroyed it was in the possession and con-l of the compress company, which was t its agent, and over which it had no ntrol.

Upon the trial evidence was given tending prove the following facts. The plaintiffs, th offices at Texarkana, were extensive yers of cotton, which they purchased in surrounding country and had it trans-rted to that place as a place of concentra-n, where it might be classified and subse-ently transported to the East and other rts of the country by the railroads.

The Union Compress Company was an lependent corporation, doing business at xarkana, as a compressor of cotton, which compressed for the various railroads hav-tracks at that place. The compress npany had a platform on its own land about 400 x 600 feet, upon which cotton delivered from wagons and from rail-d cars, and the receipt of the cotton was nowledged by the compress company. m this platform cotton was loaded on the ective cars of the different railroads, tracks of which surrounded the plat-n on three of its sides. This platform within the state of Texas. Substan-y all the cotton received at Texarkana received at this platform. The local form of the defendant company was not ilated to receive cotton for shipment he company, on account of its small size, the defendant's agent testified that he d not know what to do with cotton fered at this platform, except to send the platform of the compress company. cotton was placed on the platform of ompress company it did not then com-it, but it remained there until further orders were given, as herein stated. After delivery on the platform, and after the shipper had procured the written acknowledgment of the receipt of the cotton by the compress company, the practice was for the shipper, when he was ready to have it shipped, to go to the railway company, and, upon the surrender of the receipts of the compress company to the agent of the railway company, the shipper would receive from such agent a bill of lading for the cotton, which acknowledged its receipt by the company and the place and person it was consigned to, and the shipper had nothing further to do in regard to the cotton. He issued no orders for compressing it, and was not allowed to route it by any particular route. He would identify the cotton covered by the bill and give the destination point of the cotton and the name of the consignee, and there his right ended. The railroad company, when it received from the shipper the compress company's receipt, and gave its bill of lading to the shipper, took the receipts of the compress company and gave them up, and directed the company to compress the cotton and obtain insurance [509] upon it covering the responsibility of the railroad company, and load it into cars to be designated by the railroad company's agent. It was a general understanding between the railroad company and the compress company that when the former delivered the cotton receipts to the compress company it was to compress the cotton, obtain the insurance, and give the policies to the agent of the railway company, and ship the cotton on the cars pointed out by the railway company's agent. There is no evidence that the compress company ever compressed cotton at the orders of the shipper, or charged him for the storage of the cotton on the platform. The compressing was in fact done by the compress company for the railway company, for its convenience, by its direction, and at its cost. While the cotton was being compressed the compress company was not under the control of the railway company in matters relating to the mode and manner of compressing, nor were the employees of the compress company under any control by the railway company, but the compress company followed the orders of the railway company when to compress and where to load the cotton after compressing.

This customary way of doing business was followed with regard to the cotton in question. It was received on the platform of the compress company from plaintiffs, and receipts given for it to them. These receipts were taken on September 17, 1900, to the agent of the railway company, who thereupon signed and delivered a bill of lading

to plaintiffs, acknowledging the receipt of the cotton to be transported to Utica, New York, at named rates. The agent of the railway company then took these receipts which plaintiffs had handed to him, and delivered them to the compress company, and gave written instructions, signed by such agent, to the compress company on a form customarily used, and which ran thus: "I have this day issued on your compress receipts bill of lading to W. A. Arthur & Company for 50 bales of cotton (marks, number of bales, and total weight given). [510] Domestic. *Compress and ship the above cotton," as stated in directions. The compress company, when its own receipts were delivered to it by the railway company's agent, in accordance with its general custom, caused this cotton to be insured for the benefit of the defendant company and in the name of that company, and delivered the policies to the agent of the railway company, who forwarded them to division headquarters at Dallas, Texas. The compress company paid for the insurance under the direction of the railway company.

It was while the cotton was still on the platform, and not yet compressed, that it was burned.

The order adopted by the Texas state railroad commission, which was put in evidence, reads as follows:

"Thirteenth. When cotton is tendered to railroad companies upon compress platform, which is situated on the track of such railroad companies, it shall be the duty of the railroad companies to take charge of and receipt for such cotton in the same manner and on the same terms as they would receive and receipt for cotton when taken at its own depot or platform erected for such transactions; provided, however, that the shipper or the compress company shall, in such cases, assume the additional risk of insurance involved by such act of the railroad company."

The rule of the defendant was also put in evidence, and reads as follows:

"Rule Eleven. When cotton is tendered this company upon a compress platform which is situated on the track of this company, agent shall take charge of and receipt for such cotton in the same manner and on the same terms as he would receive and receipt for the cotton if tendered him at this compeny's depot platform or other places assigned by it for such transactions; provided, however, that the shipper or the compress company shall, in such cases, assume the additional risk of insurance involved by such act of this company."

Mr. William H. Arnold argued the cause, and, with Messrs. James K. Jones and James K. Jones, Jr., filed a brief for pl tiffs in error.

Messrs. James K. Jones and James Jones, Jr., filed a separate brief for pl tiffs in error:

The cotton had been delivered and cepted, and the liability of the defend as a common carrier existed at the time the fire.

5 Am. & Eng. Enc. Law. 2d ed. pp. 1 184, 189; Pratt v. Grand Trunk R. Co. U. S. 43, 24 L. ed. 336; Bulkley v. Nau keag Steam Cotton Co. 24 How. 386. 16 ed. 599; Fitchburg & W. R. Co. v. Hanna Gray, 541, 66 Am. Dec. 427; California I Co. v. Union Compress Co. 133 U. S. 387, L. ed. 730, 10 Sup. Ct. Rep. 365.

The courts uniformly hold that a limi tion against liability is not operative wh the loss occurred by reason of negligence

New York C. R. Co. v. Lockwood. 17 W 383, 21 L. ed. 641; Bank of Kentucky Adams Exp. Co. 93 U. S. 174, 23 L. ed. 87 Inman v. South Carolina R. Co. 129 U. 128, 32 L. ed. 612, 9 Sup. Ct. Rep. 249.

The defendant was negligent in detainin and storing the cotton with the compre company on its platforms, a place known t the defendant to be unsafe; the cotton wa kept unprotected against fire.

St. Louis & S. F. R. Co. v. Dodd, 59 Ark 317, 27 S. W. 227; St. Louis, A. & T. R. Co v. Fire Asso. of Philadelphia, 55 Ark. 177 18 S. W. 43; California Ins. Co. v. Unio Compress Co. supra; Marine Ins. Co. v. St Louis, I. M. & S. R. Co. 41 Fed. 643.

The railway company is liable for th negligence of the compress company and it employees.

Bank of Kentucky v. Adams Exp. Co supra; Merchants' Despatch Transp. Co. v Block Bros. 86 Tenn. 392, 6 Am. St. Rep 847, 6 S. W. 881; Boscowitz v. Adams Exp Co. 93 Ill. 523, 34 Am. Rep. 197; Christen son v. American Exp. Co. 15 Minn. 270, 1 Am. Rep. 122, Gil. 208; Empire Transp. Co v. Wamsutta Oil Ref. & Min. Co. 63 Pa 14, 3 Am. Rep. 515; California Ins. Co. v. Union Compress Co. 133 U. S. 397, 33 L. ed 734, 10 Sup. Ct. Rep. 365; New York C. R Co. v. Lockwood, 17 Wall. 357, 21 L. ed 627.

The fire exemption in bill of lading was void for duress.

York Mfg. Co. v. Illinois C. R. Co. 3 Wall 107, 18 L. ed. 170; Little Rock & Ft. S. R Co. v. Cravens, 57 Ark. 112, 18 L.R.A. 807, 38 Am. St. Rep. 230, 20 S. W. 803; St. Louis, I. M. & S. R. Co. v. Spann, 57 Ark 127, 20 S. W. 914; Louisville & N. R. Co. v Gilbert, 88 Tenn. 430, 7 L.R.A. 162, 12 S W. 1018; New York C. R. Co. v. Lockwood supra; Nashville, C. & St. L. R. Co. v

Stone, 112 Tenn. 348, 105 Am. St. Rep. 955, 79 S. W. 1031; Missouri, K. & T. R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Texas & P. R. Co. v. Avery, 19 Tex. Civ. App. 235, 46 S. W. 897; Gulf, C. & S. F. R. Co. Wilbanks, 7 Tex. Civ. App. 489, 27 S. W. 302; Gulf, C. & S. F. R. Co. v. Wilson, 7 Tex. Civ. App. 128, 26 S. W. 131; Illinois C. R. Co. v. Craig, 102 Tenn. 298, 52 S. W. 164; Ward v. Missouri P. R. Co. 158 Mo. 226, 58 S. W. 28; San Antonio & A. P. R. Co. v. Barnett, 12 Tex. Civ. App. 321, 34 S. W. 139; Kellerman v. Kansas City, St. J. & C. B. R. Co. 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; Duvenick v. Missouri P. R. Co. 57 Mo. App. 550.

One who has by contract assumed certain liabilities cannot free himself therefrom by the employment of an independent contractor, and this principle has been held to be applicable when the contract is merely one implied by law.

16 Am. & Eng. Enc. Law, p. 204; Montgomery Gaslight Co. v. Montgomery & E. R. Co. 86 Ala. 373, 5 So. 735; Atlanta & S. F. R. Co. v. Kimberly, 87 Ga. 161, 27 Am. St. Rep. 231, 13 S. E. 277; Waller v. Lasher, 37 Ill. App. 609; Edwards v. New York & H. R. Co. 98 N. Y. 245, 50 Am. Rep. 659.

In this case, if the compress company, while engaged in the compression of cotton under its contract with the railway company, had injured some third party in his person or property, who was under no contract with the railway company, his only remedy would have been against the compress company.

Martin v. St. Louis, I. M. & S. R. Co. 55 Ark. 510, 19 S. W. 314.

While there might have been a right of action in behalf of plaintiffs against the compress company, the railway company was primarily liable, and such action could not have been maintained except through the contract with the Texas & Pacific Ry. Co.

Bank of Kentucky v. Adams Exp. Co. 93 U. S. 174, 23 L. ed. 872; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 381, 12 L. ed. 481.

Mr. **David D. Duncan** argued the cause, and, with Mr. John F. Dillon, filed a brief for defendant in error:

The stipulations in the bill of lading that defendant should not be liable for the loss or destruction of the cotton by fire, nor for loss or damage thereto by causes beyond its control, or not occurring on its own line, and that, in having the same compressed, it should not be responsible for deviation or unavoidable delays, are all valid and binding upon the plaintiffs in this case.

Cau v. Texas & P. R. Co. 51 C. C. A. 76, 113 Fed. 91, 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663; York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 18 L. ed. 170; Hutchinson, Carr. § 240.

The compress company was not the agent of the defendant railway company.

Missouri P. R. Co. v. McFadden, 154 U. S. 156, 38 L. ed. 944, 14 Sup. Ct. Rep. 990; Martin v. St. Louis, I. M. & S. R. Co. 55 Ark. 510, 19 S. W. 314.

There was no delivery of the cotton to the railway company.

St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co. 139 U. S. 223, 35 L. ed. 154, 11 Sup. Ct. Rep. 554.

The compress company was a contractor for whose negligence defendant in error cannot be held responsible.

Dwyer v. National S. S. Co. 17 Blatchf. 472, 4 Fed. 493; Rankin v. Merchants & M. Transp. Co. 73 Ga. 229, 54 Am. Rep. 874; Martin v. St. Louis, I. M. & S. R. Co. supra; H. L. Edwards & Co. v. Texas Midland R. Co. (Tex. Civ. App.) 81 S. W. 800; St. Louis, I. M. & S. R. Co. v. Knight, 122 U. S. 83, 30 L. ed. 1079, 7 Sup. Ct. Rep. 1132.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The plaintiffs, in order to avoid the obstacle in the agreement in the third clause of the bill of lading, providing that defendant was not to be liable for damages to the cotton by fire, contend, as set up in the complaint, that the clause in the bill of lading was received under duress, and that it was unreasonable and without consideration. These contentions have been answered and overruled, upon much the same evidence, in the case of Cau v. Texas & P. R. Co. 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663, and need not be further discussed.

With the fire clause in force, it became necessary for the plaintiffs, in maintaining their action, to show that defendant had received the cotton, and that it was destroyed through the negligence of the defendant or its agents, as the exemption would not apply to a case of damage occurring through such negligence. Bank of Kentucky v. Adams Exp. Co. 93 U. S. 174, 23 L. ed. 872. We are of opinion, after carefully reading the record, that there was evidence enough to be submitted to the jury upon the question of negligence in the care of the cotton while on the platform.

This leaves the questions whether there was a delivery of the cotton to the railway company, and whether the compress *com- [515] pany, at the time of the fire, was the agent of the railway company as to that cotton.

Upon the evidence in this case, was there

a delivery? The evidence showed that the cotton was not delivered on the platform by the plaintiffs for the purpose of being compressed for them by the compress company. The order to compress was subsequently given by the railway company. That company had no other place for the delivery of the cotton to it than at this platform, but, as there were three companies with tracks at the platform, with either one of which the shipper might contract for the transportation of the cotton, it cannot be held that there was, at the time of the delivery of the cotton at the platform, a delivery to the defendant, especially as the compress company itself acknowledged the receipt of the cotton. But when these receipts were handed by the plaintiffs to the defendant's agent, who took them and issued a bill of lading to the plaintiffs, the constructive possession and the entire control of the cotton passed to the defendant. It could then, if so minded, have taken the cotton and loaded it on cars and taken it away without having had it compressed. It was, however, compressed by its own order, given in writing to the compress company, and for its own convenience, and at its own cost, and the insurance was obtained by its direction by the compress company, in the name of the defendant and for its benefit, and such policies were delivered to the defendant and sent by its agent to Dallas. Most probably the cost of compression and insurance was paid by the plaintiffs in the rate paid by them for the transportation of the cotton, as that cost was one of the factors which may be supposed to have entered into the rate of freight charged by the defendant; but the total sum paid for transportation by plaintiffs left the matter with defendant to compress and insure if it saw fit, which it probably would think fit to do in all cases, as an ordinary business precaution. The fact that in getting the cotton compressed the railway chose to have it done by [516] an independent contractor, *over whose acts it had no control while the cotton was being compressed, and the fact that it would order the compress company, after compressing, to load the cotton on cars selected by defendant's agent, did not in any way affect the fact that the cotton had been received by the railway company, and that it was thereafter subject to its full control. The defendant could not devest itself of the responsibility of due care by leaving the cotton to be compressed and loaded by the compress company. The latter company was, while so acting, the agent of the defendant, chosen by it, and, as such, the defendant was responsible for any lack of proper care of the cotton by the compress company. Bank of Kentucky v. Adams Express Co. supra.

It is urged that the case cited does not cover the facts herein, because in the reported case the attempt was to secure the immunity of the defendant express company from the consequences of the negligence of the railroad in doing the very thing that the express company had agreed to do, viz. transport the money; while in the case before us the negligence of the compress company (assuming there was such) was not in transporting the cotton, which the railway company had agreed to do, but in caring for it while awaiting compression. We see no difference, in fact, which would lead to a different result.

The compression was done for the convenience of the railroad company, after the company had received the cotton, and before the actual transportation had commenced. In order to enable it the more conveniently to do the work of transportation it cannot devest itself of its obligation to exercise due care while the cotton is in the control of the compress company, although the latter is an independent contractor, and not under the immediate control of the railway company while doing the work of compression in its behalf. There would be no justice in such holding, and we are clear it would violate the general rule that the carrier, after the freight has been received by it, must be regarded as liable, *at least, for the negligence of its own servants, and also for that of the servants of an independent contractor, employed by it to do work upon the freight for its own convenience and at its own cost.

In California Ins. Co. v. Union Compress Co. 133 U. S. 387, 33 L. ed. 730, 10 Sup. Ct. Rep. 365, the question was simply as to the liability of the insurance company on a policy of insurance against fire, issued by it to the Union Compress Company upon cotton in the possession of the compress company for compression, and which belonged to divers other parties. The policy insured the cotton for the plaintiff while "in bales, their own or held by them in trust or on commission." The defense was that, as the compress company did not own the cotton, and the beneficiaries under the policy were its owners, that no interest of any carrier was covered by the policy. The court held that the railway companies were beneficiaries under the policy, because they had an insurable interest in the cotton, and to that extent were its owners, and that it was held in trust for them by the plaintiff. The railway company had issued bills of lading upon the surrender of the receipts of the compress company. It was held that where the original depositors of the cotton

had surrendered to the railroad companies the receipts which they had taken from the compress company, that those companies became substituted in the relation to the compress company which before had been held by the depositors of the cotton; that the railroad companies thus became the beneficiaries of the trust so far as the compress company was concerned, because they thus became the persons to whom that company owed the duty of bailment, and the persons entitled to demand possession of the property from the plaintiff. The policy also contained a provision that it should be void if there were any change in the possession of the insured property, and the defendants insisted that there was such a change, caused by the signing of the bill of lading by the railway companies in return for the receipts given by the compress company upon the [518] deposit *of the cotton with the latter company, although no actual change had taken place, and the cotton still remained in the custody of the compress company. It was, however, held that the railway companies, in acquiring the receipts of the compress company and issuing bills of lading for the cotton, took only constructive possession of it, and the plaintiff retained actual physical possession of it, and did not lose any element of possession necessary to give it the right to effect the insurance for its own benefit and as bailee or agent for the protection of the railway companies, although the railroad companies' was the right to ultimate possession, which passed to them by the original deposit of the cotton receipts given by the plaintiff.

The question of whether there had been a change of possession within the meaning of that expression as used in the insurance policy is entirely different from that of whether immediate control of the cotton passed to the railway company by virtue of the delivery of the bill of lading in this case, so as to render the company liable for any neglect by it or its agent in regard to the subsequent care of the cotton. In the case at bar, not only was there a constructive possession by the railway company, but that company assumed full control of the cotton, and gave directions to the compress company what to do with it.

In St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co. 139 U. S. 223, 35 L. ed. 154, 11 Sup. Ct. Rep. 554, the question was also in regard to insurance, the insurance company endeavoring to collect from the defendant what it had paid to the owners of cotton. In that case the cotton, which had been destroyed by fire, was in the possession of the compress company, and the railway company had never given any bill of lading for it. The insurance companies had issued policies upon and delivered them to the owners of the cotton, and when the cotton had been destroyed by fire the companies paid the losses and claimed that the railway company was liable under the contract which the company had made with the compress *company to [519] receive the cotton and transport it over its railroad across the Arkansas river to the press of the compress company in Argenta, a distance of a mile and a half. The insurance companies insisted that, by the failure of the railway company, under its contract with the compress company, to transport this cotton as fast as it came in, the amount of the cotton became so great as to constitute a public nuisance, as it was piled up in the compress company's warehouse and overflowed into the adjoining streets. This court held that, as there had been no bills of lading issued by the railway company for the cotton which had been destroyed, the failure of the railway company to furnish sufficient transportation for the cotton to the compress company, while it may have been a breach of the contract between the railway company and the compress company, yet such breach created no liability in contract or tort to the owners or insurers of the cotton or to any other person. The court, at page 237, L. ed. at page 158, Sup. Ct. Rep. at page 558, said: "This cotton, certainly, was in the exclusive possession and control of the compress company. The railway company had not assumed the liability of a common carrier, or even of a warehouseman, with regard to it; had given no bills of lading for it; had no custody or control of it and no possession of it, actual or constructive, and had no hand in placing or keeping it where it was."

In speaking of the issuing of bills of lading by the railway company for certain other cotton and what effect it had upon the rights of the parties, in the case then under consideration, the court said, page 238, L. ed. page 159, Sup. Ct. Rep. page 558:

"There is nothing else in the case which has any tendency to show that the railway company had or exercised any control or custody of the cotton, or of the place where it was kept by the compress company, before it was put upon the cars by that company. The railway company evidently neither considered itself, nor was considered by the compress company, as having assumed any responsibility for the care or custody of the cotton, until it had been insured in its behalf and loaded *upon its cars. [520] The evidence warranted, if it did not require, the inference that the bills of lading were issued merely for the convenience of all parties, and with no intention of mak-

ing any change in the actual or the legal custody of the cotton until it was so loaded."

Such is not the case here.

In Missouri P. R. Co. v. McFadden, 154 U. S. 155, 38 L. ed. 944, 14 Sup. Ct. Rep. 990, the case was decided upon the facts therein stated, which were that it was understood both by the carrier and the shipper that the cotton was not to be delivered at the time the bills of lading were issued, the cotton at that time being in the hands of the compress company, which compress company was the agent of the shipper, it being the intention of the parties at the time the bills of lading were issued that the cotton should remain in the hands of the compress company, the agent of the shipper, for the purpose of being compressed. These allegations were made in the answer of the company, which was excepted to, and their truth was therefore admitted. The trial court had, nevertheless, held the company liable for the loss of the cotton. This court said (page 160, L. ed. page 946, Sup. Ct. Rep. page 991): "The case presents the simple question of whether a carrier is liable on a bill of lading for property which, at the time of the signing of the bill, remained in the hands of the shipper for the purpose of being compressed for the shipper's account, and was destroyed by fire before the delivery to the carrier had been consummated." The court held that, under such circumstances, there was no liability on the part of the common carrier, because it had never had the cotton delivered to it, the issuing of the bill of lading being subject to the intention of the parties. and the cotton remaining in the hands of the compress company as agent of the shipper.

The facts in the case at bar are totally different.

Stress was laid in the argument before us upon the fact that, under the 13th rule of the Texas railroad commission, the defendant was bound to sign the bill of lading when the receipts of the compress company [521] were presented *to the railway company, and that, therefore, the defendant cannot be held to have become liable by virtue of the delivery of the bill of lading in question upon such a purely arbitrary order. It is also urged that the 11th rule of the defendant, which is set up in the foregoing statement, and which is to the same effect as the order of the railroad commission, was adopted simply pursuant to that order, and, therefore, no liability attaches from the bill of lading issued under the circumstances of this case. We think the argument is not sound. The rule of the Texas commission applies to a case when the cotton is tendered to the railway company, although at the time it is upon the compress company's platform. Now, if the railway company not regard the presentation of these ceipts as in fact a tender to the railway co pany of the cotton in question, or if were not a valid tender of the cotton, could have refused to sign the bill of ladi The same may be said of rule 11 of t company itself. The company evidently garded the cotton as tendered them. a issued the bill in acknowledgment of t fact of such tender.

We think the evidence in this case ma out a delivery to and acceptance by the ra way company of the cotton in question, as that the compress company had the actu custody of the cotton as the agent of th railway company, and the question o whether the persons in whose custody it wa at the time of the fire were guilty of ne ligence was a question which should hav been submitted to the jury.

The judgment of the Circuit Court of Ap peals and that of the Circuit Court should be reversed and the case remanded to th Circuit Court with directions to set aside the verdict and to grant a new trial.

Reversed.

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*EAU CLAIRE NATIONAL BANK, Plff. in Err.,

v.

RALPH W. JACKMAN, as Trustee of the Estate of John H. Young, a Bankrupt.

(See S. C. Reporter's ed. 522-538.)

Error to state court—Federal question—how raised.

1. A judgment of the highest state court in favor of a trustee in bankruptcy in an action brought by him to recover the value of an alleged voidable preference may be reviewed by the Federal Supreme Court as a decision against a Federal right or immunity, specially set up or claimed, where the state court answered some of the defendant's contentions by the construction which it gave to the bankrupt act

Pleading—demurrer—waiver of objection by pleading over.

2. The question whether the election by a trustee in bankruptcy to avoid a prefer-

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Ex Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Ayer Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be

ence should be exercised by a demand before suit, or can be exercised by the suit itself, is not open to the defendant, although it demurred to the complaint, and urged, as a ground of demurrer, the absence of an allegation of a demand, where it did not stand on the demurrer, but answered, and not only traversed the allegations of the complaint, but set up an independent defense, and showed that a demand would have been unavailing.

Error to state court—questions reviewable—findings of fact.

3. Findings of fact upon which depends the answer to the question whether or not certain transactions were invalid under the bankrupt act as operating to give a creditor an unlawful preference are conclusive upon the Supreme Court of the United States, in reviewing, by writ of error, the judgment of a state court.

Bankruptcy—suit to avoid preference—scope of inquiry in state court.

4. The validity of all other claims against the bankrupt, and the question whether others have received voidable preferences and have not been required to surrender them, cannot be litigated in a suit in a state court to avoid an alleged unlawful preference, since this would, in effect, transfer the administration of the bankrupt's estate from the Federal district court to the state court.

[No. 163.]

Argued January 16 and 17, 1907. Decided February 25, 1907.

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment which affirmed a judgment of the Circuit Court of Eau Claire County, in that state, in favor of a trustee in bankruptcy in a suit to avoid an alleged unlawful preference. Affirmed.

See same case below, 125 Wis. 465, 104 N. W. 98.

Statement by Mr. Justice McKenna:

This action was brought by defendant in error, hereafter called the trustee, in the circuit court of Eau Claire county, state of Wisconsin, against the plaintiff in error, hereafter called the bank, under § 60b of the bankrupt act of 1898 [30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3445], to recover the value of property which, it is alleged, was transferred by the bankrupt to the bank, for the purpose of giving the latter a preference over other creditors. Judgment was recovered by the trustee, which, on appeal, was affirmed by the supreme court of the state. 125 Wis. 465, 104 N. W. 98. Thereupon this writ of error was sued out.

The complaint of the trustee alleges that on the 7th of June, 1902, John H. Young duly filed his petition in bankruptcy *in the [523] United States district court for the western district of Wisconsin, pursuant to the act of Congress, and was on said day duly declared a bankrupt. Subsequently defendant in error was duly elected and appointed by the creditors of the bankrupt as trustee in bankruptcy, and duly qualified as such trustee.

The plaintiff in error is and was, at all the times mentioned in the complaint, a national bank. Young, during the four months immediately preceding the filing of his petition, was the owner and in possession of certain lumber, shingles, and lath, located at Cadott, Chippewa county, Wisconsin, and certain logs in or near the Yellow river and Chippewa river in Chippewa county, which were reasonably worth the sum of $35,000. The value of all other property owned by him did not exceed the sum of $500.

On the 10th of February, 1902, Young was wholly insolvent, and owed debts which largely exceeded the value of his property, which fact was well known to him and the bank. The aggregate amount of his indebtedness exceeded the sum of $40,000, and the value of his property was substantially $35,000. He was indebted to the bank in the sum of $27,000 for moneys borrowed from time to time for a period of about two years previous to that time. On said day Young executed to the bank a chattel mortgage on 2,100,000 feet of saw logs, to secure the sum of $15,900, then owing from him to the bank, and also executed a chattel mortgage, transferring 1,000,000 feet of lumber, about 600,000 shingles, and about 200,000 lath, to secure the sum of $11,100, owing by him to the bank. This indebtedness existed long prior to said mortgages, and the property transferred constituted substantially all of the property then owned by Young not ex-

raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On review of decisions of state courts in cases involving questions of bankruptcy—see note to Thompson v. Fairbanks, 49 L. ed. U. S. 577.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On review of questions of fact on writ of error to a state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

On pleading to merits as waiver of plea in abatement—see note to Sheppard v. Graves, 14 L. ed. U. S. 518.

On actions by or against assignee in bankruptcy in a state court—see note to Loughin v. McCaulley, 48 L.R.A. 36.

empt from execution, which facts were well known by him and the bank. The effect of the foreclosure of the mortgages would be to enable the bank to obtain a much larger percentage of its debt than would the other creditors of Young in the same class as the bank. The mortgages were given by [524] Young and taken *by the bank for the sole purpose of hindering and delaying the other creditors, and were executed and received for that purpose, and the bank, at the time of their execution, had reasonable cause to believe that they were given with the intention to give it a preference over other creditors.

The Waters-Clark Lumber Company is a corporation of the state of Minnesota, and D. S. Clark is the president thereof and also a director in the bank, and W. K. Coffin is the cashier of the latter. On or about the 10th of March, 1902, Coffin, acting for the bank, requested Young to transfer to the lumber company, for the benefit of the bank, all of the property embraced in the mortgages, together with certain other property. Pursuant to such request Young did, on or about the 10th of March, 1902, transfer, by absolute bills of sale, to the lumber company, all of the property described in the mortgages, and other saw logs owned by him. The property transferred was reasonably worth the sum of $35,000. Immediately on the execution of the bills of sale the lumber company, acting pursuant to the directions by and in behalf of the bank, took possession of the property transferred, and thereafter sold the same and applied the proceeds to the payment of the indebtedness secured by the mortgages. At the time the bills of sale were made the lumber company and the bank thought the property transferred constituted all of the available assets of Young, and that the result of such transfer and the appropriation of the proceeds thereof would result in the other creditors of Young losing all of his indebtedness to them. The lumber company, acting as vendee of said property, was in reality acting as trustee for the bank, and made such pretended purchase with the understanding and agreement with the bank and Young that it would account to the bank for the proceeds of the property transferred to the amount of his indebtedness, and that any sums realized in excess of his indebtedness should be paid to Young. The bills of sale were not executed in compliance with the statutes of [525] the state. Except as to the agreement *to pay said indebtedness, no consideration was paid by the lumber company for the property, and, at the time of the transfer of the property, nothing was paid to Young therefor. By reason of said transactions the bank, within four months, appropriated to the payment of its claims substantially all of the property of Young, which at said time was and has been ever since worth $35,000. There is no other property in the possession of the trustee, belonging to Young, out of which his other creditors can be paid.

The bank demurred to the complaint on the following grounds: The court had no jurisdiction of the subject of the action; the trustee had no legal capacity to sue, in that the complaint did not allege that authority or permission was given him to bring suit; defect of parties, in that Young and the lumber company were not made parties; and that the complaint did not state a cause of action. The demurrer was overruled, and the bank, availing itself of the permission granted, filed an answer, in which it admitted its corporate character and that of the lumber company, and the execution of the mortgages and the bills of sale, and that the instruments were not executed in the manner provided by the statutes of the state. It denied all the other allegations of the complaint, and alleged that a portion of the proceeds of the sale of the property was paid to the bank to discharge valid and existing liens which it held against the property. And it alleged that the mortgages were given for a good and valuable consideration, and that neither of them nor the payments to the bank were made or received for the purpose of giving the bank a preference over other creditors of Young, "contrary to the provisions of the bankruptcy laws," and "that, prior to the commencement of this action, the plaintiff commenced an action in this court against said Waters-Clark Lumber Company to recover from said Waters-Clark Lumber Company the purchase price of logs and other material sold by said Young to said Waters-Clark Lumber Company, and thereby elected to treat and consider said contract between *said Young and said Waters-Clark Lumber Company as legal and valid, and elected to look to and hold the said Waters-Clark Lumber Company, instead of this defendant, as liable to said trustee for all sums of money which the said plaintiff may be entitled to recover on account of the transactions mentioned in plaintiff's complaint."

Questions were submitted to the jury covering the issues in the case, except the value of the property, which, by stipulation of parties, was reserved for the court. The jury, in response to the questions, found that at all the days mentioned in the complaint the property transferred at a fair valuation was insufficient to pay Young's debts; that the lumber company, acting for the bank and pursuant to the arrangement between it and the bank, took the legal title to the lumber and logs for the benefit of

the bank under an agreement with it and Young to account to the bank for a portion of the proceeds; that it was the intention of Young, by the execution of the mortgages and the transfer of the property, to give the bank a preference, and that the bank and officers and agents had reasonable cause to believe that Young intended to give it such preference and to enable it to obtain a greater percentage of its indebtedness than any other of his creditors of the same class would be able to obtain.

The court found that the lumber which was included in the bank's mortgage was worth $3,452.85, and that a note for that sum and value was given by the lumber company to Young and by him transferred to the bank; that the Cadott logs, included in the mortgage and sold by Young to the lumber company, were worth $10,077.84; that the up-river logs not included in the mortgage, but sold to the lumber company by Young, were worth $11,055.84; and that a note which was given as the net proceeds of the sale of both quantities of logs over and above certain labor liens was worth $2,508.14. This note was given by the lumber company to Young and transferred by him to the bank. The trustee contended in the trial court that he was entitled to recover [527]*for the entire value of the logs and lumber, and that no credit should be allowed the bank for the sums paid by it to discharge certain liens on the property for labor claims and unpaid purchase money. The court rejected the contentions and gave judgment for the trustee in the sum of $6,254.99. In this sum was included the value of the notes.

The assignments of error are that the supreme court erred in the following particulars: (1) In determining that the complaint stated a cause of action. (2) In determining that the bank was liable for the value of the logs and lumber to the extent of the chattel mortgage interest of the bank therein. (3) In determining that the bank was liable for having received a preference contrary to §§ 60a and 60b of the bankrupt act of July 1, 1898, as "a portion of its chattel mortgage interest in said logs, the sum of $1,335.62 as the proceeds of the sale of the portion of said logs known as the 'up-river logs,' on which logs said defendant never held any chattel mortgage, and which logs were never transferred to said defendant." (4) In determining that the bank was liable for the value and moneys it received as a preference, although the trustee had not elected to avoid such preference by bringing suit to recover the same, and had not elected to avoid such preference in any manner. (5) And in holding that, in determining a question of preference, it was immaterial, under the bankrupt act, whether the bank and the other creditors were of the same class, and in refusing to reverse the judgment because of the error of the circuit court in charging the jury that all of the creditors were of the same class. (6) In its construction of the bankrupt act in the following particulars: (a) In holding that a transfer made within four months of the bankruptcy proceedings, which enabled a creditor to obtain any portion of his debt, constituted a preference. (b) That, although the effect of the transfer in question did not operate to give the bank a greater percentage of its debts than other creditors of the same class, such transfer constituted a preference. (c) In determining, *by such [528] rules of construction of the bankrupt act, that the evidence was sufficient to establish that the bank had reasonable cause to believe that a preference was intended. (7) (8) (9) In holding that the bank was liable for the full value of the preference received in an amount in excess of what was necessary to pay all the other creditors of the bankrupt, and claims of fictitious creditors and claims of creditors who had themselves received preference, and in not limiting the recovery to such sum as would be sufficient to pay the claims of creditors whose claims were provable. (10) (11) In affirming the judgment against the bank, and not rendering judgment for it.

Mr. James Wickham argued the cause, and, with Messrs. Burr W. Jones and Frank R. Farr, filed a brief for plaintiff in error:

The decisions of this court are numerous that in a case like this this court has jurisdiction.

Factors' & T. Ins. Co. v. Murphy, 111 U. S. 738, 28 L. ed. 582, 4 Sup. Ct. Rep. 679; Traer v. Clews, 115 U. S. 528, 29 L. ed. 467, 6 Sup. Ct. Rep. 155; Dimock v. Revere Copper Co. 117 U. S. 559, 29 L. ed. 994, 6 Sup. Ct. Rep. 855; Palmer v. Hussey, 119 U. S. 96, 30 L. ed. 362, 7 Sup. Ct. Rep. 158; Winchester v. Heiskell, 119 U. S. 450, 30 L. ed. 462, 7 Sup. Ct. Rep. 281; Williams v. Heard, 140 U. S. 529, 35 L. ed. 550, 11 Sup. Ct. Rep. 885; Dushane v. Beall, 161 U. S. 513, 40 L. ed. 791, 16 Sup. Ct. Rep. 637; McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9; Kaufman v. Tredway, 195 U. S. 271, 49 L. ed. 190, 25 Sup. Ct. Rep. 33; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567.

A party who insists that a judgment cannot be rendered against him consistently

with the statutes of the United States may be fairly held, within the meaning of § 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary.

Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216.

In Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. Rep. 613, where it appeared that a national bank claimed in the state court immunity from liability under the United States banking laws, it was held that such claim was sufficient to sustain the appellate jurisdiction of the United States Supreme Court, although the bank did not, in the first instance, anticipate the specific and qualified form in which the immunity finally was denied.

When it appears by the opinion of the state supreme court, which has been made a part of the record, that a Federal question was there raised and decided against the plaintiff in error, that is sufficient to confer on the United States Supreme Court jurisdiction to review such question.

San José Land & Water Co. v. San José Ranch Co. 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730; Taylor, Jurisdiction, p. 450.

The certificate of the state supreme court removes any doubt that might otherwise exist in the record as to the fact that the Federal questions involved were raised and presented in the state court, and decided adversely to the plaintiff in error.

Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; Merchants' Nat. Bank v. Wehrmann, supra.

The trustee has not elected to avoid, or brought suit to recover, any preference that the bank may have received, and the judgment rendered therefor cannot be sustained.

Pirie v. Chicago Title & T. Co. 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906; Shuman v. Fleckenstein, 4 Sawy. 174, Fed. Cas. No. 12,826; Brooke v. McCracken, 10 Nat. Bankr. Reg. 461, Fed. Cas. No. 1,932; Lyon v. Clark, 129 Mich. 381, 88 N. W. 1047; Wright v. Skinner, 136 Fed. 694; Capital Nat. Bank v. Wilkerson (Ind. App.) 72 N. E. 247.

A preference is never void, but only voidable; and no one but the trustee can elect to avoid it.

Dyer v. Kratzenstein, 103 App. Div. 404, 92 N. Y. Supp. 1012; Lewis v. First Nat. Bank, 46 Or. 182, 78 Pac. 990.

A creditor, by merely receiving the voidable preference, does not violate any le or moral right.

Swarts v. Fourth Nat. Bank, 54 C. C. 387, 117 Fed. 11; Swartz v. Frank, 183 I 438, 82 S. W. 60.

Except in cases of fraud, and except to the right to recover a preference, trustee takes the property of the bankr in the same plight and condition that t bankrupt himself held it, and subject all the equities imposed upon it in the han of the bankrupt.

Thompson v. Fairbanks, 196 U. S. 51 526, 49 L. ed. 577, 586, 25 Sup. Ct. Re 306; York Mfg. Co. v. Cassell, 201 U. S. 34 352, 50 L. ed. 782, 785, 26 Sup. Ct. Rep. 48

If the notes constituted the preferenc the value of the logs and lumber was no material. If the logs and lumber consti tuted the preference, the value of the note was not material. It is the value of tha which constitutes the preference, and no the selling price, which fixes the measur of liability of the creditor receiving suc preference.

Bankrupt Act, § 60b; Russell v. Powel 38 Wash. 651, 80 Pac. 837.

The transaction was in the nature of a absolute payment or transfer, and not i the nature of a mortgage or other lie Where the lien has ripened into an abs lute title by a sale of the property, th provisions of the bankrupt act relating t liens no longer apply. In such a case th remedy of a trustee, if he has any, is t treat the action as an absolute payment transfer, and bring suit therefor under 60b of the bankrupt act.

Re Bailey, 144 Fed. 214.

Where a mortgage is given in part for present consideration, and in part for antecedent debt, it has been frequently he that the mortgage is valid as to the exte of the present conditions, but invalid to t extent of the antecedent debt.

City Nat. Bank v. Bruce, 48 C. C. A. 2 109 Fed. 69; Re Clifford, 136 Fed. 475.

In such a case the recovery would be the property, subject to any valid liens e isting thereon; but in a case of this kin where the creditor received an absolute pay ment, any relief which the trustee cou obtain must be under § 60b, under whic he recovers the property that the credito received, or its value.

In Swartz v. Frank, supra, it was hel that where the trustee waited until afte the year had expired in which a credito might file a claim in the bankruptcy cour before bringing any suit to avoid a prefer ence, the trustee was estopped by hav from maintaining such suit.

It was error to instruct the jury that t creditors were all of the same class.

Doyle v. Milwaukee Nat. Bank, 54 C. C. A. 97, 116 Fed. 296.

It has been frequently held that a payment to a creditor who is entitled to priority by reason of having a claim for wages, or by reason of his having some claim placing him in a different class from other creditors, did not constitute a preference. If other creditors are in a subsequent class, they are not injured by the transfer, and therefore the enforcement of the transfer does not enable the creditor receiving it to recover a greater percentage of his debt than he is entitled to.

Loveland, Bankruptcy, 2d ed. 587; Collier, Bankruptcy, 4th ed. 422; Re Henry C. King Co. 113 Fed. 110; Doyle v. Milwaukee Nat. Bank, 54 C. C. A. 97, 116 Fed. 295; Eason v. Garrison, 36 Tex. Civ. App. 574, 82 S. W. 800.

A payment or transfer by an insolvent debtor does not constitute a preference, unless it has the effect to enable one creditor to obtain a greater percentage of his debt than other creditors of the same class.

New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199; Re Henry C. King Co. supra; Swarts v. Fourth Nat. Bank, 54 C. C. A. 387, 117 Fed. 4; Loveland, Bankruptcy, 2d ed. 572, 577; Collier, Bankruptcy, 4th ed. 422; Christopherson v. Oleson (S. D.) 102 N. W. 685; Sellers v. Hayes, 163 Ind. 422, 72 S. E. 119; Peterson v. Nash Bros. 55 L.R.A. 344, 50 C. C. A. 260, 112 Fed. 311; Hastings v. Fithian, 71 N. J. L. 311, 60 Atl. 350.

Mr. C. T. Bundy argued the cause, and with Mr. R. P. Wilcox, filed a brief for defendant in error:

This court has no jurisdiction to review the decision and judgment of the supreme court of Wisconsin in this case unless it clearly appears from the record.

(a) That a Federal question was raised by the plaintiff in error in the state court by specially setting up some right, claim, or immunity under the Federal statutes.

Zadig v. Baldwin, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639; Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530; Dewey v. Des Moines, 173 U. S. 193, 198, 43 L. ed. 665, 668, 19 Sup. Ct. Rep. 379; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 654, 41 L. ed. 1149, 1151, 17 Sup. Ct. Rep. 709; Ocean Ins. Co. v. Polleys, 13 Pet. 157, 10 L. ed. 105; 11 Cyc. Law & Proc. p. 937 and cases cited; Detroit City R. Co. v. Guthard, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811; Bolln v. Nebraska, 176 U. S. 83, 91, 44 L. ed. 382, 385, 20 Sup. Ct. Rep. 287; Loeber v. Schroeder, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; Miller v. Texas, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; Chouteau v. Gibson, 111 U. S. 200, 38 L. ed. 400, 4 Sup. Ct. Rep. 340; Hagar v. California, 154 U. S. 639, Appx. and 24 L. ed. 1044, 14 Sup. Ct. Rep. 1186; 11 Cyc. Law & Proc. p. 928; 29 Am. & Eng. Enc. Law, p. 248; Beals v. Cone, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275; Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; Dewey v. Des Moines, 173 U. S. 193, 200, 43 L. ed. 665, 667, 19 Sup. Ct. Rep. 379; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Smith v. Adsit, 16 Wall. 185, 21 L. ed. 310; Farney v. Towle, 1 Black, 350, 17 L. ed. 216.

(b) That the question so raised was actually decided by the supreme court of Wisconsin, adversely to plaintiff in error.

Roby v. Colehour, 146 U. S. 153, 159, 36 L. ed. 922, 924, 13 Sup. Ct. Rep. 47; Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379.

(c) That such right, title, or immunity so set up was personal to plaintiff in error.

29 Am. & Eng. Enc. Law, p. 248 and cases cited; Fulton v. M'Affee, 16 Pet. 149, 10 L. ed. 918; Burke v. Gaines, 19 How. 388, 15 L. ed. 655; Missouri ex rel. Carey v. Andriano, 138 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385; Texas & P. R. Co. v. Johnson, 151 U. S. 81, 38 L. ed. 81, 14 Sup. Ct. Rep. 250; De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; Kizer v. Texarkana & Ft. S. R. Co. 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100.

(d) That such question was presented and right claimed by pleading, motion, exception, or other action, which is part of the record, showing that the alleged Federal question was clearly presented to and passed upon by the state court.

Bolln v. Nebraska, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287; Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Layton v. Missouri, 187 U. S. 359, 47 L. ed. 215, 23 Sup. Ct. Rep. 137; Jacobi v. Alabama, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; Baldwin v. Kansas, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; Spies v. Illinois (Ex parte Spies) 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; Mutual L. Ins. Co. v. McGrew, 188 U. S. 309, 47 L. ed. 485, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375.

And it is equally apparent that, in determining what is shown by the record, for the purpose of determining jurisdiction, no

proceeding subsequent to the entry of the judgment appealed from constitutes any part of the record. This rule eliminates entirely

(a) A certificate of the chief justice of the state of Wisconsin, sent to this court as a supplemental return, since the filing of the pending motion.

11 Cyc. Law & Proc. p. 939 and cases cited; Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Henkel v. Cincinnati, 177 U. S. 170, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; Home for Incurables v. New York, supra; Winous Point Shooting Club v. Caspersen, 193 U. S. 189, 48 L. ed. 675, 24 Sup. Ct. Rep. 431; Fullerton v. Texas, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221; Allen v. Arguimbau, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622; Marvin v. Trout, 199 U. S. 212, 50 L. ed. 157, 26 Sup. Ct. Rep. 31; Rector v. City Deposit Bank Co. 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289.

(b) The petition for rehearing addressed to the state court.

Lagrange v. Chouteau, 4 Pet. 287, 7 L. ed. 861; Susquehanna Boom Co. v. West Branch Boom Co. 110 U. S. 57, 28 L. ed. 69, 3 Sup. Ct. Rep. 408; Simmerman v. Nebraska, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; 11 Cyc. Law & Proc. p. 936; Sayward v. Denny, supra; Loeber v. Schroeder, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; Miller v. Cornwall R. Co. 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; Fullerton v. Texas, supra; Turner v. Richardson, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; Meyer v. Richmond, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106; French v. Taylor, 199 U. S. 274, 50 L. ed. 189, 26 Sup. Ct. Rep. 76; Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 182, 50 L. ed. 143, 26 Sup. Ct. Rep. 41.

(c) The petition for the allowance of a writ of error to this court.

11 Cyc. Law & Proc. p. 938; California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; Sayward v. Denny, supra; Warfield v. Chaffe, 91 U. S. 690, 23 L. ed. 383; Clark v. Pennsylvania, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 113; Butler v. Gage, 138 U. S. 52, 34 L. ed. 869, 11 Sup. Ct. Rep. 235; Corkran Oil & Development Co. v. Arnaudet, supra; 11 Cyc. Law & Proc. p. 936; Johnson v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; Simmerman v. Nebraska and French v. Taylor, supra; Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 129, 49 L. ed. 413, 25 Sup. Ct. Rep. 200.

(d) The assignments of error this court.

11 Cyc. Law & Proc. p. 938 a cited; Fowler v. Lamson, 164 U. S L. ed. 424, 17 Sup. Ct. Rep. 112; H Illinois, supra; Cornell v. Green, 75, 41 L. ed. 76, 16 Sup. Ct. Rep. souri P. R. Co. v. Fitzgerald, 160 575, 40 L. ed. 536, 540, 16 Sup. Ct. Corkran Oil & Development Co. v. and French v. Taylor, supra.

It was immaterial how the prefe given. If, through the mortgages sale, agreement, or otherwise, the in error was paid, either dir Young, or by Waters-Clark Lum pany, who purchased his property time within the prohibited perio received such payment with guilt edge, it is liable for the amount it

Stern v. Louisville Trust Co. 50 367, 112 Fed. 501; Western Tie & Co. v. Brown, 64 C. C. A. 256, 129 Swarts v. Fourth Nat. Bank, 54 387, 117 Fed. 1; Mishawaka Woo Co. v. Powell, 98 Mo. App. 530, 72 S

Courts have been frequently cal to pass upon devices and schemes one at bar, intended to cover ille erences, and uniformly hold t scheme resulting in one creditor directly or indirectly, any part of in excess of the amount other cre the same class would receive by distribution, is void.

Re Stein, 16 Nat. Bankr. Reg. Cas. No. 13,352; Fleming v. Andrew 632; Re Beerman, 112 Fed. 664; First Nat. Bank, 122 Iowa, 443, 9 284; Hackney v. First Nat. Bank, 588, 94 N. W. 805, 98 N. W. 412; v. Hargreaves Bros. 3 Neb. (Unof. N. W. 626; Re Belding, 116 Fed. 1

It is too clear to admit of reason troversy, that if a creditor recei rity for the payment of his claim has the same standing as other for the balance of his claim as have if the transaction were valid fect will necessarily be to give itor an undue advantage and a within the meaning of the bankru

Toof v. Martin, 13 Wall. 46, 20 L

The whole question, however, as er or not the officers of the bank sonable cause to believe that tended by the sale to give it a or reasonable cause to believe th getting a preference, is purely a of fact for the jury, and the found, on ample evidence, against in error.

Crittenden v. Barton, 59 App. 69 N. Y. Supp. 559; Giddings v.

Dill. 115, Fed. Cas. No. 5,405; Re Forsyth, 7 Nat. Bankr. Reg. 174, Fed. Cas. No. 4,948; Re McDonough, 3 Nat. Bankr. Reg. 221, Fed. Cas. No. 8,775; Re Eggert, 43 C. C. A. 1, 102 Fed. 735; Re Graham, 110 Fed. 135; Hackney v. Raymond Bros. Clarke Co. 68 Neb. 624, 94 N. W. 822; Bardes v. First Nat. Bank, 122 Iowa, 443, 98 N. W. 284.

A demand is not necessary.

4 Cyc. Law & Proc. p. 243; Bull v. Houghton, 65 Cal. 422, 4 Pac. 529; Crampton v. Valido Marble Co. 60 Vt. 291, 1 L.R.A. 120, 15 Atl. 153; Goldberg v. Harlan, 33 Ind. App. 465, 67 N. E. 707; Barbour v. Priest, 103 U. S. 293, 26 L. ed. 478; Toof v. Martin, supra.

Messrs. W. P. Bartlett, C. T. Bundy, and R. P. Wilcox filed a separate brief for defendant in error on motion to dismiss the writ:

To give the Supreme Court jurisdiction it must appear by the record that a Federal question is involved.

Zadig v. Baldwin, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639; Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530, 571; Dewey v. Des Moines, 173 U. S. 193, 198, 43 L. ed. 665, 666, 19 Sup. Ct. Rep. 379; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 654, 41 L. ed. 1149, 1151, 17 Sup. Ct. Rep. 709.

In order to bring a case from the state court to the United States Supreme Court for review, it is necessary that the record should show that the point giving jurisdiction was raised and decided in the court below.

Detroit City R. Co. v. Guthard, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811; Bolln v. Nebraska, 176 U. S. 83, 91, 44 L. ed. 382, 385, 20 Sup. Ct. Rep. 287; Miller v. Texas, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; Chouteau v. Gibson, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; Hagar v. California, 154 U. S. 639, and 24 L. ed. 1044, 14 Sup. Ct. Rep. 1186; Loeber v. Schroeder, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934.

Where it does not appear in any part of the record that any Federal question was actually presented for consideration, or in any way relied on, in the state court, before the final judgment from which the writ of error has been taken, and the fact that, after the final judgment, and in the petition for a writ of error, a Federal question was presented, will not give the Supreme Court jurisdiction, and the writ will be dismissed.

Johnson v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; Simmermann v. Nebraska, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333.

A Federal question cannot be raised for the first time by a petition for rehearing after judgment in the highest court of the state, so as to bring the case within the appellate jurisdiction of the United States Supreme Court.

Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; Miller v. Cornwall R. Co. 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Loeber v. Schroeder, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934.

To give the Supreme Court jurisdiction it must appear that the plaintiff in error set up and claimed some right, privilege, or immunity under a Federal statute, and that such right, privilege, or immunity was denied by the judgment of the state court sought to be reviewed.

Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 1117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; Dewey v. Des Moines, 173 U. S. 193, 200, 43 L. ed. 665, 667, 19 Sup. Ct. Rep. 379; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Smith v. Adsit, 16 Wall. 185, 21 L. ed. 310; Farney v. Towle, 1 Black, 350, 17 L. ed. 216.

The title, right, privilege, or immunity claimed must be personal to the plaintiff in error. He is not entitled to review where the title, right, privilege, or immunity was asserted by the other party, and the decision was in favor of that party and adverse to himself.

De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; Texas & P. R. Co. v. Johnson, 151 U. S. 81, 38 L. ed. 81, 14 Sup. Ct. Rep. 250; Kizer v. Texarkana & Ft. S. R. Co. 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100; Missouri ex rel. Carey v. Andriano, 138 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385.

Mere questions of fact present no Federal question and the findings of the jury are verities in this court.

Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Kaufman v. Tredway, 195 U. S. 271, 49 L. ed. 190, 25 Sup. Ct. Rep. 33; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561.

Mr. Justice **McKenna**, after stating the case as above, delivered the opinion of the court:

A motion is made to dismiss on the ground that the record *presents nothing but [532] questions of fact. It is contended that neither in the pleadings of the bank nor in any way was any right, privilege, or immunity under a Federal statute specifically set up or claimed in the state courts. The only questions presented by the pleadings, it is

urged, were, did the bankrupt give the bank a preference, and did the bank accept it with reasonable grounds to believe that a preference was intended? The supreme court, however, considered the pleadings to have broader meaning, and answered some of the contentions of the bank by the construction it gave to the bankrupt act. The case, therefore, comes within the ruling in Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216. It was there said: "A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of § 709 (U. S. Comp. Stat. 1901 p. 575), to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary." See also Rector v. City Deposit Bank Co. 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289.

On the merits of the case we start with the facts established against the bank, that the property of Young, at the time he executed the chattel mortgages and when he executed the deed to the lumber company, at a fair valuation, was insufficient to pay his debts, and that, by the execution of those instruments, and the transfer of his property effected thereby, he intended to give the bank a preference over his other creditors, and that the bank had reasonable cause to believe that he intended thereby to give it a preference, and to enable it to obtain a greater percentage of its debt than any other creditor of Young of the same class. These, then, are the prominent facts, and seemingly justified the judgment. Against this result what does the bank urge? It urges, first, that there is included in the judgment the sum of $1,335.62, the net proceeds of the sale of certain logs, called the "up-river logs," which, it is con-
[533] tended, were not covered by either of *the mortgages, and that the supreme court, in its opinion, apparently supposed that those logs were covered by the mortgages, and erred in giving judgment therefor. This is a misunderstanding of the opinion. While the court did not explicitly distinguish between the mortgages and the deed to the lumber company, we think it is clear that the court regarded the deed, and what was to be done under it, as the consummation of the "legal wrong," to use the language of the court, which went back to the time of the mortgages. In other words, that the up-river logs as well as the other property were conveyed to the lumber company for the purpose of giving a preference to the bank.

The bank also attempts to urge against this conclusion the different views expressed by the trial court and the supreme court, upon the finding of the jury as to the relation which the lumber company stood to the bank. The jury found, in answer to questions 4 and 5, that the lumber company acting for the bank, took the legal title for the benefit of the latter under an agreement with Young and the bank to account to it for a portion of the proceeds. The trial court said that this was not a finding "that the lumber company was the agent of the bank." The supreme court thought that the jury "pretty clearly decided" that the bank was a principal and the lumber company "a mere agent" in the matter. It is true the supreme court immediately added: "However, the evidence seems to clearly establish that the lumber company purchased the property from Young in the regular course of business, without any understanding with the defendant, other than that its interest in the property as mortgagee and claimant under numerous statutory labor liens should be recognized, and the equivalent thereof in money delivered to it out of the proceeds." [125 Wis. 478, 104 N. W. 102.] And this was deemed sufficient to accomplish the preference which Young intended to give the bank. The court passed over, as not important, the distinction between the notes given by the lumber company to Young as the purchase price of the lumber.

*These minor matters out of the way, we come to the more important contentions of the bank. These contentions are expressed in the form of questions, the first of which is: "Can a trustee in bankruptcy, under the provisions of the bankruptcy act, lawfully maintain a suit to recover the value of a voidable preference without first electing to avoid such preference by notice to the creditor receiving such preference, and by demand for its return?"

It is urged by the bank that it cannot, and to sustain this contention, that a preference is not void, but voidable. And voidable only at the election of the trustee, who must indicate a purpose to do so. The argument is that, a preference being voidable, the creditor receiving it is not in default until he fail to or refuse to surrender it on demand. Prior to that time his possession is rightful and lawful, and he is not guilty of any wrong, tort, or conversion. And the demand, it is further urged, must be made before suit, for, it seems also to be contended, that the creditor must be given an opportunity to exercise the election given him by subdivision g of § 57 of the bankrupt act to surrender the preference and prove his claim. We say, "seems to be contended," because we are not clear that counsel for the bank claims that the rights of a creditor un-

r 57g depend upon the action of the rustee. Counsel say:

"The bankrupt act, therefore, contemlates that the trustee shall exercise his lection as to whether or not he shall avoid preference, and it also contemplates that he creditor receiving such alleged preference must exercise an election as to what ourse he shall take. Until the trustee exercises his election, no cause of action accrues. The creditor is not called upon to elect what course he shall take until the trustee has acted. It therefore follows that the trustee should exercise his election and make his demand before commencing suit."

And this, it is argued, is more than a mere question of state practice, and involves the question whether the property consisting of the alleged preference is any part of the trust *estate. If it be intended by this to assert that the action of the creditor under 57g is to wait upon or depends upon the action of the trustee under § 60, we do not assent, and nothing can be deduced, therefore, from the supposed relation of those sections as to the necessity of a demand before suit. We do not see how such a demand can even be an element in the consideration of the creditor, whether he will surrender the preference and prove his debt. The right of surrender exists as well after suit as before suit. Keppel v. Tiffin Sav. Bank, 197 U. S. 356, 49 L. ed. 790, 25 Sup. Ct. Rep. 443.

Independently of such considerations, whether the election by a trustee to avoid preference should be exercised by a demand before suit or can be exercised by the it itself might be difficult to determine if were necessary on the record. 1 Chitty, 176, and cases cited; Shuman v. Fleckstein, 4 Sawy. 174, Fed. Cas. No. 12,826; Cooke v. McCraken Fed. Cas. No. 1,932; Wright v. Skinner, 136 Fed. 694; Goldberg Harlan, 33 Ind. App. 465, 67 N. E. 707. t we do not think it is open to the bank urge the first. The bank, it is true, demurred to the complaint and urged as a ound of demurrer the absence of an allegation of a demand. But the bank did not nd on the demurrer. It answered, and only traversed the allegations of the intiff, but set up an independent defense, showed that a demand would have been availing, and a demand is not necessary ere it is to be presumed that it would e been unavailing. Davenport v. Ladd, 38 in. 545, 38 N. W. 622; Bogle v. Gordon, Kan. 31, 17 Pac. 857. Besides, it appears a demand was made before suit. In ermining from what date interest should given the trial court said: "There is evidence of a demand, but I think only a short time elapsed until action was commenced, so that it will make little difference whether interest is computed from the time of the demand or the commencement of the action."

The trial court instructed the jury substantially, in the words of subdivision a of § 60 of the bankrupt act, as *to when a [536] debtor should be deemed to have given a preference, and, in explanation of the intention of the debtor, said to "intend to prefer would be to make a transfer for the purpose of enabling the bank to obtain a greater percentage of its debt than any other debtors of the same class." And, defining this class of creditors, said further: "So far as creditors' rights are involved in this action, they are all of the same class, by which is meant they would receive the same percentage of their claims. Claims for taxes or wages within certain times, so as to be preferred, would be of a different class. But claims of general creditors, like those approved in the Young bankruptcy proceedings, are all of the same class." The bank excepted, and assigned as error the charge that all of the creditors were of the same class. Disposing of the assignment the supreme court said: "Whether that is right or wrong does not seem to in any way concern the case. This action, as we have indicated, is simply one in trover to recover the value of property which, as is alleged, was, in fraud of the bankrupt act, wrongfully converted by defendant to its own use. Whether there was one or more classes of creditors, and in what manner the property sought to be recovered would, if the suit were successful, be administered, did not vary in the slightest degree the legal rights of the plaintiff. If the property was obtained by the defendant in fraud of the bankrupt act, plaintiff was entitled to recover the same, and this is the only question involved."

The bank contests this view, and contends that, if accepted, "it would be impossible to ascertain whether or not the preference had been received without first determining the question of whether the enforcement of the transfer would enable the bank to recover a greater percentage of its debt than other creditors of the same class." But there is a question of fact to be considered. It was a question of fact what claims were proved against the estate. At the trial the learned judge who presided described them in his instructions as claims of general creditors. In his memorandum opinion *he said [537] that, from his minutes and the statements

of the evidence in the briefs of counsel, he was inclined to believe that the point was not well taken that the evidence did not show that the effect of the enforcement of the transfer would be to enable the bank to obtain a greater percentage of its debt than other creditors of the same class. The bank, in its brief in this court, says, "certain other claims were filed and allowed in the bankruptcy proceedings as preferred claims. These were probably claims for wages after the time of the transfers in question." In the list of claims referred to some only are marked preferred. But, granting that they all were, they were represented by the trustee.

The other questions propounded by the bank are based on the sixth assignment of error. We will not examine the arguments of counsel for the bank in detail. Their fundamental contention is that the transfers to the bank were not invalid as a preference if their enforcement would not operate to give the bank a greater percentage of its debt than other creditors of the same class would receive. And such, it is further contended, was not the result, and it is intimated that claims of possible and fictitious creditors were in effect considered. But this contention encounters the facts found by the jury and the trial court. We have already seen what, in the opinion of the trial court, the evidence established as to the effect of the transfers, and the jury found that Young was insolvent at the time they were made, and that the purpose of their execution was to give the bank a preference and to enable it to obtain a greater percentage of its debt than other creditors of Young of the same class. These findings were not disturbed by the supreme court, and we must accept them as stating the facts established by the evidence, although counsel seem to invoke an examination by us of the record against them. Taking them as true, they show a case of preference and grounds to set it aside. The bank also contends, in effect; that in such suit the validity of all other claims against the bankrupt [538] can be litigated, and *whether they have received voidable preferences and have not been required to surrender them. The broad effect of the contention repels it as unsound. To yield to it would transfer the administration of a bankrupt's estate from the United States district court to the state court.

Judgment affirmed.

JOHN C. HAMMOND, Plff. in Err.
v.
WILLIAM W. WHITTREDGE, Trustee under the Will of Solon O. Richardson, deceased, et al.

(See S. C. Reporter's ed. 538-551.)

Error to state court—Federal question.

1. A decision of a state court in a case in which rights under a statute of the United States were claimed by the defendant is reviewable in the Supreme Court of the United States, where that statute was referred to by the highest state court and was an element in its decision.

Limitation of actions—in bankruptcy cases.

2. The two years' limitation prescribed by U. S. Rev. Stat. § 5057 for suits between an assignee in bankruptcy and a person claiming any adverse interest touching any property or rights of property transferable to or vested in such assignee is not applicable to adverse claims arising out of an equitable attachment and an assignment of the bankrupt's interest under a testamentary trust, where both attachment and assignment were subsequent to the assignment in bankruptcy.

Bankruptcy — title of assignee — abandonment.

3. Assignees in bankruptcy cannot be deemed to have abandoned the interest in remainder of the bankrupt under a testamentary trust because they did not sell such interest, where, apparently as soon as they learned of the existence of the trust fund and of the fact that creditors of the bankrupt were seeking to reach and apply this interest in satisfaction of his debts, they brought a bill in equity in the nature of a bill *quia timet* to compel the transfer to them of the bankrupt's interest, and to en-

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 287; In Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 512.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On the relation of the bankrupt law to assignments and insolvent proceedings under state laws—see notes to State ex rel. Strohl v. Superior Court, 45 L.R.A. 177, and Carling v. Seymour [illegible] nber Co. 51 C. C. A. 11.

join the trustee from paying any part of the trust fund to the bankrupt or those claiming under him.

[No. 164.]

Argued and submitted January 17, 1907. Decided February 25, 1907.

IN ERROR to the Supreme Judicial Court of the State of Massachusetts to review a decree that the interest of a *cestui que trust* passed to his assignees in bankruptcy, entered on a bill for instructions filed by the testamentary trustee. Affirmed.

See same case below, 189 Mass. 45, 75 N. E. 222.

Statement by Mr. Justice McKenna:

The defendant in error, Whittredge, who was trustee of certain property held in trust under the will of Solon O. Richardson, who died in 1873, filed this bill for instructions in the supreme judicial court of the state of Massachusetts.

There was bequeathed by said will $35,000, on the following trusts:

"The income to be paid to his three sisters for life, namely *Mary A. Sweetster, Martha Hutchinson, and Louisa Ricnardson; and 'at the decease of my said sisters, or either of them, my will is that the share belonging to the deceased sister shall revert to her children, to be shared by them each and each alike; if either of my said sisters shall die childless, the income belonging to her I direct shall revert to the said sisters surviving, to be shared equally between them. At the decease of all my three said sisters, I direct that the fund from which they have derived an income from my property be divided equally between the children of my said sisters, and I direct my executors to pay to them each their respective part, the same to be the property of the children of my said sisters forever.' "

The three life tenants survived the testator. Louisa never had any child; Martha Hutchinson had one child; Mary A. Sweetser had one child, a son, Elbridge L. Sweetser. He and the child of Martha were born in the lifetime of the testator. Mary A. Sweetser survived her sisters, leaving her son and niece surviving her.

This bill was brought February 1, 1901, to determine who was entitled to receive Elbridge L. Sweetser's half of the fund,—whether his assignees in bankruptcy, appointed in proceedings instituted by him in 1878, by voluntary petition in bankruptcy in the district court of the United States for the district of Massachusetts, or the plaintiff in error, who claims, under an equitable attachment made in 1881, as hereinafter stated, and an assignment made in October, 1885, to secure two debts incurred after Sweetser's bankruptcy. There are other defendants besides the plaintiff in error, but their rights are not before us.

The facts are stipulated, and the most pertinent are the following:

On February 23, 1878, Elbridge L. Sweetser filed a voluntary petition in bankruptcy in the district court of the United States, district of Massachusetts, and was, on that day, adjudged a bankrupt. On the 16th of March, 1878, *William B. H. Dowse and [540] Horace P. Biddle were appointed the assignees of his estate, and there was duly conveyed to them all the estate which the bankrupt owned or was entitled to on February 23, 1878.

During the year 1878 claims amounting to $13,940.47 were proved against the estate. No other claims have since been proved.

The only assets disclosed by Sweetser in his schedules consisted of a stock of goods subject to mortgage. The proceeds of these goods were consumed in paying the mortgage and certain expenses of the assignees, and the balance, of about $280, was paid to the assignees on account of services.

The Florence Machine Company, in 1881, filed a bill in equity against Elbridge L. Sweetser and Solon O. Richardson, then the sole trustee of Solon O. Richardson, deceased, to reach and apply in payment of five notes held by that company against Sweetser, his equitable interest under the will of said deceased. The suit was brought under the provision of General Statutes of Massachusetts, chap. 113, § 2, and is called equity suit No. 386. Subpœna was issued November 28, 1881, and served on Sweetser and Richardson, trustee, November 29, 1881. Sweetser filed an answer February 1, 1882, in which, among other things, he denied that he had any such interest under the will as could be reached and applied to the payment of the claim of the company, and also denied the validity of the claim, but did not deny making the notes. On the same date Solon O. Richardson, trustee, also filed an answer, setting up the proceedings in bankruptcy and the appointment of assignees, and suggested that any interest that Sweetser had in the fund passed to them. The suit is still pending, no hearing upon the merits having ever been had.

In 1882 the assignees filed a bill in equity against Sweetser and Solon O. Richardson, then the sole trustee under the will of said Solon O. Richardson, in the United States district court, alleging an interest in Sweetser in the fund, that it had *accrued before [541] the bankruptcy, but was not set forth in his schedule of property, and that they had no knowledge of such interest until a few days

before filing the bill. The bill prayed, among other things, "that the said Elbridge L. Sweetser might be directed to execute and deliver such instruments as would convey to said assignees all of his interest as legatee under the said will, and that the said trustee, Solon O. Richardson, might be enjoined from paying to the said Elbridge L. Sweetser, or any person or persons claiming under him, any part of the said trust fund, or the income thereof, which might accrue and become payable to the said Elbridge L. Sweetser."

On November 15, 1882, the Florence Machine Company, by its attorney, Warren O. Kyle, filed a general replication in suit No. 386.

On December 2, 1882, Sweetser and Solon O. Richardson, trustee, filed general demurrers to the bill. No hearing, however, has ever been had in the case, either upon the demurrers or the merits, and the case is still pending.

On October 24, 1885, Sweetser executed and delivered to the Monitor Oil Stove Company a note for $1,809 and a note to Solon O. Richardson, individually, for the sum of $506.05. As a security for said notes Sweetser gave a written mortgage or assignment, under seal, of all his interest under the will of Solon O. Richardson, deceased, to Richardson and the company. Sweetser's wife signed the notes and mortgage as joint maker. Notice of the mortgage assignment was acknowledged by William Morton, the then trustee under the will. On the same day Sweetser and his wife conveyed to one Sidney P. Brown their interest under the will, subject to the mortgage, and Brown conveyed to Hannah Sweetser. Notice of these conveyances was acknowledged by said trustee, William Morton.

On October 24, 1885, the Florence Machine Company brought an action at law in the superior court of Suffolk county against Sweetser, in which the then assignees in [542] *bankruptcy were summoned as trustees, to recover the sum of $7,620.13, amount due on eight promissory notes which had been proved in his bankruptcy proceedings, and and also to recover upon an account based on ledger entries made by the company in 1881. The assignees in bankruptcy were duly served with process, but did not appear, and were defaulted.

On October 26, 1885, in equity suit No. 386, Solon O. Richardson, trustee, filed a further answer, stating that he had resigned as trustee, and that William Morton had been appointed sole trustee, and had accepted the trust.

On June 16, 1891, on motion of W. B. H. Dowse, Warren O. Kyle was joined with him as a party plaintiff in the Dibble v. Sweetser, in the Unite district court, and Daniel G. Wa then trustee under the will, was s as a defendant. He accepted serv 30, 1891, and on November 4, 1 a general demurrer to the bill.

On April 19, 1893, the Florence Company was dissolved by an ac legislature, chap. 215 of the Acts of

On August 13, 1894, the Florence Company filed a motion in equity 386 that Daniel G. Walton, who come trustee of the trust under of Solon O. Richardson, deceased, then assignees in bankruptcy, Do Kyle, might be made parties defen summoned to answer the plainti Service was made on Walton Au 1894, and accepted by the assignee 30. In September, 1894, Walton's ance was entered. On May 15, 18 mond, plaintiff in error, having be signee of the claim in suit, entere pearance for the plaintiff, and also his appearance *pro se*, and filed setting forth the assignment to hi claim, and asking to be permitted cute the suit in his own name.

May, 1899, the assignees filed an alleging upon information and be Sweetser had, at the time of the ment in bankruptcy, a vested intere trust fund under the will of Ric and that, by the operation of th States bankruptcy act, said inte been transferred to them.

On February 1, 1901, William W redge, being then the sole succeedin under said will, filed this suit for tions. On April 22 he was summon pear as party defendant in the Dibble v. Sweetser, in the United district court. He accepted service peared by counsel June 12, 1901. 1901, Hammond filed a petition in to be made a party. In the peti alleged, among other things, that signees were not entitled to Swee terest as against him as assignee Florence Machine Company; amo reasons, because such rights as said ees had, if any, were barred by the of limitations. U. S. Rev. Stat. Whittredge, trustee, also filed an am leging the pendency of the suit in No. 386, brought by the Florence Company, and that his predecessor made a party therein; and also that he, Whittredge, had filed his instructions, and also that the righ tion of the assignees was barred limitations of law.

On February 10, 1904 (the said a

Dowse and Kyle having disputed the right of said John C. Hammond to be subrogated to the rights of the Florence Machine Company as to the claims proved by said company against the estate in bankruptcy of said Sweetser in 1878, and having petitioned to have said claims expunged), the United States district court made a decree in favor of said Hammond.

The decree has since been affirmed by the United States circuit court of appeals. Dowse v. Hammond, 64 C. C. A. 437, 130 Fed. 103.

The suit in equity in the United States district court, brought by the assignees of Sweetser in the first bankruptcy, has been continued from time to time at the request of the assignees, who have appeared for that purpose at the callings *of the docket to await the termination of the life interests in the trust fund.

As already stated, no hearing has been had either upon the said demurrers or upon the merits.

That part of the trust fund held by Whittredge, as trustee, which is the subject-matter of this suit, consists of property worth about $18,000.

The supreme judicial court decreed that Sweetser's interest in the fund passed to his assignees in bankruptcy. 189 Mass. 45, 75 N. E. 222. And it was decreed that Hammond, as assignee of the Florence Machine Company and as assignee of the Monitor Oil Stove Company, had "no rights in said equitable interest either by reason of the provisions of the United States Revised Statutes, § 5057, or otherwise."

Mr. Hollis R. Bailey submitted the cause for plaintiff in error:

The attachment made by the Florence Machine Company rendered it necessary for the assignees at their peril to intervene and contest the same within two years, in accordance with U. S. Rev. Stat. § 5057.

Bailey v. Glover, 21 Wall. 342, 346, 347, 22 L. ed. 636, 638; Rock v. Dennett, 155 Mass. 500, 30 N. E. 171; Pritchard v. Chandler, 2 Curt. C. C. 488, Fed. Cas. No. 11,436; Walker v. Towner, 16 Nat. Bankr. Reg. 287, Fed. Cas. No. 17,089; Avery v. Cleary, 132 U. S. 604, 33 L. ed. 469, 10 Sup. Ct. Rep. 220.

Assuming that the assignees were not bound by § 5057, U. S. Rev. Stat. to intervene within two years, they nevertheless were bound to intervene at their peril within a reasonable time.

Squire v. Lincoln, 137 Mass. 405; Taylor v. Irwin, 20 Fed. 620; Ross v. Wilcox, 134 Mass. 21; Sparhawk v. Yerkes, 142 U. S. 1, 14, 35 L. ed. 915, 918, 12 Sup. Ct. Rep. 104; Avery v. Cleary, supra; Cleary v. Ellis Foundry Co. 132 U. S. 612, 33 L. ed. 473, 10 Sup. Ct. Rep. 223.

On the question of laches and estoppel, see also Hallett v. Fowler, 10 Allen, 36; Fleming v. Courtenay, 98 Me. 410, 99 Am. St. Rep. 414, 57 Atl. 592; Nash v. Simpson, 78 Me. 152, 3 Atl. 53; Amory v. Lawrence, 3 Cliff. 535, Fed. Cas. No. 336; Sessions v. Romadka, 145 U. S. 29, 39, 36 L. ed. 609, 613, 12 Sup. Ct. Rep. 799; Lancey v. Foss, 88 Me. 215, 33 Atl. 1071; Taylor v. Irwin, 20 Fed. 615; Avery v. Cleary, supra; Herring v. Downing, 146 Mass. 14, 15 N. E. 116.

The Florence Machine Company in November, 1881, was not barred by U. S. Rev. Stat. § 5057, from bringing its attachment suit.

Rock v. Dennett and Avery v. Cleary, supra.

In Dushane v. Beall, 161 U. S. 513, 40 L. ed. 791, 16 Sup. Ct. Rep. 637, the point was raised that no Federal question was involved, but the objection was summarily disposed of.

Mr. Warren Ozro Kyle argued the cause, and, with Mr. Fred Joy, filed a brief for defendants in error:

It has been expressly decided by this court that its jurisdiction in this class of cases does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of, a Federal question.

Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 647, 44 L. ed. 308, 20 Sup. Ct. Rep. 245.

To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it.

Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435.

Where the record discloses that if a question has been raised or decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.

Eustis v. Bolles, supra; Harrison v. Morton, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742.

The only rights, titles, and immunities arising under the sections of the United States Revised Statutes referred to in the assignment of errors are the rights, titles, and immunities of assignees in bankruptcy, and as the decision is in all respects in favor of, and not against, the rights of the assignees under said statutes, this court will not review the decision of the supreme judicial court of Massachusetts.

De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; Missouri ex rel. Carey v. Andriano, 138 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385.

The Federal decision must be considered as not decided when a question of state law intervenes and is decisive of the case. To give jurisdiction, the Federal question must be necessary to the judgment or decree complained of.

Detroit City R. Co. v. Guthard, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811; Chouteau v. Gibson, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; Citizens' Bank v. Board of Liquidation (Louisiana ex rel. Citizens' Bank v. Board of Liquidation) 98 U. S. 140, 25 L. ed. 114; McManus v. O'Sullivan, 91 U. S. 578, 23 L. ed. 390; Murdock v. Memphis, supra; Adams County v. Burlington & M. River R. Co. 112 U. S. 127, 28 L. ed. 680, 5 Sup. Ct. Rep. 77; Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 548, 31 L. ed. 238, 8 Sup. Ct. Rep. 211; Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 29, 31 L. ed. 611, 8 Sup. Ct. Rep. 741; De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; Israel v. Arthur, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583; Wailes v. Smith, 157 U. S. 276, 39 L. ed. 700, 15 Sup. Ct. Rep. 624; San Francisco v. Itsell, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241; Hale v. Akers, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 182, 50 L. ed. 143, 26 Sup. Ct. Rep. 41; Beals v. Cone, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275.

The mere averment of the existence of a Federal question is not sufficient to give this court jurisdiction; a real, and not a fictitious, Federal question, is essential to give this court jurisdiction over the judgment of state courts, and when it appears that the alleged Federal question upon which jurisdiction is invoked is wholly without foundation, the writ of error will be dismissed.

Sawyer v. Piper, 189 U. S. 154, 156, 157, 47 L. ed. 757–759, 23 Sup. Ct. Rep. 633.

The asserted Federal element is too remote and frivolous.

Blythe v. Hinckley, 180 U. S. 333, 45 L. ed. 557, 21 Sup. Ct. Rep. 390; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123.

The final decree in this case which this court is asked to re-examine was entered October 31, 1905. From that decree any one of the numerous parties, including the plaintiff in error, considering himself aggrieved, might have appealed at any time within thirty days. As such, it was, when rendered, open to review by the supreme court upon a new appeal, and for that reason was not the final judgment of the highest court of the state in which a decision in the suit could be had.

Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850.

Hence it appears that said decree, at the time this writ of error was sued out, November 15, 1905, was not a final decree in the highest court of a state in which a decision in the suit could be had, and, therefore, this court has no jurisdiction.

Great Western Teleg. Co. v. Burnham, supra; Fisher v. Perkins (Fisher v. Carrier) 122 U. S. 522, 30 L. ed. 1192, 7 Sup. Ct. Rep. 1227.

The latest decision of this court construing U. S. Rev. Stat. § 5057 is Dushane v. Beall, decided March 16, 1896 (161 U. S. 513, 40 L. ed. 791, in 16 Sup. Ct. Rep. 687), which Chief Justice Fuller, delivering the opinion of the court, says that that limitation is applicable only to suits growing out of disputes in respect of property and rights of property of the bankrupt which came to the hands of the assignee, to which adverse claims existed while in the hands of the bankrupt and before assignment.

Bowen v. Delaware, L. & W. R. Co. 125 N. Y. 476, 60 Am. St. Rep. 667, 47 N. E. 967.

This court also said, in 1879, construing the same statute, that it relates to suits by or against the assignee with respect to parties other than the bankrupt; and, we submit, it cannot apply as against the assignees to establish a title either in the bankrupt himself, or in others, when derived from the bankrupt since his adjudication, to property which passed to the assignees by operation of the bankrupt law, unless such property has been abandoned by the assignees in bankruptcy.

Phelps v. McDonald, 99 U. S. 298, 306, 25 L. ed. 473, 475; Clark v. Clark, 17 How. 316, 15 L. ed. 77; Thomas v. Blythe, 5 C. C. A. 356, 8 U. S. App. 414, 55 Fed. 961.

This is not a suit between an assignee in bankruptcy and a person claiming an adverse interest. The petitioner, who is the trustee under the will, claims no adverse interest, and does not plead the statute.

Nash v. Nash, 12 Allen, 345; Minot v. Tappan, 127 Mass. 338; Re English, 6 Fed. 176.

Moreover, all statutes of limitation begin to run from the time the cause of action accrued; and, in this case, could not run until the right to the possession of the Sweetser half of the fund fell to the assignees, on the death of the bankrupt's mother, the last survivor of the testator's three sisters.

Perry, Tr. § 860; French v. Merrill, 132 Mass. 527, and cases there cited.

As it was necessary to await the termination of the life interests before anyone claiming through the remainderman could claim possession of the fund, the assignees in bankruptcy have not been remiss, and the delay, if any, has not operated to the prejudice of anybody; hence there has been no laches.

Haven v. Haven, 181 Mass. 579, 64 N. E. 410; Tucker v. Fisk, 154 Mass. 579, 28 N. E. 1051, and cases cited; Ryder v. Loomis, 161 Mass. 163, 36 N. E. 836; Beal v. Chase, 31 Mich. 532; New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co. 28 App. Div. 411, 50 N. Y. Supp. 1093; Ullman v. Clark, 75 Fed. 868.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

A motion is made to dismiss, which, we think, should be denied. Plaintiff in error sets up rights under § 5057, which were adjudged against him. The court said:

"The defendant Hammond admits that when the testator died Elbridge had either a vested remainder in one half of the trust fund of $35,000, subject to the life estates created by this item of the will, and subject to the class being opened on the birth of further child or children of the life tenants, or a vested interest in a contingent remainder, and that 'in either case' his interest was 'assignable.'

"His contention, however, is that the assignees are barred by U. S. Rev. Stat. § 5057."

The court decided against the contention, and decided, besides, that "the title of the assignees in bankruptcy became complete on the assignment to them of this interest in remainder," and that "the ownership drew after it the possession," which has continued ever since, "and all persons are barred by U. S. Rev. Stat. § 5057, from contesting it." In other words, the court decided that § 5057 did not preclude the assignees from asserting rights against plaintiff in error, but precluded him from asserting rights against them. Defendants in error, however, urge that the court's decision resulted from facts found or admitted and from general principles of law, and "there remained in the case no question as to any title, right, privilege, or immunity under a statute of the United States; and that the court expressly declined to choose 'between the opinion in Dushane v. Beall, 161 U. S. 513, 40 L. ed. 791, 16 Sup. Ct. Rep. 637, and the decision in Rock v. Dennett, 155 Mass. 500, 30 N. E. 171.'" But rights under a statute of the United States were claimed by plaintiff in error, and that statute was referred to by the *supreme judicial court, and was an element in its decision. We think also that the decree rendered was final for the purposes of this writ of error. We therefore overrule the motion to dismiss and go to the merits. [548]

On the merits nine errors are assigned, but plaintiff in error asserts that the questions really involved are only four, namely: Had Sweetser such "amount of title" in the trust fund that the Florence Machine Company could make an equitable attachment? Did § 5057 render it necessary for the assignees to intervene and contest the attachment within two years? If not within two years, then within a reasonable time? Was the machine company, in November, 1881, barred by § 5057 from bringing the attachment suit?

Section 5044 of the Revised Statutes required the register in bankruptcy to transfer by instruments under his hand all of the estate of the bankrupt. The assignment related back to the commencement of the proceedings, and operated to vest the title in the assignee. Section 5046, in most comprehensive terms, vested in the assignees all rights in equity and choses in action which the bankrupt had, and 5047, all of his remedies. Section 5057 reads as follows:

"No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming any adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

Under these provisions the contention of plaintiff in error is, that, notwithstanding the bankruptcy and the broad language of the sections referred to, Sweetser had an interest in the trust fund that could be assigned or attached, and in such way a title could be acquired good against all the world except the assignees, and good against the

assignees by their inaction within the time prescribed by § 5057 or by their abandonment. Applying this principle plaintiff in error contends that "three years having [549] elapsed without anything *having been done by the assignees in the way of disposing of this equitable asset, the bankrupt, in November, 1881, had such an amount of title that he could have brought a suit against the trustees under the will to obtain his share, assuming that the contingency had then happened upon which the right to a distribution depended." And that Sweetser, having such title, it followed, it is contended, that the Florence Machine Company, a subsequent creditor, could make an equitable attachment and make it incumbent upon the assignees to assert their rights within two years, in accordance with § 5057. The supreme judicial court met this contention by the effect of the local law. The court said:

"The title of the assignees in bankruptcy became complete on the assignment to them of this interest in remainder. In this commonwealth notice to the trustees is not necessary to complete the title of an assignee of an interest in the property held in trust by them. Thayer v. Daniels, 113 Mass. 129, and cases there cited. See also Putnam v. Story, 132 Mass. 205; Butterfield v. Reed, 160 Mass. 362, 35 N. E. 1128. By virtue of the assignment in bankruptcy, the complete ownership in this incorporeal interest in this personal property became vested in the assignees, and the ownership drew after it possession, so far as the interest here in question (an incorporeal interest, because an interest in remainder) is capable of possession. This result is not affected by the fact that the assignees were for a time ignorant of the existence of this property of the bankrupt. This ownership and possession in the assignees has continued ever since, and all persons are barred by U. S. Rev. Stat. § 5057, from controverting it. The contention that one in possession of property is barred from exercising the rights which that ownership confers on the owner, by not having brought an action, is groundless. Under these circumstances we have not found it necessary to choose between the opinion in Dushane v. Beall, supra, and the decision in Rock v. Dennett, supra."

[550] *The cases referred to are antagonistic in their construction of § 5057. In Rock v. Dennett, it was held that the limitations expressed by that section applied to adverse claims arising after the assignment in respect to property vested in the assignee.

In Dushane v. Beall the court said: "That limitation [§ 5057] is applicable only to suits growing out of disputes in respect of property and of rights of property of the bankrupt which came to the ha assignee to which adverse clai while in the hands of the bankru fore assignment."

Plaintiff in error contends fo struction expressed in Rock v. against that expressed in Dusha and insists that the latter case overrule prior cases upon whic Dennett was based. We will n reconcile Dushane v. Beall with p It is a later utterance by this disposes of the contention of p error based on § 5057.

The supreme judicial court a adversely to plaintiff in error's that the assignees had abandoned erty. The court said: "The only tention made by the defendant, is equally groundless; to wit, th signees abandoned this property. tention is put on the ground tha not sell their interest in remaind fund. Were that all that appeare ment would be without merit. B not all." And, referring to the su by the assignees in the district co said further: "This bill appa brought by the assignees as so learned of the existence of the fu the fact that creditors of Elb seeking to reach and apply th of Elbridge in satisfaction of th from him to them. The bringi bill (which seems to have been nature of a bill *quia timet*) disp contention *that it was in fact th of the assignees to abandon this

We think that the record sustai clusion of the court.

These views dispose of all the in the case.

Decree affirmed.

LOUISVILLE & NASHVILLE R. COMPANY, Plff. in Err.,
v.
SMITH, HUGGINS, & COMP

(See S. C. Reporter's ed. 55

Error to state court—Federal que raised.

1. A carrier's denial that "it by law," as alleged by complain ceive, as a connecting and ultim a certain interstate shipment an and deliver it to its ultimate d does not amount to the assertion

NOTE.—On the general subject of error from the United State Court to state courts—see notes v. Hunter, 4 L. ed. U. S. 97; B

under the act to regulate commerce, so as to sustain a writ of error from the Supreme Court of the United States to review a judgment of a state court adverse to such contention.

Error to state court—Federal question—effect of certificate of state court.

2. The certificate of the chief justice of the highest court of a state cannot help out the total failure of the record to show that a Federal question was raised which would sustain a writ of error from the Supreme Court of the United States.

[No. 198.]

Argued and submitted January 31, 1907. Decided February 25, 1907.

IN ERROR to the Supreme Court of the State of Tennessee to review a decree which affirmed a decree of the Chancery Court of Appeals of that state, reversing the decree of the Chancery Court for the County of Jefferson, and adjudging that a railway company was liable as a connecting and ultimate carrier for failure to receive an interstate shipment and forward and deliver it to its ultimate destination. Dismissed for want of jurisdiction.

Statement by Mr. Justice McKenna:

This suit was brought in the chancery court for the county of Jefferson, state of Tennessee, by defendant in error against the plaintiff in error and the Southern Railway Company, for damages alleged to have been received by the defendant in error to certain car loads of corn shipped over the Southern Railway Company from certain points in Tennessee, to be delivered to defendant in error or its order at Birmingham, Alabama.

The bill alleged that at the time of the shipments the two *railway companies were common carriers of goods and chattels, the Southern Railway being the receiving and initial carrier, and the one with which the contracts were made, and the plaintiff in error being the connecting and ultimate carrier, and, as such, bound by said contracts and the law relative to common carriers to receive said cars of corn, and to forward and deliver them to destination whereunto consigned, in good order and in a reasonable time. It was alleged that one of said companies "breached the said several contracts," whereby the damage complained of accrued.

The companies filed separate answers. That of the Southern Railway Company we need not set out. Plaintiff in error, in its answer, neither admitted nor denied certain of the allegations of the bill, and expressed want of knowledge as to others. Touching the allegation of the bill, that it was a common carrier, it admitted that it was such in certain states and portions of the country where it operated lines of roads, but denied "that it was the connecting and ultimate carrier of the car loads of corn alleged to have been delivered to the Southern Railway Company," denied that it made the contracts or was liable under them, or "that it was bound by law to receive said alleged car loads of corn and forward and deliver them to their ultimate destination in good order and in reasonable time."

The chancellor adjudged that there was no liability on the part of plaintiff in error, and dismissed the bill as to it. He held the Southern Railway Company liable for not delivering the cars, according to its contracts, within a reasonable time, and, after report by a master, to whom the cause was referred, decreed that complainant have and recover the sum of $1,015.69. The case was taken to the court of chancery appeals, both by defendant in error and the Southern Railway Company. And that court adjudged that the court of chancery erred (1) in adjudging that the Southern Railway Company was liable for any part of the damages to the corn which accrued after its arrival upon the delivery tracks of the company in *Birmingham, and after notice to [553] the consignees of its arrival; (2) in adjudging that plaintiff in error was not liable for the damages suffered by the corn after its arrival in Birmingham and while it was in the yards prior to being unloaded. The court said:

"This court is of the opinion that the Southern Railway Company is only liable

Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

As to what is the record for this purpose—see note to Home for Incurables v. New York, 63 L.R.A. 329.

On the certificate of a state court as showing presence of Federal question—see note to Cincinnati, P. B. S. & P. Packet Co. v. Bay, 50 L. ed. U. S. 428.

for such portion of the damages as accrued by reason of the delay in transition of the cars shipped, which is fixed by the concurrent finding of the master and chancellor at 40 per cent of the entire damages.

"This court is further of the opinion and decrees that the Louisville & Nashville Railroad Company is liable for 60 per cent of the damages reported by the master, being the per cent of damages which accrued while the corn remained undelivered in the yards at Birmingham."

It was accordingly adjudged and decreed that the complainant recover of the Southern Railway Company $415.84, and of the Louisville & Nashville Railroad Company $609.42, being 60 per cent of the recovery awarded by the chancellor, together with interest from May 8, 1905, making a total of $623.73. The plaintiff in error took an appeal to the supreme court of the state. It assigned as error the action of the court of chancery appeals (1) "In refusing to find certain uncontradicted facts when specially requested to so find." The facts were set out. (2) That the court erred in holding the company liable for any portion of the alleged damage "because, under the facts of the case, it was not a connecting carrier, and was not bound to handle these shipments." The other errors assigned we are not concerned with. The decree of the chancery court of appeals was affirmed without an opinion by the supreme court. The order of affirmance recites that the cause came "on to be heard upon the transcript of the record from the chancery court of Jefferson county, the opinion and findings of fact of the court of chancery appeals, and the assignment of errors filed to the decree of said court of chancery appeals by the defendant, [554] Louisville & Nashville *Railroad Company, and the reply brief of complainants."

The assignments of error in this court are to the effect that the supreme court erred in not giving full force and effect to the interstate commerce act, which, it is contended, governed the shipments, and in not disregarding the statutes and decisions of the state in conflict therewith, and in denying the rights claimed by plaintiff in error under the interstate commerce act. And that the court erred in holding that it was the duty of plaintiff in error to switch over its yards and terminals cars tendered to it by the Southern Railway Company; in holding that it did not have the right to discriminate as to freight arriving on its own lines, or could not prefer its own business; in rendering judgment against it because it would not turn over its private switch yards and terminals to a competing road, and because of its refusal to make a through routing with the Southern Railway Company; in holding that it was its d to switch cars for other roads within its minals to the exclusion of its own busin the effect being to cause an obstruction interstate commerce and an interfere with the paramount duties to which it subjected by the Constitution and laws the United States.

Other facts will appear in the opinion.

Mr. James B. Wright argued the cau and, with Mr. John H. Frantz, filed a bri for plaintiff in error:

This court has held that, although a certificate in itself is not sufficient to confer jurisdiction, still it may have the effect of making more certain and specific what is too general and indefinite in a record.

Parmelee v. Lawrence, 11 Wall. 36, 20 L. ed. 48; Brown v. Atwell, 92 U. S. 327, 23 L. ed. 511; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256; Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939.

The certificate may induce the Supreme Court, where the question is a close one, not to construe the record so strictly as to hold that it does not sufficiently present a Federal question.

Roby v. Colehour, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47.

Even though the state court did not, in its opinion, expressly refer to the Federal Constitution, if the bill of affirmance necessarily denied Federal rights claimed by the defendant, the writ of error will lie.

Roby v. Colehour, supra; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97.

The Supreme Court of the United States has jurisdiction in error over a judgment of the supreme court of the state when it necessarily involves the decision of the question raised in the appellate court for the first time, and noticed in its opinion, whether a statute of the state conflicts with the Constitution of the United States.

Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; Green Bay & M. Canal Co. v. Patten Paper Co. supra.

The Federal question is involved if the effect of the state decision is to construe the act alleged to violate the Federal Constitution, although the state court does not mention the statute.

Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545.

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una Water Power Co. v. Green Bay
nal Co. 142 U. S. 254, 35 L. ed. 1004,
Ct. Rep. 173; Snell v. Chicago, 152
1, 38 L. ed. 408, 14 Sup. Ct. Rep.

ppear from the record, by clear and
intendment, that the Federal
must have been directly involved,
he state court could not have given
without deciding it, that will be
to give jurisdiction.
v. Brunswick County, 150 U. S.
. ed. 1134, 14 Sup. Ct. Rep. 166;
ıg v. Athens County, 16 Pet. 284,
966.
not necessary that the question
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if it appears by clear and
intendment that the question
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dgment.
v. Randell, 10 Pet. 368, 9 L. ed.

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which the Federal right is based
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ıt it must have been misconstrued.
ough v. Virginia, 172 U. S. 118, 43
3, 19 Sup. Ct. Rep. 134.
sal or failure to consider a Fed-
ıtion is equivalent to a decision
be Federal rights involved therein.
ines Nav. & R. Co. v. Iowa Home-
123 U. S. 555, 31 L. ed. 204, 8 Sup.
217; Erie R. Co. v. Purdy, 185 U.
L. ed. 847, 22 Sup. Ct. Rep. 605.
a party relies upon an act of Con-
l the questions considered by the
upon which the case turns are
the party has brought himself
ıe scope of that act, a Federal
is presented.
sé Land & Water Co. v. San
h Co. 189 U. S. 177, 47 L. ed. 765,
ep. 487.
te court could not have reached a
adverse to the plaintiff in error
olding either that none of its prop-
been taken, or that it was not
o compensation therefor, which is
to saying that it had not been
of its property without due process
Thus was presented a Federal
eviewable in this court.

Kaukauna Water Power Co. v. Green Bay & M. Canal Co. supra.

The answer and claim made by defendant in the state court, that the act of Congress furnished a complete defense to the action to enforce a state statute, raised a Federal question, and the overruling of that defense by that court gives the Supreme Court jurisdiction to review the state judgment.

Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Re Lennon, 166 U. S. 553, 41 L. ed. 1112, 17 Sup. Ct. Rep. 658; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 568, 50 L. ed. 604, 26 Sup. Ct. Rep. 341.

Mr. C. T. Rankin submitted the cause for defendant in error:

This court will search the record in vain for any suggestion of a Federal question made in the state courts. Neither the pleadings, decrees, nor findings of the state courts contain any intimation that such question was suggested there.

It is suggested first in the petition for writ of error from this court and the certificate of Chief Justice Beard thereon.

It has been repeatedly held by this court that this is not a sufficient presentation of a Federal question to confer on this court jurisdiction on writ of error to a state court.

Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617; Parmelee v. Lawrence, 11 Wall. 36–39, 20 L. ed. 48, 49; Felix v. Scharnweber, 125 U. S. 54–60, 31 L. ed. 687–689, 8 Sup. Ct. Rep. 759; Brown v. Atwell, 92 U. S. 327–330, 23 L. ed. 511–513; Powell v. Brunswick County, 150 U. S. 433–442, 37 L. ed. 1134–1137, 14 Sup. Ct. Rep. 166; Wabash R. Co. v. Flannigan, 192 U. S. 29–38, 48 L. ed. 328–331, 24 Sup. Ct. Rep. 224.

It is well settled that this court will look to the opinion and findings of the state courts, in order to see the ground of decision; especially, where such opinions are made part of the record.

Jacks v. Helena, 115 U. S. 288, 29 L. ed. 392, 6 Sup. Ct. Rep. 39; Bank of Commerce v. Tennessee, 163 U. S. 416–426, 41 L. ed. 211–214, 16 Sup. Ct. Rep. 1113.

Mr. Justice McKenna delivered the opinion of the court:

A motion is made to dismiss the writ of error, on the ground that no Federal question was raised in the state courts or decided by them. In opposition to the motion plaintiff in error contends that the allegations of the bill and its denial thereof sufficiently raise a Federal question, and that the courts of the state, in rendering judgment against plaintiff in error, necessarily decided that question. And it is further

contended that, even if those courts did not pass on the Federal question, their failure or refusal to do so is equivalent to a decision against the Federal rights involved. A number of cases are cited to sustain these propositions. But is the basis of the propositions sound? In other words, was a Federal question raised, or, if raised, ignored? First, as to the pleadings. The bill charges a breach of the contracts of [557] shipment *by one or the other of the railway companies who, the bill alleges, were connecting common carriers, and, as such, bound by the contracts and the law relative to common carriers to receive and forward to destination the goods shipped, in good order and in a reasonable time. Plaintiff in error admitted that it was a common carrier in some states, but was not a connecting and ultimate carrier of the corn in question, denied that it was bound by the contracts, and denied that "it was bound by law" to receive the corn and forward and deliver it to its ultimate destination. And this denial, it is insisted, raised a Federal question. We do not think so. The denial was of a legal conclusion resulting from the facts alleged, and added nothing to them. Besides, if a party relies upon a Federal right, he must specially set it up, and a denial of liability under the law is not a compliance with that requirement. For this we need not cite cases.

Was a Federal question decided or ignored? To answer the question a review of the proceedings is necessary. The chancery court held that, as between the complainant and plaintiff in error, there was no liability upon the part of the latter. The rights of the railway companies, between themselves, the court said, need not be determined. The opinion and findings of the chancery court of appeals are very elaborate. They state the issue, the proceedings in and the judgment of the chancery court, and recite that—

"Now, it appears that the Louisville & Nashville Railway denies any liability for its refusal to receive corn shipped over the Southern Railway after its arrival at Birmingham and deliver it over its terminal tracks to the American Mill & Elevator Company, to whom the corn had been sold.

"Of course, this denial is predicated upon the idea that it was not a connecting carrier in handling the shipments of corn involved in this case, or that it was under any obligation respecting the same."

Passing on these denials the court said that at the time of the shipments the South- [558] ern Railway Company was placing *shipments, as they were requested, upon the spur track of plaintiff in error, and that the latter was accustomed to receive them and remove them to places where they w to be delivered; and this was its custom years, and, until about the time or before the corn reached Birmingham, was a part of its business and a daily currence to receive and remove such c of freight." And this was done for all p sons offering them and without discrimi tion. For this service it received compe sation. The court, however, also found th plaintiff in error "placed an embargo up the receipt or handling of such cars, N vember 13, 1902, after the complainant ha contracted to sell the car loads of corn, an after most of them were shipped."

The contention of the Louisville & Nash ville Railroad Company, the court stated a follows:

"The contention of the Louisville & Nash ville Railroad Company, reduced to its sim plest statement, is that it was not bour to receive these cars of corn and place them

"This insistence on its part rests upon th proposition that, in the matter of handlin the cars of other roads in its yards or ove its spur tracks, it was not a common car rier, but simply a private carrier, and that this being so, it had the right to refuse t receive and handle these cars, and, as a corollary to this proposition, that it ha the right to discriminate between freigh arriving in Birmingham over its lines an freight arriving over other lines, and coul give preference between those that it chos to serve in this business."

The court decided against the contentio and that the company, by reason of it practice in handling freight, "assumed wit respect thereto the character of a commo carrier, and hence incurred the duties an liabilities of such character." The cour added:

"The result is that we are of opinion tha the Louisville & Nashville Railway Com pany was bound, by virtue of its previou course of business, to accept these cars o corn and deliver them to their destinatio on its terminal or spur *tracks, and that by reason of its failure to do so, it is lia ble for all damages resulting from its fail ure. . . ."

There was a petition for an additiona finding of fact and a rehearing, which th court said would take in the neighborhoo of one hundred pages of typewritten infor mation to set out and answer in the form in which they were presented. Some, how ever, were granted; some qualified. W give only those which we think are relevan The fifteenth request was that the court s out in full from the evidence, which w it was said, uncontradicted, the conditio which caused the embargo to be laid plaintiff in error against switching. T

evidence was set out. The court, answering the request, said:

"The simple fact in connection with this matter is that the Louisville & Nashville Railroad Company declined to receive these cars of corn and deliver them to their destination on their spur or side tracks, because it deemed it to its advantage to use its said tracks for and in its own special business."

The twenty-fifth request was "that the terminals and equipment of the Louisville & Nashville Railroad Company at that time were sufficient under ordinary circumstances and conditions." In granting this request the court remarked:

"The twenty-fifth request is granted, with the statement that, in our opinion, based upon the evidence as we construe it, the Louisville & Nashville Railroad Company could have handled this corn and delivered it to its destination much sooner than it did had it not preferred other business, and even with that business, with the energetic appliance of all the means and facilities at its command."

It will be seen from this statement of the case that there is not a word in it which refers to the intrestate commerce act or the assertion of any rights under that act. Plaintiff in error accounts for the want of explicit statement on the ground that the action was instituted and tried, until the decision of the chancery court, upon the theory that the Southern Railway Company and plaintiff in error were "connecting carriers," *and that this theory of the case having been disproved and the appeal dismissed as to plaintiff in error, complainant (defendant in error) shifted its position, and, under the broad practice and pleading in the state court, was allowed to proceed and procure judgment upon the theory that plaintiff in error had discriminated against defendant in error by preferring its own business, that it had failed to furnish equal facilities for interchange as to this shipment, and that, on account of its previous switching arrangements with the Southern Railway Company, it had no right to refuse to "switch" the cars over its terminals. The record furnishes no justification for this contention. The bill charged the railroad companies as being connecting common carriers, plaintiff in error being the ultimate carrier, and that both were bound by the contracts made, and bound to carry the corn from the points of shipment to destination. Plaintiff in error denied these allegations, as we have seen, and on the issue thus formed proof was taken.

The chancery court found, it is true, in favor of plaintiff in error. The case was taken to the court of chancery appeals, where it was heard, the record recites, "upon the transcript of the record from the chancery court of Jefferson county and upon the assignments of error and briefs of counsel." In other words, the court of chancery appeals heard the case as made in the chancery court. What the chancery court of appeals said of the issues and contentions of the parties we have already stated, and we need only repeat that the assignment of error by complainant (defendant in error) in the chancery court of appeals was general, and showed no change in the theory upon which the case was brought and conducted. It was that the chancery court erred in holding that there was no liability on the part of the Louisville & Nashville Railroad Company, and in refusing to hold that it was liable either alone or jointly with the other company. And the court said that the denial of plaintiff in error of liability was "predicated upon the idea that it was not a *connecting carrier in handling [561] the shipments of corn involved in this case, or that it was under no obligations respecting the same." It is true the court also said that plaintiff in error contended "that it had the right to discriminate between freight arriving in Birmingham over its lines and freight arriving over other lines, and could give preference between those that it chose to serve in this business," but this contention, it was also said, was "as a corollary" to the proposition that plaintiff in error was not a common carrier, but simply a private carrier. The court determined against this proposition, and in consequence adjudged plaintiff in error liable. In other words, the judgment of the court was in exact response to the pleading. Nor was there any change on appeal to the supreme court. The railroad company's second assignment of error was (and it is the only one with which we can concern ourselves) that it was not "liable for any portion of the alleged damage to these various shipments, because, under the facts of this case, it was not a connecting carrier, and was not bound to handle these shipments. . . ."

There is in the printed record a certificate of the chief justice of the supreme court of the state, given when the writ of error was applied for, to the effect that the supreme court of the state was of opinion "that the statutes and laws of Tennessee were not in conflict with the act of Congress regulating interstate commerce, and that the act of Congress did not control the shipments in controversy." Counsel concedes the rule to be that the certificate of the presiding judge of a state court is insufficient to give us jurisdiction, but insists that it can make more certain and specific what is too general and indefinite in the record. There is no doubt of the rule, but there is nothing

in this record to justify its application. There is nothing in the record to specialize. It is less open to conjecture than the certificate. As no Federal question was raised, the motion to dismiss must be granted.

It is so ordered.

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[562] UNITED STATES, Appt.,

v.

EDWIN M. KEATLEY.

(See S. C. Reporter's ed. 562-565.)

Clerks—docket fees—separate trials under one indictment.

1. Separate trials under one indictment against several defendants are separate causes, within the meaning of U. S. Rev. Stat. § 828, U. S. Comp. Stat. 1901, p. 635, prescribing the docket fees which the clerk of a Federal court may charge in a cause.

Clerks—fees—recording judgments.

2. The services of a clerk of a Federal court for recording abstracts of judgments, as required by a rule of court, are not covered by docket fees prescribed by U. S. Rev. Stat. § 828, par. 10, and separate charges therefor are justified by par. 8 of that section, prescribing the fees which such clerk may receive for "making any record."

[No. 482.]

Submitted January 29, 1907. Decided February 25, 1907.

APPEAL from the Court of Claims to review a judgment allowing a clerk of a Federal court separate docket fees for separate trials under one indictment, and disallowing a counterclaim for charges paid for recording abstracts of judgments. Affirmed.

See same case below, 41 Ct. Cl. 384.

The facts are stated in the opinion.

Assistant Attorney General **Van Orsdel** and Mr. **Philip M. Ashford** submitted the cause for appellant.

Mr. **Frank B. Crosthwaite** submitted the cause for appellee:

After severance the records in the several cases become entirely distinct and to all intents and purposes as though the defendants were charged in separate indictments.

State v. Rogers, 6 Baxt. 563; Noland v. State, 19 Ohio, 131.

Where an order of severance is made it is equivalent to dividing the cause into a number of distinct actions.

Bryan v. Spivey, 106 N. C. 99, 11 S. E. 510.

Where severance is had one defendant cannot rely upon anything in the record of the trial of another defendant as *res judicata* in his own case.

Eikenberry v. Edwards, 71 Iowa, 82, N. W. 183.

Mr. Justice **McKenna** delivered the o ion of the court:

The claimant in the court below, appel here, was clerk of the United States c cuit court for the southern district of W Virginia from July 1 to July 6, 1902, a clerk of that court and the district cou from July 16, 1902, to September 17, 190 He regularly rendered accounts for se services, which contained, among oth things, charges for "separate docket fees i separate trials under one indictment." Th charges were disallowed and this suit w brought therefor in the court of claim Judgment was rendered for claimant for th sum of $125.45, certain items being disa lowed.

A counterclaim was filed by the Unit States for the recovery of $57.90, charged f "docketing judgments," alleged to have be erroneously and unlawfully paid to clai ant by the accounting officers of the Unit States. The counterclaim was disallow and the United States assigns as error th action of the court in rendering judgme for the claimant as aforesaid and overruli the counterclaim. In passing on the char for the service the court of claims said:

"The defendant's contention as to item is troublesome. It appears that joint in dictments were returned against several d fendants; that on motion of defendant counsel separate trials were granted to som of the defendants, whereupon the clerk mad separate docket entries in accordance wit said motion, docketing said causes a though separate indictments had been re turned against the parties granted separat trials.

"Paragraph 10 of § 828 of the Revise Statutes (U. S. Comp. Stat. 1901, p. 635 provides:

"'For making dockets and indexes, issu ing venire, tax costs, and all other service on the trial or argument of a cause when issue is joined and testimony given, thre dollars.'

"By paragraph 11 a fee of $2 is allowe where no testimony is given, and by para graph 12 a fee of $1 is allowed where th cause is dismissed or discontinued or jud ment or decree rendered without issue."

The contention of the appellant turns u on the word "cause." The argument is th the word "cause" is limited by the wo indictment, and if it be returned against number of persons and they be granted sep rate trials there is only one "cause." is conceded that the court may grant sep rate trials, and it is not disputed that t court did so in the case for which the s

ices sued for were charged and that each was separately designated on the records.

We think the order granting separate trials made separate causes, and therefore each was independent of the other. State v. Rogers, 6 Baxt. 563; Noland v. State, 19 Ohio, 131; Bryan v. Spivey, 106 N. C. 95, 11 S. E. 510. The services rendered were a proper charge under the statute.

2. The counterclaim was for the recovery [564]of $57.90, charges *made for "docketing judgments," and the lists filed showed amounts from $0.15 to $8.70. The court of claims' comment was: "The defendant's counterclaim, predicated upon the alleged illegal allowance for the docketing of judgments, will have to be dismissed. The services here charged for were admittedly performed, by order of the court, and, under United States v. Jones, 193 U. S. 528, 48 L. ed. 776, 24 Sup. Ct. Rep. 561, allowable."

The case referred to is United States v. Jones, supra. In the absence of anything in the record to the contrary, we must assume that the application of that case was made on account of the facts presented to the court of claims in this. Counsel for the United States say that the findings of the court of claims "on the subject of the counterclaim are not as full and complete as they might be." A belief is expressed, however, that it appears, from the face of the counterclaim, that they are folio fees. At all events, it is insisted, that they are not the charges specified in paragraphs 10, 11, and 12 of § 828 of the Revised Statutes. This the appellee concedes in effect, and urges that the charge was made under and is justified by paragraph 8 of that section, which reads as follows: "For entering any rule, order, continuance, judgment, decree, or recognizance, or drawing any bond or making any *record*, certificate, return, or report, for each folio, fifteen cents." The words we have italicized are the words upon which appellee relies, combined with the following order of the court:

"The clerk of this court is directed to keep a judgment docket wherein shall be *recorded* abstracts of all judgments rendered in cases wherein the United States is a party. Said judgment docket shall contain:

"The number of the case.

"The date of the indictment.

"The names of the parties.

"The amount of the judgment.

"The amount of costs.

"The date of the judgment.

[565] *"When docketed.

"The amount paid.

"The disposition of the funds and any additional matter which the clerk may deem pertinent."

The record required by that rule, appellee contends, is different from the various dockets which are kept in all United States courts in which brief entries of fact are made, and which, it is said, are covered by the docket fee. The contention is consonant with the decision of the court of claims, and we do not think it is refuted by the suggestions made by appellant.

Judgment affirmed.

D. S. OSBORNE, J. K. P. Carroll, A. J. Barnes, and G. L. Baker, Suing as Trustees of Carrick Academy of the County of Franklin, etc., Plffs. in Err.,

v.

R. A. CLARK and Winchester Normal College.

(See S. C. Reporter's ed. 565–569.)

Error to state court—Federal question—how raised.

1. References to the Dartmouth College Case in the opinions of the state courts in discussing the question whether a certain educational institution is public or private, the decision of which question would determine the validity of state legislation under the state Constitution, do not show that the contract clause of the Federal Constitution was relied upon to invalidate such

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

Error to state courts in cases presenting questions of impairment of contract obligations.

I. The question a Federal one.
II. How the question must be presented to, and decided by, the state court.
III. Scope of review.

I. The question a Federal one.

The claim in a state court that a state statute is invalid because it impairs the obligation of a contract presents a Federal question. Bridge Proprietors v. Hoboken

legislation, so as to sustain a writ of error from the Supreme Court of the United States.

Error to state court—Federal question—how raised.

2. The question as to the validity of a state law under the Federal Constitution is not necessarily involved so as to sustain a writ of error from the Supreme Court of the United States to a state court merely because the state law logically might have been assailed as invalid under the Federal Constitution upon grounds more or less similar to those actually taken.

[No. 159.]

Argued January 16, 1907. Decided February 25, 1907.

IN ERROR to the Supreme Court of the State of Tennessee to review a decree which reversed a decree of the Court of Chancery Appeals in that state, affirming a decree of the Chancery Court of Franklin County, overruling a demurrer to a bill to set aside a lease of the property of an educational institution. Dismissed for want of jurisdiction.

See same case below, 112 Tenn. 483, [illegible] S. W. 64.

The facts are stated in the opinion.

Messrs. Floyd Estill and James J. Lyne argued the cause, and, with Messrs. Jesse M. Littleton, Isaac W. Crabtree, and Felix D. Lynch, filed a brief for plaintiffs in error:

The Federal question as to the impair-

Land & Improv. Co. 1 Wall. 116, 17 L. ed. 571; Furman v. Nichol (Green v. Nichol) 8 Wall. 44, 19 L. ed. 370; Hill v. Merchants' Mut. Ins. Co. 134 U. S. 515, 33 L. ed. 994, 10 Sup. Ct. Rep. 589; East Tennessee, V. & G. R. Co. v. Frazier, 139 U. S. 288, 35 L. ed. 196, 11 Sup. Ct. Rep. 517; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; The Binghamton Bridge (Chenango Bridge Co. v. Binghamton Bridge Co.) 3 Wall. 51, 18 L. ed. 137; Yazoo & M. Valley R. Co. v. Thomas, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68; Yazoo & M. Valley R. Co. v. Levee Comrs. 132 U. S. 190, 33 L. ed. 308, 10 Sup. Ct. Rep. 74; Northwestern University v. Illinois, 99 U. S. 309, 25 L. ed. 387; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; Given v. Wright (New Jersey, Given, Prosecutor, v. Wright) 117 U. S. 648, 29 L. ed. 1021, 6 Sup. Ct. Rep. 907; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; Walsh v. Columbus, H. Valley & A. R. Co. 176 U. S. 469, 44 L. ed. 548, 20 Sup. Ct. Rep. 393; Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921; Williams v. Louisiana, 103 U. S. 637, 26 L. ed. 595; McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545.

A municipal ordinance is a state statute so far as this question is concerned. Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760.

So, also, is a provision of the state Constitution. Delmas v. Merchants' Mut. Ins. Co. 14 Wall. 661, 20 L. ed. 757.

The existence of the contract has been said to be a part of the Federal question itself. Hoadley v. San Francisco (Clark v. San Francisco) 124 U. S. 639, 31 L. ed. 553, 8 Sup. Ct. Rep. 659.

Hence, the Supreme Court of the United States in numerous instances maintains its jurisdiction, although it may be forced to affirm the judgment of the state court because, in reviewing such judgment, it finds, either that there was no contract, or that it did not confer the right claimed. Ibid.; Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193.

A different course was adopted in New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142, where the court thought that the ruling in Millingar v. Hartupee, 6 Wall. 258, 18 L. ed. 829, necessitated the conclusion that, before the Supreme Court of the United States can take jurisdiction on the ground that the state court has upheld a state statute drawn in question as impairing the obligation of the contract, it should appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired. The court, therefore, declined jurisdiction despite the formal raising of the question, because it was of the opinion that no contract existed.

A somewhat analogous case is St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575, where a writ of error to review a judgment of a state court in a case in which the obligation of a contract with a municipality was claimed to have been impaired by a subsequent municipal ordinance was dismissed for want of jurisdiction on the ground that such ordinance was a mere denial of liability on the contract; and, hence, that there was no state legislation from the enforcement of which an impairment of the obligation of the contract did, or could, result.

Unless these decisions are referable to

nt of the obligation of the contract was iciently raised in the pleadings.

olumbia Water Power Co. v. Columbia ctric Street R. Light & P. Co. 172 U. S. , 43 L. ed. 521, 19 Sup. Ct. Rep. 247; Mclough v. Virginia, 172 U. S. 104, 43 L. 382, 19 Sup. Ct. Rep. 134; Yazoo & M. ley R. Co. v. Adams, 180 U. S. 1, 45 ed. 395, 21 Sup. Ct. Rep. 240.

he opinion of the court may be looked in determining whether or not a Federal stion was raised and decided.

Murdock v. Memphis, 20 Wall. 590, 22 L. 429; San José Land & Water Co. v. San é Ranch Co. 189 U. S. 177, 47 L. ed. 765, Sup. Ct. Rep. 487.

The insistence of defendants in error is l has been that the act of Congress of 1806 really conveyed the property to the state, and that, by virtue of this act, the state became the owner of the fund arising from the sale of this property, and that the academies endowed therewith were state agencies for this reason. Plaintiffs in error insisted that the state was only made a trustee, and that the fund was intended for Carrick Academy, and that the endowment of Carrick Academy with this fund did not make it a public corporation or state agency. The supreme court adopted the view of the defendants in error, and construed this act of Congress according to their insistence. This was necessary to the decision of the case, as it was decided. And hence a Federal question arises.

Glasgow v. Baker, 128 U. S. 560, 32 L.

principle that a Federal contention st not be wholly without foundation e note to Offield v. New York, N. H. & R. Co. ante, 231), they do not seem easy explanation on any other theory than at suggested in the note to Burt v. Smith, te, 121, to account for the decisions in sler v. Washington Harbor Line, 146 U. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190, d other cases considered in connection erewith, *viz.:* That, as the judgment of e state court was not to be reversed, it as not very material whether the writ of ror was dismissed, or the jurisdiction entained and the judgment affirmed.

And perhaps this is the best explanation r the holding in Mills v. St. Clair County, How. 569, 12 L. ed. 1201, that the question whether the contract, if any, under hich the owner of land holds under a ant in fee simple was violated by an use of the right of eminent domain under e sanction of a state statute was not e which would confer jurisdiction on the upreme Court of the United States under 25 of the judiciary act of 1789. "It is t an invasion and illegal seizure of prite property on pretense of exercising the ght of eminent domain, and which act is abuse claiming the sanction of a state w," said Mr. Justice Catron, "that gives s court jurisdiction. . . . Were this rt to assume jurisdiction and re-examine d revise state court decisions on a doubt- construction that an interest in land d by patent was a contract, and the ner entitled to constitutional protection our decision in case of abuse and tress by an oppressive exercise of state aurity, it would follow that all state laws, cial and general, under whose sanction ds, ferries, and bridges are established, uld be subject to our supervision. A w source of jurisdiction would be opened, endless variety and extent."

Where the sole question involved is the nstruction of a charter or contract, no deral question is presented. Yazoo & M. alley R. Co. v. Adams, 180 U. S. 41, 45 ed. 415, 21 Sup. Ct. Rep. 256.

The question of the validity of a contract under the state law when the contract was made is not Federal, where no subsequent legislation is claimed to impair its obligation. Bethell v. Demaret, 10 Wall. 537, 19 L. ed. 1007; Mississippi & M. R. Co. v. McClure, 10 Wall. 511, 19 L. ed. 997.

And where certain state bonds were in the possession of the state at the time of the adoption of a constitutional amendment invalidating bonds so held, no question as to the impairment of contract obligations is involved in the inquiry whether such bonds, when subsequently stolen and put into circulation by the state treasurer, were valid obligations in the hands of innocent holders. Bier v. McGehee, 148 U. S. 137, 37 L. ed. 397, 13 Sup. Ct. Rep. 580.

If the Supreme Court of the United States could review the decision of a state court because that court held a contract to be void which the former court might have upheld, every case in which a contract was held by the state court not to be binding for any cause whatever could be reviewed in the Supreme Court of the United States, which would thus become the court of final resort in all cases of contract where the decisions of the state courts were against the validity of the contracts set up in those courts. This obviously was not the purpose of the judiciary act. Mississippi & M. R. Co. v. Rock, 4 Wall. 177, 18 L. ed. 381.

Hence, the Supreme Court of the United States has no jurisdiction to review state judgments because they refuse effect to valid contracts, or in their effect impair the obligation of contracts. Northern R. Co. v. New York, 12 Wall. 384, 20 L. ed. 412; Knox v. Exchange Bank, 12 Wall. 379, 20 L. ed. 414; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; Missouri ex rel. Quincy, M. & P. R. Co. v. Harris, 144 U. S. 210, 36 L. ed. 407, 12 Sup. Ct. Rep. 838; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

"It is the peculiar province and privilege of the state courts," said Mr. Justice Grier in Commercial Bank v. Buckingham, 5 How. 317, 12 L. ed. 169, "to construe their own

ed. 513, 9 Sup. Ct. Rep. 154; Neilson v. Lagow, 7 How. 772, 12 L. ed. 908; Joplin v. Chachere, 192 U. S. 94, 48 L. ed. 359, 24 Sup. Ct. Rep. 214; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; Kennedy Min. & Mill. Co. v. Argonaut Min. Co. 189 U. S. 1, 47 L. ed. 685, 23 Sup. Ct. Rep. 501.

Mr. Charles C. Trabue argued the cause, and, with Mr. William L. Granbery, filed a brief for defendants in error:

This court has repeatedly said that it was without authority to review the decision of a state supreme court, unless it affirmatively appeared that a Federal question was actually raised and actually decided; or, to state it a little differently, unless it appeared that the decision of a Federal question was necessary to the conclusion reached by the state court.

Murdock v. Memphis, 20 Wall. 590, 22 ed. 429; Detroit City R. Co. v. Guthard, 1 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 81 Spies v. Illinois (Ex parte Spies) 123 U S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 2 Brooks v. Missouri, 124 U. S. 394, 31 ed. 454, 8 Sup. Ct. Rep. 443; Cox v. Texas 202 U. S. 446, 50 L. ed. 1099, 26 Sup. C Rep. 671; Adams County v. Burlington M. River R. Co. 112 U. S. 123, 28 L. ed. 67 5 Sup. Ct. Rep. 77; Simmerman v. Nebraska, 116 U. S. 54, 29 L. ed. 535, 6 Sup. C Rep. 333; Leeper v. Texas, 139 U. S. 46 35 L. ed. 225, 11 Sup. Ct. Rep. 577; Bunnell v. Crooke Min. & Smelting Co. 148 U S. 688, 37 L. ed. 612, 13 Sup. Ct. Rep. 77

statutes; and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary."

A change of view by a state court as to the proper construction of a state statute relating to deeds and acknowledgments, so as to render invalid a deed executed prior to the enactment, does not present a Federal question. Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

The same is true of a change of view by the highest court of a state with respect to the limit of private ownership on tide waters. Mobile Transp. Co. v. Mobile, 187 U. S. 489, 47 L. ed. 266, 23 Sup. Ct. Rep. 170.

A Federal question which will support a writ of error to a state court is not raised by a decision of such court against the validity, under the state Constitution, of a statute under which certain bonds were issued, although it had held such statute valid before their issue, there being no subsequent legislation touching the subject. Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464.

So, a change of view by a state court in regard to the proper construction of a state statute, even if its former holding had become a rule of property, cannot constitute a Federal question as to the impairment of the obligation of a contract for which a writ of error will lie from the Supreme Court of the United States to the state court. Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023.

And, even assuming that there could be a vested right in an erroneous decision, no question of the impairment of the obligation of the contract is presented by a decision of a state court construing a state statute differently from the construction previously placed by it on a similar, but not identical, statute. Wood v. Brady, 150 U. S. 18, 37 L. ed. 981, 14 Sup. Ct. Rep. Dougherty v. Nevada Bank, 160 U. S. 17 40 L. ed. 382, 16 Sup. Ct. Rep. 258.

Where the question is not whether certain constitutional and statutory provisions were valid, but whether, by their adoption and enactment, a condition attached to a conveyance of land for the erection of a capitol was so broken as to authorize the grantor to revoke the deed and take possession of the property, no question of the impairment of the obligation of a contract is involved, since the most that can be claimed is that the state has violated its contract, not impaired it. Brown v. Colorado, 106 U. S. 95, 27 L. ed. 132, 1 Sup. Ct. Rep. 175.

No question as to the impairment of the obligation of a contract by a state statute requiring the purchaser of the property and franchises of a railway company to assume the liability of that company can arise in a suit in a state court brought under that act to enforce a liability founded on tort, and not arising out of any contract relations. Winona & St. P. R. Co. v. Plainview, 143 U. S. 371, 36 L. ed. 191, 12 Sup. Ct. Rep. 530.

The repugnancy of state legislation to the Federal Constitution is the Federal question usually regarded as involved in a case in which the obligation of a contract is claimed to be impaired. But jurisdiction to review the judgment of a state court in such a case may be rested on the ground that its decision was adverse to a right claimed under the Federal Constitution.

For this reason, as well as because the decision of the state court was in favor of the validity of an authority exercised under the state, challenged as repugnant to the Federal Constitution, the Supreme Court of the United States, in Home Ins. Co. v. Augusta, 93 U. S. 116, 23 L. ed. assumed jurisdiction to review a decision of a state court adverse to a claim that a city ordinance imposing a license tax upon an insurance company of another state was in conflict with the contract clause of the Federal Constitution.

Whether the contract clause of the Fed

Loeber v. Schroeder, 149 U. S. 585, 37 L. ed. 859, 13 Sup. Ct. Rep. 934; Powell v. Brunswick County, 150 U. S. 439, 37 L. ed. 1136, 14 Sup. Ct. Rep. 166; Hale v. Akers, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171.

And it is not sufficient that the Federal question might have been raised.

Murdock v. Memphis, supra; Crowell v. Randell, 10 Pet. 398, 9 L. ed. 470; Chouteau v. Gibson, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340.

Where constitutional objections are pointed out, specific reference is made in each instance to the Constitution of Tennessee.

One or two other objections which are apparently intended to be constitutional make no reference to either the state or Federal Constitution, but, under the well-settled doctrine of this court, they will be conclusively presumed to have referred to the state Constitution.

Porter v. Foley, 24 How. 415, 16 L. ed. 740; Miller v. Cornwall R. Co. 168 U. S. 134, 42 L. ed. 411, 18 Sup. Ct. Rep. 34; Capital City Dairy Co. v. Ohio, 183 U. S. 248, 46 L. ed. 176, 22 Sup. Ct. Rep. 120.

The averment in a petition for writ of error that a Federal question was raised and decided in the state court is insufficient in itself to give this court jurisdiction.

Leeper v. Texas, Adams County v. Burlington & M. River R. Co. and Cox v. Texas, supra.

The court below discussed the constitu-

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eral Constitution constitutes a bar to mandamus proceedings in a state court is a Federal question. Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617.

II. How the question must be presented to, and decided by, the state court.

The Federal question here involved being the repugnancy of state legislation to the Federal Constitution, the manner in which the question is raised is not very important. But, although a formal raising of the question is not indispensable, it must have been so presented that the state court knew, or should have known, that such question was involved in the controversy. See note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

The question of the repugnancy of the authority of a public officer of the state exercising authority under the state to that provision of the Federal Constitution which forbids a state to pass any law impairing the obligation of a contract is sufficiently drawn in question by an application for a writ of mandamus to compel a county clerk to accept payment of certain bank notes in discharge of a license tax, which proceeds on the theory that the state had, in the passage of a statute creating the bank, made a contract to receive its notes in payment of state taxes, and that it was not within the power of a subsequent legislature to impair the binding force of this contract. Furman v. Nichol (Green v. Nichol) 8 Wall. 44, 19 L. ed. 370.

An allegation that a statute as construed by the state court violates both the state and Federal Constitution, made in a motion to set aside a judgment on an agreed case, which presents no issue as to the validity of the statute, is not sufficient to present a Federal question as to the impairment of the obligation of a contract created by a charter (which was not mentioned in the agreed case), or as to the denial of the equal protection of the laws, on the theory that, as the proper construction of the statute was definitely settled by the state court, it can be seen that the statute as thus construed would have that effect. Louisville & N. R. Co. v. Louisville, 166 U. S. 709, 41 L. ed. 1173, 17 Sup. Ct. Rep. 725.

Jurisdiction to review a judgment of a state court on the ground that it involved a decision sustaining the validity of state legislation claimed to impair contract obligations does not exist when the only question apparently involved in the state court was the construction of a charter or contract, although it appeared that there were statutes subsequent thereto which might have been relied upon as raising a Federal question concerning the construction of the contract, which were not alluded to, either in the pleadings, proofs, or in the opinion of the state court. Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256.

The question ought to be so raised that the highest state court can, in the regular course of its proceedings, consider it; but if such court actually passes on the question, the defective mode of presentation would seem not to be a matter of importance. Hence, where the highest state court passes adversely upon the contention that a state law impaired contract obligations, it is no objection to the exercise by the Supreme Court of the United States of its appellate jurisdiction that the point may not have been so raised under the state practice as to be properly the subject of review in the highest state court. Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989.

The question must not only be raised, it must be decided. But the decision may be either in terms or necessarily involved in the judgment rendered. Either mode is sufficient to sustain the appellate jurisdiction of the Federal Supreme Court. See note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

A certificate of the chief justice of a state court, stating that the validity of state legislation subsequent to the charter of a corporation was drawn in question upon the ground that it impaired the obligation of a contract, and that the decision was in favor of the validity of such legis-

tionality of the act with reference solely to the state Constitution.

Whether the state court decided this question correctly will not be a subject of inquiry in this court.

De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; Hale v. Akers, 132 U. S. 565, 33 L. ed. 446, 10 Sup. Ct. Rep. 171.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill to set aside a lease made by former trustees of Carrick Academy to the trustees of the Winchester Normal College, in pursuance of an act of the general assembly of Tennessee, authorizing the letting of the academy property to said lessees. The bill alleged that the act was contrary to the Constitution of the state for various reasons, but said nothing of the Constitution of the United States, and in no way implied a reliance upon any of its terms. An act of Congress of April 18, 1806 [2 Stat. at L. 381, chap. 31], was referred to, but was not alleged to be contravened. The defendants demurred, and the demurrer, after being overruled by the court of chancery appeals, was sustained by the supreme court of the state. 112 Tenn. 483, 80 S. W. 64. The case then was brought here by writ of error, and was argued both on the merits and upon a motion to dismiss.

The assignment of errors sets up that the above-mentioned state law impairs the obligation of contracts, contrary to the Con-

lation, may be resorted to, in the absence of an opinion, to show that a Federal question, which was otherwise raised in the record, was actually passed upon by the court. Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26.

The state court cannot be held to have decided a question as to the impairment of the obligation of a contract unless it has given effect to subsequent state legislation claimed to have accomplished that result. Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 667, 8 Sup. Ct. Rep. 741; Winona & St. P. R. Co. v. Plainview, 143 U. S. 371, 36 L. ed. 191, 12 Sup. Ct. Rep. 530.

Effect cannot be deemed to have been given to a legislative enactment claimed to impair the obligation of a contract by a decision of a state court enforcing a liability voluntarily assumed under such statute. Winona & St. P. R. Co. v. Plainview, supra.

A decision of a state court upholding a municipal tax on a bridge on the ground that the bridge company, by accepting its franchise from the city, voluntarily agreed that the bridge should be subject to taxation, rests upon a ground broad enough to dispose of the case without reference to the Federal question involved in the contention that the tax ordinances of the city impaired the obligations of its charter from the state, and of a contract which the bridge company entered into with a railroad company for the maintenance and operation of the bridge. Henderson Bridge Co. v. Henderson, 141 U. S. 679, 35 L. ed. 900, 12 Sup. Ct. Rep. 114.

A decision of a state court that a creditor of an insolvent, by accepting the benefit of a composition offer under a state statute, waived any right to object to the validity of such statute as impairing contract obligations, rests upon a non-Federal ground broad enough to support its judgment denying his right to recover the balance of his debt without reference to the Federal question. Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131.

The effect upon cases of this character of the rule that, where the state court rests its judgment upon non-Federal grounds sufficient to support it, the Supreme Court of the United States is without jurisdiction, needs carefully to be noted, where the ground on which the state court rests its decision is that the contract did not exist, or did not confer the right claimed. The question depends for its solution upon a determination whether or not the state court did in fact give effect to the subsequent state legislation.

Where the state court decides that an alleged contract never existed because of the want of a compliance with a state statute, and renders judgment wholly without reference to the subsequent statute, which is alleged to have impaired the obligation of the contract, the Supreme Court of the United States cannot review such judgment. Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023.

The same is true when the state court bases its judgment entirely upon the effect and construction of the statutes claimed to create the contract, and upon grounds which would have been equally controlling if the later acts had not been passed. Kreiger v. Shelby R. Co. 125 U. S. 39, 31 L. ed. 674, 8 Sup. Ct. Rep. 752.

So, where the state court rested its judgment enforcing the payment of taxes on railway property, not upon the ground that such property was rendered taxable by any law passed subsequent to the company's charter, but that, under the terms of the charter itself, such property was taxable, the Supreme Court of the United States is without jurisdiction to review that judgment. St. Paul, M. & M. R. Co. v. Todd County, 142 U. S. 282, 35 L. ed. 1014, 12 Sup. Ct. Rep. 281.

The ruling of a state court adverse to a claim under a judgment because the notes for which such judgment was rendered were given for a loan of confederate money, and the transactions which resulted in the acquisition of the notes were had between en-

;itution of the United States, although it ɔes not show definitely what contract, or ɔw that contained in the charter of Car-ck Academy is impaired. It sets up, also, ıat the act is repugnant to the act of Con-ress of April 18, 1806; and it alleges that ıe plaintiffs in error specially set up and laimed their rights in these respects in the hancery court of the state.

To show that the Constitution of the Inited States was relied upon below, the laintiffs in error refer to passages in the pinions of the court of chancery appeals nd the supreme court, in which Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 29, was discussed, as establishing the point. But we are *unable to see that those passages rove the fact. The court of chancery appeals states the violations of the state Constitution set up in the bill, summarizes the questions presented by the bill and demurrer, and then addresses itself to answering those questions, suggesting no others, and saying nothing about the Constitution of the United States. After a statement of historical facts, it says that if the act authorizing the lease is constitutional, and the subject-matter of the act was under the control of the state, the case is at an end. If Carrick Academy is a public corporation, the state is assumed to have control. If it is a private corporation, the state Constitution is assumed to invalidate the statute by one of the clauses set up in the bill. The judge, speaking for himself, would regard the academy as a public corporation, but he

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mies during the Civil War in violation of he proclamation of the President forbid-ing commercial intercourse with the enemy, s not the subject of review by the Supreme Court of the United States, where such uling was based upon its previous adjudica-ions, and not upon the provision in the tate Constitution subsequently adopted rohibiting enforcement of contracts found-d upon confederate money. Stevenson v. Villiams, 19 Wall. 572, 22 L. ed. 162.

And where the state court holds that a ote given in renewal of obligations arising rom the sale of a slave is void under the ettled principles of the jurisprudence of he state, tested by which the contract was oid when made, without passing upon the alidity, under the Federal Constitution, of provision of the state Constitution, sub-equently adopted, annulling contracts for he sale of persons, its judgment cannot be eviewed in the Supreme Court of the Uni-ed States. Palmer v. Marston (Worthy v. Marston) 14 Wall. 10, 20 L. ed. 826.

And even where the state court has ac-ually decided the Federal question, if there s besides another and distinct non-Federal round on which the judgment can be sus-ained, the Supreme Court of the United tates will not entertain jurisdiction to re-iew such judgment. Hence a decision of a tate court which held that a state statute nder which a mortgage foreclosure was had id not impair the obligation of the mort-age contract is not reviewable in the Su-reme Court of the United States when its udgment was based upon the ground that he foreclosure was valid without reference o such statute, because the method pur-ued was in strict conformity to the mode f foreclosure authorized when the mort-age contract was made by the laws then n existence. Kennebec & P. R. Co. v. Port-and & K. R. Co. 14 Wall. 23, 20 L. ed. 850.

But where the state court does give effect o the subsequent law, the Supreme Court as jurisdiction, although the state court ay have* placed its decision upon the round that the contract did not exist, or, existing, did not confer the right claimed. The Supreme Court of the United States is not without jurisdiction to review, by writ of error, a decision of a state court sustaining a state statute claimed to impair contract obligations, because the state court rests its conclusion of the nonexistence of the contract upon a construction of the state Constitution and laws. Atty. Gen. ex rel. Kies v. Lowrey, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27.

The Federal Supreme Court may review a decision of a state court sustaining the enforcement against a railway company of an alleged charter obligation to pay over the surplus profits to the state, which could not have been reached except by erroneously construing the charter, without relying on subsequent legislation flagrantly repugnant to the Federal Constitution, and challenged for that reason, where the state court clearly did rely upon that legislation to some extent, although it put forward in its judgment the untenable construction more than the unconstitutional statutes. Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 48 L. ed. 1124, 24 Sup. Ct. Rep. 767.

A decision of a state court upholding taxes imposed under a state law claimed to impair a contract contained in the charter of the corporation exempting it from taxation, though rested upon the ground that the exemption claimed was not granted by such charter, is reviewable in the Supreme Court of the United States. Yazoo & M. Valley R. Co. v. Thomas, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68; Yazoo & M. Valley R. Co. v. Levee Comrs. 132 U. S. 190, 33 L. ed. 308, 10 Sup. Ct. Rep. 74.

A decision of a state court that a statutory exemption from taxation is not a valid contract, but is void because conflicting with the state Constitution in force when it was enacted; and that, therefore, no contract right was violated in subjecting the property to taxation under a later act,—is reviewable in the Supreme Court of the United States. Northwestern University v. Illinois, 99 U. S. 309, 25 L. ed. 387.

And a decision of a state court which gives effect to state statutes subjecting the property of a railroad company to taxation that are claimed to impair the obligation

yields to the weight of the decision in the Dartmouth College Case, or, at least, to the principle of that case, according to which, as he conceives, the academy is a private corporation, and therefore exempt from a diversion from its original charter purposes, such as the act authorizing the lease is assumed to effect. The objections to such a diversion that he is considering are those that he has stated as presented by the bill. The supreme court, after stating the nature of the corporation and the relations and course of dealing of the state with it, and citing cases to prove that Carrick Academy is a public agency, refers to the decision below and the citation there of the Dartmouth College Case only in order to show that that case was misapplied.

But the plaintiffs in error say further that the question of their rights under the Constitution of the United States necessarily was involved in a decision upon the bill, and that that is enough when the validity of a state law is concerned. Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 488, 43 L. ed. 521, 525, 19 Sup. Ct. Rep. 247; McCullough v. Virginia, 172 U. S. 102, 117, 43 L. ed. 382, 387, 19 Sup. Ct. Rep. 134. These and similar cases, however, are not to be pressed to the point that, whenever it appears that the state law logically might have been assailed as invalid *under the[561] Constitution of the United States, upon grounds more or less familiar to those actually taken, the question is open. If a case

of a charter exemption from taxation is reviewable in the Supreme Court of the United States, although such decision was rested on the ground that the exemption clause was invalid because in conflict with the state Constitution, and because of its vagueness and uncertainty. Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 38 L. ed. 794, 14 Sup. Ct. Rep. 968.

The decision of a state court which gives effect to a state revenue law, and holds that a contract does not confer a right of exemption from its operation, may involve a Federal question, although the state court concedes that the contract is valid, but denies, merely, that the particular property in question was embraced within its terms. Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72.

Where it is claimed that the obligation of a contract of exemption from taxation has been impaired by the general tax laws of the state, and the state court justifies such impairment on the ground of the surrender of such exemption by long acquiescence in the imposition of taxes, the Supreme Court of the United States has jurisdiction to review that decision. Given v. Wright (New Jersey, Given, Prosecutor, v. Wright) 117 U. S. 648, 29 L. ed. 1021, 6 Sup. Ct. Rep. 907.

The jurisdiction of the Supreme Court of the United States to review a judgment of the highest court of a state sustaining a license tax imposed on a banking business cannot be defeated on the theory that such judgment rests upon non-Federal grounds sufficient to sustain it, even assuming that the state court rests its decision upon the grounds that, by reason of the bank's acceptance of a certain state statute, and by virtue of an act extending its charter, it became subject to certain constitutional provisions authorizing or requiring the payment of such a tax, where the bank pleaded that, at the time of the imposition of the tax, it had a contract exemption from taxation. Citizens' Bank v. Parker, 192 U. S. 73, 48 L. ed. 346, 24 Sup. Ct. Rep. 181.

The affirmance by the highest state court of an order awarding a peremptory writ of mandamus to compel the reduction of railroad rates to conform to the schedule made by the act under which the railroad was incorporated, on the ground that, by its incorporation under that act, the company became subject to its provisions, is not based on non-Federal grounds, so as to preclude a review in the Federal supreme court, where the company relied upon the provisions of a prior act authorizing the incorporation of the purchasers of a railroad after a sale in foreclosure proceedings, with the rights and privileges of the original company as a contract right, protected from impairment by the Constitution of the United States. Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310.

A decision by the state court that an act of Congress granting land to Ohio for the construction of canals did not constitute a contract for the perpetual maintenance of such canals, and could not, therefore, be impaired by a state statute abandoning a canal and leasing it to a railroad company, is reviewable in the Supreme Court of the United States. Walsh v. Columbus, H. Valley & A. R. Co. 176 U. S. 469, 44 L. ed. 548, 20 Sup. Ct. Rep. 393.

A decision of a state court adverse to a claim of an exclusive franchise granted by an inferior court acting under legislative authority, which could not be impaired by subsequent legislation without violating the contract clause of the Federal Constitution, is reviewable in the Supreme Court of the United States, although the state court disposed of the case by deciding that the state statutes did not authorize the inferior court to grant such an exclusive franchise, and in so doing gave a construction to a state statute. Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921.

A decision of a state court invalidating certain state bonds because in excess of the limit of state indebtedness prescribed by the state Constitution is reviewable in the Supreme Court of the United States, where it was contended in the state court that such bonds were founded on an obligation which existed prior to the adoption of the

through the state courts upon ar-
drawn from the state Constitution
e defeated party cannot try his
here merely by suggesting for the
when he takes his writ of error
decision is wrong under the Con-
of the United States. Crowell v.
10 Pet. 368, 398, 9 L. ed. 458, 470;
an v. Nebraska, 116 U. S. 54, 29
5, 6 Sup. Ct. Rep. 333; Hagar v.
a, 154 U. S. 639, 24 L. ed. 1044,
t. Rep. 1186; Erie R. Co. v. Purdy,
. 148, 153, 46 L. ed. 847, 850, 22
Rep. 635.

the less uneasy at the conclusion
we are forced, that we do not ap-
that the statute of Tennessee is in-
the reason now put forward. That
that the general assembly of the
no authority to authorize the tak-
e property of this corporation for
the private use of another. This objection might be urged with some force, perhaps, to the lease that was made. But the statute, which alone could be brought in question here, merely authorized the trustees of Carrick Academy to let the academy property to the trustees of the Winchester Normal College for not more than fifty years, and required the trustees of the college to keep the property in good condition and free from debt or encumbrance, if the lease was made. It said nothing about terms. It left the academy free. There was no taking of property, but, at most, an authority to change an investment. So far as the act shows on its face, which is all that we have before us, it might have contemplated a lease of the present grounds merely as a means to keeping up the academy with increased resources in a better place elsewhere.

Writ of error dismissed.

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onal provision. Williams v. Louis-
U. S. 637, 26 L. ed. 595.

ion of the supreme court of ap-
Virginia, which denied the validity
ovision of a statute of that state
efunding of the public debt, that
of refunding bonds should be re-
for all taxes, debts, dues, and de-
e the state, which shall be so ex-
n their face" was held in Mc-
v. Virginia, 172 U. S. 102, 43 L.
9 Sup. Ct. Rep. 134, to give effect
subsequent statutes which tended
ass the coupon holders in the ex-
the right granted by the funding
therefore, to be reviewable by the
Court of the United States, al-
e state court in its opinion only
ly referred to these statutes, and
decision distinctly on the ground
funding act was void in so far
ted to the coupon contract.

sult of the authorities," says Mr.
ray in New Orleans Waterworks
uisiana Sugar Ref. Co. 125 U. S.
ed. 607, 8 Sup. Ct. Rep. 741, "ap-
cases of contracts the settled
t, in order to give this court juris-
a writ of error to a state court,
l question must have been, ex-
in effect, decided by that court;
fore, that, when the record shows
deral question and another ques-
presented to that court, and its
urned on the other question only,
t has no jurisdiction,—may be
up as follows: When the state
des against a right claimed under
t, and there was no law subse-
the contract, this court clearly has
iction. When the existence and
ruction of a contract are undis-
l the state court upholds a subse-
, on the ground that it did not
e obligation of the admitted con-
is equally clear that this court
iction. When the state court holds
that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract; and, if it is of opinion that it did not confer the rights affirmed by the state court, and therefore its obligation was not impaired by the subsequent law, may on that ground affirm the judgment. So, when the state court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld. But when the state court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction."

The judgment of a state court enforcing a cause of action provided by a state statute in case of a default in payment over an objection that the statute, as construed by the authorities, impaired the obligation of a contract, gives effect to such statute so as to render the judgment reviewable in the Supreme Court of the United States, although it rests on the ground that payments previously made, and accepted by the state, are void; and the court did not mention the statute. Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545.

No denial of relator's contention that the limitation of municipal taxing power made by a state statute violated the contract clause of the Federal Constitution is involved in the refusal of the highest state court, after affirming the judgment of an inferior court which granted, in the exact form prayed for, a mandamus to compel a municipality to exhaust its power of taxation, if necessary, for the payment of a judgment, to grant a rehearing and define

the rate of taxation. Louisiana ex rel. New Orleans Gaslight Co. v. New Orleans, 108 U. S. 568, 27 L. ed. 823, 2 Sup. Ct. Rep. 955.

III. Scope of review.

As may easily be inferred from the cases cited supra, I., the Federal Supreme Court, when reviewing a judgment of a state court in a case in which a question of the alleged impairment of contract obligations is involved, will determine for itself the existence, construction, and validity of the contract, as well as the further question whether the impairment of its obligation has been effected by state legislation. The following cases recognize this rule: Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73; Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530, 571; Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; Hoadley v. San Francisco (Clark v. San Francisco) 124 U. S. 639, 31 L. ed. 553, 8 Sup. Ct. Rep. 659; Vashon v. Greenhow, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173; Delmas v. Merchants' Mut. Ins. Co. 14 Wall. 661, 20 L. ed. 757; Illinois C. R. Co. v. Chicago, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; Piqua Branch of State Bank v. Knoop, 16 How. 369, 14 L. ed. 977.

Were the rule otherwise, the constitutional inhibition against the impairment of contract obligations always could be evaded by the state courts by giving such a construction to the contract, or such a decision concerning its validity, as to render the power of the Federal court of no avail. Delmas v. Merchants' Mut. Ins. Co. supra.

The construction of a contract claimed to have been impaired by a subsequent statute is no less a Federal question than if the construction of the contract were undisputed and the point decided upon the ground that the subsequent act did not impair it. The question in either case is whether the contract has been impaired, and that question may be answered, either by holding that there is no contract at all, or that no exclusive rights were given by it, or, granting that such exclusive rights were conferred, that the subsequent legislation did not impair it. Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. supra.

The application of this rule often requires the Federal Supreme Court to construe for itself state Constitutions and statutes, the interpretation of which generally has been regarded as the exclusive prerogative of the state courts. Jefferson Branch Bank v. Skelly; Piqua Branch of State Bank v. Knoop; Mobile & O. R. Co. v. Tennessee; Stearns v. Minnesota; Louisville & N. R. Co. v. Palmes; and Vashon v. Greenhow,—supra; Bridge Proprietors v. Hoboken Land & Improv. Co. 1 Wall. 116, 17 L. ed. 571; Illinois C. R. Co. v. Chicago; St. Paul Gaslight Co. v. St. Paul; McCullough v. Virginia; Chicago, B. & Q. R. Co. v. Nebraska; and Hoadley v. San Francisco,—supra; Board of Liquidation v. Louisiana, 179 U. S. 622, 45 L. ed. 347, 21 Sup. Ct. Rep. 263; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.; and Citizens' Sav. Bank v. Owensboro,—supra.

In the light of these decisions, the protest of the Mississippi high court of errors and appeals in McIntyre v. Ingraham, 35 Miss. 25, can be of little other than historical interest. That court was of the opinion that, where the contract was alleged to arise from a state statute, the only question which the Federal Supreme Court could consider was the constitutionality of the subsequent legislation, and was bound to accept the construction given by the state courts to the prior statute.

A decision of the highest court of a state that a state statute establishing a charitable association did not affect pre-existing provisions of the Code against the keeping of a gaming table is, however, conclusive on the Federal Supreme Court in reviewing a later judgment of the state court in a case in which the statute was claimed to constitute a contract, and that a later repealing act effected an impairment of the obligation of such contract, and was, therefore, void. Aicardi v. Alabama, 19 Wall. 635, 22 L. ed. 215.

And decisions of the state courts that two statutes of that state must be taken *in pari materia*, and receive the same construction as if embodied in one act, are conclusive on the Federal Supreme Court in reviewing, on writ of error to a court of such state, the question of the conformity of one of such statutes to the contract clause of the Federal Constitution. Phalen v. Virginia, 8 How. 163, 12 L. ed. 1030.

The construction of a state statute by the highest court of the state as a legislative change of the grade of a street for its full width is conclusive on the Supreme Court of the United States in determining, on writ of error to the state court, whether such statute impairs the obligation of any contract right of abutting owners to appropriate the street or an extension thereof for wharfage purposes. Mead v. Portland,

U. S. 148, 50 L. ed. 413, 414, 26 Sup. Rep. 171.

'he rule adopted by the Federal Supreme ırt on this point is also subject to the ılification that the settled construction 'en by the state court of last resort to Constitution and laws must be taken correct so far as contracts entered into the faith of such construction are con- rued. Louisiana v. Pilsbury, 105 U. S. 8, 26 L. ed. 1090; Warburton v. White, 76 U. S. 484, 44 L. ed. 555, 20 Sup. Ct. ep. 404.

However, when reviewing the final judg- nent of a state court upholding a state tatute prohibiting lotteries, which was al- eged to violate the contract clause of the 'ederal Constitution, the Supreme Court of he United States, in Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199, refused to be bound by prior de- isions of the state court to the effect that vested rights could be acquired in a lottery franchise by an agreement with the grantee of such franchise.

And to come within this exception the construction of the state Constitution and laws must have been so firmly established as to constitute a rule of property. Louis- ville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193.

And the Federal Supreme Court will not be bound by a state decision declaring that an irrevocable contract was created by a state statute which is directly in conflict with the settled adjudications of the former court, and was not made in time to enter into the consideration of the parties in forming the contract. Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530, 571.

The correctness of the state court's deci- sion is of no importance in testing the right to review.

"The argument that no Federal question is presented because the court below award- ed to the contract creditors all the rights to which they were entitled involves," said Mr. Justice White in Board of Liquidation v. Louisiana, 179 U. S. 622, 45 L. ed. 347, 21 Sup. Ct. Rep. 263, in passing on a mo- tion to dismiss a writ of error to a state court to review a judgment sustaining a provision of the state Constitution claimed to impair contract obligations, "the assump- tion that jurisdiction to review the decision of a state court disposing of a Federal question depends upon the conception of the state court, or some of the parties to the record, as to the correctness of the de- cision rendered. This in effect denies the power to review a decision disposing of a Federal question in every case where the state court assumes that such question has been by it correctly disposed of. But this necessarily imports that, in no case what- ever where a state court has decided a Fed- eral question, can review in this court be had, since in every case it must be assumed that a state court of last resort has decided, according to its understanding, the issues presented to it for determination."

*MASON CITY & FORT DODGE RAIL- [570]
COMPANY
v.
C. D. BOYNTON.

(See S. C. Reporter's ed. 570–580.)

Removal of causes—diverse citizenship—which party is defendant in condemnation proceedings.

The express declaration in Iowa Code 1897, § 2009, that, on the appeal to a district court, which either party may take from the commissioners' award in proceedings to condemn land for railway purposes, the "landowner shall be plaintiff and the corporation defendant," does not fix the status of the parties under the removal act, but the landowner must be deemed the defendant so far as the right of removal to a Federal circuit court on the ground of diverse citizenship is concerned, because, under the state statutes, the institution and continuance of the proceedings depend upon the will of the railroad company.

[No. 170.]

Argued January 22, 23, 1907. Decided February 25, 1907.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit presenting a question as to whether the landowner in condemnation proceedings is the defendant for the purpose of removal to a Federal circuit court. Answered in the affirmative.

Statement by Mr. Justice Holmes:

This case comes here on the following certificate:

"The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri, on the 8th day of December, A. D. 1905, certifies that the record on file in the above-entitled cause, which is pending in such court upon a writ of error duly issued to review a judgment rendered in such cause in favor of the defendant in error in the circuit court of the United States for the southern district of Iowa, discloses the following:

"The Code of Iowa, 1897, in a chapter relating to the taking of private property for works of internal improvement, including

NOTE.—On removal of causes in cases of diverse citizenship—see notes to Whelan v. New York, L. E. & W. R. Co. 1 L.R.A. 65; Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108; Huskins v. Cincinnati, N. O. & T. P. R. Co. 5 L.R.A. 545; Bierbower v. Miller, 9 L.R.A. 228; Brodhead v. Shoemaker, 11 L.R.A. 567; Delaware R. Constr. Co. v. Meyer, 25 L. ed. U. S. 593; Butler v. National Home for Disabled Volunteer Soldiers, 36 L. ed. U. S. 346; and Torrence v. Shedd, 36 L. ed. U. S. 528.

the construction and repair of railways, contains the following:

[571] *" 'Sec. 1999. If the owner of any real estate necessary to be taken for either of the purposes mentioned in this chapter refuses to grant the right of way or other necessary interest in said real estate required for such purposes, or if the owner and the corporation cannot agree upon the compensation to be paid for the same, the sheriff of the county in which such real estate may be situated shall, upon written application of either party, appoint six freeholders of said county not interested in the same or a like question, who shall inspect said real estate, and assess the damages which said owner will sustain by the appropriation of his land for the use of said corporation, and make report in writing to the sheriff of said county; and, if the corporation shall, at any time before it enters upon said real estate for the purpose of constructing said railway, pay to the sheriff, for the use of the owner, the sum so assessed and returned to him as aforesaid, it may construct and maintain its railway over and across such premises.'

" 'Sec. 2009. Either party may appeal from such assessment to the district court within thirty days after the assessment is made, by giving the adverse party, or, if such party is the corporation, its agent or attorney, and the sheriff notice in writing that such appeal has been taken. The sheriff shall thereupon file a certified copy of so much of the appraisement as applies to the part appealed from, and said court shall try the same as in an action by ordinary proceedings. The landowner shall be plaintiff and the corporation defendant.

" 'Sec. 2010. An appeal shall not delay the prosecution of work upon said railway if said corporation pays or deposits with the sheriff the amount assessed. The sheriff shall not pay such deposit over to the person entitled thereto after the service of notice of appeal, but shall retain the same until the determination thereof. . . .

" 'Sec. 2011. On the trial of the appeal no judgment shall be rendered except for costs. The amount of damages shall be ascertained and entered of record, and, if no money has [572] *been paid or deposited with the sheriff, the corporation shall pay the amount so ascertained, or deposit the same with the sheriff before entering upon the premises. Should the corporation decline to take the property and pay the damages awarded on final determination of the appeal, then it shall pay, in addition to the costs and damages actually suffered by the landowner, a reasonable attorney's fee, to be taxed by the court.

" 'Sec. 2012. If, on the trial of the appeal, the damages awarded by the commis-

sioners are increased, the corporati pay or deposit with the sheriff th amount of damages awarded befor ing on or using or controlling the p The sheriff, upon being furnished certified copy of the assessment, may said corporation, and all persons ac or under it, from said premises, un amount of the assessment is forthwi or deposited with him.

" 'Sec. 2013. If the amount awa the commissioners is decreased on t of the appeal, the reduced amount on be paid the landowners.'

"Section 3497 of the Code of Iow also provides:

" 'An action may be brought agai railroad corporation, . . . in ar ty through which such road or lin or is operated.'

"The Mason City & Fort Dodge I Company, plaintiff in error, her called 'railroad company,' was a corporation organized and existing the laws of the state of Iowa, and, entitled to avail itself of the provi the foregoing statutes of Iowa. C. I ton, defendant in error, hereinafte the owner, was the owner of certain ground in the town of Carroll, Carr ty, in the state of Iowa, and was, at a mentioned herein, a citizen of the Missouri. Prior to February 18, 1 railroad company, requiring Boynt as a right of way for the constructi railroad, filed an application in the the sheriff of Carroll county, asking appointment of six freeholders to ins lots and assess the damages which t er would sustain by the appropriati lots for the use of the railroad c On February 18, 1902, the commi were duly appointed by the sheriff a their report, assessing the owner's occasioned by the appropriation of by the railroad company at $4,75

"On the same day the railroad paid the sheriff that amount of m the use of the owner.

"Afterwards, and within the time the state statute, the owner appea the commissioners' award to the court of Carroll county. In due t owner filed in the last-mentioned petition for the removal of the ca the circuit court of the United S the western division of the southern of Iowa, on the ground of diversity zenship. In his petition and bond such removal the owner referred treated himself as the defendant, ferred to and treated the railroad as the plaintiff, in the case.

"In due course the cause cam

in the circuit court, when the par-
a written stipulation filed with the
aived a jury and agreed to try the
the court. Both parties introduced
and fully submitted themselves to
sdiction of the court (if they could
The trial resulted in an assess-
the owner's damages at $11,445, and
gment against the railroad company
s, including a fee of $300 for the
attorneys. In due time the rail-
npany regularly sued out a writ of
the end that the record and pro-
in the circuit court might be re-
by this court. The assignment of
which accompanied the petition for
t of error alleged that the circuit
red in ascertaining and fixing the
of damages to be paid by the rail-
mpany for its appropriation of the
lots, in that there was an entire ab-
evidence to support the award and
At no time during the pendency of
eedings *in the circuit court did the
company question the jurisdiction
court or the right of the owner to
the cause into that court, but both
participated in the trial up to a
igment, and in the proceeding to se-
writ of error, as if there was no
of jurisdiction in the case. Not
ie railroad company filed its brief
court was the jurisdiction of the cir-
irt in any manner challenged. But,
rief, as also in the oral argument
n its behalf, the chief point relied
the railroad company to secure a
of the finding and judgment of the
court is that the owner was the
f in said cause and proceeding, and
have the right to remove the same
e circuit court, and that therefore
urt could not entertain jurisdiction

the circuit court of appeals for the
circuit further certifies that the fol-
questions of law are presented in
ise, that their decision is indispensa-
decision of the cause, and that to
that such court may properly decide
ies of law so presented it desires the
ion of the Supreme Court of the
States upon such questions, to wit:
Was the landowner a defendant with-
neaning of the removal statute, when
was removed into the circuit court?
the landowner was not a defendant,
the meaning of the removing stat-
ld the circuit court take cognizance
suit through a removal by him?
n other words, the question is this:
provision of the removal statute, to
ct that the removal, on the ground
se citizenship, may be 'by the de-
fendant or defendants therein, being non-
residents of that state,' restrictive and ju-
risdictional in the sense that cognizance of
the suit can be taken by the circuit court
through a removal only when it is by the
defendant, or is the provision only modal
and formal in the sense that noncompliance
therewith, or nonconformity thereto, may be
waived?

*"3. Is the judicial proceeding which the [575]
landowner is authorized by the statutes of
Iowa to initiate in the district court of the
state, by way of a so-called appeal from the
assessment of the commissioners selected by
the sheriff, a suit which can be originally
instituted in the circuit court of the United
States, when the citizenship of the parties
and the sum or value of the matter in dis-
pute are such as to make the suit otherwise
cognizable in that court?

"4. If the circuit court could not have
taken cognizance of the suit through the re-
moval by the landowner, and if the circuit
court could have taken cognizance of the
suit through its original institution in that
court after the assessment by the commis-
sioners, did the parties, by appearing in the
circuit court and there litigating to a final
conclusion the matter in dispute, without
any objection to the jurisdiction of the
court or to the manner in which its juris-
diction was invoked, authorize the circuit
court to exercise jurisdiction and to proceed
to final judgment in like manner and with
like effect as if the suit had been originally
instituted in that court, the citizenship of
the parties and the sum or value of the
matter in dispute being such as to make the
suit otherwise cognizable in that court?"

Mr. **Thomas D. Healy** argued the cause, and, with Messrs. A. G. Briggs, John L. Erdall, M. F. Healy, and Robert Healy, filed a brief for the Mason City & Fort Dodge R. Co.

The corporation seeking to condemn real estate is in fact the defendant, and occupies a position analogous to that of a defendant in a case brought to recover the value of real estate which has been appropriated. This is the case where there is nothing left to contest but the value of the real estate taken.

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206.

When a case was transferred to the district court by appealing from the award of the commissioners, it took, under the statutes of the state, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. No other question was open to contest in the state district court.

Turner v. Holleran, 11 Minn. 253, Gil. 168;

Mississippi & R. River Boom Co. v. Patterson, supra; Myers v. Chicago & N. W. R. Co. 118 Iowa, 312, 91 N. W. 1076.

This is the rule in condemnation proceedings under the Iowa statutes and the supreme court of Iowa holds that the condemning corporation on the trial in the state court is in fact the defendant.

Myers v. Chicago & N. W. R. Co. supra.

The Iowa supreme court cites in support of this conclusion the following cases:

Mississippi & R. River Boom Co. v. Patterson, supra; Union Pacific R. Co. v. Myers, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; Searl v. School Dist. No. 2, 124 U. S. 197, 31 L. ed. 415, 8 Sup. Ct. Rep. 460; Ragatz v. Dubuque, 4 Iowa, 343; Sigafoos v. Talbot, 25 Iowa, 214. See also Chicago, K. & W. R. Co. v. Butts, 55 Kan. 660, 41 Pac. 948; Missouri River, Ft. S. & G. R. Co. v. Owen, 8 Kan. 409; St. Joseph & D. C. R. Co. v. Orr, 8 Kan. 419; Reisner v. Strong, 24 Kan. 410.

The Federal court will respect a construction placed on the condemnation statutes by the state supreme court. It becomes a rule of property.

Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 250, 49 L. ed. 466, 25 Sup. Ct. Rep. 251; Mississippi & R. River Boom Co. v. Patterson, supra; Leffingwell v. Warren, 2 Black, 599, 17 L. ed. 261; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; Lowndes v. Huntington, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758; Bondurant v. Watson, 103 U. S. 281, 26 L. ed. 447; Burgess v. Seligman, 107 U. S. 20-33, 27 L. ed. 359-365, 2 Sup. Ct. Rep. 10; Gage v. Pumpelly, 115 U. S. 454, 29 L. ed. 449, 6 Sup. Ct. Rep. 136; Hardin v. Jordan, 140 U. S. 371, 382, 402, 35 L. ed. 428, 433, 440, 11 Sup. Ct. Rep. 808, 838; Union & Planters' Bank v. Memphis, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604; United States v. Morrison, 4 Pet. 124, 7 L. ed. 804; Green v. Neal, 6 Pet. 291, 8 L. ed. 402; United States v. Freeman, 113 Fed. 370.

The circuit court cannot take cognizance of a suit through a removal by anyone save the defendant or defendants therein, being nonresidents of the state. A failure to so remove is a truly jurisdictional defect.

Martin v. Snyder, 148 U. S. 663, 37 L. ed. 602, 13 Sup. Ct. Rep. 706; Fife v Whittell, 102 Fed. 537; Torrence v. Shedd, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726; Ayers v. Watson, 113 U. S. 594, 28 L. ed. 1093, 5 Sup. Ct. Rep. 641; Martin v. Baltimore & O. R. Co. (Gerling v. Baltimore & O. R. Co.) 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; Hanrick v. Hanrick, 153 U. S. 192, 38 L. ed. 685, 14 Sup. Ct. Rep. 835; Fisk v. Henarie, 142 U. S. 459, 35 L. ed. 1079, 12 Sup. Ct. Rep. 207; Re Pennsylvania Co. 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141; Black's Dillon, Removal of Causes, § 65; Western U. Teleg. Co. v. Brown, 32 Fed. 337; Anderson v. Appleton, 32 Fed. 855; Weller v. J. B Pace Tobacco Co. 32 Fed. 860.

Mr Benjamin I. Salinger argued the cause and filed a brief for Boynton:

To give this court jurisdiction, it must appear by the record, affirmatively, that the circuit court of appeals had jurisdiction.

Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; Plaquemines Tropical Fruit Co. v. Henderson, 170 U. S. 511, 42 L. ed. 1128, 18 Sup. Ct. Rep. 685; Minnesota v. Northern Securities Co. 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. Rep. 598.

The jurisdictional facts must appear affirmatively, or it will be presumed that jurisdiction does not exist. It is not enough that it might be inferred, argumentatively, from averment of facts found in a petition for removal.

Fife v. Whittell, 102 Fed. 539.

The circuit court of appeals has no jurisdiction where the sole question presented to it is whether the circuit court had, as a Federal court, jurisdiction.

Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

This is so where questions other than jurisdiction are suggested, but suggested incidentally only.

Torrence v. Shedd, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726.

The nonresident landowner may remove before he appeals to the state court from award made.

Hudson River R. & Terminal Co. v Day, 54 Fed. 545; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 249, 49 L. ed. 466, 25 Sup. Ct. Rep. 251.

While state laws, and decisions by state courts of last resort, may, as to litigants who remain in the courts of the state, settle, arbitrarily, who is plaintiff, neither a legislature nor such courts may, directly or indirectly, abridge the right to remove to the Federal court in a case of which that court has original, concurrent jurisdiction.

Hess v. Reynolds, 113 U. S. 73, 28 L. ed. 927, 5 Sup. Ct. Rep. 377; Myers v. Chicago & N. W. R. Co. 118 Iowa, 321, 91 N. W. 1076; Union Terminal R. Co. v. Chicago, R. & Q. R. Co. 119 Fed. 209; Searl v. School Dist. No. 2, 124 U. S. 197, 31 L. ed. 415, 8

ıp. Ct. Rep. 460; Madisonville Traction ., v. St. Bernard Min. Co. 196 U. S. 249, 2, 254–256, 49 L. ed. 466–469, 25 Sup. . Rep. 251; Reagan v. Farmers' Loan & T. . 154 U. S. 391, 38 L. ed. 1021, 4 iters. Com. Rep. 560, 14 Sup. Ct. Rep. 47.

What is removable in one state must be in every other; and a state may not ary the standard of removability by mak- ıg proceedings which affect the property ghts of a nonresident unlike what suits sually are. Ibid.

While the Federal courts will, in such ases as plaintiff in error cites, follow the ecisions of the highest state courts, even here the soundness of such decisions is ot approved, this rule does not apply to tate decisions that directly or indirectly end to abridge the jurisdiction of the Fed- ral courts.

Ibid.

Under the statutes of Iowa such appeal ould also present whether conditions exist- d which, under such statutes, warranted ondemnation proceedings.

Union Terminal R. Co. v. Chicago, B. & Q. . Co. supra.

Under said statutes the condemnation at ar was sufficiently a judicial proceeding make the one who instituted it, rather han the owner who appealed from the ward, the plaintiff.

Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 241–251, 49 L. ed. 463–67, 25 Sup. Ct. Rep. 251; Mississippi & R. iver Boom Co. v. Patterson, 98 U. S. 404, 5 L. ed. 207; Searl v. School Dist. No. 2, 24 U. S. 199, 200, 31 L. ed. 416, 417, 8 Sup. t. Rep. 460.

Had the Iowa statutes done less than to ake the proceedings on condemnation suf- ciently judicial to allow a hearing on hether the right to condemn existed, and onfined them to the mere right to have ompensation ascertained, there would have een a denial of due process of law.

Madisonville Traction Co. v. St. Bernard Min Co. 196 U. S. 251, 252, 49 L. ed. 467, 68, 25 Sup. Ct. Rep. 251.

Mr. Justice Holmes delivered the opinion f the court:

In Madisonville Traction Co. v. St. Ber- ard Min. Co. 196 U. S. 239, 49 L. ed. 462, Sup. Ct. Rep. 251, it was decided that roceedings of this character could be re- oved to the United States circuit court. e question to be decided now is only ether the removal in this case can be up- t on the ground that it was asked by the ong party. The railroad company relies on the words of the Iowa Code, § 2009, oted above, and upon a decision of the supreme court of the state in a case like the present, except that the railroad was a foreign company, in which it was held that the railroad had a right to remove. Myers v. Chicago & N. W. R. Co. 118 Iowa, 312, 324, 91 N. W. 1076. See *also Kirby v. Chi- [579] cago & N. W. R. Co. 106 Fed. 551. It is said that this court is bound by the construction given to the state law by the state court. Indeed, the above § 2009 does not need construction; it enacts, in terms, that the landowner shall be plaintiff. As the right to remove a suit is given only to the defendants therein, being nonresidents of the state, it is argued that the state decision ends the case.

But this court must construe the act of Congress regarding removal. And it is obvious that the word "defendant" as there used is directed toward more important matters than the burden of proof or the right to open and close. It is quite conceivable that a state enactment might reverse the names which, for the purposes of removal, this court might think the proper ones to be applied. In condemnation proceedings the words "plaintiff" and "defendant" can be used only in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no past or threatened wrong. Both parties are actors: one to acquire title, the other to get as large pay as he can. It is not necessary, in order to decide that the present removal was right, to say that the state decision was wrong. We leave the latter question where we find it. But we are of opinion that the removal in this case was right for reasons which it will not take long to state.

It is said the proceedings only become a case, within the meaning of the act of Congress, after the preliminary assessment and the appeal, and that then the landowner is in the position of one demanding pay for property which he has lost. If we take a general view of the Iowa statutes, this conclusion is not correct. The railroad might have taken the appeal. If it had, the landowner would have been on the defensive in endeavoring at least to uphold the assessment, but he would have been called the plaintiff none the less. Whichever party appeals, it is not true that the landowner is seeking pay for what he has lost. By § 2011 the railroad is free to decline to take the property if it thinks the price too large. Even if, as in this case, it deposits the amount *first assessed with the sheriff, the [580] latter is not to pay it over until the determination of the appeal. § 2010. We see no reason to suppose that the deposit impairs the railroad's right to withdraw, although the supreme court of Iowa says ubi supra, that, by payment and entry, the rail-

road appropriates the land. See § 2013. Probably, too, the position of the parties under the act of Congress should be determined upon general considerations, without regard to what has happened. Looked at as a whole, the Iowa statutes provide a process by which railroads and others may acquire land for their purposes which the owner refuses to sell. The first step is the valuation. Whether it is part of the case or not, it is a necessary condition to the proceedings in court. Against the will of the owner the title to the land is not acquired until the case is decided and the price paid. The intent of the railroad to get the land is the mainspring of the proceedings from beginning to end, and the persistence of that intent is the condition of their effect. The state is too ocnsiderate of the rights of its citizens to take from them their land in exchange for a mere right of action. The land is not lost until the owner is paid. Therefore, in a broad sense, the railroad is the plaintiff, as the institution and continuance of the proceedings depend upon its will. Hudson River R. & Terminal Co. v Day, 54 Fed. 545.

It is not argued that this is any the less a suit because the railroad is free to decline to take the property. The adjudication fixes the right of the railroad to take the land at the price adjudged, and charges it with costs and attorney's fees taxed by the court, in case it elects not to take. The question is not discussed in Madisonville Traction Co. v. St. Bernard Min. Co. supra, where, if there had been anything in it, possibly it might have been raised.

As what we have said is sufficient to dispose of the matter of the certificate, we think it unnecessary to consider other arguments, or to answer any question but the first.

The first question is answered "Yes."

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[581] JOHN J. ALLEN, Appt.,
v.
UNITED STATES

(See S. C. Reporter's ed. 581-584.)

Fees of United States commissioner—in civil-rights cases.

1. A commissioner of a Federal circuit court is not entitled to compensation for services rendered in connection with complaints in civil-rights cases in which there has been no arrest and examination, since the fee of $10 allowed him by U. S. Rev. Stat. § 1986, U. S. Comp. Stat. 1901, p. 1265, "for his services in each case, inclusive of all services incident to the arrest and examination," when earned, covers all services, and, unless earned, he gets no other fee.

Fees of United States commissioner—in civil-rights cases.

2. Fees cannot be allowed a commissioner of a Federal circuit court for certifying complaints in civil-rights cases, as required by U. S. Rev. Stat. § 2027, to himself as chief supervisor of elections.

Set-off—in court of claims—fees illegally paid.

3. A set-off in favor of the United States against the demand of a commissioner of a Federal circuit court for 5 cents more per folio for drawing complaints in civil-rights cases than the amount he had been paid as in full for such services may be allowed by the court of claims, under the broad provisions of U. S. Rev. Stat. § 1059, U. S. Comp. Stat. 1901, p. 734; act of March 3, 1887 (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752), § 1, to the extent of fees improperly and unlawfully paid him in the settlement of his former account, which was approved by the circuit court "subject to revision by the accounting officers of the United States Treasury," even though some of such illegal payments were made later than the filing of the claim.

[No. 192.]

Argued January 29, 30, 1907. Decided February 25, 1907.

APPEAL from the Court of Claims to review a judgment disallowing certain claims made by a commissioner of a Federal circuit court for services rendered in connection with complaints in civil-rights cases. Affirmed.

See same case below, 40 Ct. Cl. 170.

The facts are stated in the opinion.

Mr. Charles Calvert Lancaster argued the cause, and, with Mr. Herbert E. Smith, filed a brief for appellant.

Assistant Attorney General Van Orsdel argued the cause, and, with Mr. Philip M. Ashford, filed a brief for appellee.

Mr. Justice Holmes delivered the opinion of the court:

This is a claim made by a commissioner of the United States circuit court for services rendered between January 29, 1886, and January 20, 1892, charges for which were disallowed by the officers of the Treasury Department. It is necessary to state only the items and matters now in controversy. Item 1, so far as disallowed by the court of claims, is for drawing complaints which charged offenses under the Revised Statutes, title "Crimes" (70) chap. 7 (U. S. Comp. Stat. 1901, p. 3711) (Crimes against the Elective Franchise and Civil Rights of Citizens) and upon which warrants never were served "because inquiry developed no offense had been committed." The disallowed portion of item 2 is for drawing jurats to sim-

r complaints of which the same facts re true. Item 11 is for certifying com- ints for offenses under said chap. 7, the imant being the chief supervisor of elec- ns, to whom he, as commissioner, certi- l the complaints. Item 20 is for filing l entering similar complaints, in civil- hts proceedings, where the warrants were urned unexecuted by the marshal. Item is for drawing depositions for complaints similar proceedings, where "no warrant ued as the result of scrutiny of lists of ters by commissioner and inquiries at res- nces." These are the disallowed claims ought here by this appeal.

By Rev. Stat. § 1986, U. S. Comp. Stat. 01, p. 1265, district attorneys and others entioned are to be paid for their services der the provisions for enforcing said chap. "the same fees as are allowed to them for e services in other cases." The sentence en goes on: "and where the proceedings e before a commissioner he shall be en- led to a fee of ten dollars for his serv- s in each case, inclusive of all services cident to the arrest and examination." It established and admitted that this fee is t earned (because there is not a "case" thin the meaning of the section) unless ere be an arrest and an examination. uthworth v. United States, 151 U. S. 179, 5, 38 L. ed. 119, 121, 14 Sup. Ct. Rep. 4, 161 U. S. 639, 40 L. ed. 835, 16 Sup. Rep. 694. And again, it is plain that e fee, when it is earned, covers all serv- es; as sufficiently appears from the con- ast to the allowance of the usual fees to hers in the earlier part of the same sen- nce and from the final words of the en- tling clause. These two propositions anted, it seems to us not *to need argu- ent to conclude that unless the fee is rned the commissioner gets no other. This ction having supplanted the usual pro- sions of §§ 823, 828 (U. S. Comp. Stat. 01, pp. 632, 635), § 847 for the cases to hich it refers, cannot be held to leave open resort to § 847 when the conditions at- ched to the substituted compensation are t fulfilled. This disposes of all items ex- pt 11, which stands on a different ground. to that a few words are enough. By v. Stat. § 2027, it was the claimant's duty commissioner to forward the original nplaint, etc. to the chief supervisor for judicial district. As he was supervisor well as commissioner this section merely uired a change in the character of his tody. No certificate was necessary, and the complaints were certified it can have n only for the purpose of charging fees. t further, if that duty had been added to others in connection with cases covered § 1986, the mere fact that the addition was by a later statute would not break in upon the rule established by § 1986, that the compensation for all the services was entire.

The first item is not for the whole service of drawing the complaints. It admits the receipt of 15 cents per folio and demands 5 cents more on the strength of cases decided after the claimant had been paid upon his former account. United States v. Ewing, 140 U. S. 142, 35 L. ed. 388, 11 Sup. Ct. Rep. 743; United States v. Barber, 140 U. S. 164, 35 L. ed. 396, 11 Sup. Ct. Rep. 749. These cases being decisions under Rev. Stat. § 847, are not in point. But, if that be in any way material, they had the effect of inducing the applicant to open his account. The present is called a new account in argument, to be sure. But it is hard to conceive a more distinct opening than the demand of money in addition to sums received at the time as full payment for indivisible items. On the claimant's own view of his rights, there were not two charges for each folio, one for 15 cents and another for 5. He asserted one indivisible right on which he had been paid 15 cents in full, and he now said that that was not enough. The United States, by way of counterclaim to this attempt *to get additional pay, de- [584] manded the sums already paid to the claimant contrary to the principle that we have laid down, and the court of claims allowed an offset of $3,120, found to have been paid by mistake, against the larger sum that it found due to the claimant. We see no reason to doubt the right of the United States, or the legality of its asserting that right by counterclaim. Wisconsin C. R. Co. v. United States, 164 U. S. 190, 41 L. ed. 399, 17 Sup. Ct. Rep. 45; United States v. Burchard, 125 U. S. 176, 31 L. ed. 662, 8 Sup. Ct. Rep. 832; McElrath v. United States, 102 U. S. 426, 26 L. ed. 189. It is urged that the account was approved by the United States circuit court. The account was approved, "subject to revision by the accounting officers of the United States Treasury" only. On the findings on which the case comes before us this qualified approval has no weight. One portion of the counterclaim is for dates later than the filing of the claim. But, in view of the broad language of the statutes ("all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever," Rev. Stat. § 1059, U. S. Comp. Stat. 1901, p. 734, clause second; act of March 3, 1887, chap. 359, § 1, 24 Stat. at L. 505, U. S. Comp. Stat. 1901, p. 752, clause second, we are of opinion that it properly was allowed with the rest.

The case was elaborately argued at the bar, and is discussed at length in printed

briefs. We have examined all the details of the latter, but do not deem it necessary to add more to the careful consideration that the case received in the court of claims.

Judgment affirmed.

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[585]*CHICAGO, BURLINGTON, & QUINCY RAILWAY COMPANY, Appt.,

v.

F. C. BABCOCK, As Treasurer of Adams County, Nebraska, et al. (No. 215.)

UNION PACIFIC RAILROAD COMPANY, Appt.,

v.

ROBERT O. FINK, Treasurer of Douglas County, Nebraska, et al. (No. 341.)

(See S. C. Reporter's ed. 585–598.)

Taxation of railroad property—collateral attack on valuation.

1. The members of a state board of equalization and assessment should not be subjected to a cross-examination, on a proceeding for equitable relief against the taxation of railroad property, with regard to the operation of their minds in arriving at the valuation of such property for tax purposes.

Injunction against taxation—methods of valuation.

2. Injunctive relief against the taxation of railroad property because of the methods adopted by the state board of equalization and assessment in arriving at the valuation of such property for tax purposes will not be given in a Federal court except in a case of fraud or a clearly shown adoption of a fundamentally wrong principle.

Injunction against taxation—inequality of valuation.

3. A Federal court will not enjoin the collection of state taxes on railroad property because of undervaluation of the other taxable property in the state, where such inequality is not the result of a scheme or agreement among the taxing officers.

Taxation of railroad property—valuation—including property outside of state.

4. A state may tax that portion of the property of an interstate railroad company lying within the state at its value as an organic portion of the entire road.

NOTE.—On injunction against illegal taxation—see notes to Odlin v. Woodruff, 22 L.R.A. 699; Dows v. Chicago, 20 L. ed. U. S. 65; and Ogden City v. Armstrong, 42 L. ed. U. S. 445.

As to constitutional equality in the United States in relation to corporate taxation—see note to Bacon v. State Tax Comrs. 60 L.R.A. 321.

On corporate taxation and the commerce clause—see note to Sandford v. Poe, 60 L. R.A. 641.

As to situs for taxing purposes of tangible personal property of domestic corporations—see note to Teagan Transp. Co. v. Board of Assessors, 69 L.R.A. 431.

[Nos. 215, 341.]

Argued January 21, 22, 1907. Decided February 25, 1907.

APPEALS from the Circuit Court of the United States for the District of Nebraska, to review decrees dismissing bills to declare void certain assessments of taxes on railroad property and to enjoin the collection of the same beyond certain sums tendered. Affirmed.

The facts are stated in the opinion.

Messrs. John N. Baldwin and Maxwell Evarts argued the cause, and, with Mr. Robert S. Lovett, filed a brief for appellant in No. 341:

The state board took into account, considered, and in effect and in fact assessed, property of the Union Pacific Railroad Company beyond the jurisdiction of the state, and committed many gross errors in its calculations, and thereby imposed an unconstitutional burden on the complainant and on commerce among the states.

Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 486; Coulter v. Weir, 62 C. C. A. 429, 127 Fed. 897; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669.

The board, in making the assessment complained of, did not exercise its free and fair judgment, and fix a fair cash value on the property assessed, but, intimidated, influenced, and terrorized by great public clamor and tumult, fixed a value thereon largely in excess of the fair cash value.

Chicago Union Traction Co. v. State Bd. of Equalization, 114 Fed. 557; Merrill v. Humphrey, 24 Mich. 170.

If the great bulk of the property in a state is valued at less than its actual value, the rest of the property therein must be so valued, although the statute provides for valuation of all property at full value.

First Nat. Bank v. Montrose County (Colo.) 84 Pac. 1111; Taylor v. Louisville & N. R. Co. 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 364; Chicago & N. W. R. Co. v. Boone County, 44 Ill. 242; Bureau County v. Chicago, B. & Q. R. Co. 44 Ill. 229; Randall v. Bridgeport, 63 Conn. 321, 28 Atl. 53; Chicago, B. & Q. R. Co. v. Atchison County, 54 Kan. 781, 39 Pac. 1 9; Cocheco Mfg. Co. v. Strafford, 51 N. H. 455; Ex parte R.

Smith & V. B. Bridge Co. 62 Ark. 461, 36 S. W. 1060; People ex rel. Warren v. Carter, 109 N. Y. 576, 17 N. E. 222; People ex rel. Delaware & H. Canal Co. v. Ganley, 29 N. Y. S. R. 130, 8 N. Y. Supp. 563; Manchester Mills v. Manchester, 57 N. H. 309.

In respect to this matter of overvaluation of the property of the complainant and the systematic and habitual undervaluation of all other property, this case comes directly within the rules laid down in the following cases:

Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Poindexter v. Greenhow, 114 U. S. 270, 295, 29 L. ed. 185, 194, 5 Sup. Ct. Rep. 903, 962; Taylor v. Louisville & N. R. Co. supra.

Mr. **Charles J. Greene** argued the cause, and, with Messrs. James E. Kelby and Charles F. Manderson, filed a brief for appellant in No. 215.

Mr. **Norris Brown** argued the cause, and, with Mr. M. F. Stanley, filed a brief for appellees:

When the state board of equalization and assessment fixed the value of complainant's property in Nebraska, it acted judicially, and its judgment cannot be assailed collaterally except for fraud or want of jurisdiction.

Courts of equity are without power to control the discretion vested in said board by law as to the value of property for taxation purposes.

Loewenthal v. People, 192 Ill. 222, 61 N. E. 462; Keokuk & H. Bridge Co. v. People, 176 Ill. 267, 52 N. E. 117; East St. Louis Connecting R. Co. v. People, 119 Ill. 182, 10 N. E. 397; Ottawa Glass Co. v. McCaleb, 81 Ill. 562; Jones v. Rushville Natural Gas Co. 135 Ind. 595, 35 N. E. 390; Senour v. Matchett, 140 Ind. 636, 40 N. E. 122; 1 High, Inj. §§ 485, 486, 490, 493; Heywood v. Buffalo, 14 N. Y. 534; Burnes v. Atchison, 2 Kan. 454; McPike v. Pew, 48 Mo. 525; Warden v. Fond du Lac County, 14 Wis. 618; Clarke v. Ganz, 21 Minn. 387; Montgomery v. Sayre, 65 Ala. 564; Stanley v. Albany County, 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; Collins v. Keokuk, 118 Iowa, 30, 91 N. W. 791; 1 Cooley, Taxn. 3d ed. p. 784; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Maish v. Arizona, 164 U. S. 599, 41 L. ed. 567, 17 Sup. Ct. Rep. 193; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Western U. Teleg. Co. v. Taggart, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; Ogden City v. Armstrong, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; State ex rel. Goff v. Dodge County, 20 Neb. 599, 31 N. W. 1117; State ex rel. Bee Bldg. Co. v. Savage, 65 Neb. 714, 91 N. W. 716; Coulter v. Louisville & N. R. Co. 196 U. S. 605, 49 L. ed. 616, 25 Sup. Ct. Rep. 342.

The methods authorized by the Nebraska law and followed by the state board of equalization and assessment are sanctioned by the courts of the country.

State Railroad Tax Cases and Pittsburgh, C. C. & St. L. R. Co. v. Backus, supra; Kansas City, Ft. S. & M. R. Co. v. King, 57 C. C. A. 278, 120 Fed. 614; Chicago Union Traction Co. v. State Bd. of Equalization, 114 Fed. 557; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604.

Equity will not enjoin the collection of taxes on account of the underassessment of other property by taxing officers, unless it appears that such undervaluation is the result of system, design, intention, habit, custom, or agreement.

Taylor v. Louisville & N. R. Co. 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; German Nat. Bank v. Kimball, 103 U. S. 732, 26 L. ed. 469; New York v. Barker, 179 U. S. 279, 45 L. ed. 190, 21 Sup. Ct. Rep. 121; Exchange Nat. Bank v. Miller, 19 Fed. 372; Coulter v. Louisville & N. R. Co. supra.

The question of undervaluation of other property by the local taxing officers was adjudicated by the state board of equalization and assessment, when, on the complaint of the complainant, and in its presence, the state board of equalization passed on the valuation of lands, live stock, and other properties subject to the jurisdiction of local taxing officers. Complainant is therefore bound, and cannot attack such judgment of said board collaterally.

Coulter v. Louisville & N. R. Co. supra; Hacker v. Howe (Neb.) 101 N. W. 255.

Whenever the law vests in a special officer or tribunal the duty and power to ascertain and determine a question of fact, such decision amounts to more than a mere presumption that the fact exists, and such decision cannot be overthrown in a collateral attack by evidence tending to show that the fact was otherwise than was found and determined.

Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 434, 38 L. ed. 1039, 14 Sup. Ct. Rep. 1114; Western U. Teleg. Co. v. Taggart, supra; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 229, 41 L. ed. 698, 17 Sup. Ct. Rep. 305; Coulter v. Louisville & N. R. Co. supra.

The complainant in this case has not been discriminated against or denied the equal protection of the laws within the

meaning of the 14th Amendment to the Constitution of the United States by reason of the action of the state board of equalization and assessment in assessing its property in the state of Nebraska, nor by reason of the action of the local taxing officers and local boards of equalization which assessed property other than railroads within their jurisdiction.

Coulter v. Louisville & N. R. Co. supra; King v. Mullins, 171 U. S. 436, 43 L. ed. 226, 18 Sup. Ct. Rep. 925; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 464, 42 L. ed. 237, 17 Sup. Ct. Rep. 829; Florida C. & P. R. Co. v. Reynolds, 183 U. S. 476, 46 L. ed. 286, 22 Sup. Ct. Rep. 176.

Mr. William T. Thompson also argued the cause for appellees.

Mr. Justice Holmes delivered the opinion of the court:

These are bills to declare void assessments of taxes made by the state board of equalization and assessment for the year 1904, and to enjoin the collection of the same beyond certain sums tendered. The bills allege that the board, coerced by political clamor and its fears, arbitrarily determined in advance to add about nineteen million dollars to the assessment of railroad property for the previous year, and then pretended to fix the values of the several roads by calculation. They allege that the assessments were fraudulent, and void for want of jurisdiction, and justify these general allegations by more specific statements. One is that other property in the state, especially land, was valued at a lower rate than that of the railroads. Another, of more im-
[592] portance, is to the effect that *the board adopted a valuation by stock and bonds, and then taxed the appellants upon the proportion of the value so reached that their mileage within the state bore to their total mileage, without deducting a large amount of personal property owned outside the state, or specially valuable terminals, etc., east of the Missouri river. The principle of this last objection was sanctioned in Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498, under the commerce clause of the Constitution, art. 1, § 8, but later cases have decided that tangible property permanently outside the jurisdiction is exempted from taxation by the 14th Amendment (Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36), and the 14th Amendment alone, somewhat inadequately referred to, is the foundation of these appeals. Demurrers to the bills were overruled, mainly, if not wholly, on the ground of the charges of duress and fraud. Answers then were filed denying the material allegations, and, after a hearing on evidence, the bills were dismissed.

The dominant purport of the bills is to charge political duress, so to speak, and a consequent scheme of fraud, illustrated by the specific wrongs alleged, and in that way to make out that the taxes were void. As the cases come from the circuit court, other questions beside that under the Constitution are open, and, therefore, it is proper to state at the outset that the foundation for the bills has failed. The suggestion of political duress is adhered to in one of the printed briefs, but is disposed of by the finding of the trial judge, which there is no sufficient reason to disturb. The charge of fraud, even if adequately alleged (Missouri v. Dockery, 191 U. S. 165, 170, 48 L. ed. 133, 134, 24 Sup. Ct. Rep. 53), was very slightly pressed at the argument, and totally fails on the facts. Such charges are easily made and, it is to be feared, often are made without appreciation of the responsibility incurred in making them. Before the decree could be reversed it would be necessary to consider seriously whether the constitutional question on which the appeals are based *was[593] not so pleaded as part of the alleged fraudulent scheme that it ought not to be considered unless that scheme was made out. Eyre v. Potter, 15 How. 42, 56, 14 L. ed. 592, 598; French v. Shoemaker, 14 Wall. 314, 335, 20 L. ed. 852, 857; Hickson v. Lombard, L. R. 1 H. L. 324.

When we turn to the evidence there is equal ground for criticism. The members of the board were called, including the governor of the state, and submitted to an elaborate cross-examination with regard to the operation of their minds in valuing and taxing the roads. This was wholly improper. In this respect the case does not differ from that of a jury or an umpire, if we assume that the members of the board were not entitled to the possibly higher immunities of a judge. Buccleuch v. Metropolitan Bd. of Works, L. R. 5 H. L. 418, 433. Jurymen cannot be called, even on a motion for a new trial in the same case, to testify to the motives and influences that led to their verdict. Mattox v. United States, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50. So, as to arbitrators. Buccleuch v. Metropolitan Bd. of Works, L. R. 5 H. L. 418, 457, 462. Similar reasoning was applied to a judge in Fayerweather v. Ritch, 195 U. S. 276, 306, 307, 49 L. ed. 193, 212, 214, 25 Sup. Ct. Rep. 58. A multitude of cases will be found collected in 4 Wigmore on Evidence, §§ 2348, 2349. All the often-repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by an-

hibiting on cross-examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law. See Coulter v. Louisville & N. R. Co. 196 U. S. 599, 610, 49 L. ed. 615, 618, 25 Sup. Ct. Rep. 342; Central P. R. Co. v. California, 162 U. S. 91, 107, 108, 117, 40 L. ed. 903, 908, 909, 16 Sup. Ct. Rep. 766, 105 Cal. 576, 594, 38 Pac. 905; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; Cleveland, C. C. & St. L. R. Co. v. Backus, 133 Ind. 513, 542, 18 L.R.A. 729, 33 N. E. 421. In Fargo v. Hart, 193 U. S. 490, 496, 497, 48 L. ed. 761, 764, 24 Sup. Ct. Rep. 498, there was no serious dispute as to what was the principle adopted.

Again, this board necessarily kept, and evidently was expected by the statutes to keep, a record. That was the best evidence, at least, of its decisions and acts. If the roads had *wished an express ruling by the board upon the deductions which they demanded, they could have asked for it, and could have asked to have the action of the board or its refusal to act noted in the record. It would be time enough to offer other evidence, when such a request had been made and refused. See Fargo v. Hart, 193 U. S. 490, 498, 48 L. ed. 761, 764, 24 Sup. Ct. Rep. 498; Cleveland, C. C. & St. L. R. Co. v. Backus, supra; Havemeyer v. Cook County, 202 Ill. 446, 66 N. E. 1044. However, as the foregoing objections were not urged, and as the cases were discussed upon all the testimony, we shall proceed to consider them in the same way.

The facts that appear from any source are few. The board voted first, as a preliminary step toward ascertaining the actual value of all property to be assessed, to make an estimate of the tangible property of the railroads, to be taken as one of the factors in making up the total assessment of the roads. Schedules were prepared, and it is objected that the board added 25 per cent to certain items as furnished by the companies. If this be true, and it is not admitted that any figures were more than tentative, the addition seems to have been made on personal judgment and on a theory that the values given were the values the property was insured for. If mistaken, a mistake does not affect the case. The main point comes on the final assessment, to which we turn at once.

The board expressed its result in another vote. "Having given full and due consideration to the returns furnished said board by the several railroad companies, and having taken into consideration the main track, side track, spur tracks, warehouse tracks, roadbed, right of way, and depot grounds, and all water and fuel stations, buildings, and superstructures thereon, and all machinery, rolling stock, telegraph lines, and instruments connected therewith, all material on hand and supplies, moneys, credits, franchises, and all other property of said railroad companies, and having taken into consideration the gross and net earnings of said roads, the total amount *expended in operation and maintenance, the dividends paid, the capital stock of each system or road and the market value thereof and the total amount of secured and unsecured indebtedness [we] do hereby ascertain and fix, for the purposes of taxation, the full actual value, the average value per mile, and the assessable value per mile of the several roads as follows:" with a list. [595]

The roads supplement the record by evidence that the state treasurer, a member of the board, on the objection being made to a paper said to exhibit the stock, bonds, and floating debt of the Union Pacific, that the stock and bonds of other companies owned by the Union Pacific had not been deducted, answered, "the board has decided that it cannot make deductions for property outside of the state." This answer was in the presence of the other members of the board. It is agreed that the paper referred to was prepared for the use of the board. It shows a column of figures marked "Deductions for locally assessed," and amounting, when added, to 1,152,230. Then, under the head "Earnings," are the figures 398,474,068, from which is subtracted 1,152,230, giving 397,321,838, which is divided by 6,104, giving 65,092 as the quotient. This dividend is said to be shown, by the coincidence of figures, to have been made up of the market value of the stock of the Union Pacific, its mortgage bonds and other indebtedness, less the property locally assessed in the state, but without the deduction to which we have referred and to which the road alleges that it was entitled. The divisor is the total number of miles of the road. It is true that the valuation ultimately reached was $55,000 a mile instead of $65,092, but this is said to have been an arbitrary reduction, and did not reduce the amount sufficiently, if we were to assume that this paper furnished the basis of the tax.

But no such assumption can be made. The board considered the paper, no doubt, but so they considered a capitalization of what they understood to be the net earnings *in the state, and the value of the tangible property apart from its outside connections. Exactly what weighed in each mind, and even what elements they purported to consider in their debates, is little more than a guess. There is testimony which cannot [596]

be neglected that, in this very matter of valuing the road by stocks and bonds, etc., the board, from another table furnished by the company, valued it at over $540,000,000, and did deduct from that sum the stocks and bonds owned by the road, and valued by the board at over $140,000,000, prior to the subsequent reduction to $55,000 a mile. It is said that this valuation is absurd and due to misunderstanding of the table. But we have nothing to do with complaints of that nature, or with anything less than fraud, or a clear adoption of a fundamentally wrong principle. The board, in its formal action properly before us, did vote to request of the Union Pacific, among other things, "an itemized statement of the several bonds and stocks owned by said company, for which they are legally entitled to receive credit on offset, in estimating the value of said Co. for assessment." This recognizes the true principle, almost in terms. Beyond a speculation from figures, and a few statements improperly elicited from one or two members of the board, there is nothing to contradict the inference from this vote except the above alleged statement of the treasurer, met by his and others' testimony that a proper deduction was made.

Evidently the board believed that the figures furnished by the roads were too favorable and were intended to keep the taxes as low as they could be kept. Evidently, also, the members or some of them used their own judgment and their own knowledge, of which they could give no very good account on cross-examination, but which they had a right to use, if honest, however inarticulate the premises. It would seem from the testimony, as might have been expected, that the valuations fixed were a compromise and were believed by some members to be too low, as they seemed to one too high. It is argued to us, on expert testi-
[597] mony, that they are too low. *The result of the evidence manifests the fruitlessness of inquiries, which, as we have said, should not have been gone into at all. We have adverted more particularly to the case of the Union Pacific, but that of the Chicago, Burlington, & Quincy Railroad stands on similar and no stronger ground, and what we have said disposes of the main contention of both. If the court below had found the other way it would have been difficult to say that the finding was sustained by competent evidence. There certainly is no sufficient reason for disturbing the finding as it stands.

A point less pressed than the foregoing was that the other property in the state was greatly undervalued and that thus the rule of uniformity prescribed by the Constitution of Nebraska had been violated. Upon this matter it is enough to say that no scheme or agreement on the part of the county assessors, who taxed the other property, was shown, or on the part of the board of equalization and assessment, and to refer to Coulter v. Louisville & N. R. Co. 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342.

Again, it was said that, inasmuch as the present Union Pacific Company, a Utah corporation, acquired its road by foreclosure of a mortgage from a preceding corporation chartered by the United States, it appeared from admissions in testimony or followed from the board's taxing the Nebraska portion of the road as a going concern that it was taxing United States franchises, contrary to the decision in California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073. This, also, although stated, was not pressed. It does not appear that the present Union Pacific has any United States franchises that were taxed, and, if it has any that were considered in estimating the value of the road, it does not appear that they were considered improperly under the later decisions of this court. Central P. R. Co. v. California, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766, 105 Cal. 576, 590, 38 Pac. 905. See Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604. And the same thing may be said as to the interstate business of the *roads. Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604. The board had a right to tax all the property in the state, and to tax it at its value as an organic portion of a larger whole. Western U. Teleg. Co. v. Missouri, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730.

Various arguments were addressed to us upon matters of detail which would afford no ground for interference by the court, and which we do not think it necessary to state at length. Among them is the suggestion of arbitrariness at different points, such as the distribution of the total value set upon the Chicago, Burlington, & Quincy system, among the different roads making it up. But the action does not appear to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions,—impressions which may lie beneath consciousness without losing their worth. The board was created for the purpose of using its judgment and its knowledge. State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; State ex rel. Bee Bldg. Co. v. Savage, 65 Neb. 714, 768, 769, 91 N.

e Cruger, 84 N. Y. 619, 621; San Co. v. January, 57 Cal. 614, 616. jurisdiction, except, as we have e case of fraud or a clearly shown f wrong principles, it is the ulti- dian of certain rights. The state ed those rights to its protection rusted to its honor and capacity des the protection of other social o the courts of law. Somewhere t be an end. We are of opinion ever grounds for uneasiness may ed, nothing has been proved so l palpably as it should be proved, inciple laid down in San Diego Town Co. v. National City, 174 , 754, 43 L. ed. 1154, 1160, 19 ep. 804, in order to warrant these the extraordinary jurisdiction of court.

affirmed.

ice Peckham and Mr. Justice Mc- ent.

M J. DOYLE and James G. Doak, ading as Doyle & Doak,

v.

GUARANTEE & ACCIDENT COMPANY, LIMITED.

. C. Reporter's ed. 599-608.)

review of contempt proceedings— ion of circuit court of appeals— ree.

circuit court of appeals cannot, in the final decree in the suit, review of a Federal circuit court which he defendants in such suit guilty t in disobeying an order for the of certain books and papers for for the benefit of the plaintiff, es a fine or imprisonment in the ailure to produce such books or a specified date, since this is not er rendered in a proceeding crim- nature, and, as such, within the jurisdiction of the circuit court , under the act of March 3, 1891 at L. 828, chap. 517, U. S. Comp. , p. 550), § 6, but was intended to secure the rights of the party to the suit for whose benefit the original order was made.

[No. 155.]

Argued January 11, 1907. Decided February 25, 1907.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Third Circuit presenting a question as to the appellate jurisdiction of that court to review an order in contempt proceedings. Answered in the negative.

The facts are stated in the opinion.

Mr. E. Clinton Rhoads argued the cause, and, with Mr. John C. Bell, filed a brief for Doyle et al.

The contumacy of a witness is within the classification of criminal contempts, as pertaining primarily to the authority of the court as distinguished from the assertion of a private right.

Hanks Dental Asso. v. International Tooth Crown Co. 194 U. S. 303, 48 L. ed. 989, 24 Sup. Ct. Rep. 700; Bessette v. W. B. Conkey Co. 194 U. S. 324, 48 L. ed. 997, 24 Sup. Ct. Rep. 665; Re Christensen Engineering Co. 194 U. S. 458, 48 L. ed. 1072, 24 Sup. Ct. Rep. 729; Alexander v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. Rep. 356.

In cases in which a distinction is made between a witness and a party, it is not meant that a party who becomes a witness is denied rights which a witness would have. To assert that when a defendant has a clerk who refuses to produce a paper there may be an appeal from the finding of disobedience, and if the defendant himself be called as a witness to produce the same paper under the same circumstances, he may be committed for contempt without any appeal, would, we submit, present an absurd situation, which the law would not countenance. It might be perfectly correct to say that an order committing a witness for contempt would have no bearing upon the main litigation, and that, as to the main litigation, it might be an interlocutory order; but it by no means follows that when the plaintiff calls the defendant as a witness, the defendant is denied the right to appeal from a penalty following an unauthorized order.

Lester v. People, 150 Ill. 408, 41 Am. St. Rep. 375, 23 N. E. 387, 37 N. E. 1004.

When the lower court undertook to compel obedience to an order secured by the complainant, and to which he was not entitled, the order became final, and justified a writ of error.

Thomson v. Dean (Dean v. Nelson) 7 Wall. 342, 19 L. ed. 94; Alexander v. United

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On the jurisdiction of the circuit ppeals—see notes to Lau Ow Bew States, 1 C. C. A. 6; Salmon v. C. C. A. 374; and United States and & Emigration Co. v. Gallegos, 475.

hat judgments or decrees are final es of review—see notes to Brush . v. Electric Improv. Co. 2 C. C. entral Trust Co. v. Madden, 17 238; Prescott & A. C. R. Co. v. T. & S. F. R. Co. 28 C. C. A. 482; Ogden, 5 L. ed. U. S. 302; and v. Hemphill, 49 L. ed. U. S. 1001.

States, supra; Bessette v. W. B. Conkey Co. 194 U. S. 329, 48 L. ed. 1002, 24 Sup. Ct. Rep. 665; Eau Claire v. Payson, 46 C. C. A. 466, 107 Fed. 552; Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co. 63 C. C. A. 607, 129 Fed. 105; Lester v. People, supra.

All cases of contempt are primarily criminal in their nature, and are separable from any litigation to which they are incident.

New Orleans v. New York Mail S. S. Co. 20 Wall. 392, 22 L. ed. 357; Williamson's Case, 26. Pa. 9, 67 Am. Dec. 374; Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co., Bessette v. W. B. Conkey Co., and Re Christensen Engineering Co. supra.

The authorities recognize the right of appeal from a void order, even where the right to appeal is otherwise in doubt.

Re Chetwood, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385; Com. ex rel. Keely v. Perkins, 124 Pa. 36, 2 L.R.A. 223, 16 Atl. 525, 528.

Mr. Thomas Raeburn White argued the cause and filed a brief for the London Guarantee & Accident Company:

A final judgment or decree is one which leaves nothing further to be done in the case except execution of the judgment of the court.

Grant v. Phœnix Mut L. Ins. Co. 106 U. S. 429, 27 L. ed. 237, 1 Sup. Ct. Rep. 414; St. Louis, I. M. & S. R. Co. v. Southern Exp. Co. 108 U. S. 24, 27 L .ed. 638, 2 Sup. Ct. Rep. 6; Robinson v. Belt, 5 C. C. A. 521, 12 U. S. App. 431, 56 Fed. 328.

It matters not that the question sought to be reviewed involves an attack upon the jurisdiction of the lower court; an appeal or writ of error cannot be considered until after the final disposition of the case.

McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118.

Contempt proceedings are of two classes, —vindicatory and remedial.

Re Chiles (Texas v. White) 22 Wall. 157, 168, 22 L. ed. 819, 822; Bessette v. W. B. Conkey Co. 194 U. S. 324, 48 L. ed. 997, 24 Sup. Ct. Rep. 665; Re Nevitt, 54 C. C. A. 622, 117 Fed. 448.

Vindicatory contempt proceedings are the only ones reviewable on writ of error by the circuit courts of appeals prior to the termination of the main suit.

Ex parte Kearney, 7 Wheat. 38, 5 L. ed. 391; New Orleans v. New York Mail S. S. Co. 20 Wall. 387, 22 L. ed. 354; Hayes v. Fischer, 102 U. S. 121, 26 L. ed. 95; Bessette v. W. B. Conkey Co. supra.

The court which has imposed punishment as a coercive measure in a civil suit can afterwards remit the punishment, which it would not have the power to do were such cases criminal, because the pardoning power rests only in the President.

Hendry v. Fitzpatrick, 19 Fed. 810; Re Nevitt, supra.

Remedial contempt proceedings are a part of the main suit, and can be reviewed on writ of error or appeal only after final judgment in the court below.

Hayes v. Fischer and Bessette v. W. B. Conkey Co. supra; Heinze v. Butte & B. Consol. Min. Co. 194 U. S. 632, 48 L. ed. 1159, 24 Sup. Ct. Rep. 856, 63 C. C. A. 388, 129 Fed. 274; King v. Wooten, 4 C. C. A. 519, 2 U. S. App. 651, 54 Fed. 612; Re Nevitt, supra.

All such interlocutory orders and decrees will, however, be reviewed by the appellate courts when considering the case after final decree by writ of error or on appeal.

Worden v. Searls, 121 U. S. 14, 30 L. ed. 853, 7 Sup. Ct. Rep. 814; Bessette v. W. B. Conkey Co. 194 U. S. 324, 329, 48 L. ed. 997, 1002, 24 Sup. Ct. Rep. 665.

Mr. Justice Day delivered the opinion of the court:

This case is here upon certificate from the circuit court of appeals for the third circuit. From the facts stated it appears that William J. Doyle and James G. Doak were adjudged guilty of contempt of court in the circuit court of the United States for the eastern district of Pennsylvania. After the bringing of the action, upon the petition of the London Guarantee & Accident Company, Limited, the plaintiff below, the court made the following order:

"And now, June 25th, 1904, the court orders the defendants to produce, within twenty days, in the office of the clerk of said court, their pay sheets, time books, cash books, and all other books of original entry which contain information as to the amount of compensation paid to employees of themselves or of their subcontractors or of any other persons contemplated in the contracts upon which suit is brought in this case during the period of said contracts, as set forth in the petition filed."

After that order was made the certificate recites:

"Thereafter the plaintiff presented to the court a petition *alleging disobedience by the defendants of the above order and praying that an attachment issue against them for contempt of court. Thereupon the court granted a rule upon the defendants to show cause why an attachment should not issue against them for contempt of court by reason of their violation and disobedience of said order. To this rule the defendants filed an answer under oath, denying intentional noncompliance with said order, and stating

that they were not able to produce all the books and papers called for, because, upon a thorough search, the absent ones could not be found, and averring their belief that they were accidentally lost or by mistake were destroyed at a time when alterations were made in their office and a removal of its contents to another place occurred. Subsequently, to wit, on January 3d, 1905, upon the hearing of the rule, the court gave and entered judgment that the 'defendants are guilty of contempt in disobeying the order referred to,' and further adjudged as follows:

"If the defendants produce in the office of the clerk of the circuit court on or before January 15th, 1905, the ledger of 1902-1904, the pay rolls or time sheets from March to May 28, 1903, and the cash book from May 28 to December 1, 1902, or, if they produce the cash book alone, they are ordered to pay no more than the costs accruing upon this motion, including the stenographer's charges, on or before January 20, or, in default of such payment, to suffer imprisonment in the jail of this county for the period of sixty days. If the foregoing books and papers are not produced on or before January 15, the defendants are ordered to pay a fine of $250, and also the cost accruing upon this motion, including the stenographer's charges, on or before January 20, or, in default of such payment, to suffer imprisonment in the jail of this county for the period of sixty days."

A writ of error was allowed to the circuit court of appeals. Upon the facts stated the following question was certified to this court:

[603] *"Has the circuit court of appeals jurisdiction upon the writ of error sued out by the defendants to review the above-recited judgment of January 5th, 1905, adjudging that the defendants are guilty of contempt of court in disobeying the above-recited order of court of June 25th, 1904, and imposing upon the defendants a fine of $250.00 on the specified conditions and terms?"

Cases involving the right to review orders of the Federal courts in matters of contempt have been so recently before this court that an extended discussion of the principles involved is unnecessary. Bessette v. W. B. Conkey Co. 194 U. S. 324, 48 L. ed. 997, 24 Sup. Ct. Rep. 665; Re Christensen Engineering Co. 194 U. S. 458, 48 L. ed. 1072, 24 Sup. Ct. Rep. 729; Alexander v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. Rep. 356.

In Bessette v. W. B. Conkey Co. supra, a question was certified here from the circuit court of appeals of the seventh circuit, involving the jurisdiction of that court to review an order in a contempt proceeding finding the petitioner guilty of contempt for violation of an order of the circuit court, and imposing a fine. In that case the subject underwent a full examination and the previous cases in this court were cited and reviewed. As a result of those decisions we deem it settled that an order punishing for contempt, made in the progress of the case, when not in the nature of an order in a criminal proceeding, is regarded as interlocutory, and to be reviewed only upon appeal from a final decree in the case.

Re Christensen Engineering Co. supra. In Bessette v. W. B. Conkey Co. supra, it was pointed out that this court had no jurisdiction to review judgments in contempt proceedings criminal in their nature, under the power to punish for contempt defined by Congress (1 Stat. at L. 83, chap. 20) and limited by the act of March 2, 1831. 4 Stat. at L. 487, chap. 99, Rev. Stat. § 725, U. S. Comp Stat. 1901, p. 583.

The right to review a judgment in a contempt proceeding in the circuit court of appeals was derived from the circuit court of appeals act, § 6 [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550], of which Mr. Justice Brewer, speaking for the court in the Bessette Case said:

"So when, by § 6 of the courts of appeals act, the *circuit courts of appeals are given [604] jurisdiction to review the 'final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law,' and the preceding section gives to this court jurisdiction to review convictions in only capital or otherwise infamous crimes, and no other provision is found in the statutes for a review of the final order in contempt cases, upon what satisfactory ground can it be held that the final decisions in contempt cases in the circuit or district courts are not subject to review by the circuit courts of appeals? Considering only such cases of contempt as the present,—that is, cases in which the proceedings are against one not a party to the suit, and cannot be regarded as interlocutory,—we are of opinion that there is a right of review in the circuit court of appeals."

And again, in the same case, it is said:

"As, therefore, the ground upon which a review by this court of a final decision in contempt cases was denied no longer exists, the decisions themselves cease to have controlling authority, and whether the circuit courts of appeals have authority to review proceedings in contempt in the district and circuit courts depends upon the question whether such proceedings are criminal cases."

It therefore appears that the only right of review given to the circuit court of ap-

peals in contempt proceedings is derived from the act giving that court such right in criminal cases. In the course of the discussion in the Bessette Case it is said that proceedings for contempt may be divided into those which have for their purpose the vindication of the authority and dignity of the court, and those seeking to punish parties guilty of a disregard of such orders as are remedial in their character, and intended to enforce the rights of private parties, to compel obedience to orders and decrees made to enforce their rights, and to give them a remedy to which the court deems them entitled. And it is said that [605] the one class is *criminal and punitive in its nature, in which the government and the public are interested, and the other civil, remedial, and coercive in its character, in which those chiefly concerned are individuals whose private rights and remedies are undertaken to be protected and enforced. From the discussion in that case it clearly appears that proceedings which are criminal in their nature and intended for the vindication of public justice, rather than the coercion of the opposite party to do some act for the benefit of another party to the action, are the only ones reviewable in the circuit court of appeals under its power to take jurisdiction of and determine criminal cases.

In that case, and in cases generally where the right of review has been recognized, the party prosecuted has been other than one directly interested in the suit, and brought into it for the purpose of punishing a known violation of an order in defiance of the authority and power of the court. In such case the proceeding is entirely independent and its prosecution does not delay the conduct of the action between the parties to final decree. True it is that in some cases, as in the Christensen Case, 194 U. S., the punishment for contempt which has been held reviewable is for a past act of a party in violation of an order made for the benefit of the other party. In that case one half of the fine imposed went to the United States, and was not intended for the enforcement of an order in favor of a party, but rather for the vindication of the authority of the court, and punishment for an act done in violation of the court's order, and it was held that such judgment was in a criminal proceeding and reviewable in the circuit court of appeals. In the present case, while it is true that the fine imposed is not made payable to the opposite party, compliance with the order relieves from payment, and, in that event, there is no final judgment of either fine or imprisonment.

"It may not be always easy," said the learned justice, speaking for the court in the Conkey Case, "to classify a particular act as belonging to either one of these two classes *[speaking of vindicatory and remedial [606] proceedings.] It may partake of the characteristics of both. A significant and general determinative feature is that the act is by one party to a suit, in disobedience of a special order made in behalf of the other. Yet sometimes the disobedience may be of such a character and in such a manner as to indicate a contempt of the court rather than a disregard of the rights of the adverse party."

In view of the principles which we deem settled by the adjudications referred to, the question decisive of the present case, therefore, is: Was the judgment rendered in the contempt proceeding criminal in its nature, and having for its object the vindication of the authority of the court, or was it one in the nature of a proceeding to enforce an order seeking the protection of the rights of the party to the suit for whose benefit it was made?

The certificate does not fully indicate the character of the action in which the order was made; yet sufficient appears from which it is to be inferred that the action before the court was one in which it was necessary for the protection of the plaintiff that an inspection of the books and papers of the defendant be had. The defendants were required to produce in the office of the clerk the time books, cash books, etc., containing information as to the amount of compensation paid to the employees of themselves or subcontractors, or to any other persons contemplated in the contracts upon which suit was brought. The court deemed it proper, in view of certain contracts between the parties, that these books and papers be opened for inspection for the benefit of the plaintiff. And, after hearing the parties, it was adjudged that if they produce the books they should be liable only for the costs of the proceedings, or, in default of payment, suffer imprisonment for a period of sixty days. And if the books and papers were not produced on or before January 15 a fine of $250 and costs was imposed, or, in default of payment thereof, imprisonment in the county jail for the period of sixty days. We think it is apparent from a perusal of this order, in the light of the statement *of facts [607] under which it was made, that its object and purpose was to obtain information for the benefit of the plaintiff in the suit to which the court found it entitled, and that the punishment of fine and imprisonment, which was in the alternative, was imposed not for the vindication of the dignity or authority for the court, in the interests of the public, but in order to secure, for the bene-

fit of the plaintiff, a compliance with the order of the court as to the production of the books. The case clearly falls within the class of contempt proceedings which are not criminal in their nature, and are not reviewable before final decree. The proceeding is against a party, the compliance with the order avoids the punishment, and there is nothing in the nature of a criminal suit or judgment imposed for public purposes upon a defendant in a criminal proceeding.

It may be true, as said in argument, that, unless the party complies with the order, he may be subjected to fine or imprisonment; and, if the order cannot be reviewed until after final decree, it may come too late to be of any benefit to the party aggrieved. But the power to punish for contempt is inherent in the authority of courts, and is necessary to the administration of justice, and part of the inconvenience to which a citizen is subject in a community governed by law regulated by orderly judicial procedure. As has been said, while the party may suffer imprisonment, "he carries the keys of the prison in his own pocket" (Re Nevitt, 54 C. C. A. 622, 117 Fed. 461), and, by compliance with the order of the court, may deliver himself from punishment.

But, whatever the hardship, the question now before the court is as to the authority of the circuit court of appeals to review judgments in contempt proceedings. In the circuit court of appeals act, as construed by this court, the jurisdiction of the circuit court of appeals is extended to the right to review judgments entered before final decree in the action out of which the contempt proceedings arose where the order is final and [608] in a proceeding of a criminal nature. *Beyond this, the jurisdiction of the court has not been carried, and, in our opinion, no right of review exists in such a case as is shown in the certificate before us, in advance of a final decree in the case in which the order was made.

It is urged by counsel for plaintiff in error that the only authority of the circuit court to make an order for the production of books and papers in a common-law action is under § 724 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 583), providing for the productions of papers after issue joined. But the question certified is not as to the lack of authority of the circuit court to make the order for want of jurisdiction,—a question which might arise upon a habeas corpus proceeding,—but concerns the right of the circuit court of appeals to review an order made in the circuit court, undertaking to punish for contempt for violation of an order made in other than a proceeding of a criminal character. The court of appeals act of 1891 gives no right to review other than final judgments in the district and circuit courts, except in injunction orders, as provided in § 7 of the act. McLish v. Roff, 141 U. S. 661, 668, 35 L. ed. 893, 895, 12 Sup. Ct. Rep. 118.

For the reasons stated we think the Circuit Court of Appeals has no jurisdiction to review the judgment set forth in the certificate, and the question certified will be answered in the negative.

Mr. Justice Peckham took no part in the decision of this case.

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*COMPUTING SCALE COMPANY OF [609] AMERICA, Appt.,

v.

AUTOMATIC SCALE COMPANY.

(See S. C. Reporter's ed. 609–622.)

Patents — construction — narrowing claim — prior state of art.

1. The claims of the Hayden patent No. 700,919, for an improvement in a spring-balance computing scale, must be deemed to be limited to the specific means shown for translating the vertical movement of the runner into the rotary movement of the vertical inner computing cylinder, in view of the action of the Patent Office in requiring, as a means of saving the first claim, that such claim call for "a spring-supported, load-bearing, and cylinder-revolving rod," and "connecting means between rod and computing cylinder" to secure the rotary movement of the inner cylinder, in which action the applicant acquiesced, though "without prejudice to the claims which remain," because "the allowed claims appear to cover the invention as it would be constructed in practice," and in view of the state of the art, which shows that the elements of the invention, broadly considered, were previously disclosed in horizontal machines, and that the idea of vertical construction was old.

Patents—infringement—nonuse of essential element.

2. Infringement of the claims of the Hayden patent 700,919, for an improvement in spring-balance computing scales, does not result from the use of a scale in which the downward movement of the load accomplishes the rotary movement of the inner computing cylinder by other mechanism than the suspended rod with its spiral, which,

NOTE.—On the construction of patents—see notes to Evans v. Eaton, 4 L. ed. U. S. 433; Royer v. Coupe, 36 L. ed. U. S. 1073; Leggett v. Standard Oil Co. 37 L. ed. U. S. 737; and Dashiell v. Grosvenor, 40 L. ed. U. S. 1025.

As to what constitutes infringement of a patent—see notes to Royer v. Coupe and Dashiell v. Grosvenor, supra.

with its connection with the cylinder, is the essential element of the Hayden invention.

[No. 175.]

Argued January 23, 1907. Decided February 25, 1907.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of that District dismissing a bill to restrain the infringement of a patent. Affirmed.

See same case below, 26 App. D. C. 238.

The facts are stated in the opinion.

Mr. Melville Church argued the cause, and, with Mr. Joseph B. Church, filed a brief for appellant:

It is undoubtedly true that a patentee, having once made and stricken out a broad claim and having then accepted a narrower claim, is not to be heard to say, when he sues an alleged infringer on his narrow claim, that such claim should be given a breadth of construction commensurate with that of the broad claim which he relinquished.

But if an inventor presents a broad claim and strikes it out and then presents and obtains an equally broad claim he loses no right by such action, and may justly assert his allowed claim to be a broad one and restrain anyone who infringes it.

So, too, if he makes and strikes out a broad claim and accepts a narrower one, the mere fact that he has once made and relinquished the broader claim does not prevent him from asserting the validity of the narrower claim as against any defendant who invades it. Plainly, even a narrow claim may be infringed.

Hubbell v. United States, 179 U. S. 77, 45 L. ed. 95, 21 Sup. Ct. Rep. 24.

To be estopped by the action of the Patent Office, the patentee must be shown to have surrendered something which he now claims in order to obtain that which was allowed.

Bundy Mfg. Co. v. Detroit Time-Register Co. 36 C. C. A. 394, 94 Fed. 524.

That the spirally grooved rod and the rollers of the Hayden patent are described as the preferred form of translating device indicates plainly that it was not considered the only form of translating device that might have been used.

Sewall v. Jones, 91 U. S. 185, 23 L. ed. 277; Holliday v. Pickhardt, 29 Fed. 858.

Both broad claims and narrow claims must, if possible, be given effect and not construed to be alike.

Bresnahan v. Tripp Giant Leveller Co. 43 C. C. A. 48, 102 Fed. 899; Risdon Iron & Locomotive Works v. Trent, 92 Fed. 375.

The patent itself is prima facie evidence of both the novelty and utility of the invention covered by it.

Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. ed. 939.

Claims for combinations of instrumentalities designed to produce a new and useful result are not to be held anticipated and declared invalid because some or all of the elements are, individually, old. The combination, as such, must be shown to be old. There is no anticipation unless all the elements are found in some prior structure, combined in the same way, to produce the same result.

Inhaeuser v. Buerk, 101 U. S. 647, 660, 25 L. ed. 945, 947; Parks v. Booth, 102 U. S. 96, 104, 26 L. ed. 54, 57.

The invention of Hayden may not now, after the event, seem difficult of accomplishment. The defendant claims it was obvious; but this defense is one that the courts have little patience with.

Howe v. Underwood, 1 Fisher, Pat. Cas. 160, Fed. Cas. No. 6,775; Waterbury Brass Co. v. Miller, 9 Blatchf. 77, Fed. Cas. No. 17,254; Forbush v. Cook, 2 Fisher, Pat. Cas. 668, Fed. Cas. No. 4,931; Wood v. Cleveland Rolling Mill Co. 4 Fisher, Pat. Cas. 550, Fed. Cas. No. 17,941; Graham v. Plano Mfg. Co. 33 Fed. 918; Palmer v. Johnston, 34 Fed. 337; Stegner v. Blake, 36 Fed. 185; Gould Coupler Co. v. Pratt, 70 Fed. 624.

Mr. H. P. Doolittle argued the cause, and, with Mr. E. Hilton Jackson, filed a brief for appellee:

A patentee is bound by the written record he makes in the Patent Office in obtaining his patent.

Westinghouse v. Boyden Power Brake Co. 170 U. S. 537, 42 L. ed. 1136, 18 Sup. Ct. Rep. 707; Kokomo Fence Mach. Co. v. Kitselman, 189 U. S. 8, 47 L. ed. 689, 23 Sup. Ct. Rep. 521; Chicago & N. W. R. Co. v. Sayles, 97 U. S. 554, 24 L. ed. 1053; Durham v. Seymour, 6 App. D. C. 103; Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. 152 U. S. 429, 38 L. ed. 502, 14 Sup. Ct. Rep. 627; Hubbell v. United States, 179 U. S. 77, 45 L. ed. 95, 21 Sup. Ct. Rep. 24.

Combination claims cannot, by construction, be so altered as to cover more elements, so as not to be invalid (Howe Mach. Co. v. National Needle Co. 134 U. S. 394, 33 L. ed. 967, 10 Sup. Ct. Rep. 570; Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. supra), nor fewer elements to catch supposed infringers (Shepard v. Carrigan, 116 U. S. 597, 29 L. ed. 724, 6 Sup. Ct. Rep. 493; Sutter v. Robinson, 119 U. S. 541, 30 L. ed. 495, 7 Sup. Ct. Rep. 376; McClain v. Ortmayer, 141 U. S. 425, 35 L. ed.

802, 12 Sup. Ct. Rep. 76; Walker, Patents, § 186).

The combination claimed is a pure aggregation.

Richards v. Chase Elevator Co. 158 U. S. 299, 39 L. ed. 991, 15 Sup. Ct. Rep. 931; Interior Lumber Co. v. Perkins, 25 C. C. A. 613, 53 U. S. App. 66, 80 Fed. 528; Durham v. Seymour, 6 App. D. C. 103; Re McNeill, 20 App. D. C. 294; Hailes v. Van Wormer, 20 Wall. 353, 22 L. ed. 241; Pickering v. McCullough, 104 U. S. 310, 317, 26 L. ed. 749, 751; Thatcher Heating Co. v. Burtis, 121 U. S. 286, 30 L. ed. 942, 7 Sup. Ct. Rep. 1034; Wright v. Yuengling, 155 U. S. 47, 39 L. ed. 64, 15 Sup. Ct. Rep. 1.

Mr. Justice Day delivered the opinion of the court:

This is an appeal from the court of appeals of the District of Columbia, affirming [610] a decree of the supreme court of the *District, dismissing the bill of the Computing Scale Company of America, appellant, against the Automatic Scale Company, based upon the alleged infringement of letters patent No. 700,919, granted to the complainant as the assignee of the inventor, Austin B. Hayden, said letters bearing date May 27, 1902, for an improvement in computing scales.

The bill contained a prayer for an injunction and accounting. The answer denied the patentability of the alleged invention of the plaintiff, set up the alleged anticipating invention of one Christopher, and denied infringement.

The alleged improvement of Hayden is shown in the accompanying illustrations taken from the patent. [See next page.]

To understand these drawings they are to be viewed in the light of the description of the mechanism given by complainant's expert, which has the approval of the expert of the defendant, and was accepted as correct in the court of appeals. This description, somewhat abridged, is as follows:

"The two principal parts of the mechanism are as follows: 1st, a vertically arranged, nonrotating frame which comprises and includes a vertical cylindrical casing which incloses, conceals, and protects the major portion of the operating portions of the scale, and upon which are marked the price indications which indicate the price per pound at which the articles weighed are to be sold. As clearly shown in the drawings this external casing or frame is provided with a vertically disposed sight opening through which the coacting mechanism is observable, and along one vertical edge of this sight opening are arranged the numerals indicating the price per pound.

"The second of these principal parts is a second cylinder located within the casing, this cylinder constituting a computing cylinder or chart drum upon which are placed indications indicating the weight in pounds of the article weighed, and also having other indications indicating the price of an article weighed corresponding to the weight and to the price per pound. This chart drum or computing cylinder extends vertically within the external casing and it is arranged to rotate *on a vertical axis within the external [611] casing. This casing is appropriately connected to the spring balancing mechanism and to the scale pan so that when the spring balancing mechanism moves up and down on the placing or removing of a load on the scale pan, the chart drum will be rotated in one direction or the other within the external casing or frame.

*"As shown in Fig. 2, the weight and val- [612] ue-indicating figures are placed in horizontal rows on the external surface or periphery of the rotatable chart drum of the computing cylinder, the weight indications being shown in a horizontal row at the bottom, and the price indications in horizontal rows above, there being as many of these horizontal rows of price indicating figures as there are 'price per pound' indicating figures on the fixed external casing. These value-indicating figures on *the chart drum are [613] computed at different rates corresponding to the 'price per pound' figures on the external casing. As indicated in figure 2 of the drawings of the patent, there is supposed to be a weight on the scale pan of 5 pounds, this weight being indicated on the weight scale, and it will be seen that in such instance the various value indications on the chart drum opposite the 'price per pound' indications on the fixed casing are, in each illustrated instance, five times as great as the corresponding 'price per pound' indications. The drawings illustrate only a portion of the indicating figures on the chart drum, but it will be understood in practice that this drum will be entirely covered on its external surface with figures corresponding to the weights multiplied by the figures indicating 'price per pound' on the nonrotatable external casing. Accordingly, whenever the interior chart drum is turned a distance corresponding to the load placed on the scale pan, the value of the load can be read at once opposite the figures on the external casing which correspond to the price per pound of the article weighed.

"The various price indications on the chart drum are visible through the sight opening in the external casing.

"The mechanism whereby the chart drum is rotated a distance corresponding to the weight of the load placed on the scale pan is as follows: The balancing mechanism is

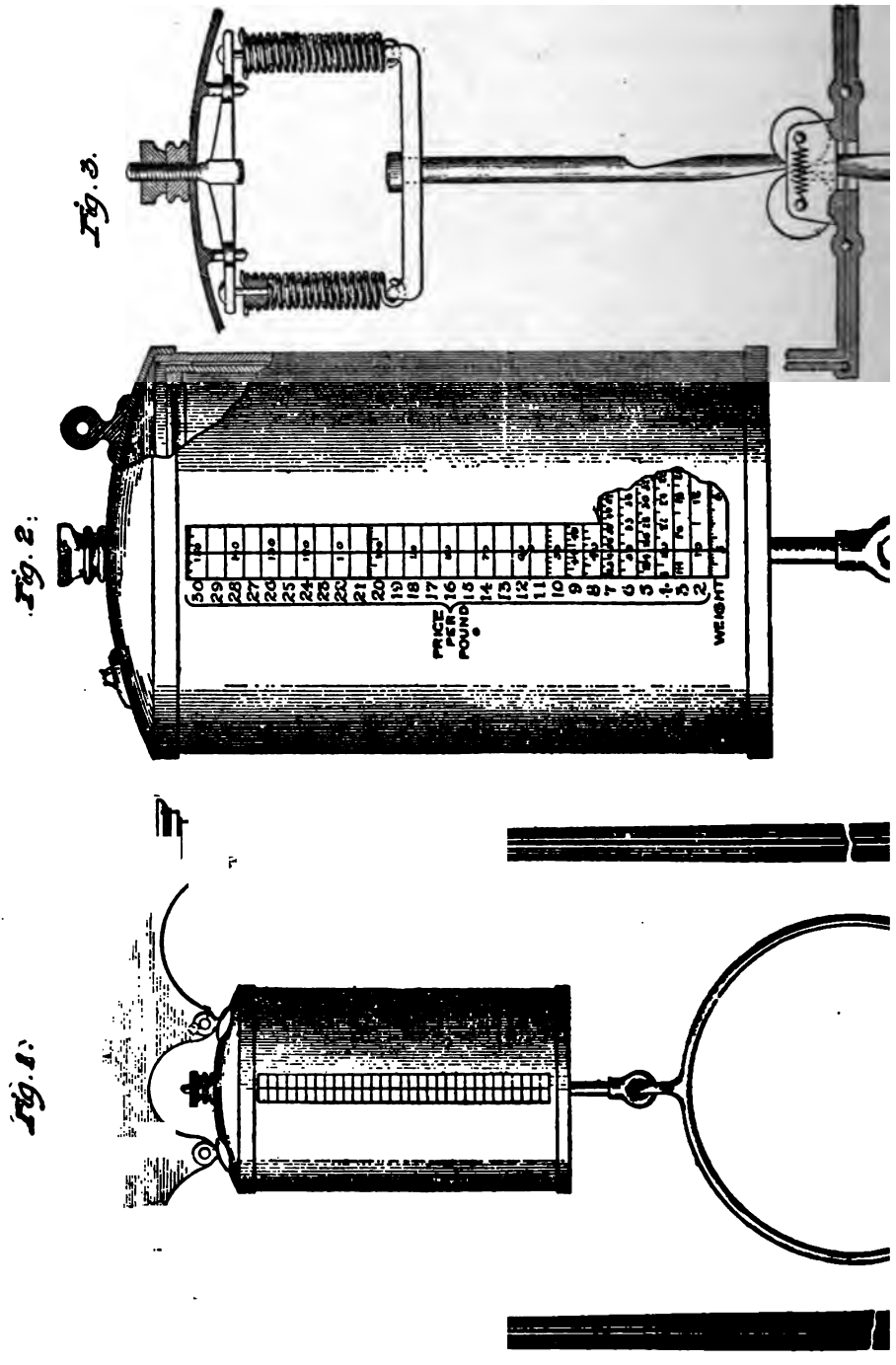
Fig. 1.
Fig. 2.
Fig. 3.
PRICE PER POUND
WEIGHT

a spring balance comprising two springs which are suspended from a suitable portion of the nonrotating frame of the scale. To the lower ends of these springs is attached a crossbar in the middle of which depends a rod, this crossbar and rod constituting the runner of the scale. (See Fig. 3.) The scale pan is suspended from the lower end of this rod as illustrated in Figure 1. When a load is placed on the scale pan the vertical runner moves vertically downward distending the spring to an extent proportional to the weight of the load. In order to indicate the weight this vertical movement of the spring-supported runner is converted or translated into a rotary movement of the chart drum [614] by suitable intervening mechanism. *This intervening mechanism consists of a spiral groove of high pitch on the vertical rod and two rollers journaled in suitable bearings carried by the rotatable chart drum, the bearings of one of these rollers being spring pressed so that the rollers are held in yielding contact with the spiral groove on the rod. Consequently as the rod moves vertically the spiral groove thereof causes the chart drum or computing cylinder to rotate on its vertical axis.

"Accordingly, the mechanism is such that the vertical movement of the runner is translated into rotary movement of the chart drum, and the chart drum is rotated to an extent proportional to the vertical movement of the runner."

In his application, Hayden, having set forth a description of his invention, disclaiming any intention to limit his invention by the precise description of the specifications, except as appears from his claims, sets forth eleven (11) claims, which he alleges as new and desires to secure by letters patent.

The claims alleged to be infringed in this case are numbered 1, 2, 6, 7, and 8. Numbers 1 and 2 are practically alike, except that in No. 2 the spring-supported, load-bearing, and cylinder-revolving rod is described as nonrotatably suspended. Claims 6, 7, and 8 have some trifling variations, but, in the view we take of this case, they are sufficiently embodied in claim No. 6. We shall, therefore, consider, in arriving at a decision, claims 1 and 6. They are as follows:

"1. In a spring-balance computing scale, the combination of a suitably-supported vertical nonrotatable casing provided with a price index, a vertical rotatable computing cylinder journaled in said casing, provided with cost computations, a spring-supported, load-bearing, and cylinder-revolving rod suspended from said casing, and connecting means between rod and computing cylinder, whereby, by longitudinal movement of the rod, rotary movement is imparted to said cylinder, substantially as and for the purpose set forth.

"6. In a spring balance, the combination of a nonrotating frame providing an external casing and having means for supporting *it from above, weighing springs secured [615] at their upper ends to rigid parts of said frame, a vertically-movable runner which is suspended from the lower ends of said springs and is provided with depending means to support the load, a chart drum rotatably mounted within said casing on a vertical axis and having external horizontal rows of value-indicating figures computed at different rates, said casing having a sight opening through which portions of said value-indicating rows may be seen, and corresponding rate-indicating figures on the outer face of said frame adjacent to the value-indicating rows on the chart drum, and mechanism for translating the vertical movement of the runner into the rotary movements of the chart drum."

Hayden did not assume to be a pioneer in this field of invention, but he claims to have made an improvement in computing scales of the spring-balance type, and states his object to be specially to increase the computing capacity of scales of that type.

An examination of the record discloses that computing scales have been the subject of prior inventions and were well known at the time of Hayden's application. It is true that the scales disclosed in the prior art were generally those having a horizontal axis, case, and cylinder, although it was not new to arrange a scale vertically.

If we are to read the claims as broadly as is contended for, and omit, for the present, vertical construction shown by Hayden, we shall find in the patent of Phinney, No. 106,869, of August 30, 1870, a computing scale having the general elements of a nonrotatable casing, provided with a price index and rotatable cylinder journaled in the case, and having computations thereon, a suspended, spring-supported, load-bearing, and cylinder-revolving rod, and connecting means between the rod and computing cylinder, to impart rotary motion to the inner cylinder. This is perhaps more emphatically true in the invention of Smith, patent No. 545,619, of September 3, 1895.

*In the patent of Babcock, No. 421,805, [616] February 18, 1890, a vertical construction is shown. It is true that Babcock's invention was not automatic in its operation, and required the intervention of the operator to complete the required process, but it serves to show that the idea of vertical construction was not new when Hayden entered the field. Taking the state of the art at that time, it is evident that there is little room

to claim a broad construction of Hayden's improvement. It is well settled by numerous decisions of this court that, while a combination of old elements producing a new and useful result will be patentable, yet, where the combination is merely the assembling of old elements producing no new and useful result, invention is not shown. Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co. 174 U. S. 492-498, 43 L. ed. 1058-1060, 19 Sup. Ct. Rep. 641, and previous decisions of this court there cited.

It is true that many valuable inventions seem simple when accomplished, and yet are entitled to protection. The books abound in cases showing inventions involving only small departure from former means, yet making the difference between a defective mechanism and a practical method of accomplishing results. In such cases a decision in favor of invention as distinguished from mere mechanical improvement has not infrequently resulted, in view of the fact that the device has made the difference between an impracticable machine and a useful improvement displacing others theretofore occupying the field. Krementz v. S. Cottle Co. 148 U. S. 556, 37 L. ed. 558, 13 Sup. Ct. Rep. 719; Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co. 47 Fed. 894; Star Brass Works v. General Electric Co. 49 C. C. A. 409, 111 Fed. 398.

In the present case it nowhere appears in the testimony, nor is it claimed in the specifications of Hayden's patent, that the prior mechanisms of horizontal construction were impracticable or inefficient. There is no suggestion that Hayden's invention has been the last step between an inoperative machine and one practically operative and useful. There is no showing that it has been generally accepted in the trade and [617] displaced *the former machines used for the same purpose. Without resort to the record in the Patent Office, we think it is plain that the invention is but a small advance upon others already in use.

Broadly considered, the elements of Hayden's invention were in the horizontal machines, and the idea of vertical construction was old. Considering this invention in the light of what occurred in the Patent Office in connection with the other considerations already referred to, and the state of the art at the time, we think Hayden's invention can only be sustained to a limited extent.

Before taking up the record as disclosed in the file wrapper and contents we may premise that it is perfectly well settled in this court by frequent decisions that where an inventor, seeking a broad claim which is rejected, in which rejection he acquiesces, substitutes therefor a narrower claim, he cannot be heard to insist that the construction of the claim allowed shall cover that which has been previously rejected. Corbin Cabinet Lock Co. v. Eagle Lock Co. 150 U. S. 38–40, 37 L. ed. 989, 990, 14 Sup. St. Rep. 28, and cases there cited.

A late statement of the rule, and one as favorable to the inventor as the previous cases would admit, is found in Hubbell v. United States, 179 U. S. 77, 80, 45 L. ed. 95, 98, 21 Sup. Ct. Rep. 24, 25, as follows:

"An examination of the history of the appellant's claim, as disclosed in the file wrapper and contents, shows that, in order to get his patent, he was compelled to accept one with a narrower claim than that contained in his original application; and it is well settled that the claim as allowed must be read and interpreted with reference to the rejected claim, and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the Patent Office or disclosed by prior devices. Leggett v. Avery, 101 U. S. 256, 25 L. ed. 865; Shepard v. Carrigan, 116 U. S. 593, 29 L. ed. 723, 6 Sup. Ct. Rep. 493; Knapp v. Morss, 150 U. S. 221, 227, 37 L. ed. 1059, 1061, 14 Sup. Ct. Rep. 81.

"It is quite true that where the differences between the claim as made and as allowed consist of mere changes of *expression, having substantially the same meaning, such changes, made to meet the views of the examiners, ought not to be permitted to defeat a meritorious claimant. While not allowed to revive a rejected claim by a broad construction of the claim allowed, yet the patentee is entitled to a fair construction of the terms of his claim as actually granted."

Looking to the record in the Patent Office we find that claim 1, as originally presented, read as follows:

"1. In a spring-balance computing scale, the combination of a suitably supported vertical nonrotatable casing provided with a price index, a vertical rotatable computing cylinder journaled in said casing provided with cost computations, a spring-supported load pan supported from said casing, and means connected with said pan and cylinder for rotating the cylinder as the pan is lowered under pressure, substantially as and for the purpose set forth."

The examiner rejected this claim upon the patent of Smith, No. 545,616, price scales, and in view of the patent of Turnbull, No. 378,382, spring scales, saying: "It would not involve invention to arrange upon Turnbull's scales a vertical stationary casing having within it a revolvable computing chart, the axis being connected with the index carrying shaft P shown in the Turnbull patent."

the applicant, through his attor-
ied:
'st portion of the examiner's letter
lerstood, as there are no modifica-
rred to in lines 6 to 26 of page 3.
leration of the claims is requested,
eason that it is believed that the
cited do not anticipate any of the
In both of the references cited a
extending transversely of the cen-
otation of the computing chart
means of engagement with a pin-
e axis of the computing chart, to
e latter. This is entirely differ-
applicant's construction, and it is
that the references are pertinent
ue. Certainly, the references, nei-
ly nor taken together, anticipate
ture set forth in the claims, and
hardly be *any question that the
on which applicant shows is a sub-
improvement in the art. It is
it all the claims may be allowed."
examiner again rejected claims 1,
upon the references of record, and
it would not involve invention to
pon the vertical shaft of Turnbull's
mputing chart and inclosing case
e characteristics of Smith's scale.
the attorneys for applicant an-

claims are canceled, not because
l unallowable, but because it is not
prosecute an appeal, in view of
that the allowed claims appear to
invention as it would be con-
in practice. The cancelation is
erefore, without prejudice to the
ich remain."
xth claim was allowed upon the
n of the examiner, as follows:
pring balance, the combination of a
ng frame providing an external
d having means for supporting it
ve, weighing springs secured at
er ends to rigid parts of said frame,
lly movable runner which is sus-
om the lower ends of said springs
ovided with means to support the
rt drum rotatably mounted within
g on a vertical axis and having
horizontal rows of value-indicating
mputed at different rates, said
ving a sight opening through which
of said value-indicating rows may
and corresponding rate-indicating
the outer face of said frame adja-
the value-indicating rows on the
m, and mechanism for translating
al movement of the runner into
y movements of the chart drum."
afterwards stated by the exam-

consideration of claim 6 prepara-
s.

tory to the declaration of interference it is found that the claim does not clearly and patentably distinguish from the scale shown in the patent to Herr, No. 651,801, June 12, 1900, Price Scales, and it is *therefore neces- [620] sary to reject the claim. It is believed, however, that the claim may be rendered allowable by inserting *depending* before "means' in line 6,"

and, accordingly, the word "depending" was inserted in the claim, so as to make it in its present form. How this added anything to the patentability of the mechanism described it is difficult to perceive, in view of the presence of "depending means to support the load" in all scales of this class.

The general rule, as stated, as to the effect of a patentee striking out a broad claim and accepting a narrow one, is conceded by the learned counsel for appellant, but it is contended that if an inventor presents a broad claim and strikes it out and then presents and obtains an equally broad claim, he loses no right by such action, and may justly claim his allowed claim to be a broad one and have relief accordingly. But we think the action of the department in this case cannot be thus eliminated. Claim 1, as presented, had contained the words "a spring-supported load pan supported from said casing, and means connected with said pan and cylinder for rotating the cylinder as the pan is lowered under pressure," and, as allowed, there was inserted "a spring-supported, load-bearing, and cylinder-revolving rod suspended from said casing, and connecting means between rod and computing cylinder, whereby, by longitudinal movement of the rod, rotary movement is imparted to said cylinder, substantially as and for the purpose set forth." This limitation to specific means is certainly a narrowing of the claim.

It was accepted, as the patentee said, "in view of the fact that the allowed claims appear to cover the invention as it would be constructed in practice."

We cannot think it was the intention of the department, after requiring the insertion of "a spring-supported, load-bearing, and cylinder-revolving rod" and "connecting means between rod and computing cylinder" to secure the rotary movement of the inner cylinder as a means of saving claim 1, to then permit the claim to be granted broadly in allowing other *claims. And we believe [621] it would be a more reasonable construction of the letter of the applicant to say that he recognized that his invention, "as constructed in practice," must have read into it to sustain the claim, the specific means shown for translating the vertical movement of the runner into the rotary movement of the chart drum, rather than as sav-

ing a right to construe a claim broadly as including in one claim what had just been refused in another.

It is to be noted that Hayden, in his specifications, says:

"The spiral rod passing through the lower ends of the casing, and serving, by means of its connection with the two cylinders, to rotate the computing cylinder, is regarded as the essence of this feature of the invention, however, regardless of the precise details of connection between cylinders and rod."

In view of the action of the Patent Office in this case and the acquiescence of the applicant, considered also in view of the state of the art, in our opinion it is necessary to have this novel element of the invention read into them in order to save the claims of Hayden's patent.

Conceding that this spiral rod and its connections with the cylinder in the manner and for the purposes stated is a novel feature in the combination, and entitled to protection, it is of that narrow character of invention which does not entitle the patentee to any considerable range of equivalents, but must be practically limited to the means shown by the inventor. The distinction between pioneer inventions permitting a wide range of equivalents and those inventions of a narrower character, which are limited to the construction shown, has been frequently emphasized in the decision of this court. Cimiotti Unhairing Co. v. American Fur Ref. Co. 198 U. S. 399, 406, 49 L. ed. 1100, 1103, 25 Sup. Ct. Rep. 697, and cases therein cited.

Thus limiting the invention, we do not think the construction of the defendant amounts to an infringement. Its mechanism, by means of which the downward movement of the load accomplishes the rotary [622] movement of the cylinder, consists *of a bar which has a rod extended upward and carrying a rack which meshes with a pinion on a shaft journaled in bearings on a crossbar of the frame of the machine. On this shaft is a gear meshing with the pinion, secured to an upright shaft journaled in bearings in the frame, and projecting above it so as to receive a light frame composed of cross arms and a circular rim to which the chart drum is secured. The downward movement of the load-supporting hook causes the rack to move in the same direction, rotating the horizontal shaft by means of the pinion, and this movement is communicated by means of the gearing to the upright shaft carrying the chart drum. The cylinder-revolving rod with its connections, which, as we have seen, was made an essential element to accomplish invention in Hayden's device, is not found. The complainant's expert is of opinion that it is shown in the hook at the bottom of defendant's scale for holding the load pan. We cannot agree to this conclusion; the hook is not the cylinder-revolving spiral rod and does not accomplish its function.

The court of appeals held the sixth claim void. We are of opinion that it cannot be allowed for the broad claim "mechanism for translating the vertical movement of the runner into the rotary movement of the chart drum," but must be limited to Hayden's suspended rod with its spiral, engaging with the rollers, or similar devices on the cylinder, practically in the manner and for the purposes shown by him. If the claim be thus limited, for the reasons we have already stated, the mechanism of the defendant does not infringe.

We find no error in the decree rendered by the Court of Appeals, and it is affirmed.

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*JOHN W. DUKE, Mayor, and William T. [623] Walker et al., Councilmen of the City of Guthrie, Plffs. in Err.,

v.

C. W. TURNER and James A. Kirkwood.

(See S. C. Reporter's ed. 623-632.)

Limitation of actions—mandamus.

1. A proceeding in mandamus cannot be deemed to be governed by the limitations prescribed by Okla. Code, §§ 18, 23, for civil actions, in view of the provision of § 694 of such Code, that pleadings in mandamus are to be construed and may be amended and issues joined and the proceedings had in the same manner as in a civil action, and of the declaration in § 687, that writs of mandamus may not be issued where there is a plain and adequate remedy in the ordinary course of law.

Limitation of actions—mandamus—laches.

2. Mandamus to compel the levy of a tax to satisfy municipal warrants will not be refused on the theory that the relators have slept upon their rights for an unreasonable time, to the prejudice of the rights of respondents, or of other interested persons, where, in some form, legal proceedings for the collection of these warrants have been prosecuted by various holders in different courts up to the commencement of the mandamus proceedings, without beneficial results.

[No. 178.]

NOTE.—As to laches as a defense—see notes to Hammond v. Hopkins, 36 L. ed. U. S. 135; Felix v. Patrick, 36 L. ed. U. S. 720; Middletown v. Newport Hospital, 1 L.R.A. 191; Calhoun v. Delhi & M. R. Co. 8 L.R.A. 248; Coffey v. Emigh, 10 L.R.A. 125; Pratt v. Carroll, 3 L. ed. U. S. 667; and Abraham v. Ordway, 39 L. ed. U. S. 1037.

ary 24, 25, 1907. Decided February 25, 1907.

R to the Supreme Court of the y of Oklahoma to review a judgaffirmed a judgment of the Disof Logan County, in that terriing mandamus to compel the t to satisfy municipal warrants.

case below, 14 Okla. 284, 78 Pac.

are stated in the opinion.

Huston argued the cause, and, s. L. E. Payson, William R. mes Hepburn, and Laurence & l a brief for plaintiffs in error.

k Dale argued the cause, and, . G. C. Bierer, filed a brief for in error.

ce Day delivered the opinion of

nal action was a proceeding in commenced in the district court unty, Oklahoma territory, July Turner and Kirkwood against and councilmen of the city of he petitioners obtained a writ of in the district court to compel cials, for the payment of certain levy a tax upon the property residing in the territory covered former "provisional governknown as Guthrie proper, East est Guthrie, and Capitol Hill, d in the city of Guthrie.

rrants were issued in pursuance l act of the territorial legislaved December 25, 1890. 1 Wil: Anno. Stat. 260, 261. This act ubject of consideration in this alidity was sustained, and its his found in Guthrie Nat. Bank v. 3 U. S. 528, 43 L. ed. 796, 19 p. 513. The act is set forth in of the report of that case at d. at p. 797, Sup. Ct. Rep. at p. arrants sued upon are seventeen , all bearing the date of July 1, maturing in various years, from 94, to July 1, 1898, inclusive. ants are in the following form:

f the city of Guthrie, Oklahoma territory.

No. 6.

of the city of Guthrie:

after date pay to the order of Cunningham, receiver National rie, the sum of five hundred and nd 15.100 dollars with interest the rate of 6 per centum per m June 3, 1891, from any moneys which shall arise from special levy for the payment of city warrants issued under the provisions of chapter No. 14, of the Statutes of Oklahoma, providing for the payment of indebtedness of the provisional governments of the cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, upon the subdivision of Guthrie known as East Guthrie.

By the order of the city council, July 1, 1893.

A. M. McElhinney, Mayor.

Attest: E. G. Milliken, City Clerk.

The supreme court of the territory preceded its opinion with the following statement:

"This is the third time that these warrants have been brought before this court. W. H. Gray, receiver of the National Bank of Guthrie, and successor to Harper S. Cunningham, on the 7th day of September, 1895, commenced a mandamus proceeding, identical with this, in the district court of Logan county, for the purpose of compelling the then mayor and councilmen of the city of Guthrie to levy a tax to provide a fund for the payments of these warrants; the district court allowed the writ, but the case was appealed to this court, and, on the twelfth day of February, 1897, was reversed. [5 Okla. 188, 48 Pac. 106.] After this reversal nothing whatever was done by the holder of these warrants in the way of taking any steps toward collecting them for more than four years *thereafter. But after [627] the decision in the case of the Guthrie Nat. Bank v. Guthrie was rendered in the Supreme Court of the United States [173 U. S. 528, 43 L. ed. 796, 19 Sup. Ct. Rep. 513] the holders of these warrants who had lain dormant during the years made another move. The old case of Gray v. Martin, after it had been reversed and remanded, had been dropped from the docket, and on the 28th day of June, 1901, Turner and Kirkwood filed their motion as the successors in interest of Gray, to have the case redocketed, and also filed on the same day an application to have the case revived in their names, as the successors in interest of Gray, and on the same day they filed their motion to dismiss said action, which motion was sustained, and the case dismissed. Shortly after the dismissal of the original mandamus case Turner and Kirkwood brought suit against the city of Guthrie upon these same warrants, wherein a judgment against the city for the amount of the warrants was prayed for; they failed in this suit in the district court and appealed to the supreme court, where the judgment of the lower court was affirmed. [13 Okla. 26, 73 Pac. 283.]

"On the 23d day of July, 1903, after the

final decision in this court in the case of Turner v. Guthrie, this mandamus proceeding was commenced against the mayor and councilmen, the same being in all respects similar to and identical with the original mandamus proceeding brought by W. H. Gray, receiver, upon the same warrants in 1895. The return and answer of the alternative writ sets forth the same defense as was alleged in the return to the proceedings brought by Gray, receiver, and also alleges the bar to the action of the statute of limitations. Trial was had before the court, wherein it was agreed that the allegations set forth in the fourth answer or return of the defendants to the alternative writ are true, and which show the facts substantially as above set forth. Thereupon the court rendered judgment for the plaintiffs below, and allowed a peremptory writ of mandamus [628] against plaintiffs in error *from which judgment and final order the plaintiffs in error appeal to this court." [14 Okla. 285, 78 Pac. 108.]

The supreme court of the territory affirmed the judgment of the district court upon the ground that the statute of limitations, which is also the defense made in the case upon which the decision of the appeal to this court turns, did not begin to run in favor of the municipal corporation upon the obligation evidenced by the warrants until the municipality had provided funds by which payment could be made.

The authorities are much in conflict as to whether a statute of limitations, without express words to that effect, governs a proceeding in mandamus as though it were an ordinary civil action. Some of the cases hold that the statute of limitations applies which would govern an ordinary action to enforce the same right.

Other cases hold that the statute of limitations does not apply as it would to ordinary civil actions, but the relator is only barred from relief where he has slept upon his rights an unreasonable time, particularly when the delay has been prejudicial to the rights of the respondent. The cases pro and con are collected in a note to § 30b, High on Extraordinary Legal Remedies, 3d ed.

The question is not a new one in this court; it was under consideration in Chapman v. Douglas County, 107 U. S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62. That case was a bill in equity filed September 10, 1877, to compel the county of Douglas to surrender possession of two certain tracts of land to which the county had acquired title through deed made by Chapman, March 5, 1859, or, in case the county elected to retain and hold the land, that it be compelled to pay the reasonable price and value thereof to the complainant. The land had been conveyed for a "poor farm." The county made a payment on the land and gave its notes, secured by mortgage, payable in one, two, three, and four years. Afterwards the supreme court of the state decided that, in the purchase of lands for such a purpose, the county could not be bound to pay the purchase money at any *specified time or to secure it by mortgage upon the land, but was limited to a payment in cash and to the levy of an annual tax to create a fund wherewith to pay the residue. The notes remaining unpaid, the bill was filed in equity for the purpose above stated. In considering the nature of the relief and the applicability of the statute of limitations Mr. Justice Matthews, speaking for the court (p. 355, L. ed. p. 381, Sup. Ct. Rep. p. 68), said:

"And if in such cases a proceeding in mandamus should be considered to be the more appropriate, and, perhaps, the only effective, remedy, it also is not embraced in the statute of limitations prescribed generally for civil actions. The writ may well be refused when the relator has slept upon his rights for an unreasonable time, and especially if the delay has been prejudicial to the defendant, or to the rights of other persons, though what laches, in the assertion of a clear legal right, would be sufficient to justify a refusal of the remedy by mandamus, must depend, in a great measure, on the character and circumstances of the particular case. Chinn v. Trustees, 32 Ohio St. 236; Moses, Mandamus, 190. There is no statute of limitations in Nebraska applicable to that proceeding."

It will be observed that the learned justice refers in the citation just given to Chinn v. Trustees, supra, and Moses on Mandamus, 190. In that treatise the author gives his preference for the English rule, that the party should suffer no unreasonable delay in the opinion and discretion of the court, as more just and equitable than the rule countenanced by some of the American cases.

The case of Chinn v. Trustees, supra, holds that under the Ohio Code there is no strict limitation as to the time wherein a writ of mandamus may be obtained, and the case is directly in point, owing to the similarity of the Codes of Ohio and Oklahoma.

The statute of limitation relied upon in the case at bar is the three years' limitation, contained in second paragraph, § 18, Oklahoma Code, 2 Wilson's Rev. & Ann. Stat. 973, 975, as to statutory liabilities, and § 23, regulating the time *for the beginning of a new action to one year after reversal or failure on a former action. These sections in article 3, "Time of Commencing Civil Actions," are as follows:

'Sec. 18. Civil actions, other than for the overy of real property, can only be ught within the following periods, after cause of action shall have accrued, and afterwards:

'First. Within five years, an action upon contract, agreement, or promise in iting.

'Second. Within three years, an action on a contract not in writing, express or plied; an action upon a liability created statute other than forfeiture or penalty.

. . . . . .

"Sec. 23. If any action be commenced ithin due time, and a judgment thereon r the plaintiff be reversed, or if the plainff fail in such action otherwise than upon e merits, and the time limited for the me shall have expired, the plaintiff, or, if e die and the cause of action survive, his presentatives, may commence a new action ithin one year after the reversal or failre."

The limitation to three years, said to be pplicable here, is upon an action created statute other than forfeiture or penalty; ut this language is in a section limiting *ivil actions* other than for the recovery of al property, and the language used in § 3 has reference to actions of like character.

The proceeding in mandamus is regulated article 33, Oklahoma Code, 2 Wilson's ev. & Anno. Stat. 1130. That the proceedg is not regarded as a civil action is shown § 694, Code, 2 Wilson's Rev. & Anno. Stat. 31, which provides that pleadings are to construed and may be amended in the me manner "as pleadings in a civil acon," and issues joined, tried, and the proedings had, "in the same manner as in a il action." The Oklahoma Code (§ 687) o declares that writs of mandamus may t be issued where there is a plain and adeate remedy in the ordinary course of the v.

In Chinn v. Trustees, ubi supra, Judge tt, delivering the opinion of the Ohio reme court, said:

"'The Code of Civil Procedure limits the e within which an action can be brought on a liability created by statute, other n a forfeiture or penalty,' to six years. 4. This provision is found in title 2 of Code, the object of which is to define and scribe 'the time of commencing civil acns.' The civil action of the Code is a stitute for all such judicial proceedings prior thereto, were known either as acns at law or suits in equity § 3. By , the limitations of this title are expressconfined to civil actions. But proceedgs in mandamus were never regarded as action at law, or a suit in equity, and not, therefore, a civil action within the meaning of the Code. Mandamus is an extraordinary or supplementary remedy, which cannot be resorted to if the party has any adequate, specific remedy. The Code provides for and regulates this remedy, but does not recognize it as a civil action."

This language is no less applicable to the Oklahoma Code. The proceeding in mandamus is not a civil action, and therefore not within the terms of the statute of limitations.

Following, then, the rule recognized and approved in Chapman v. Douglas County, supra, the question is, Should the writ be refused because the relator has slept upon his rights for an unreasonable time, and has the delay caused prejudice to the defendant, or to the rights of other interested persons?

We perceive nothing in the record to warrant that conclusion. Gray, as receiver of the National Bank of Guthrie and successor of Cunningham, to whom the warrants were payable, on September 7, 1895, began a suit in mandamus in Logan county, Oklahoma. He prevailed in that court. The case was reversed on February 12, 1897, by the supreme court of the territory (5 Okla. 188, 48 Pac. 106), and was remanded and refiled in the district court, April 7, 1897.

The validity of the act was in controversy in the case of Guthrie Nat. Bank v. Guthrie, and sustained in this court, April 3, 1899 (173 U. S. 528, 43 L. ed. 796, 19 Sup. Ct. Rep. 513), reversing the supreme court of the territory.

*On the 28th day of June, 1901, Turner [632] and Kirkwood, as the successors in interest to Gray, having purchased the warrants, as they allege, on January 5, 1901, filed their motion to dismiss the original action, which was sustained. They then (on June 28, 1901) brought suit against the city of Guthrie for judgment upon the warrants against the city, in which they failed in the district court, and on appeal to the supreme court, that court holding that the remedy, if any, was by mandamus. 13 Okla. 26, 73 Pac. 283. On the 23d day of July, 1903, this mandamus proceeding was begun.

These facts do not disclose any laches in asserting their rights such as would bar the right to obtain a writ of mandamus, nor does it appear that the municipal corporation has been in anywise prejudiced by the delay. In some form legal warfare seems to have been waged for the collection of these warrants by various holders in different courts without beneficial results until the present action.

While we do not put our decision upon the same grounds as the Supreme Court of the territory, we think its conclusion was right, and its judgment will be affirmed.

J. T. SMITHERS, Plff. in Err.,
v.
T. SMITH, S. A. Greer, R. C. Reagan, et al.

(See S. C. Reporter's ed. 632–646.)

Courts — jurisdiction of circuit court — amount in dispute.

1. Plaintiff's allegations of value govern in determining the jurisdiction of a Federal circuit court except where, upon the face of his own pleadings, it is not legally possible for him to recover the jurisdictional amount, or where such allegations are fraudulently made for the purpose of creating the jurisdiction.

Courts — jurisdiction of circuit court — amount in dispute.

2. A suit for the recovery of land of the alleged value of $5,000, and for $2,000 damages for its detention, cannot be dismissed by a Federal circuit court, acting under the authority of the act of March 3, 1875 (18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 511) § 5, as not really and substantially involving a dispute or controversy properly within its jurisdiction, because, after hearing evidence, the court is satisfied that the defendants did not act jointly, as plaintiff alleged and defendants denied, and that the land taken and held by each defendant was of less value than $2,000, since in so deciding the court did not determine a jurisdictional fact, but an essential element of the merits, upon which the parties were entitled to the finding of a jury.

[No. 138.]

Submitted December 21, 1906. Decided February 25, 1907.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas to review a judgment dismissing an action for the recovery of land and for damages for its detention on the ground that the jurisdictional amount was not involved. Reversed and remanded for further proceedings.

Statement by Mr. Justice Moody:

The plaintiff in error, a citizen of New York, brought in the circuit court for the northern district of Texas a petition to try the title to 1,280 acres of land, against ten defendants, citizens either of Texas, Kentucky, or Illinois. Six of the defendants were warrantors of the plaintiff's title, and questions arising as to them are not material here. The petition alleged that upon January 15, 1902, "the defendants Reagan Smith, Greer, and Deven unlawfully entered upon said premises and dispossessed plaintiff thereof, and have since that date unlawfully withheld from the plaintiff the possession thereof, to his damage $2,000.00; that the plaintiff's title was derived by mesne conveyances from two patents of adjoining lots of land, known respectively as survey 27 and survey 91; that prior to plaintiff's acquisition of title the two surveys were circumscribed by a fence 2 miles long and 1 mile wide, making a single tract of land of those dimensions; that the value of the land was $5,000, and that the defendants have destroyed fences and other improvements and thereby damaged the plaintiff in the sum of $2,000; and prayed possession of the land, and damages.

The answer of Reagan alleged that he was the owner of part of the land described in the petition by a title separate and independent from the other defendants; that his land is inclosed by a fence and in his possession; that he disclaims title to the remainder of the land claimed; that the allegation in the petition that he entered upon any other than his own land was untrue, "and made with the intent to confer upon this court jurisdiction over him;" that the value of the land which he entered, is in possession of, and claims is less than $800, and asked that the suit abate as to him.

Treating the foregoing answer as a plea in abatement, Reagan, without waiving it, further answered, disclaiming as to part of the land claimed in the petition and pleading the general issue as to the remainder.

The answer of Greer was substantially the same, except that the value of the land to which he entered and was possessed of was alleged to be less than $600. Greer further answered, alleging the pendency in the courts of the state of an action "to the title to recover of S. A. Greer, a defendant in the case at bar, one T. Smith and the title and possession of the land described in the petition in the case" and praying that the cause await the termination of the cause in the state court. The answer of Smith contained the allegation with regard to the pendency of the action in the state court as that Greer disclaimed as to part of the land claimed in the petition, and pleaded the general issue as to the remainder. Deven filed an answer.

More than a year after the foregoing pleadings were filed Smith filed what was entitled "First Original petition." In it Lee, a citizen of Texas, was named as an additional defendant. The amendment set

NOTE.—On the jurisdiction of Federal courts as affected by the amount in dispute —see notes to Rich v. Bray, 2 L.R.A. 225; Auer v. Lombard, 19 C. C. A. 75; and Tennessee Shoe Co. v. Roper, 36 C. C.

stantially like the original petition, except that it alleged that "the defendants Reagan, Smith, Greer, Lee, and Deven together unlawfully entered upon said premises and dispossessed plaintiff thereof," and that "all of said defendants have jointly taken possession of plaintiff's said land;" that the plaintiff has acquired title to land by the statute of limitations, and that the action is one to fix and determine the boundaries, which are uncertain, and that "the entire land is the subject-matter of this controversy as between the plaintiff and each and all of said defendants."

Subsequently Lee answered, alleging that he was the owner of part of the land de-
[635] scribed in plaintiff's petition by a title *separate and independent from that of the other defendants, and with respect to that he pleads the general issue, and disclaims as to the remainder. The answer also alleged that the matter in controversy did not exceed the sum of $2,000, and that "the claim of plaintiff as set forth in his petition as to the value of said land, improvements, rents, and damages, exceeding $2,000, has been fraudulently alleged with the intent and purpose to confer jurisdiction upon this honorable court, when in truth and in fact no such jurisdiction existed, because the matter in controversy is of less than $2,000 in value."

Subsequently Smith amended his answer and alleged that he was the owner and in possession of 443 acres of the land described in plaintiff's petition, which was of the value of $1,500, and disclaimed as to the remainder. He also alleged that the valuation placed by the plaintiff on the land, and the plaintiff's allegation that "he and S. A. Greer jointly took possession of said lands," was "fraudulently claimed and alleged for the intent and purpose of conferring jurisdiction upon this honorable court, when in truth and in fact no such jurisdiction existed, because the whole matter in controversy is and was of less value than $2,000." He further alleged that the controversy had been adjudicated in the state court. The pleas to the jurisdiction were, on motion of the defendants, tried by the judge, jury being waived, who found that "the pleas of each of the said defendants Reagan, Lee, Smith, and Greer is fully proved and sustained, and that this court has no jurisdiction over the subject-matter in dispute," and dismissed the action for want of jurisdiction. A writ of error was allowed "solely upon the question of jurisdiction," the judge, certifying that no other question was tried, transmitted the record containing a bill of exceptions to this court.

The bill of exceptions shows that it was agreed that the plaintiff owned the two surveys, 91 and 27, containing 1,280 acres, of a value much exceeding $2,000; that Lee owned section 32, Reagan section 31, Smith section 28, and Greer *section 90, all of which [636] were adjoining sections and surrounded three sides of the plaintiff's land. The dispute concerned the situation of the boundaries. As the defendants claimed the boundaries, they owned 1,014 acres of what the plaintiff claimed to be his land, which, when he acquired it, was inclosed by a fence in one parcel of 1,280 acres. Of the 1,014 acres taken from the land claimed by plaintiff, Lee claimed 96, Reagan 288, Smith 443, and Greer 187. The evidence, which is reported in full in the bill of exceptions, shows the following facts: In 1892, before any of the defendants appeared claiming title, the 1,280 acres claimed by the plaintiff was inclosed as one parcel by a substantial fence, and was known as the Pendleton pasture. Subsequently the plaintiff acquired title to the inclosed land. Smith pulled down part and Reagan another part of the Pendleton pasture fence, and Smith and Greer each pastured their cattle throughout the Pendleton pasture.

Mr. **David T. Bomar** sumbitted the cause for plaintiff in error. Mr. Frank E. Dycus was on the brief:

A joint trespass by the defendants upon the inclosed lands of the plaintiff authorized an action by the plaintiff to join all of the defendants in one suit.

Greer v. Mezes, 24 How. 268, 16 L. ed. 661; Louisville & N. R. Co. v. Smith, 63 C. C. A. 1, 128 Fed. 5; McGuire v. Pensacola City Co. 44 C. C. A. 670, 105 Fed. 679; 1 Pom. Eq. Jur. §§ 145–273.

The right to fix and establish the boundaries of the entire 1,280 acres being the object of the suit, as to each and all of the defendants, the value of the entire tract is the matter in dispute.

Louisville & N. R. Co. v. Smith, supra; Muncy v. Mattfield (Tex. Civ. App.) 40 S. W. 346.

A disclaimer by the defendants, or either of them, does not take away the jurisdiction of the court, which is fixed by the claim of the demandant.

Green v. Liter, 8 Cranch, 230, 3 L. ed. 545; Way v. Clay, 140 Fed. 355; McGuire v. Pensacola City Co. supra.

Where the circuit court dismisses a case for lack of jurisdictional value, the evidence on which that conclusion is reached must be shown of record to a legal certainty. The lack of jurisdiction must clearly appear.

Barry v. Edmunds, 116 U. S. 553, 29 L. ed. 730, 6 Sup. Ct. Rep. 501; Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; Put-in-Bay Waterworks Light & R. Co. v. Ryan, 181 U. S. 409, 45 L. ed.

927, 21 Sup. Ct. Rep. 709; Gage v. Pumpelly, 108 U. S. 164, 27 L. ed. 668, 2 Sup. Ct. Rep. 390.

The Supreme Court will look into the facts, review the evidence, and determine whether it supports the action of the circuit court in dismissing the case for lack of jurisdiction.

Wetmore v. Rymer, supra; Steigleder v. McQuesten, 198 U. S. 141, 49 L. ed. 986, 25 Sup. Ct. Rep. 616.

The jurisdiction of the circuit court is fixed by the matter in dispute at the date of the decree rendered in that court.

Knapp v. Banks, 2 How. 74, 11 L. ed. 184; Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494; Massachusetts Ben. Asso. v. Miles, 137 U. S. 689, 34 L. ed. 835, 11 Sup. Ct. Rep. 234.

It is sufficient to give jurisdiction to the court that it had jurisdiction at the time the decree was rendered; and it is immaterial how long before that time its jurisdiction had attached.

Washer v. Bullitt County, 110 U. S. 558, 28 L. ed. 249, 4 Sup. Ct. Rep. 249; Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; First Nat. Bank v. Radford Trust Co. 26 C. C. A. 1, 47 U. S. App. 692, 80 Fed. 572.

In the action of trespass to try title in Texas, the plaintiff may, by amendment, set up a new cause of action or a new title acquired by him after the suit was brought. The cause thereupon proceeds as a new suit based on such amendment.

Collins v. Ballow, 72 Tex. 330, 10 S. W. 248; Ballard v. Carmichael, 83 Tex. 359, 18 S. W. 734; Sinsheimer v. Kahn, 6 Tex. Civ. App. 143, 24 S. W. 535; Schmidt v. Huff, 7 Tex. Civ. App. 593, 28 S. W. 1055.

The disclaimer by the defendants of lands found in their possession did not take away the jurisdiction of the court, provided said lands exceeded in value, with the damages and rents, the sum of $2,000.

Green v. Liter, 8 Cranch, 229, 3 L. ed. 545; Galbraith v. Howard, 11 Tex. Civ. App. 230, 32 S. W. 808; Wootters v. Hall, 67 Tex. 513, 3 S. W. 725; Dikes v. Miller, 24 Tex. 422; Capt v. Stubbs, 68 Tex. 225, 4 S. W. 467; Tate v. Wyatt, 77 Tex. 492, 14 S. W. 25.

The jurisdiction of the court as between plaintiff and Smith and Greer is not to be determined by the value of the right of the present possession, but by the value of the entire 720 acres of the land in controversy now in Smith's possession.

Black v. Jackson, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648.

Mr. Theodore Mack submitted the cause for defendants in error. Messrs. Sam J. Hunter and Ray Hunter were on the brief:

The presumption is that a cause is wi[illegible] out the jurisdiction of the circuit co[illegible] unless the contrary affirmatively appear[illegible]

Grace v. American Cent. Ins. Co. 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 2[illegible]7; Peper v. Fordyce, 119 U. S. 469, 30 L. ed. 435, 7 Sup. Ct. Rep. 287; Turner v. B[illegible] of North America, 4 Dall. 8, 1 L. ed. 7[illegible]; Livingston v. Van Ingen, 1 Paine, 45, Fed. Cas. No. 8,420; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 168.

Distinct demands cannot be united in one suit by a plaintiff against several defendants in order to give the court jurisdiction.

1 Desty, Fed. Proc. 9th ed. 374; Walter v. Northeastern R. Co. 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348; Fishback v. Western U. Teleg. Co. 161 U. S. 96, 40 L. ed. 630, 16 Sup. Ct. Rep. 506; Citizens' Bank v. Cannon, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89; Busey v. Smith, 67 Fed. 13.

If several persons have a common undivided interest, although separable as between themselves, the amount of their joint interest is the test of the jurisdiction. But this is not true where the claims are from their nature separate.

Holt v. Bergevin, 60 Fed. 1; Walter v. Northeastern R. Co. supra; Putney v. Wh[illegible]mire, 66 Fed. 385.

Where shareholders are individually li[illegible]ble for the debts of a corporation, th[illegible] claims of creditors against shareholders a[illegible] several, and cannot be joined to make [illegible] the required amount.

1 Desty, Fed. Proc. 9th ed. 375; Ame[illegible] v. Lombard, 19 C. C. A. 72, 33 U. S. App. [illegible], 72 Fed. 209.

In an action by the taxpayers to restra[illegible] the issue of municipal bonds, the amou[illegible] of taxes which plaintiff would have to pay, and not the entire issue, would be the te[illegible] of jurisdiction of amount.

1 Desty, Fed. Proc. 9th ed. 375; Colvin v. Jacksonville, 158 U. S. 456, 39 L. ed. 1[illegible], 15 Sup. Ct. Rep. 866.

An allegation of the amount of taxes to be collected in different counties cannot be made for the purpose of obtaining the jurisdictional amount of $2,000.

1 Desty, Fed. Proc. 9th ed. 376; Fishback v. Western U. Teleg. Co. and Citizens' Bank v. Cannon, supra.

When one sues for an amount which exceeds $2,000, but at the trial his own evidence shows that he actually claims less than $2,000, the court is without jurisdiction.

1 Desty, Fed. Proc. [illegible] ed. 377; Cabot v. McMaster, 61 Fed. 129; [illegible]nited States Ex[illegible] Co. v. Poe, 61 Fed. 475; Horst v. Merkle, 204 U. S.

Fed. 502; Holden v. Utah & M. Machin- Co. 82 Fed. 209.

'he court does not acquire jurisdiction ere the amount claimed is not claimed good faith.

ank of Arapahoe v. David Bradley & Co. C. C. A. 206, 36 U. S. App. 519, 72 Fed. ; American Wringer Co. v. Ionia, 76 l. 6.

ll doubts as to jurisdiction must be re- red against the court's jurisdiction.

t. Louis, I. M. & S. R. Co. v. Davis, 132 l. 629; McDaniel v. Traylor, 123 Fed. 338.

Pon defendants filing disclaimer the rt may render judgment for the land claimed.

usk v. Manghum, 14 Tex. Civ. App. 621, S. W. 459.

Matter in dispute" is something upon ich the court must hear evidence.

tillwell-Bierce & S. V. Co. v. William- n Oil & Fertilizer Co. 80 Fed. 69; Bow- n v. Chicago & N. W. R. Co. 115 U. S. , 29 L. ed. 502, 6 Sup. Ct. Rep. 192; bot v. McMaster, 61 Fed. 131.

n disclaimer leaving court without ju- diction, see Cooper v. Preston, 105 Fed. ; Stemmler v. McNeill, 102 Fed. 660; rring v. Swain, 84 Tex. 525, 19 S. W. ; Wootters v. Hall, 67 Tex. 515, 3 S. W. .

Mr. Justice **Moody**, after making the fore- ng statement, delivered the opinion of court:

The plaintiff in error brought an action the circuit court for the recovery of cer- n land and damages for the detention reof, basing jurisdiction upon a diversity citizenship, which was undisputed. In ch case it is essential to the jurisdiction the circuit court that "the matter in dis- te exceeds, exclusive of interest and costs, e sum or value of *$2,000." Act of March 1875, chap. 137, § 1, 18 Stat. at L. 470; ended act of August 13, 1888, chap. 866, 1, 25 Stat. at L. 434, U. S. Comp. Stat. 01, p. 508. The action was dismissed by e authority given by § 5 of the act of arch 3, 1875, in which it is provided that , in any suit commenced in a circuit urt, . . . it shall appear to the sat- faction of said circuit court, at any time ter such suit has been brought, . . . at such suit does not really and sub- antially involve a dispute or controversy operly within the jurisdiction of said cir- it court, or that the parties to such suit ve been improperly or collusively made or ined either as plaintiffs or defendants for e purpose of creating a case cognizable . . under this act," the court shall dis- iss the suit. The propriety of the dis- issal is brought here for review by virtue of § 5 of the act of March 3, 1891 [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549], and is the only question for decision.

The plaintiff was the owner in fee simple of a quadrangular lot of land 2 miles long and 1 mile wide, containing 1,280 acres, inclosed by a fence, and known as the Pendleton pasture. Its value largely exceeded $2,000. He sought to recover possession of this land and damages from the defendants Reagan, Smith, Greer, Deven, and Lee, who, as he claimed, had disseised him of the land, and were unlawfully holding possession. In ascertaining the precise nature of the plaintiff's claim we take into account not only the original petition, but that pleading entitled "First amended original petition," although it is urged that it does not appear that the amendment was allowed by the court. It is not clear that the amendment adds anything material to the question presented here, to the original petition, but, however that may be, as it is certified to be a part of the record and was answered by one of the defendants, we assume that it was properly allowed, and was not a mere casual intruder among the papers in the case. The plaintiff alleged in substance in the original, and more specifically in the amended, petition that the defendants had jointly entered upon, taken, and held possession of, his land, which was of the value of $5,000, and *inflicted damages of $2,000 [641] upon him by the unlawful entry and possession, and sought to recover of all the defendants the whole parcel of land and all the damages claimed. Thus the plaintiff set forth a case within the jurisdiction of the court. Giving to the defendants' answers the broadest possible effect, they each, for the purpose of disputing the jurisdiction of the court, denied that they had jointly entered upon plaintiff's land, and, each disclaiming as to the remainder, alleged that, under a title separate and independent from the other defendants, he had entered upon and held possession of only a certain part of the plaintiff's land, which, together with the damages inflicted by the entry and possession, was of much less value than $2,000. The answers further alleged that the allegations of the value of the land, the extent of the damages, and the joint action of the defendants in entering, taking, and holding possession, were fraudulently made by the plaintiff with the intent and purpose of conferring jurisdiction upon the court, when in truth no such jurisdiction existed, because the matter in controversy was in reality less than the value of $2,000. Upon the motion of the defendants the judge, without a jury, passed upon the question of jurisdiction, and, after hearing evidence,

found that the pleas of the defendants as to the jurisdiction were "fully proved and sustained," and that the court has no jurisdiction over the subject-matter in dispute, and dismissed the suit.

The order of the court is subject to review in this court in respect of the rulings of law and findings of fact upon the evidence. Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293.

The absence of any opinion in the court below, and of any finding of fact except by reference to the several answers of the defendants, which are said to be "fully proved and sustained," and of any more specific recital in the judgment than that the suit was dismissed for want of jurisdiction, renders it somewhat difficult to understand the facts and reasons which led to the dismissal. But, upon an examination of the whole record, it seems clear that the court found:

[642] *(1) That the defendants did not jointly take and hold the plaintiff's land;

(2) That each defendant, acting independently of the others, took and held only a part of plaintiff's land, and that each part thus taken and held by each defendant was of less value than $2,000; and

(3) That the plaintiff, in his petition, had fraudulently stated the value of his land, the extent of his damages, and the joint character of defendants' action in entering and taking possession of his land, and had done this for the purpose of conferring jurisdiction upon the court.

If the last finding of fact was warranted by the evidence there is no need of going further, because such a state of facts would demand a dismissal of the action. Ordinarily the plaintiff's claim with respect to the value of the property taken from him or the amount of damages incurred by him through the defendants' wrongful act measures, for jurisdictional purposes, the value of the matter in controversy (Smith v. Greenhow, 109 U. S. 669, 27 L. ed. 1080, 3 Sup. Ct. Rep. 421; Barry v. Edmunds, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17), unless, upon inspection of the plaintiff's declaration, it appears that, as a matter of law, it is not possible for the plaintiff to recover the jurisdictional amount (Lee v. Watson, 1 Wall. 337, 17 L. ed. 557; Schacker v. Hartford F. Ins. Co. 93 U. S. 241, 23 L. ed. 862; Vance v. W. A. Vandercook Co. 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 645; North American Transp. & Trading Co. v. Morrison, 178 U. S. 262, 44 L. ed. 1061, 20 Sup. Ct. Rep. 869). The rule that the plaintiff's allegations of value govern in determining the jurisdiction, except where, on the face of his own pleadings, it is not legally possible for him to recover the jurisdictional amount, controls even where the declaration shows that a perfect defense might be interposed to a sufficient amount of the claim to reduce it below the jurisdictional amount. Schunk v. Moline M. & S. Co. 147 U. S. 500, 37 L. ed. 255, 13 Sup. Ct. Rep. 416. In the last case the plaintiff's petition prayed judgment on several promissory notes, of which some, amounting to $530, were due, and others, amounting to $1,664, were not due, the jurisdictional amount then, *as now, being[643] $2,000. In holding that the court had jurisdiction of the claim this court, by Mr. Justice Brewer, said:

"Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute. Suppose an action were brought on a non-negotiable note for $2,500, the consideration for which was fully stated in the petition, and which was a sale of lottery tickets, or any other matter distinctly prohibited by statute,—can there be a doubt that the circuit court would have jurisdiction? There would be presented a claim to recover the $2,500; and whether that claim was sustainable or not, that would be the real sum in dispute. In short, the fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defense will be presented by the defendant, or, if presented, sustained by the court?"

Nevertheless, however stringent and far-reaching the rule may be that it is the plaintiff's statement of his case which governs in determining the jurisdiction, it does not exclude the power of the court to protect itself against fraud. This was pointed out in Smith v. Greenhow, ubi supra, where it was said that, if the court found as a fact that the damages were laid in the declaration colorably and beyond a reasonable expectation of recovery, for the purpose of creating jurisdiction, there would be authority for dismissing the case; and, following this statement of the law, it was held that where the judge of the circuit court, upon sufficient evidence, found that the damages had been claimed and magnified fraudulently beyond the jurisdictional amount, the action should be dismissed. Globe Ref. Co. v. Landa Cotton Oil Co. 190 U. S. 540, 47 L. ed. 1171, 23 Sup. Ct. Rep. 754. It follows, therefore, as has been said,

if the third finding of the judge in court below was warranted, his action lismissing the case should be affirmed. after an examination of the evidence, are of the opinion *that nothing in it ranted any such finding. It appeared rly that the Pendleton pasture, which plaintiff sought to recover against all defendants, was of a value much in ss of the jurisdictional amount. There not a word of evidence reflecting upon plaintiff's good faith in bringing the on, in joining the defendants, or in ning his petition. He doubtless pre- ed to try his controversy in the Federal rts, and, whatever the motive of his pref- ice may have been, he had the right to upon it. Blair v. Chicago, 201 U. S. 400, L. ed. 801, 26 Sup. Ct. Rep. 427; Chica- . Mills (decided February 4, this term) U. S. 321, ante, 504, 27 Sup. Ct. Rep.

Therefore the validity of the order lismissal must be considered, after anination of the finding that the plain- claim was fraudulently made.

e plaintiff's claim, which we now as- to have been made in good faith, was the defendants, acting together, took held from him land of the value of 0, and at the same time inflicted dam- upon him of $2,000. Upon any pos- theory of law this claim states the tiff's side of a controversy which is estionably within the jurisdiction of circuit court. When it is duly put in by the defendants' pleadings the record its face discloses a controversy be- n citizens of different states, in which matter in dispute exceeds $2,000 in ," and, therefore, one which is with- he exact words of the act conferring diction upon that court. It is legally ble for the plaintiff to recover the full nt of all the land and the full amount e damages claimed. We know of no that holds that in such a situation udge of the circuit court is authorized terpose and try a sufficient part of the oversy between the parties to satisfy elf that the plaintiff ought to recover than the jurisdictional amount, and to ude, therefore, that the real contro- between the parties is concerning a ct of less than the jurisdictional value, we think that, by sound principle, he bidden to do so. In exercising the au- ty to dismiss the action conferred by ct of 1875 *the judge may proceed upon n of the parties or upon his own n, and, if he chooses, without trial ry. Williams v. Nottawa, 104 U. S. 26 L. ed. 719; Wetmore v. Rymer, ubi . Such an authority obviously is not ited, and its limits ought to be as- certained and observed, lest, under the guise of determining jurisdiction, the merits of the controversy between the parties be summarily decided without the ordinary incidents of a trial, including the right to a jury. For it must not be forgotten that where, in good faith, one has brought into court a cause of action which, as stated by him, is clearly within its jurisdiction, he has the right to try its merits in the manner provided by the Constitution and law, and cannot be compelled to submit to a trial of another kind. This was clearly stated by Mr. Justice Matthews in Barry v. Edmunds, 116 U. S., at page 565, 29 L. ed., at page 734, 6 Sup. Ct. Rep., at page 509, who said: "In no case is it permissible for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice which the jury itself is the appointed constitutional tribunal to award." In applying these general principles for the purpose of ascertaining the limits of the authority to dismiss summarily for lack of jurisdiction, the circumstance that, in this case, a jury was waived by the parties, is without significance, because, if the judge had authority to adopt this summary method, he could dispense with the jury whether the parties agreed to it or not.

The error into which the judge in the court below has fallen is shown by an analysis of his findings. He did not find that the land which the plaintiff claimed to recover was not of a value in excess of $2,000, but that parts of that land which each defendant claimed that the plaintiff ought only to recover against him were each of less than the value of $2,000. As the plaintiff alleged, and the defendants denied, that the defendants jointly took and held his whole lot of land, the judge, on the conceded value of the plaintiff's land, in order to have arrived at the conclusion that the case should be dismissed, *must have found that [646] the defendants had not jointly taken and held the whole of the plaintiff's land. In doing this we think he exceeded his authority under the statute, and, in determining the jurisdiction, in effect decided the controversy between the parties upon the merits. In deciding that the defendants had not acted jointly, as the plaintiff alleged and the defendants denied, he determined not a jurisdictional fact, but an essential element of the merits of the dispute upon which the parties were at issue.

An assumption which underlay the action of the court below in dismissing the case evidently was that, if the defendants, as they asserted in their pleadings, had each, acting by virtue of a separate and inde-

pendent title, taken and held a part only of the plaintiff's land, each part being less than the jurisdictional amount, although the whole was of more than the jurisdictional amount, there was no controversy within the jurisdiction of the circuit court. The correctness of this assumption of law has been argued before us by the parties. We do not deem it necessary to decide that question. There is certainly respectable authority which tends to show that in such a case the plaintiff, being the owner of a single lot of land, may maintain one action against all the defendants, and that the measure of jurisdiction is the value of the plaintiff's land, and not the value of the part held by each defendant. The appropriate rule, however, to be applied to the facts of this case, can be better determined in a trial on the merits, where instructions on their varied aspects may be given to the jury, subject to the review provided by law.

Because the circuit court erred in dismissing the case for want of jurisdiction, its action must be reversed.

The judgment of the court below is therefore reversed and the cause remanded to that court with directions to take such further proceedings therein as the law requires and in conformity with this opinion.

Mr. Justice Brewer dissents.

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[647] *JOSEPH M. CUNNINGHAM, Trustee; Ida May Jones and Andrieus A. Jones, Plffs. in Err.,

v.

CHARLES SPRINGER and John B. Dawson.

(See S. C. Reporter's ed. 647-658.)

Appeal—harmless error.

1. Error, if any, in refusing to strike out expert testimony as to the reasonable value of legal services, because, on cross-examination, it appeared that such testimony was based upon an assumption of fact not disclosed to the jury, is not prejudicial, where the jury, by its verdict, finds that the amount of compensation to be paid for such services was fixed by contract, and each witness testified upon the assumption that the compensation was not so fixed, and it was upon that assumption alone that their testimony was submitted to the jury.

Appeal—going outside the record.

2. An appellate court cannot assume that an amended instruction was not taken out by the jury when it retired, in the absence of any statement to that effect in the record.

Trial — instructions — compliance with request.

3. The trial judge does not err in refusing to adopt the exact words of a requested instruction if he instructs the jury correctly and in substance covers the relevant rules of law proposed by counsel.

[No. 146.]

Argued January 10, 1907. Decided February 25, 1907.

IN ERROR to the Supreme Court of the Territory of New Mexico to review a judgment which affirmed a judgment of the District Court of San Miguel County, in that territory, in favor of defendants in an action to recover for legal services. Affirmed.

See same case below (N. M.) 82 Pac. 222.

Statement by Mr. Justice Moody:

The plaintiffs brought an action in the district court in the territory of New Mexico, in which they sought to recover $75,000 as the reasonable value of the services of the plaintiff Jones, as an attorney at law, rendered to the defendants at their request. For answer the defendants pleaded a general denial and payment. The jury returned a verdict for the defendants. The plaintiffs alleged exceptions to certain rulings of the judge who presided at the trial, which were overruled by the supreme court of the territory, and are here upon writ of [648] error to that court. The exceptions are stated in the opinion.

Mr. Neill B. Field argued the cause and filed a brief for plaintiffs in error:

Where there is a dispute as to the terms of an alleged contract, such as we have in the present case, evidence of the value of the subject-matter of the contract is admissible as tending to show that such a contract was or was not probably entered into.

Barney v. Fuller, 133 N. Y. 605, 30 N. E. 1008; Flagg v. Reilly, 23 App. Div. 57, 48 N. Y. Supp. 544; H. M. Whitney Co. v. Stevenson, 17 App. Div. 224, 45 N. Y. Supp. 552; Walker v. Johnson, 21 Misc. 16, 46 N. Y. Supp. 864; Allison v. Horning, 22 Ohio St. 138; Swain v. Cheney, 41 N. H. 222; Roberts v. Roberts, 91 Iowa, 231, 59 N. W. 25; Paddleford v. Cook, 74 Iowa, 433, 38 N. W. 137; Johnson v. Harder, 45 Iowa, 677; Kidder v. Smith, 34 Vt. 294; Bradbury v. Dwight, 3 Met. 31; Baxter v. Wales, 12 Mass. 365; Leland v. Stone, 10 Mass. 459.

A glaring inadequacy of price affords strong presumptive evidence that the contract, if oral, was never entered into, and

NOTE.—On the right to refuse requested instructions—see notes to International & G. N. R. Co. v. Keenan, 9 L.R.A. 703, and Dambmann v. Metropolitan Street R. Co. 2 L.R.A.(N.S.) 309.

written, was obtained by circumvention
l fraud.
Iume v. United States, 132 U. S. 414,
, 33 L. ed. 396, 397, 10 Sup. Ct. Rep. 134.
s the charge was not modified in writ-
and the carbon copy was not placed on
, this carbon copy was not before the
y, but must have remained in possession
the judge, and the original charge on
was the only charge which the jury had
could properly have had with them in
jury room during their deliberations.
Iopt v. Utah, 104 U. S. 634, 26 L. ed. 874;
w Albany Woolen Mills v. Meyers, 43
. App. 128; Territory v. Perea, 1 N. M.
; Territory v. Lopez, 3 N. M. 156, 2 Pac.
; Louisville & N. R. Co. v. Johnson, 27
C. A. 367, 53 U. S. App. 381, 81 Fed. 679.
Mr. Charles A. Spiess argued the cause
d, with Messrs. Thomas B. Catron, Aldis
Browne, and Alexander Britton, filed a
ief for defendants in error:
Even if the court did commit error in re-
sing to withdraw from the consideration
the jury the evidence expressed in the
inions of the witnesses Veeder, Leahy,
d Twitchell, it was error without preju-
ce, because the jury, by its verdict, found
at the plaintiff had no cause of action.
Consolidated Coal Co. v. Maehl, 130 Ill.
1, 22 N. E. 716; Manning v. Bresnahan,
Mich. 584, 30 N. W. 189; Alexander v.
shkosh, 33 Wis. 280; Baumgardner v. Wil-
tt, 63 Kan. 889, 66 Pac. 1001; Atchison,
& S. F. R. Co. v. Sly, 41 Kan. 729, 21
ac. 790; Yaeger v. Southern California R.
o. (Cal.) 51 Pac. 190; Kansas City, Ft. S.
M. R. Co. v. Chamberlain (Kan.) 60 Pac.
5; W. W. Kendall Boot & Shoe Co. v.
avenport, 63 Kan. 884, 65 Pac. 688; Fow-
r v. Phœnix Ins. Co. 35 Or. 559, 57 Pac.
21; Thompson v. Schuster, 4 Dak. 163, 28
. W. 858; Knapp v. Sioux Falls Nat.
ank, 5 Dak. 378, 40 N. W. 587; Parrott v.
wain, 29 Ill. App. 266; Burnett v. Lutt-
ll, 52 Ill. App. 19; Carruthers v. McMur-
ay, 75 Iowa, 173, 39 N. W. 255; Norton v.
oster, 12 Kan. 44; Moody v. Camden, 61
e. 264; Poland v. Brownell, 131 Mass. 138,
1 Am. Rep. 215; Parsons v. Sutton, 7
ones & S. 544; Read v. Nichols, 118 N. Y.
24, 7 L.R.A. 130, 23 N. E. 468; Nones v.
orthouse, 46 Vt. 587; Fulham v. Howe,
0 Vt. 351, 14 Atl. 652; Schrubbe v. Con-
ell, 69 Wis. 476, 34 N. W. 503.
The court is not bound to instruct the
ry in the exact language of the request,
ut may instruct in such terms and such a
anner as shall comport the real merits of
e case.
Continental Improv. Co. v. Stead, 95 U.
165, 24 L. ed. 405; Boyce v. California
tage Co. 25 Cal. 460; Birmingham F. Ins.
o. v. Pulver, 126 Ill. 329, 9 Am. St. Rep.
598, 18 N. E. 804; White v. Gregory, 126 Ind. 95, 25 N. E. 806; Larsh v. Des Moines, 74 Iowa, 512, 38 N. W. 384; Missouri P. R. Co. v. Cassity, 44 Kan. 207, 24 Pac. 88; Naples v. Raymond, 72 Me. 213; Kershner v. Kershner, 36 Md. 334; Champlain v. Detroit Stamping Co. 68 Mich. 238, 36 N. W. 57; Norwood v. Somerville, 159 Mass. 105, 33 N. E. 1108; Lau v. W. B. Grimes Dry Goods Co. 38 Neb. 215, 56 N. W. 954; Ayers v. Watson, 137 U. S. 584, 34 L. ed. 803, 11 Sup. Ct. Rep. 201.

Mr. Justice Moody delivered the opinion of the court:

The plaintiff Jones was engaged as an attorney at law by the defendants, in an action of ejectment to recover certain lands from one of the defendants, in which the other defendant had an interest. Under his employment Jones rendered services in the preparation and trial of the case in the district and supreme courts of the territory of New Mexico and in the Supreme Court of the United States. The plaintiffs brought this action to recover the reasonable value of Jones's services. The defendants, admitting the employment and the services, contended that they were rendered under a special contract, whereby Jones agreed to accept $500 in full payment for the entire litigation, and that payment was made in conformity with the agreement. The plaintiffs, admitting that a payment of $500 was made to and accepted by Jones, contended that it was made and accepted in pursuance of an agreement to accept that sum as full payment for the service to be rendered in the first trial of the case in *the district and [652] supreme courts of the territory, and did not cover the services in this court, or in the subsequent proceedings in the courts of the territory, for which they claimed the sum of $75,000 as a reasonable compensation. The parties introduced evidence in support of their respective contentions. The jury returned a verdict for the defendants. Exceptions to the rulings and instructions of the court are presented here for consideration.

Both parties offered testimony of witnesses, who qualified as experts, as to the value of Jones's services, and their estimates ranged from $2,000 to $125,000. Three witnesses called by the defendants on this branch of the case, after testifying to their qualifications and their knowledge of the course of the litigation in which Jones was employed, gave their opinion of the value of Jones's services on the assumption that his fee was not fixed by contract. No objection was made to the testimony at the time it was given, but, it appearing upon cross-examination that each witness assumed

in his own mind some value of the land in dispute in the litigation in which Jones was employed, counsel for the plaintiffs, without asking what that value was, in the case of each witness, at the conclusion of his testimony, moved to strike it out, because it was based upon an assumption of the value of the land in controversy in the original case, which was not disclosed to the jury and not based upon the evidence in the case on trial. To the refusal of the court to strike out the testimony the plaintiffs excepted.

These three exceptions do not materially differ, and may, therefore, be considered together. They illustrate the importance of a strict application of the principle that the excepting party should make it manifest that an error prejudicial to him has occurred in the trial in order to justify an appellate court in disturbing the verdict. The witnesses were testifying in chief in response to hypothetical questions which do not appear in the record. The plaintiffs had the right to the fullest cross-examination for the purpose of determining their [653] competency *and affecting the weight of their testimony. If there was in the mind of either of the witnesses an assumption of fact not fairly presented by the evidence, or one which the jury might regard as improbable, it might have been elicited upon cross-examination, and the testimony then excluded or discredited accordingly. This course was not pursued by counsel, who preferred to obtain the benefit of an exception. To say the least, it is difficult to detect any error in the rulings. But, assuming, without deciding or intimating, that there was error in the refusal of the court to strike out the testimony of these witnesses, the error was not prejudicial to the plaintiffs, because, by the course of the trial, this branch of the case became entirely immaterial. The defendants' contention was that Jones was employed under a contract by which he agreed to give his services throughout the entire litigation for $500, and that he had been paid in accordance with the terms of the contract. The plaintiffs' contention was that he agreed upon $500 as his compensation for the trial of the case in the district court and the supreme court of the territory, and that for all subsequent services he was entitled to be paid a reasonable compensation. In the charge to the jury these conflicting contentions were clearly submitted for determination. The jury were instructed that if, as the defendants asserted, Jones had agreed to give his services throughout the entire litigation for $500, and that that $500 had been paid to him, that the verdict should be for the defendants. The jury were instructed, on the other hand, that, if the contract between the parties was as asserted by the plaintiffs, the jury should find for the plaintiffs whatever part of the $500 remained unpaid and, in addition thereto, the reasonable value of the services Jones rendered in the subsequent proceedings. In other words, the jury were instructed that, only in the case Jones agreed to give his services throughout the entire litigation for $500, which had been paid, there should be a verdict for the defendants; otherwise there should be a verdict for the plaintiffs in a sum to be fixed by the jury. The jury did return a verdict *for the defendants. The verdict, therefore, affirmed the defendants' version of the contract and thereby rendered all of the testimony as to the value of Jones's services immaterial. The plaintiffs however, urged in argument before us that the evidence of the value of Jones's services was competent not only as fixing the amount which he might recover in case his version of the contract should be found by the jury to be true, but also in the settlement of the dispute as to the terms of the contract between the parties, upon the theory that if the services of Jones were reasonably worth a far larger sum than $500, that fact would have some tendency to show that he did not agree to render them for $500. However this may be, the testimony on the value of the services was not admitted for any such purpose. Each witness testified upon the assumption that the compensation was not fixed by contract, and it was upon that assumption alone that the testimony was submitted for the consideration of the jury. It was not admitted for the purpose of determining the dispute between the parties as to the terms of the contract. Moreover, in submitting that testimony to the jury under instructions which were clear and adequate, the judge who presided at the trial limited it to the purposes for which it was admitted, and instructed the jury that if they believed from the evidence that the contract was that Jones should give his services throughout the entire litigation for $500, then the jury "should not consider the evidence of the various attorneys who have testified to the reasonable value of the services of the said Jones, but should disregard the same, for the reason that the contract has limited and fixed the amount to which said Jones is entitled." To the admission of the evidence for this limited purpose, to the instructions of the judge thus limiting it and directing that it should be disregarded if the jury found the defendants' version of the contract to be true, the plaintiffs did not object. It is too late now to claim that it might have been admissible for a broader purpose. There is, therefore, pre-

ented a case of evidence admitted and used solely upon an *issue which has become immaterial by the verdict of the jury. Any errors, therefore, if such there were, in admitting the evidence, became immaterial. Greenleaf v. Birth, 5 Pet. 132, 8 L. ed. 72; Brobst v. Brock (Doe ex dem. Brobst v. Roe) 10 Wall. 526, 19 L. ed. 1002; Poland v. Brownell, 131 Mass. 138, 41 Am. Rep. 215; Sullivan v. Lowell & D. Street R. Co. 162 Mass. 536, 39 N. E. 185; Oak Island Hotel Co. v. Oak Island Grove Co. 165 Mass. 260, 42 N. E. 1124; Geary v. Stevenson, 169 Mass. 23, 47 N. E. 508; Read v. Nichols, 118 N. Y. 224, 7 L.R.A. 130, 23 N. E. 468; Schrubbe v. Connell, 69 Wis. 476, 34 N. W. 503; Nones v. Northouse, 46 Vt. 587; Carruthers v. McMurray, 75 Iowa, 173, 39 N. W. 255; Allen v. Blunt, 2 Woodb. & M. 129, Fed. Cas. No. 217; Burnett v. Luttrell, 52 Ill. App. 19. For these reasons the three foregoing exceptions should be overruled.

The thirteenth instruction to the jury was as follows:

"In this case the burden of proof is upon the plaintiffs as to every material fact, except that of payment, as to which fact the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case, they must establish every such material fact, with the exception aforesaid, by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced, or that it preponderates in favor of the defendant, then the plaintiffs cannot recover, and you shall find for the defendants."

To this instruction the plaintiffs excepted. Thereupon the judge said to the jury:

"In the thirteenth instruction given you by the court, in which I spoke about the burden of proof, I have concluded to modify that instruction by striking out the words *material fact* in the second line and inserting in lieu thereof the word *issue;* and also in same line the word *fact* and insert in lieu the word *issue*, and in the fifth line strike out the words *material fact* and put in the word *issue*,—so the instruction will read, gentlemen, as follows:

"'In this case the burden of proof is on the plaintiffs as to every issue, except that of payment, as to which issue the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case they must establish every such *issue, with the exception aforesaid, by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced, or that it preponderates in favor of the defendants, then the plaintiffs cannot recover, and you should find for the defendants.'

"Now, gentlemen, I will withdraw instruction No. thirteen given to you before, and insert and give this amended instruction instead."

The court read the foregoing amended instruction from a carbon copy of the original charge, in which the words above mentioned as stricken out were crossed out with a pencil, and the words mentioned as having been inserted were written in with a pencil. After the foregoing amended instruction was read to the jury, the counsel for the plaintiffs said to the court:

"As thus modified I think the charge is absolutely without objection, if the court please."

The exception, therefore, was abandoned in open court, but it is argued that reversible error appears in the record because it goes on to say:

"The amendment to the thirteenth instruction by the court to the jury as thus made was also taken down by the court's stenographer and transcribed by the said stenographer from his notes of the proceedings of the trial and attached to the original charge on file, after the verdict of the jury had been returned."

In support of this contention it was said that by § 2922 of the statute of New Mexico "all instructions to the jury must be in writing;" and that, by § 3002, "the jury, when it retires, shall be allowed to take the pleadings in the case, instructions of the court, and any instruments in writing admitted as evidence," and urged that either the record shows that the amended instruction in writing was not taken to the jury room, and therefore the plaintiff is entitled to claim this failure as an error, although it was not alleged at the time of the occurrence, or that, by the failure of the court *to [657] send the amended instruction to the jury, the plaintiff is entitled to the benefit of the original exception which was abandoned in open court. Whatever merit this contention may have rests upon the assumption that the amended instruction was not taken by the jury when it retired. We do not know whether it was so taken or not. It is enough to say that the record does not affirmatively disclose that the judge failed to give the written amendment to the jury when it retired. If the plaintiffs' counsel did not discover at the time that the instructions were not taken by the jury, in accordance with the terms of the statute, it is too much to expect this court to conjecture that they were not taken, in the absence of any such statement in the record. Grove v. Kansas City, 75 Mo. 672.

An exception is alleged to the refusal of the court to give the following instruction:

"If the jury believes from the evidence

that the plaintiff A. A. Jones agreed with the defendant Charles Springer to defend the case of the Maxwell Land Grant Co. v. Dawson, for a fee of $500, and that thereafter and before the rendition of all the services agreed to be rendered by said Jones in said cause, the said Springer said to the said Jones, 'You cannot be expected to attend to this business for any $500; go on with the case, and we will see how we come out, and after it is all over, you will be paid what is right,' or words to that effect, and such proposition was accepted and acted on by said Jones, then the plaintiffs in this case are entitled to recover for the services of said Jones in said case whatever the same may be reasonably worth, as shown by the evidence in this case."

But the instruction requested was substantially as given by the court in instructions 5 and 8, which are as follows:

"Plaintiffs claim, however, that the original contract in relation to the services of A. A. Jones was modified by a subsequent agreement made with the defendant Charles Springer to the effect that his compensation [658] was not to be limited to *the $500 originally fixed, but that he was to go on with the litigation, see how it came out, and then Charles Springer would do what was right, and after the property should be sold he would pay said Jones a big cash fee.

"(8) If the jury believes from the evidence that the original contract in relation to Mr. Jones's compensation was afterward modified so that such compensation was not to be the $500 agreed upon, then you should find for the plaintiffs in such sum as you believe from the evidence to be the reasonable value for the services of Jones, less whatever sum may have been paid thereon."

The plaintiff excepted to the refusal of the court to instruct the jury as follows:

"The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury; and the law is that where two witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or the lack of intelligence, and from all of the other surrounding circumstances appearing on the trial, which witness is the more worthy of credit, and to give credit accordingly."

But, so far as the plaintiffs were entitled to this instruction, it was given to the jury by instruction 14. A judge is not bound to charge the jury in the exact words proposed to him by counsel. The form of expression may be his own. If he instructs the jury correctly and in sub the relevant rules of law pro by counsel, there is no error i adopt the exact words of the r tinental Improv. Co. v. Stead, 24 L. ed. 403.

The judgment of the Supre New Mexico is, therefore, affir

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*JAMES COFFEY, Plff. i
v.
COUNTY OF HARL

(See S. C. Reporter's ed.

Constitutional law—due proce criminal proceedings.

A public officer convict zling public moneys, who has full opportunity to present e permitted by the laws of the denied due process of law by th as a part of the sentence, purs Crim. Code § 124, entirely in the question whether restituti made, of a fine in double the a embezzlement found by the ju the terms of that section, is t a judgment against the estate vict.

[No. 177.]

Argued and submitted Janua
Decided February 25,

IN ERROR to the Circuit United States for the Dis braska to review a judgment f in an action of ejectment. Aff

The facts are stated in the

Mr. C. C. Flansburg argued and, with Mr. R. O. Williams, for plaintiff in error:

The construction of its own Constitution by the Nebras court is conclusive and binding ceeding.

Claiborne County v. Brooks 400, 28 L. ed. 470, 4 Sup. C Bucher v. Cheshire R. Co. 125 L. ed. 795, 8 Sup. Ct. Rep. 974 Seligman, 107 U. S. 20, 27 L. ed Ct. Rep. 10.

And the Nebraska supreme c

NOTE.—As to what constitu cess of law—see notes to Peopl 2 L.R.A. 255; Kuntz v. Sumpt 655; Re Gannon, 5 L.R.A. 35 Baltimore, 11 L.R.A. 224; Gilm 13 L.R.A. 304; Pearson v. Ye ed. U. S. 436; and Wilson v. lina, 42 L. ed. U. S. 865.

On cruel and unusual pun notes to State ex rel. Garvey 35 L.R.A. 561.

this identical judgment, held that
risonment alone was the punish-
r the crime, and that the judgment
l for $22,390 was no part of the
ent, but was merely compensation
value of the thing embezzled, and
idated damages.
on v. State, 66 Neb. 154, 92 N. W.

onstitutional validity of a law is
ested, not by what has been done
t, but by what may, under its au-
be done.
t v. Palmer, 74 N. Y. 183, 30 Am.
).
s it due process that Whitney was
at the time the judgment was en-
nd so had knowledge or was bound
r that it was entered. Nor is the
it one has notice by chance suffi-

ey had no opportunity of estab-
his payment and discharge from his
bility, for which the judgment was
Will the law sanction such an
and call it due process?
oyett, 136 N. C. 415, 67 L.R.A. 972,
. St. Rep. 944, 48 S. E. 789.
diction is the right to hear and de-
, not the right to determine without
ng.
sor v. McVeigh, 93 U. S. 274, 23 L.
; Hovey v. Elliott, 167 U. S. 409, 42
215, 17 Sup. Ct. Rep. 841; Galpin v.
8 Wall. 350, 21 L. ed. 959; Ex parte
07 U. S. 289, 27 L. ed. 562, 2 Sup. Ct.
9.
personal actions a personal notice
portunity to defend must be afford-
l if either is withheld the court is
power and its judgment void as in
ention of due process of law.
arte Wall, supra; Hovey v. Elliott,
S. 409, 417, 42 L. ed. 215, 221, 17
. Rep. 841; Underwood v. McVeigh,
t. 409; Simon v. Craft, 182 U. S.
, 45 L. ed. 1165, 1170, 21 Sup. Ct.
3.
nconstitutional statute affords pro-
to no one who has acted under it.
judgment rendered in accordance
mandate is a nullity everywhere.
ds v. Simonds, 103 Mass. 572;
ll v. Sherman, 35 Wis. 103; Monroe
s, 17 Ohio St. 665; Astrom v. Ham-
McLean, 107, Fed. Cas. No. 596;
v. Dodge, 6 McLean, 142, Fed. Cas.
32.
gment rendered by the court upon a
not within the pleadings nor ten-
y the issues of the case must be
as a nullity.
lds v. Stockton, 43 N. J. Eq. 211, 3
S.

Am. St. Rep. 305, 10 Atl. 385. 140 U. S. 254, 35 L. ed. 464, 11 Sup Ct. Rep 773; Munday v. Vail, 34 N. J. L. 418. Unfried v. Heberer, 63 Ind. 67; Smith v. Ontario, 18 Blatchf. 454, 4 Fed. 386

The judgment of a court acting without authority is a nullity.

Horan v. Wahrenberger, 9 Tex. 313, 58 Am. Dec. 145; Seamster v. Blackstock, 83 Va. 232, 5 Am. St. Rep. 262, 2 S. E. 36; Dunlap v. Southerlin, 63 Tex. 38.

A judgment in a criminal case is not a bar in a civil case, and cannot be pleaded as an estoppel.

United States v. Schneider, 35 Fed. 107; Coffey v. United States, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; Betts v. New Hartford, 25 Conn. 180; Clark v. Irvin, 9 Ohio, 131; Mead v. Boston, 3 Cush. 404; Corbley v. Wilson, 71 Ill. 209, 22 Am. Rep. 98; Dyer County v. Chesapeake, O. & S. W. R. Co. 87 Tenn. 712, 11 S. W. 943; Hutchinson v. Merchants' & M. Bank, 41 Pa. 42, 80 Am. Dec. 596; Wharton, Ev. § 777; Potter v. Baker, 19 N. H. 166.

Mr. J. W. Deweese submitted the cause for defendant in error. Messrs. Wiltse A. Myers and Webster S. Morlan were on the brief:

The state can punish for violations of its laws by forfeiture, fine, and imprisonment, or any one or all of them. When the state, by virtue of statute, imposes any one or all of these penalties, the determination of the constitutionality of the statute is exclusively within the courts of the state.

Cooley, Const. Lim. § 39; Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544; Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185.

The sentence in the case of the State of Nebraska v. Ezra S. Whitney has been passed on in three different cases in the supreme court of the state, and the constitutionality of the law which imposes as a penalty a payment on the part of the defendant of twice the amount embezzled has been sustained.

Whitney v. State, 53 Neb. 287, 73 N. W. 696; Harlan County v. Whitney, 65 Neb. 105, 101 Am. St. Rep. 610, 90 N. W. 993; Everson v. State, 66 Neb. 159, 92 N. W. 137.

At common law, a fine could be enforced by levy of execution and a sale of property thereunder. Statutes providing for the issuance of execution upon a fine are declaratory of the common law.

Gill v. State, 39 W. Va. 479, 26 L.R.A. 655, 45 Am. St. Rep. 928, 20 S. E. 568; People v. Brown, 113 Cal. 35, 45 Pac. 181; Howard v. Fuller, 100 Ky. 148, 37 S. W. 585; Huddleson v. Ruffin, 6 Ohio St. 604; Ex parte Dickerson, 30 Tex. App. 448, 17 S.

W. 1076; Terry v. State, 30 Tex. App. 408, 17 S. W. 1075.

A statute that provides, as part of the punishment for embezzlement, for a fine for the use of the party whose money or property has been embezzled, is not unconstitutional for the reason that it makes the amount of the fine equal to double the amount of money or property embezzled.

Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Mier v. Phillips Fuel Co. 130 Iowa, 570, 107 N. W. 621.

It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.

Fayerweather v. Ritch, 34 C. C. A. 61, 63 U. S. App. 112, 91 Fed. 721; Stevens v. Kansas City, 146 Mo. 460, 48 S. W. 658; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

"Due course of law" simply means that a person should be brought into court and have an opportunity to prove any fact for his protection; the regular course of the administration of the law being through courts of justice, by timely and regular proceedings to judgment and execution, according to the fixed forms of law.

Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; People ex rel. Witherbee v. Essex County, 70 N. Y. 229; Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

Mr. Justice Moody delivered the opinion of the court:

The plaintiff in error, a citizen of Kansas, brought an action of ejectment against the defendant in error, a citizen of Nebraska, in the circuit court for the district of Nebraska, where there was judgment for the defendant, which is brought here by writ of error on a constitutional question. The land sought to be recovered was once the property of Ezra S. Whitney, through whom both parties claim title,—the plaintiff, through a deed of the land executed and delivered by Whitney, on November 30, 1898; the defendant, under a sale of the land on execution in pursuance of a levy duly made on April 12, 1898. The defendant's paper title is therefore the earlier one and must prevail if the sale upon execution was valid. The validity of this sale is the only question in the case.

The execution issued on a judgment in a criminal case, in which, by information, Whitney was charged with the embezzlement, while county treasurer of Hall county, in the state of Nebraska, of $11[illegible] of the public money in his possession by virtue of his office. Upon trial by jury Whitney was found guilty as charged and sentenced to imprisonment for a term of years, and "pay a fine in the sum of $22,390," which was double the amount of the embezzlement found by the jury. On appeal the conviction was affirmed by the supreme court of Nebraska. Whitney v. State, 53 Neb. [illegible], 73 N. W. 696. The sentence awarded was that prescribed by § 124 of the Nebraska Criminal Code, which provides that a public officer who embezzles the public money "*shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money or other property so embezzled as aforesaid, which fine shall operate as a judgment at law on all of the estate of the party so convicted and sentenced, and shall be enforced to collection by execution or other process for the use only of the party or parties whose money or other funds, property, bonds, or securities, assets or effects of any kind as aforesaid has been so embezzled.*" Neb. Comp. Stat. 1903, p. 1942.

The proceedings which ended in the sale on execution under which the defendant claims title were in conformity with the Constitution and laws of Nebraska, and the sheriff's deed vested title in the defendant. Everson v. State, 66 Neb. 154, 92 N. W. 137. It is within the power of the state to enact laws creating and defining crimes against its sovereignty, regulating the procedure in the trial of those who are charged with committing them, and prescribing the character of the sentence which shall be awarded against those who have been found guilty. In these respects the state is supreme and its power absolute, and without any limits other than those prescribed by the Constitution of the United States. The exercise of the power of the state in this field cannot be drawn in question in this court or elsewhere than in its own courts, except for the purpose of restraining it within the limits thus established. One of the limitations upon the power of the state imposed by the 14th Amendment, is that the state shall not deprive any person of life, liberty, or property without due process of law. The plaintiff contends that the sentence awarded against Whitney violated this prohibition, in that Whitney had

opportunity to be heard upon and de-
l against that part of the sentence which
osed a fine and authorized a judgment
inst his estate for its collection. The
ntiff therefore insists that the sale on
cution of Whitney's land was bad, be-
se the execution issued upon a judgment
ch was void. The short and conclusive
wer to the whole contention is, that it
not true in fact. Whitney was
en an opportunity to be heard and
defend. The information charged him
h embezzling $11,190, the property
Harlan county. The trial was had upon
information and the jury returned a
dict in the following terms:

We, the jury, duly impaneled and sworn
the above-entitled cause, do find the de-
dant guilty, as charged in the informa-
n, and we further find the sum so em-
zled to be $11,190." Thereupon it be-
ne the duty of the court to impose a sen-
ce of imprisonment of not less than one
r nor more than twenty-one years, and
a fine that should be equal to double the
ount of the money embezzled. This was
e. The case was then appealed to the
reme court of Nebraska, argued by coun-
, and the conviction affirmed. It is idle
say that Whitney was denied a hearing,
an opportunity for every defense permit-
to him by the laws of Nebraska.

The plaintiff in error rests his contention
n some language used by the supreme
rt of Nebraska in Everson v. State, ubi
ra. In that case Everson was convicted
trespass upon the land in dispute. He
nded against the charge by claiming ti-
through the deed from Whitney, under
ch, as Everson's grantee, the plaintiff in
case claims title. The state, on the
er hand, contended that the title *was in
lan county by virtue of the sale on ex-
tion hereinbefore stated. Everson, as-
ing, as the plaintiff here asserts, that
execution sale passed no title, attacked
judgment upon which it was issued
n two grounds:

irst, that the law under which it was
lered was repealed by a subsequent pro-
on of the Constitution of the state;

econd, that it was unconstitutional in
icting a double punishment, in that the
was added to imprisonment.

n overruling these two contentions the
rt described the statute as one giving
xed sum "in the nature of liquidated
lages . . . to one who has suffered
ry by the wrongful act of a public officer,"
said: "We . . . do not care to put
selves upon record as holding that the
rn of the property or the value of the
property which the thief has embezzled or stolen, either voluntarily or by compulsory process, should be considered any part of his punishment within the meaning of our Bill of Rights." P. 158, N. W. p. 138. Seizing hold of this language, the plaintiff in error in this case argues that, by an interpretation of the statute binding upon us, it authorizes a mere civil judgment for damages, against which the defendant has been denied the right to defend by showing that his civil liability for the embezzlement had been discharged, and that therefore the judgment was wanting in due process of law. But this argument misinterprets the decision of the supreme court of Nebraska by giving to its language a meaning not expressed or intended.

As part of the consequences of a conviction of the crime of embezzlement by a public officer, the law of Nebraska provides that a fine double the amount embezzled shall be inflicted, which shall operate as a judgment against the estate of the convict. It is not of the slightest importance whether this fine is called a penalty, a punishment, or a civil judgment. Whatever it is called, it comes to the convict as the result of his crime. The amount of the judgment is fixed by the amount of the embezzlement, and not by the amount remaining *due on [665] account of the embezzlement, and the only question left open to the accused is the fact and amount of the embezzlement. It is provided that the judgment shall issue for double that amount, entirely irrespective of the question whether restitution has been made in whole or in part. Upon the only question, therefore, open to him, Whitney had an opportunity to be heard, and, in point of fact, was heard. Upon his appeal (53 Neb. 287, 73 N. W. 696) the amount of the embezzlement was expressly affirmed by the court (p. 303, N. W. p. 701), and the claim that the restitution of the stolen property relieves the offender from criminal liability was pronounced "a monstrous doctrine," and it was said: "Whether or not Harlan county has been successful in collecting or securing the payment of the money which the defendant is charged with having embezzled is of no consequence in this case." Whitney had full opportunity to present every defense allowed to him by the law of the state. The law itself was justified by the plenary power of the state, and neither it nor its administration in this case discloses any violation of a right secured by the Constitution of the United States, and the judgment of the Circuit Court is therefore affirmed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

IN THE MATTER OF THE MON-
NG COMPANY, Limited, *Peti-*
o. 13, Original.]
arles J. Hughes, Jr., W. E. Browne, and *Alex. Britton* for

hur Brown, J. H. Ralston, M. . Siddons, and *T. C. Bach* for

, 1907. *Stricken from the* unced by *Mr. Justice Brewer.*

EN *et al., Plaintiffs in Error,* LACIOS RICE & IRRIGATION [No. 150.]
o the Supreme Court of the s.
se below, 98 Tex. 494, 107 Am. 86 S. W. 11.
e B. Proctor for the plaintiffs

C. Coke for the defendant in

4, 1907. Judgment *affirmed* *trickley* v. *Highland Boy Gold* U. S. 527, 531, 50 L. ed. 581, Ct. Rep. 301; *Clark* v. *Nash,* , 49 L. ed. 1085, 25 Sup. Ct.

S, *Appellant, v.* BENJAMIN H. N, Co. [No. 160.]
m the Circuit Court of the for the Southern District of

y General for appellant.
n Winthrop for appellees.
5, 1907. Decree *reversed* on error by appellees, and case further proceedings according

STATE OF SOUTH CAROLINA EX REL. O. W. BUCHANAN, *Plaintiff in Error, v.* R. H. JENNINGS *et al.* [No. 3.] [668]

In Error to the Supreme Court of the State of South Carolina.

Messrs. Charles A. Douglas and *Levi H. David* for plaintiff in error.

Mr. Duncan C. Ray for defendants in error.

January 21, 1907. *Dismissed* for the want of jurisdiction. *French* v. *Taylor,* 199 U. S. 274, 50 L. ed. 189, 26 Sup. Ct. Rep. 76; *Leonard* v. *Vicksburg, S. & P. R. Co.* 198 U. S. 416, 49 L. ed. 1108, 25 Sup. Ct. Rep. 750; *Murdock* v. *Memphis,* 20 Wall. 590, 22 L. ed. 429; *Eustis* v. *Bolles,* 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131.

SUM GAY alias SAM LEE, *Appellant, v.* UNITED STATES. [No. 182.]

Appeal from the District Court of the United States for the Northern District of California.

Mr. Assistant Attorney General Cooley for the appellee.

No brief filed for the appellant.

January 28, 1907. Decree *affirmed.*

EX PARTE: IN THE MATTER OF HARRISON BOYNTON, *Petitioner.* [No. —, Original.]

Motion for Leave to File Petition for a Writ of Habeas Corpus and to Proceed in *Forma Pauperis.*

Mr. A. B. Browne for petitioner.

February 4, 1907. *Denied.*

UNITED STATES *et al., Appellants, v.* WILLIAM B. KIRK. [No. 136.]

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 70 C. C. A. 187, 137 Fed. 753.

Messrs. Solicitor General Hoyt, Robert A. Howard, and *Henry C. Lewis* for the appellants.

Messrs. Abram J. Rose and *Alfred C. Petté* for the appellee.

February 25, 1907. Decree *affirmed* by a divided court, and cause remanded to the Circuit Court of the United States for the Northern District of New York.

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[669]*SIGMOND ORNSTINE, *Plaintiff in Error*, v. W. J. CARY. [No. 200.]

In Error to the Supreme Court of the State of Wisconsin.

See same case below, 126 Wis. 135, 105 N. W. 792.

Mr. E. M. McVicker for the plaintiff in error.

Mr. A. C. Titus and *Mr. L. M. Sturdevant* for the defendant in error.

February 25, 1907. *Dismissed* for the want of jurisdiction. *DeWolf* v. *Johnson*, 10 Wheat. 386, 6 L. ed. 348; *Missouri, K. & T. Trust Co.* v. *Krumseig*, 172 U. S. 351, 43 L. ed. 474, 19 Sup. Ct. Rep. 179; *Louisville & N. R. Co.* v. *Kentucky*, 161 U. S. 677, 700, 40 L. ed. 849, 859, 16 Sup. Ct. Rep. 714; *Frisbie* v. *United States*, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586; *Lawton* v. *Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Dunham* v. *Gould*, 16 Johns. 378, 8 Am. Dec. 323; *Com.* v. *Danziger*, 176 Mass. 290, 57 N. E. 461; *Ex parte Berger* 193 Mo. 16, 3 L.R.A.(N.S.) 530, 112 Am. St. Rep. 472, 90 S. W. 759, and see *State ex rel. Zillmer* v. *Kreutzberg*, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098.

KATHARINE TODD STEARNS *et al.*, *Appellants*, v. JAMES E. TODD *et al.* [No. 386.]

Appeal from the Circuit Court of the United States for the Western District of Virginia.

Messrs. James Bumgardner, Jr., and *C. S. W. Barnes* for the appellants.

Mr. Charles Curry for appellees.

February 25, 1907. Decree *affirmed* with costs. *Wheless* v. *St. Louis*, 180 U. S. 379, 382, 45 L. ed. 583, 585, 21 Sup. Ct. Rep. 402; *Miller* v. *Clark*, 138 U. S. 223, 34 L. ed. 966, 11 Sup. Ct. Rep. 300.

FRANK D. ZELL, *Petitioner*, v. B. W. LEIGH *et al.* [No. 528.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Charles L. Frailey, William L. Royall, Charles H. Burr, Reynolds D. [670]*Brown*, and *Malcolm* *Lloyd, Jr.*, for the petitioner.

Messrs. Floyd Hughes, Tazewell Taylor, and *D. Lawrence Groner* for the respondents.

January 7, 1907. *Denied.*

EMPIRE STATE CATTLE COMPANY *et* *titioners*, v. ATCHISON, TOPEKA, & FE RAILWAY COMPANY [No. 533]; SOTA & DAKOTA CATTLE COMPAN *tioner*, v. ATCHISON, TOPEKA, & S. RAILWAY COMPANY. [No. 534.]

Petitions for Writs of Certiorar United States Circuit Court of Ap the Eighth Circuit.

Messrs. James S. Botsford and *R.* for petitioners.

Messrs. Gardiner Lathrop, Robe lap, and *A. B. Browne* for respond

January 21, 1907. *Granted.*

EDWARD S. THOMAS *et al.*, Truste *tioners*, v. ANNA D. TAGGART *et* 559.]

Petition for a Writ of Certiora United States Circuit Court of Ap the Second Circuit.

Mr. Abram I. Elkus for petitione

Messrs. Thomas Thacher, Ric Sweezy, and *George E. Hall* for res

January 21, 1907. *Granted.*

NEWS & COURIER COMPANY *et al.*, *ers*, v. FRANK E. BUTLER *et* 542.]

Petition for a Writ of Certiora United States Circuit Court of Ap the Fourth Circuit.

See same case below, 148 Fed.

Messrs. Wm. Henry Parker and *M. Smith* for the petitioners.

Messrs. Adrian H. Joline and *Au Smythe* for the respondents.

January 21, 1907. *Denied.*

KNUDSEN-FERGUSON FRUIT COMPA *tioner*, v. CHICAGO, ST. PAUL, M OLIS, & OMAHA RAILWAY *COMPA 549.]

Petition for a Writ of Certiora United States Circuit Court of Ap the Seventh Circuit.

See same case below, 149 Fed. 97

Mr. Roger S. Powell for the petit

Messrs. C. A. Severance and *F Kellogg* for the respondent.

January 21, 1907. *Denied.*

KNUDSEN-FERGUSON FRUIT COMPA *tioner*, v. MICHIGAN CENTRAL R COMPANY. [No. 550.]

Petition for a Writ of Certiora United States Circuit Court of Ap the Eighth Circuit.

See same case below, 148 Fed. 9

Mr. Roger S. Powell for the peti

Messrs. C. A. Severance and *F Kellogg* for the respondent.

January 21, 1907. *Denied.*

T. H. ADRIAN TROMP, *Petitioner*, *v.* WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING COMPANY. [No. 552.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 75 C. C. A. 75, 143 Fed. 867.

Messrs. Norman G. Johnson and *Ernest Dickman* for the petitioner.

Mr. Henry G. Ward for the respondent.

January 21, 1907. *Denied.*

MAGNUS J. PALSON *et al.*, *Petitioners*, *v.* NORTH GERMAN LLOYD, Claimant. [No. 557.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 149 Fed. 97.

Mr. Edward E. Blodgett for the petitioners.

Mr. Joseph Larocque, Jr., for respondent.

January 21, 1907. *Denied.*

EDWARD FLICKINGER, *Petitioner*, *v.* UNITED STATES. [No. 560.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for [672] the Sixth *Circuit.

See same case below, 150 Fed. 1.

Messrs. Edward T. Powell, Thomas E. Powell, and *Charles W. Baker* for the petitioner.

The Attorney General and *Solicitor General Hoyt* for respondent.

January 21, 1907. *Denied.*

MARY SHERMAN MCCALLUM, *Petitioner*, *v.* PHILLIPS L. GOLDSBOROUGH, Collector, etc. [No. 551.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 150 Fed. 289.

Messrs. J. Altheus Johnson and *E. S. Wagenhorst* for the petitioner.

Mr. Solicitor General Hoyt for the respondent.

January 28, 1907. *Denied.*

PHILADELPHIA & READING RAILWAY COMPANY, *Petitioner*, *v.* JULIA KLUTT, etc. [No. 553.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 148 Fed. 818.

Mr. John G. Lamb for the petitioner.

Mr. Francis Fisher Kane for the respondent.

February 4, 1907. *Denied.*

HORACE F. BROWN *et al.*, *Petitioners*, *v.* ROBERT HENRY LANYON *et al.* [No. 561.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 148 Fed. 838.

Messrs. Francis M. Phelps and *Douglas Dyrenforth* for the petitioners.

February 4, 1907. *Denied.*

BOSTON & MAINE RAILROAD, *Petitioner*, *v.* JOHN N. GORKEY. [No. 562.]

Petition for a Writ of *Certiorari to the [673] United States Circuit Court of Appeals for the Second Circuit.

Messrs. George B. Young and *Edgar J. Rich* for petitioner.

No appearance for respondent.

February 4, 1907. *Granted.*

CHARLES W. HUNTER *et al.*, *Petitioners*, *v.* REBECCA A. JOHNSON *et al.* [No. 563.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. L. P. Berry for petitioners.

No appearance for respondents.

February 25, 1907. *Granted.*

OLD DOMINION COPPER MINING & SMELTING COMPANY, *Petitioner*, *v.* FREDERICK LEWISOHN *et al.*, Executors, etc. [No. 573.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Louis D. Brandeis and *William H. Dunbar* for petitioner.

Mr. Eugene Treadwell for respondents.

February 25, 1907. *Granted.*

CONTINENTAL WALL PAPER COMPANY, *Petitioner*, *v.* LEWIS VOIGHT & SONS COMPANY. [No. 582.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Louis Marshall and *Joseph Wilby* for petitioner.

Messrs. Morrison R. Waite and *Harlan Cleveland*, for respondent.

February 25, 1907. *Granted.*

HARRY L. HAYNES, *Petitioner*, *v.* J. B. WATKINS *et al.* [No. 570.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the *Fifth Circuit. [674]

Mr. George A. Titterington for the petitioner.

Mr. John W. Wray for respondents.

February 25, 1907. *Denied.*

MATHIESON ALKALI WORKS, *Petitioner*, *v.* T. T. MATHIESON. [No. 566.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 150 Fed. 241.

Mr. Frank W. Christian for the petitioner.

Messrs. Daniel Trigg, Robert L. Harrison, and *William Byrd* for the respondent.

February 25, 1907. *Denied.*

VICTOR A. WILDER *et al.*, *Petitioners*, *v.* UNITED STATES. [No. 578.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 74 C. C. A. 567, 143 Fed. 433.

Mr. Maynard F. Stiles for the petitioners.

Mr. Solicitor General Hoyt for the respondent.

February 25, 1907. *Denied.*

YEE YUEN, *Appellant*, *v.* UNITED STATES. [No. 154.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Oliver Dibble for appellant.

The Attorney General for appellee.

January 10, 1907. *Dismissed*, pursuant to the Tenth Rule.

PHŒNIX WATER COMPANY, *Appellant*, *v.* COMMON COUNCIL OF THE CITY OF PHŒNIX. [No. 327.]

Appeal from the Supreme Court of the Territory of Arizona.

See same case below (Kan.) 84 Pac. 1095.

Messrs. John F. Dillon, Harry Hubbard and *C. F. Ainsworth* for appellant.

Messrs. Roy S. Goodrich and *Walter Bennett* for appellee.

January 23, 1907. **Dismissed* with costs, per stipulation.

GEORGE W. CROSSMAN *et al.*, *Plaintiffs in Error*, *v.* GEORGE R. BIDWELL. [No. 52.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. W. Wickham Smith for the plaintiffs in error.

The Attorney General for defendant in error.

February 4, 1907. *Dismissed* with costs, on motion of *Mr. Solicitor General Hoyt* in behalf of counsel for the plaintiffs in error.

ADRIAN C. HONORÉ, Executor, etc., *et al.*, *Plaintiffs in Error*, *v.* WILLIAM C. WILSON, as Acting Comptroller of the State of New York. [No. 353.]

In Error to the Surrogates' Court of New York County, State of New York.

See same case below, in Court of Appeals 183 N. Y. 238, 76 N. E. 16.

Mr. Charles K. Carpenter for plaintiffs in error.

Mr. Emmet R. Olcott for the defendant in error.

February 4, 1907. *Dismissed*, per stipulation.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1906,

Vol. 205.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1906,

AND REPORTED HERIN.

VOLUME 205,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

50 Law. ed. U. S.	Title.	Here in.
1	Schlemmer v. Buffalo, R. & P. R. Co.	681
8	" "	684
8-11	" "	685
11-13	" "	686
13-15	" "	687
15-16	" "	688
16-20	" "	689
20	Tinsley v. Treat	689
24-26	" "	692
26-28	" "	693
28-31	" "	694
31-33	" "	695
33	Kessler v. Treat Morgan v. Treat Carpenter v. Treat Whittle v. Treat Wilcox v. Treat Braden v. Treat Royster v. Treat Smith v. Treat Burroughs v. Treat McDowell v. Treat	695
4	" "	696
4	Halter v. Nebraska	696
7-38	" "	699
8-40	" "	700
0-43	" "	701
3-45	" "	702
5-46	" "	703
6	Citizens' Sav. & Trust Co. v. Illinois C. R. Co.	703
6-47	" "	704
7-49	" "	705
5	" "	705
3-55	" "	706
5-58	" "	707
8-59	" "	708
0	Wilmington Star Min. Co. v. Fulton	708
4-66	" "	712
6-68	" "	713
8-71	" "	714
1-73	" "	715

Oct. Sep. 50 U. S.	Title.	Here in.
73-76	Wilmington Star Min. Co. v. Fulton	716
76-78	" "	717
78-79	" "	718
80	United States ex rel. West v. Hitchcock	718
82-83	" "	720
83-86	" "	721
86	" "	722
86	Peacock v. United States	722
88-89	" "	722
89-91	" "	723
91-92	" "	724
93	Delamater v. South Dakota	724
96	" "	727
96-98	" "	728
98-101	" "	729
101-103	" "	730
103-104	" "	731
105	United States v. Bethlehem Steel Co.	731
105-108	" "	733
108-110	" "	733
110-113	" "	734
113-114	" "	735
117-119	" "	736
119-121	" "	737
121-122	" "	738
122	Northern P. R. Co. v. Slaght	738
125-127	" "	739
127-129	" "	740
129-132	" "	741
132-134	" "	742
134	Northern P. R. Co. v. Slaght	742
134	" "	743
135	Martin v. District of Columbia Brandenburg v. District of Columbia	743
137-138	" "	743
139-141	" "	744
141	" "	745
141	Wetmore v. Karrick	745
146	" "	746

170	Urquhart v. Brown	700	500-509	"	"
170-172	" "	701	509	"	"
172-180	" "	702	509-511	Johnson v. Browne	
183	Tindle v. Birkett	702	511-512	" "	
184-186	" "	703	516-517	" "	
186-188	" "	704	517-520	" "	
187	Davidson S. S. Co. v. United States		520-522	" "	
189-190	" "	704	522-524	Hood v. New York Cotton Exchange	
190-192	" "	705			
192-193	" "	706	524-528	" "	
193	" "	707	528-529	" "	
		708	529	" "	
198-199	Love v. Chaffee	709	533-534	" "	
199	" "	709	534-536	" "	
199-201	" "	710	536-539	" "	
201-209	" "	711	539	" "	
202	Hancock v. McKenna	712	540	Dunn v. Hotchkiss	
205	" "	712	545-546	" "	
205-207	" "	713	546-547	" "	
207-210	" "	714	547-549	" "	
210-212	" "	716	549	Konkomoon v. Polybius	
212-214	" "	716	552	" "	
214	Moore v. McClure	716	553-554	" "	
216-221	" "	717	554	Tropaski Transp. Co. v. Lake Forest R. Co.	
221-222	" "	718			
222-225	" "	719		Tropaski Transp. Co. v. Edwards	
225	Empire State-Idaho M. & D. Co. v. Henley	719	554-559	" "	
225-228	" "	720	559	" "	
228-230	" "	721	559-560	" "	
230-233	" "	722	560-562	" "	
233-235	" "	723	562-563	" "	
235-236	" "	724	564	Peterson v. Chicago, R. I. & P. R. Co.	
236-237	Rochester R. Co. v. Rochester	724		" "	
237-240	" "	725	564-567	" "	
240-242	" "	726	567-569	" "	
242-244	" "	728	569-572	" "	
244-246	" "	729	572-574	" "	
246-248	" "	730	574-577	" "	
248-251	" "	731	577-580	" "	
251-254	" "	732	580-582	" "	
254-256	" "	733	583-586	" "	
257	Peavey v. Strandskog	734	586-590	" "	
260-261	" "	735	590-593	" "	
261-267	" "	736	593-594	" "	
267-269	" "				

106 U. S. Page	Title.	Page in
401–409	Cohn, Meyer & Co. v. Campbell & Co. Tanner	
409–410	" "	860
410–412	Quinlan v. Green County	860
412–414	" "	861
414–415	" "	862
415–416	" "	863
416–420	" "	864
420–422	" "	865
422–423	" "	866
423	Trustees v. Reinhardt	866
423–426	" "	867
426–429	" "	868
429–432	" "	870
432–436	" "	871
436–439	" "	872
439–441	" "	873
441–444	" "	874
444–447	Chicago, B. & Q. R. Co. v. Williams	875
447–449	" "	876
449–451	" "	877
451–453	" "	878
453–454	" "	879
454	Patterson v. Colorado ex rel. Attorney General	879
456–459	" "	879
459–461	" "	880
461–463	" "	881
463–465	" "	882
465	Chanler v. Kelsey	883
465–468	" "	883
468	" "	884
468–474	" "	886
474–476	" "	887
476–478	" "	888
478–481	" "	889

106 U. S. Page	Title.	Page in
481–482	Chanler v. Kelsey	890
483	Harrington v. Missouri	890
483–485	" "	891
485–487	" "	892
487–488	" "	893
489	Whitfield v. Ætna L. Ins. Co.	893
489–493	" "	894
494	" "	895
494–497	" "	896
497–499	" "	897
499–501	" "	898
501	Harrison v. Magoon	898
502–503	" "	901
503	Home Sav. Bank v. Des Moines People's Sav. Bank v. Des Moines Des Moines Sav. Bank v. Des Moines	901
508	" "	903
509–511	" "	906
511–512	" "	907
512–515	" "	908
515–518	" "	909
518–520	" "	910
520–521	" "	911
521	Frank v. Vollkommer	911
522–523	" "	912
523	" "	914
523–528	" "	915
528	" "	916
530	Green v. Chicago, B. & Q. R. Co.	916
531–534	" "	917
534	" "	918
535–551	Memorandum Cases	919–925

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1906.

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[1]*CATHERINE SCHLEMMER, Plff. in Err.,
v.
BUFFALO, ROCHESTER, & PITTSBURG RAILWAY COMPANY.

(See S. C. Reporter's ed. 1-20.)

Error to state court—Federal question—decision on non-Federal ground.

1. A state court, by deciding that a railway employee who was killed while attempting to make a coupling with a car not equipped with an automatic coupler, as required by the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, was, as a matter of law, guilty of contributory negligence in lifting his head a little too high after he had been warned of the danger, cannot defeat the appellate jurisdiction of the Federal Supreme Court, where § 8 of that statute was specially invoked as excluding the defense of assumption of risk.

Master and servant—duty as to appliances—automatic coupler.

2. A shovel car is a "car" within the meaning of the act of March 2, 1893, § 2, requiring any car used in moving interstate traffic to be equipped with an automatic coupler.

Evidence—burden of proof.

3. The burden of proof is upon a carrier to bring itself within the exception in favor of four-wheeled cars which is made by the proviso in § 6 of the automatic coupler act of March 2, 1893.

Master and servant—assumption of risk—automatic coupler act — contributory negligence.

4. The possibility that a railway employee, while attempting to make a coupling with a car not equipped with an automatic coupler, as required by the act of March 2, 1893, § 2, might miscalculate the height to which he might safely raise his head, is so inevitably and clearly attached to the risk which, under § 8 of that statute, he does not assume, as to prevent a court from holding, as a matter of law, that he was guilty of contributory negligence which would defeat any recovery in lifting his head a little too high after being warned of the danger.

[No. 41.]

Argued January 18, 21, 1907. Decided March 4, 1907.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas for the County of Jefferson, in that state, granting a nonsuit in an action for the death of a railway employee who was killed while attempting to make a coupling with a car not equipped with an automatic coupler. Reversed.

See same case below, 207 Pa. 198, 56 Atl. 417.

The facts are stated in the opinion.

Mr. Luther M. Walter (by special leave) and Frederic D. McKenney argued the cause, and, with Messrs. Edward A. Moseley and

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On the relation between defenses of assumption of risk and contributory negligence—see note to Limberg v. Glenwood Lumber Co. 49 L.R.A. 49.

A. J. Truitt, filed a brief for plaintiff in error:

Whether a right or privilege claimed under the Constitution or laws of the United States was distinctly and sufficiently pleaded and brought to the notice of a state court is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state.

Carter v. Texas, 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 Sup. Ct. Rep. 687; Neal v. Delaware, 103 U. S. 370, 396, 397, 26 L. ed. 567, 573, 574; Mitchell v. Clark, 110 U. S. 633, 645, 28 L. ed. 279, 283, 4 Sup. Ct. Rep. 170, 312; Boyd v. Nebraska, 143 U. S. 135, 180, 36 L. ed. 103, 116, 12 Sup. Ct. Rep. 375.

So, where, in this court, a party asserts that the final judgment of the highest court of a state denied to him a right or immunity set up and claimed under the Constitution or laws of the United States, if, upon examining the record, this court can find that a Federal question was properly raised, or that a Federal right or immunity was specially claimed, in the trial court, then jurisdiction to review the judgment of such state court will not have been defeated by the mere failure of the highest court of the state to dispose of the question so raised, or to pass upon the right or immunity so claimed.

Erie R. Co. v. Purdy, 185 U. S. 148, 154, 46 L. ed. 847, 850, 22 Sup. Ct. Rep. 605.

It is immaterial that the state courts considered the case to fall within the principles of general common law, untrammeled by statutory enactments.

Anderson v. Carkins, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905.

A case arises under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either.

Cohen v. Virginia, 6 Wheat. 375, 5 L. ed. 284.

Also whenever the rights set up by a party may be defeated by one construction or sustained by another.

Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Starin v. New York, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28.

The jurisdiction of this court extends to every right protected by the laws of the United States, irrespective of the source whence such rights may spring.

New Orleans v. De Armas, 9 Pet. 224, 9 L. ed. 109.

And the refusal of a state supreme court to consider a Federal question which is controlling in a case is equivalent to a decision against the Federal right involved therein, and gives to this court jurisdiction to review its judgment.

Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; Phœnix Bank v. Risley, 111 U. S. 125, 28 L. ed. 374, 4 Sup. Ct. Rep. 322.

While it is conceded that this court cannot enter upon the inquiry as to whether the finding of a jury in a state court is against the evidence (Missouri, K. & T. R. Co. v. Haber, 169 U. S. 639, 42 L. ed. 887, 18 Sup. Ct. Rep. 488), nevertheless, the question as to the sufficiency, competency, or legal effect of the evidence, as bearing upon a question of Federal law raised in the course of the trial, may be reviewed by this court, as a supreme court of error of a state may review the proceedings of inferior courts of original jurisdiction (Mackay v. Dillon, 4 How. 447, 11 L. ed. 1050; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452).

Though it should be conceded that, in the absence of any question as to the construction and application of the Federal safety appliance law, the defense of contributory negligence gives rise to questions of general law merely, which are finally determinable by the decision of the state court (Texas & P. R. Co. v. Johnson, 151 U. S. 81, 98, 38 L. ed. 81, 87, 14 Sup. Ct. Rep. 250), still where, as here, contributory negligence as matter of defense is found and declared as matter of law by the state courts, and the plaintiff's right to immunity from the burdens of such defense, set up under the provisions of a Federal statute, is, by such declaration, in effect, if not in fact, denied, this court has jurisdiction to consider and determine for itself whether, under the provisions of the Federal statute specifically invoked, the defense of contributory negligence is available to a defendant who has violated its express prohibitions; and, if so, then whether the evidence upon which such defense rests is of such a character as justifies the trial court in peremptorily instructing the jury to return their verdict against the damaged plaintiff.

The trial court erred in holding that the shovel car was not a car used in interstate commerce or any other kind of traffic.

Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412, 11 So. 262; Thomas v. Georgia R. & Bkg. Co. 38 Ga. 224; Perez v. San Antonio & A. P. R. Co. 28 Tex. Civ. App. 224, 67 S. W. 137; Texas & P. R. Co. v. Webb, 31 Tex. Civ. App. 498, 72 S. W. 1044; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23.

"Traffic" as well as "commerce" covers the transportation of persons and property; and the words "interstate traffic" cover all transportation of persons and property

here such transportation crosses state nes.

Mobile County v. Kimball, 102 U. S. 702, 5 L. ed. 241; Gloucester Ferry Co. v. Pennylvania, 114 U. S. 196, 204, 29 L. ed. 158, 32, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 26; Lottery Case (Champion v. Ames) 188 U. S. 321, 345, 47 L. ed. 492, 496, 23 Sup. Ct. Rep. 321.

The shovel car was being transported as freight; and, while hauling this construction train, of which the shovel car was a part, the defendant did not cease to be a common carrier.

Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co. 109 Ill. 135, 50 Am. Rep. 605.

It was error to hold, as matter of law, that the alleged contributory negligence of deceased barred plaintiff's right to recover damages growing out of defendant's negligence in failing or refusing to comply with the plain requirements of the United States laws.

Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 39 L. ed. 624, 15 Sup. Ct. Rep. 491; New York C. R. Co. v. Lockwood, 17 Wall. 382, 21 L. ed. 641; Choctaw, O. & G. R. Co. v. Holloway, 191 U. S. 334, 48 L. ed. 207, 24 Sup. Ct. Rep. 102.

The receipt of this car by the defendant in an unlawful condition was gross or wilful negligence.

Shumacher v. St. Louis & S. F. R. Co. 39 Fed. 174; Milwaukee & St. P. R. Co. v. Arms, 91 U. S. 495, 23 L. ed. 376; Louisville & N. R. Co. v. McCoy, 81 Ky. 403; Riley v. Western U. Teleg. Co. 6 Misc. 221, 26 N. Y. Supp. 532; Bannon v. Baltimore & O. R. Co. 4 Md. 108; Schindler v. Milwaukee, L. S. & W. R. Co. 87 Mich. 400, 49 N. W. 670; United States, v. Southern R. Co. 135 Fed. 122.

Contributory negligence cannot be pleaded as a bar to recovery by a plaintiff when the proximate cause of plaintiff's injury was the failure of defendant to comply with a statute.

Carterville Coal Co. v. Abbott, 181 Ill. 75, 55 N. E. 131; Kansas City, M. & B. R. Co. v. Flippo, 138 Ala. 487, 35 So. 457; Elmore v. Seaboard Air Line R. Co. 130 N. C. 1, 41 S. E. 786; Greenlee v. Southern R. 122 N. C. 977, 41 L.R.A. 399, 65 Am. St. Rep. 734, 30 S. E. 115; Troxler v. Southern R. Co. 124 N. C. 191, 44 L.R.A. 313, 70 Am. St. Rep. 580, 32 S. E. 550; Fleming v. Southern R. Co. 131 N. C. 476, 42 S. E. 1; Union P. R. Co. v. McDonald, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 618; Pennsylvania (The Pennsylvania v. Hop) 19 Wall. 125, 22 L. ed. 148; Flint & P. M. R. Co. v. Lull, 28 Mich. 510.

The court erred in not submitting the question of contributory negligence to the jury.

Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 663, 21 L. ed. 745, 749; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 475, 24 L. ed. 256, 259; Texas & P. R. Co. v. Carlin, 189 U. S. 354, 361, 47 L. ed. 849–853, 23 Sup. Ct. Rep. 585; Northern P. R. Co. v. Everett, 152 U. S. 107, 38 L. ed. 373, 14 Sup. Ct. Rep. 474; Goodrich v. New York C. & H. R. R. Co. 116 N. Y. 398, 5 L.R.A. 750, 15 Am. St. Rep. 410, 22 N. E. 397; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 10 Sup. Ct. Rep. 914; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; Esher v. Mineral R. & Min. Co. 28 Pa. Super. Ct. 387; Kilkeary v. Thackery, 165 Pa. 584, 30 Atl. 1013; Hogan v. West Mahanoy Twp. 174 Pa. 352, 34 Atl. 563; Fetterman v. Rush Twp. 28 Pa. Super. Ct. 77.

Mr. **Marlin E. Olmstead** argued the cause, and, with Messrs. C. H. McCauley and A. C. Stamm, filed a brief for defendant in error:

No Federal question is involved.

Sayward v. Denny, 158 U. S. 180, 183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; Ansbro v. United States, 159 U. S. 695, 697, 40 L. ed. 310, 311, 16 Sup. Ct. Rep. 187; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Detroit City R. Co. v. Guthard, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

Even though a Federal question had been squarely raised in the supreme court of Pennsylvania, nevertheless, as the defense of contributory negligence was found by that court to be a complete defense, it would have been unnecessary for it to pass upon the Federal question, and its failure to do so could not have been assigned as error here.

Adams County v. Burlington & M. River R. Co. 112 U. S. 123, 28 L. ed. 678, 5 Sup. Ct. Rep. 77; Chouteau v. Gibson, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; Murdock v. Memphis, 20 Wall. 590, 636, 22 L. ed. 429, 444; Jenkins v. Loewenthal, 110 U. S. 222, 28 L. ed. 129, 3 Sup. Ct. Rep. 638; Hale v. Akers, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; Detroit City R. Co. v. Guthard, supra; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; De Saussure v. Gaillard, 127 U. S. 216–233, 32 L. ed. 125–132, 8 Sup. Ct. Rep. 1053; Eustis v. Bolles, 150 U. S. 361–366, 37 L.

ed. 1111, 1112, 14 Sup. Ct. Rep. 131; Rutland R. Co. v. Central Vermont R. Co. 159 U. S. 630, 640, 40 L. ed. 284, 289, 16 Sup. Ct. Rep. 113; Israel v. Arthur, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583.

Under the law of Pennsylvania, plaintiff would not be entitled to recover in this case even if the deceased had not been guilty of contributory negligence; because it is the well-settled law of that state that an employee assumes the risks incident to the discharge of his duties, even though those duties are hazardous, if he has had an opportunity to ascertain their dangerous character.

Patterson v. Pittsburg & C. R. Co. 76 Pa. 389, 18 Am. Rep. 412; Pittsburgh & C. R. Co. v. Sentmeyer, 92 Pa. 276, 37 Am. Rep. 684; Moore v. Pennsylvania R. Co. 167 Pa. 495, 31 Atl. 734; Auburn v. Tube Works Co. 14 Pa. Super. Ct. 570; Rooney v. Carson, 161 Pa. 26, 28 Atl. 996; Bemisch v. Roberts, 143 Pa. 1, 21 Atl. 998.

It is a rule of universal application, sustained by hundreds of decisions, that recovery by a plaintiff is precluded where his or her own negligence has proximately contributed to his or her own injury. It is sufficient to refer to—

Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; 7 Am. & Eng. Enc. Law, p. 371; Sunney v. Holt, 15 Fed. 880; Motey v. Pickle Marble & Granite Co. 20 C. C. A. 366, 36 U. S. App. 682, 74 Fed. 155.

Although, under the act of 1893, where applicable, an employee will not be deemed to have assumed the risk of the employment, nevertheless, he must act in such a manner that injury shall not befall him as the result of his own fault or imprudence. The distinction between "assumption of risk" and "contributory negligence" has always been clearly drawn.

Union P. R. Co. v. O'Brien, 161 U. S. 451–456, 40 L. ed. 766–770, 16 Sup. St. Rep. 618; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24; Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 304; St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495; Hesse v. Columbus, S. & H. R. Co. 58 Ohio St. 167, 50 N. E. 354; Miner v. Connecticut River R. Co. 153 Mass. 398, 26 N. E. 994; Cleveland, C. C. & St. L. R. Co. v. Baker, 33 C. C. A. 468, 63 U. S. App. 553, 91 Fed. 224.

With the exception of two or three decisions by a divided supreme court of North Carolina, all the cases hold that, where the plaintiff was contributorily negligent, he cannot recover, even though the defendant was disregarding a statutory requirement.

Winkler v. Philadelphia & R. R. Co. 1 Penn. (Del.) 80, 53 Atl. 90, 4 Penn. (Del.) 387, 56 Atl. 112; Cleveland, C. C. & St. L. R. Co. v. Baker, supra; Denver & R. G. R. Co. v. Arrighi, 63 C. C. A. 649, 129 Fed. 347; Narramore v. Cleveland, C. C. & St. L. R. Co. supra; Lake Erie & W. R. Co. v. Craig, 19 C. C. A. 631, 37 U. S. App. 654, 73 Fed. 643; Hodges v. Kimball, 44 C. C. A. 193, 104 Fed. 752; Dixon v. Western U. Teleg. Co. 68 Fed. 630; Kilpatrick v. Grand Trunk R. Co. 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531, 72 Vt. 263, 82 Am. St. Rep. 939, 47 Atl. 827; Mobile, J. & K. C. R. Co. v. Bromberg, 141 Ala. 258, 37 So. 395; Holum v. Chicago, M. & St. P. R. Co. 80 Wis. 299, 50 N. W. 99; Victor Coal Co. v. Muir, 20 Colo. 320, 26 L.R.A. 435, 46 Am. St. Rep. 299, 38 Pac. 378; Taylor v. Carew Mfg. Co. 143 Mass. 470, 10 N. E. 308; Grand v. Michigan C. R. Co. 83 Mich. 564, 11 L.R.A. 402, 47 N. W. 837; Vicksburg & M. R. Co. v. McGowan, 62 Miss. 694, 52 Am. Rep. 205; Mobile & O. R. Co. v. Stroud, 64 Miss. 792, 2 So. 171; New Orleans & N. E. R. Co. v. Brooks, 85 Miss. 274, 38 So. 40; Buckner v. Richmond & D. R. Co. 72 Miss. 877, 18 So. 449.

The ruling of the Pennsylvania courts upon the question of contributory negligence is not reviewable here, it not presenting a Federal question. In any event, it is in entire harmony with the rulings of this and all other courts.

Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; Southern P. Co. v. Seley, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 536.

Mr. Justice Holmes delivered the opinion of the court:

This is an action for the death of the plaintiff's intestate, Adam M. Schlemmer, while trying to couple a shovel car to a caboose. A nonsuit was directed at the trial and the direction was sustained by the supreme court of the state. The shovel car was part of a train on its way through Pennsylvania from a point in New York, and was not equipped with an automatic coupler in accordance with the act of March 2, 1893, chap. 196, § 2, 27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174. Instead of such a coupler it had an iron drawbar fastened underneath the car by a pin and projecting about a foot beyond the car. This drawbar weighed about 80 pounds and its free end played up and down. On this end was an eye, and the coupling had to be done by lifting the free end possibly a foot, so that it should enter a slot in an automatic coupler on the caboose and allow a pin to drop through the eye. Owing to the absence of buffers on the shovel car and to its

being so high that it would pass over those on the caboose, the car and caboose would crush anyone between them if they came together and the coupling failed to be made. Schlemmer was ordered to make the coupling as the train was slowly approaching the caboose. To do so he had to get between the cars, keeping below the level of the bottom of the *shovel car. It was dusk, and in endeavoring to obey the order and to guide the drawbar he rose a very little too high, and, as he failed to hit the slot, the top of his head was crushed.

The plaintiff, in her declaration, alleged that the defendant was transporting the shovel car from state to state, and that the coupler was not such as was required by existing laws. At the trial special attention was called to the United States statute as part of the plaintiff's case. The court having directed a nonsuit with leave to the plaintiff to move to take it off, a motion was made on the ground, among others, "that under the United States statute, specially pleaded in this case, the decedent was not deemed to have assumed the risk, owing to the fact that the car was not equipped with an automatic coupler." The question thus raised was dealt with by the court in overruling the motion. Exceptions were allowed and an appeal taken. Among the errors assigned was one "in holding that the shovel car was not a car used in interstate commerce or any other kind of traffic,"—the words of the court below. The supreme court affirmed the judgment in words that we shall quote. We are of opinion that the plaintiff's rights were saved and that we have jurisdiction of the case, subject to certain matters that we shall discuss.

On the merits there are two lesser questions to be disposed of before we come to the main one. A doubt is suggested whether the shovel car was in course of transportation between points in different states, and also an argument is made that it was not a car within the contemplation of § 2. On the former matter there seems to have been no dispute below. The trial court states the fact as shown by the evidence, and testimony that the car was coming from Limestone, New York, is set forth, which, although based on the report of others, was evidence, at least, unless objected to as hearsay. Damon v. Carrol, 163 Mass. 404, 408, 409, 40 N. E. 185. It was the testimony of the defendant's special agent employed to investigate the matter.

The latter question is pretty nearly answered by Johnson v. *Southern P. Co. 196 U. S. 1, 16, 49 L. ed. 363, 368, 25 Sup. Ct. Rep. 158, 161. As there observed: "Tested by context, subject-matter, and object, 'any car' meant all kinds of cars running on the rails, including locomotives. . . . The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars." These considerations apply to shovel cars as well as to locomotives, and show that the words "used in moving interstate traffic" should not be taken in a narrow sense. The later act of March 2, 1903, chap. 976, 32 Stat. at L. 943, U. S. Comp. Stat. Supp. 1905, p. 603, enacting that the provision shall be held to apply to all cars and similar vehicles, may be used as an argument on either side; but, in our opinion, indicates the intent of the original act. 196 U. S. 21, 49 L. ed. 371, 25 Sup. Ct. Rep. 158. There was an error on this point in the decision below.

A faint suggestion was made that the proviso in § 6 of the act, that nothing in it shall apply to trains composed of four-wheel cars, was not negatived by the plaintiff. The fair inference from the evidence is that this was an unusually large car of the ordinary pattern. But, further, if the defendant wished to rely upon this proviso, the burden was upon it to bring itself within the exception. The word "provided" is used in our legislation for many other purposes beside that of expressing a condition. The only condition expressed by this clause is that four-wheeled cars shall be excepted from the requirements of the act. In substance it merely creates an exception, which has been said to be the general purpose of such clauses. Interstate Commerce Commission v. Baird, 194 U. S. 25, 36, 37, 48 L. ed. 860, 865, 866, 24 Sup. Ct. Rep. 563. "The general rule of law is, that a proviso carves special exceptions only out of the body of the act; and those who set up any such exception must establish it," etc. Ryan v. Carter, 93 U. S. 78, 83, 23 L. ed. 807, 809; United States v. Dickson. 15 Pet. 141, 165, 10 L. ed. 689, 698. The rule applied to construction is applied equally to the burden of proof in a case like this. United States v. Cook, 17 Wall. 168, 21 L. ed. 538; Com. v. Hart, 11 Cush. 130, 134.

We come now to the main question. The opinion of the supreme court was as follows: "Whether the act of Congress *. . . [11] has any applicability at all in actions for negligence in the courts of Pennsylvania is a question that does not arise in this case, and we therefore express no opinion upon it. The learned judge below sustained the nonsuit on the ground of the deceased's contributory negligence, and the judgment is affirmed on his opinion on that subject." [207 Pa. 202, 56 Atl. 419.] It is said that the existence of contributory negligence is not a Federal question, and that, as the

decision went off on that ground, there is nothing open to revision here.

We certainly do not mean to qualify or limit the rule that, for this court to entertain jurisdiction of a writ of error to a state court, it must appear affirmatively that the state court could not have reached its judgment without tacitly, if not expressly, deciding the Federal matter. Bachtel v. Wilson (Jan. 7, 1907) 204 U. S. 36, ante, 357, 27 Sup. Ct. Rep. 243. But, on the other hand, if the question is duly raised and the judgment necessarily, or, by what appears, in fact involves such a decision, then this court will take jurisdiction, although the opinion below says nothing about it. Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173. And if it is evident that a ruling purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake, that may be sufficient to warrant a review. Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 48 L. ed. 1124, 24 Sup. Ct. Rep. 767. The application of this rather vague principle will appear as we proceed.

It is enacted by § 8 of the act that any employee injured by any car in use contrary to the provisions of the act shall not be deemed to have assumed the risk thereby occasioned, although continuing in the employment of the carrier after the unlawful use had been brought to his knowledge. An early, if not the earliest, application of the phrase "assumption of risk" was the establishment of the exception to the liability of a master for the negligence of his servant when the person injured was a fellow servant of the negligent man. Whether an actual assumption by contract was supposed on grounds of economic theory, or the assumption was imputed because of a [12]*conception of justice and convenience, does not matter for the present purpose. Both reasons are suggested in the well-known case of Farwell v. Boston & W. R. Corp. 4 Met. 49, 57, 58, 38 Am. Dec. 339. But, at the present time, the motion is not confined to risks of such negligence. It is extended, as in this statute it plainly is extended, to dangerous conditions, as of machinery, premises, and the like, which the injured party understood and appreciated when he submitted his person to them. In this class of cases the risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, on a general principle of our law. Probably the modification of this general principle by some judicial decisions and by statutes like § 8 is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist.

Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 68, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24. Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master (a matter upon which we express no opinion), then, unless great care be taken, the *servant's rights will be sacrificed by simply [13] charging him with assumption of the risk under another name. Especially is this true in Pennsylvania, where some cases, at least, seem to have treated assumption of risk and negligence as convertible terms. Patterson v. Pittsburg & C. R. Co. 76 Pa. 389, 18 Am. Rep. 412. We cannot help thinking that this has happened in the present case, as well as that the ruling upon Schlemmer's negligence was so involved with and dependent upon erroneous views of the statute that if the judgment stood the statute would suffer a wound.

To recur for a moment to the facts: The only ground, if any, on which Schlemmer could be charged with negligence, is that when he was between the tracks he was twice warned by the yard conductor to keep his head down. It is true that he had a stick, which the rules of the company required to be used in coupling, but it could not have been used in this case, or at least the contrary could not be and was not assumed for the purpose of directing a nonsuit. It was necessary for him to get between the rails and under the shovel car as he did, and his orders contemplated that he should do so. But the opinion of the trial judge, to which, as has been seen, the supreme court refers, did not put the decision on the fact of warning alone. On the

trary, it began with a statement that an ployee takes the risk even of unusual dan- s if he has notice of them and voluntarily oses himself to them. Then it went on to that the deceased attempted to make the pling with a full knowledge of the dan- , and to imply that the defendant was lty of no negligence in using the arrange- nt which it used. It then decided in terms t the shovel car was not a car within the aning of § 2. Only after these prelimi- ries did it say that, were the law other- se, the deceased was guilty of contributory gligence; leaving it somewhat uncertain at the negligence was.

It seems to us not extravagant to say that final ruling was so implicated with the lier errors that on that ground alone the gment should not be allowed to stand. are *clearly of opinion that Schlemmer's hts were in no way impaired by his get- g between the rails and attempting to ple the cars. So far he was saved by the vision that he did not assume the risk. e negligence, if any, came later. We bt if this was the opinion of the court ow. But suppose the nonsuit has been clearly and in terms on Schlemmer's sing his head too high after he had been rned. Still we could not avoid dealing th the case, because it still would be our ty to see that his privilege against being d to have assumed the risk of the situa- n should not be impaired by holding the ne thing under another name. If a man intent on suicide, but desiring to live, said to be chargeable with negligence as tter of law when he miscalculates the ght of the car behind him by an inch, ile his duty requires him, in his crouching ition, to direct a heavy drawbar moving ve him into a small slot in front, and this the dusk, at nearly nine of an August ning, it is utterly impossible for us to in- pret this ruling as not, however uncon- ously, introducing the notion that to some ent the man had taken the risk of the ger by being in the place at all. But atever may have been the meaning of the l courts, we are of opinion that the pos- lity of such a minute miscalculation, un- such circumstances, whatever it may be ed, was so inevitably and clearly at- ted to the risk which Schlemmer did not ume, that to enforce the statute requires the judgment should be reversed.

udgment reversed.

r. Justice **Brewer**, dissenting:

dissent from the opinion and judgment his case and for these reasons:

his was an action in the common pleas t of Jefferson county, Pennsylvania, to ver damages on account of the death of the husband of plaintiff. On the trial the court ordered *a nonsuit on the ground of[15] contributory negligence on the part of the decedent, with leave to the plaintiff to move to take the same off. This motion was made and overruled; judgment for the defendant was entered, which was affirmed by the supreme court of the state. The decedent was killed while attempting to couple a steam shovel to a caboose. The steam shovel was being moved in interstate transportation, and was not equipped with the safety coupler required by act of Congress of March 2, 1893. 27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3176. The 8th section of that act provides:

"That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

This, while removing from the employee the burden of any assumption of risk, does not relieve him from liability for contributory negligence. For the rule is well settled that while, in cases of this nature, a violation of the statutory obligation of the employer is negligence *per se*, and actionable if injuries are sustained by servants in consequence thereof, there is no setting aside of the ordinary rules relating to contributory negligence, which is available as a defense, notwithstanding the statute, unless that statute is so worded as to leave no doubt that this defense is also to be excluded. Taylor v. Carew Mfg. Co. 143 Mass. 470, 10 N. E. 308; Krause v. Morgan, 53 Ohio St. 26, 40 N. E. 886; East Tennessee, V. & G. R. Co. v. Rush, 15 Lea, 145, 150; Queen v. Dayton Coal & I. Co. 95 Tenn. 458, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460; Reynolds v. Hindman, 32 Iowa, 146; Caswell v. Worth, 5 El. & Bl. 849; Buckner v. Richmond & D. R. Co. 72 Miss. 873, 18 So. 449; Victor Coal Co. v. Muir, 20 Colo. 320, 26 L.R.A. 435, 46 Am. St. Rep. 299, 38 Pac. 378; Holum v. Chicago, M. & St. P. R. Co. 80 Wis. 299, 50 N. W. 99; Kilpatrick v. Grand Trunk R. Co. 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531; Denver & R. G. R. Co. v. Arrighi, 63 C. C. A. 649, 129 Fed. 347; Winkler v. Philadelphia *& R. R. Co.[16] 4 Penn. (Del.) 80, 53 Atl. 90. The Interstate Commerce Commission held this to be the rule in reference to this particular statute. 14 Ann. Rep. 1900, p. 84. Indeed, it is not contended by the majority that the defense of contributory negligence has been taken away.

That there is a vital difference between

assumption of risk and contributory negligence is clear. As said by this court in Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 68, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24, 25: "The question of assumption of risk is quite apart from that of contributory negligence." See also Union P. R. Co. v. O'Brien, 161 U. S. 451, 456, 40 L. ed. 766, 770, 16 Sup. Ct. Rep. 618. This proposition, however, is so familiar and elementary that citation of authorities is superfluous.

In the motion for a nonsuit the second proposition was that "the evidence upon behalf of plaintiff proves conclusively that the accident happened because the deceased failed to keep his head at least as low as the floor of the steam shovel, that this omission was the fault of the deceased exclusively, and that deceased was guilty of contributory negligence and there can be no recovery in this case."

In ordering the nonsuit the trial court said:

"True, under said act he was not considered to have assumed the risks of his employment, but by this is certainly meant no more than such risks as he was exposed to thereby, and resulted in injury free from his own negligent act. It would hardly be argued that defendant would be liable, under such circumstances, were the employee to voluntarily inflict an injury upon himself by means of the use of the improperly equipped car. And yet it is but a step from contributory negligence to such an act.

. . . . . .

"It seems very clear to us that, whatever view we may take of this case, we are led to the legal conclusion that decedent was guilty of negligence that contributed to his death, and that the plaintiff, however deserving she may be, or however much we regret the unfortunate accident, cannot recover."

[17] *The supreme court affirmed the judgment in the following *per curiam* opinion:

"Whether the act of Congress . . . in regard to the use of automatic couplings on cars employed in interstate commerce has any applicability at all in actions for negligence in the courts of Pennsylvania is a question that does not arise in this case, and we therefore express no opinion upon it. The learned judge below sustained the nonsuit on the ground of the deceased's contributory negligence, and the judgment is affirmed on his opinion on that subject." [207 Pa. 202, 56 Atl. 419.]

That contributory negligence is a non-Federal question is not doubted, and that when a state court decides a case upon grounds which are non-Federal and sufficient to sustain the decision this court has no jurisdiction is conceded.

While sometimes negligence is a mixed question of law and fact, yet, in the present case, whether the decedent, in attempting to make the coupling after the warning given by the conductor, lifted his head unnecessarily and negligently, is solely a question of fact, and, in cases coming on error from the judgment of a state court, the findings of that court on questions of fact have always been held conclusive on us. See Chrisman v. Miller, 197 U. S. 313, 319, 49 L. ed. 770, 772, 25 Sup. Ct. Rep. 468, and the many cases cited in the opinion.

It would seem from this brief statement that the case ought to be dismissed for lack of jurisdiction. Escape from this conclusion can only be accomplished in one of these ways: By investigation of the testimony and holding that there was no proof of contributory negligence. If the case came from one of the lower Federal courts we might properly consider whether there was sufficient evidence of contributory negligence; but, as shown above, a very different rule obtains in respect to cases coming from a state court. We said this very term, in Bachtel v. Wilson, 204 U. S. 36, 40, ante, 357, 359, 27 Sup. Ct. Rep. 243, 245, in reference to a case coming from a state court to this: "Before we can pronounce its judgment in conflict with the Federal Constitution it must be made to appear that its decision was one necessarily in conflict *therewith, and not that possibly [18] or even probably it was." Before, then, we can disturb this judgment of the supreme court of Pennsylvania, it must (paraphrasing the language just quoted a little) be made to appear that its decision of the question of contributory negligence was one necessarily in disregard of the testimony and not that possibly or even probably it was.

It cannot be said that there was no evidence of negligence on the part of the decedent. The plaintiff's testimony (and the defendant offered none) showed that deceased was an experienced brakeman; that the link and pin coupling was in constant use on other than passenger coaches; that before the deceased went under the car the pin had already been set; that, as he was going under the car, he was twice notified to be careful and keep his head down, and yet, without any necessity therefor being shown, he lifted his head and it was crushed between the two cars; that all he had to do was to guide the free end of the drawbar into the slot, and while the drawbar weighed 75 to 80 pounds, it was fastened at one end, and the lifting and [illegible]iding was only of the other and l[illegible]d; that the drawbar heads were of the su[illegible]lard height and the

y of the shovel car higher than that of caboose. Immediately thereafter the pling was made by another brakeman hout difficulty. If an iron is dangerly hot, and one knows that it is hot l is warned not to touch it, and does ch it without any necessity therefor beshown, and is thereby burned, it is ling to say that there is no evidence of ligence.

A second alternative is that this court is that the supreme court of Pennsylia recognizes no difference between asption of risk and contributory negliice. But that is not to be imputed in w of the rulings in the lower court, afned by the supreme court, to say nothing the recognized standing and ability of t court.

Or we may hold that the Pennsylvania rts intentionally, wrongfully, and with any evidence thereof, found that there as contributory negligence in order to id the binding force of the Federal law. ring the course of the argument, in reonse to an interrogation, counsel for plain in error bluntly charged that upon se courts. Of course this court always aks in respectful terms of the decisions reviews, but the implication of the most rteous language may be as certain as lirect charge.

It is intimated that the Pennsylvania rts confuse assumption of risk and conbutory negligence,—in other words, are mindful of the difference between them,—l Patterson v. Pittsburg & C. R. Co. 76 . 389, 18 Am. Rep. 412, is cited as author. That case was decided more than thirty rs ago, and might, therefore, fairly be sidered not an expression of the present ws of those courts. But, on examination the case, in which a judgment in favor the railroad was reversed by the sume court, we find this language, which is posed to indicate the confusion (pp. , 394, Am. Rep. p. 415):

'In this discussion, however, we are not forget that the servant is required to rcise ordinary prudence. If the instrutality by which he is required to perm his service is so obviously and immetely dangerous that a man of common idence would refuse to use it, the master not be held liable for the resulting dam. In such case the law adjudges the vant guilty of concurrent negligence, and l refuse him that aid to which he otherwould be entitled. But where the serv, in obedience to the requirement of master, incurs the risk of machinery ich, though dangerous, is not so much is to threaten immediate injury, or where is reasonably probable that it may be safely used by extraordinary caution or skill, the rule is different. In such case the master is liable for a resulting accident."

Curiously enough, in Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 77, 37 C. C. A. 499, 505, 96 Fed. 298, 304, a recent decision of the court of appeals of the sixth circuit, in the opinion announced by Circuit Judge Taft is language not altogether dissimilar:

"Assumption of risk and contributory negligence approximate *where the danger is so [20] obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover, because he, and not the master, causes the injury, or because they jointly cause it."

For these reasons I dissent from the opinion and judgment, and am authorized to to say that Mr. Justice Peckham, Mr. Justice McKenna, and Mr. Justice Day concur in this dissent.

JAMES G. TINSLEY, Appt.,
v.
MORGAN TREAT, United States Marshal in and for the Eastern District of Virginia, et al.

(See S. C. Reporter's ed. 20-33.)

Criminal law—removal to another Federal district—local practice not controlling.

1. The local practice under which one indicted for a crime is not entitled to a preliminary examination prior to the trial on the merits has no application to the proceedings under U. S. Rev. Stat. § 1014, U. S. Comp. Stat., 1901, p. 716, for the arrest and removal to another Federal district for trial of a person there charged with an offense against the United States.

Criminal law—removal to another Federal district—probable cause—indictment not conclusive.

2. Evidence tending to show that no

NOTE.—On the removal to another Federal district for trial of a person there charged with an offense against the United States—see note to Greene v. Henkel, 46 L. ed. U. S. 177.

offense, triable in the Federal district court to which the accused is sought to be removed pursuant to U. S. Rev. Stat. § 1014, has been committed by him in that district, cannot be excluded in the removal proceedings, on the theory that a certified copy of the indictment and proof of the identity of the party accused furnish conclusive evidence of probable cause.

[No. 369.]

Argued December 3, 4, 1906. Decided March 4, 1907.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia to review an order dismissing a writ of habeas corpus to inquire into an order of the district judge of that district, directing the removal to another Federal district for trial of a person there charged with an offense against the United States. Reversed and remanded with directions to discharge the appellant from custody without prejudice to a renewal of the application to remove.

The facts are stated in the opinion.

Messrs. John J. Vertrees and John S. Miller argued the cause, and, with Messrs Henry A. M. Smith and James C. Bradford, filed a brief for appellant:

That part of U. S. Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716, which says the proceedings are to be conducted "agreeably to the usual mode of process against offenders in such state," relates alone to the procedure before the commissioner. It has no relation to the proceedings before the circuit court upon habeas corpus.

Hyde v. Shine, 199 U. S. 85, 50 L. ed. 97, 25 Sup. Ct. Rep. 760.

In habeas corpus removal proceedings instituted to prevent the removal of an "offender" under § 1014 of the Revised Statutes, from his residence in one state to a district in another state, for trial under an indictment found in the latter state, when a certified copy of the indictment is the only evidence introduced by the government to show the existence of probable cause, it is the right of the "offender" to present evidence that proves the absence of probable cause, that he is innocent of the offense charged in the indictment, or that the court has no jurisdiction.

This right exists also on the hearing before the judge of the district, upon an application to him for an order of removal.

Re Greene, 52 Fed. 106; Re Wolf, 27 Fed. 609; Re Doig, 4 Fed. 195; Re Price, 83 Fed. 830; United States v. Pope, 3 Ohio L. J. 30, Fed. Cas. No. 16,069; Re Wood, 95 Fed. 288; United States v. Fowkes, 49 Fed. 50, 3 C. C. A. 394, 3 U. S. App. 247, 53 Fed. 13; Re Wolf, 27 Fed. 606; United States v. Greene, 100 Fed. 941; United States v. Lee, 84 Fed. 626; United States v. Greene, 108 Fed. 816; Re Dana, 68 Fed. 886; Ex parte Rickelt, 61 Fed. 203; Price v. McCarty, 32 C. C. A. 162, 59 U. S. App. 578, 89 Fed. 84; United States v. Rogers, 23 Fed. 661; United States v. Brawner, 7 Fed. 86; Re Buell, 3 Dill. 116, Fed. Cas. No. 2,102; United States v. Volz, 14 Blatchf. 15, Fed. Cas. No. 16,627; United States v. Haskins, 3 Savy. 262, Fed. Cas. No. 15,322; United States v. Shepard, 1 Abb. (U. S.) 431, Fed. Cas. No. 16,273; Re Alexander, 1 Low. Dec. 530, Fed. Cas. No. 162; Re Beshears, 79 Fed. 70; Re Terrell, 51 Fed. 213; Re Corning, 51 Fed. 205; Hughes, Crim. Proc. §§ 15–17, p. 29.

Upon the question of jurisdiction, as well as of innocence or guilt, the commissioner or committing magistrate, in considering the probative effect of the indictment, is to consider it as prima facie establishing probable cause on both questions, and it necessarily follows that what is prima facie is subject to rebuttal.

Beavers v. Henkel, 194 U. S. 73, 48 L. ed. 882, 24 Sup. Ct. Rep. 605; Hyde v. Shine, 199 U. S. 84, 50 L. ed. 97, 25 Sup. Ct. Rep. 760.

Strictly speaking, an indictment is not evidence in the legal sense. It is merely hearsay assertion as to the offender's guilt.

2 Wigmore, Ev. p. 1110.

It is secondary evidence, which, to a certain extent, is admissible on such examinations.

United States v. Greene, 100 Fed. 943; United States v. Pope, supra.

In the absence of exculpatory evidence, a copy of the indictment may well be accepted as equivalent to an affidavit, as sufficient authority for removal; not because it is evidence in the legal or primary sense, but because such removal cases ought to be ranged with that class of cases wherein secondary or hearsay evidence is deemed good enough to be accepted. In that sense it is prima facie evidence of probable cause. It is treated as evidence, and as being sufficient under such circumstances.

United States v. Fowkes, 49 Fed. 52.

When it is said that there must be evidence of probable cause, what is meant is that the court should be satisfied that there is evidence on which a jury may convict (Ibid.); or, at least, proof furnishing good reasons to believe that the crime alleged has been committed by the accused (Re Burr, 4 Cranch, 470 Appx. 2 L. ed. 684, Appx. Fed. Cas. No. 14,692a).

Messrs. Marcellus Green and Garner Wynn Green also filed a brief for appellant.

Assistant Attorney General McReynolds argued the cause and filed a brief for appellees:

ppeals from decrees of circuit courts in eas corpus proceedings cannot be taken ectly to this court unless they come with- one of the clauses of the act of March 3, 1, § 5.

au Ow Bew v. United States, 144 U. S. 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. ; Cross v. Burke, 146 U. S. 82, 88, 36 L. 896, 898, 13 Sup. Ct. Rep. 22; Re Len- n, 150 U. S. 393, 399, 37 L. ed. 1120, 1122, Sup. Ct. Rep. 123.

The only ground upon which an argument n be bottomed to sustain the present ap- al is that the case involves the construc- on or application of the Constitution of e United States, within the meaning of ose terms in § 5; and, in order for that aragraph to apply, there must be a real, bstantial dispute or controversy as to ch construction or application.

Carey v. Houston & T. C. R. Co. 150 U. 181, 37 L. ed. 1044, 14 Sup. Ct. Rep. 63; Western U. Teleg. Co. v. Ann Arbor R. Co. 78 U. S. 243, 44 L. ed. 1054, 20 Sup. Ct. ep. 867; American Sugar Ref. Co. v. New rleans, 181 U. S. 281, 45 L. ed. 861, 21 p. Ct. Rep. 646.

The proceedings were under U. S. Rev. at. § 1014, U. S. Comp. Stat. 1901, p. 716, d the thing in issue was the proper con- ruction of that section, which is the foun- tion of whatever rights the petitioner d. The government contended that, under a sufficient indictment, with proof or ad- ssion of identity, made out a conclusive se, and rendered it obligatory upon the dge to direct removal. This view pre- iled. Petitioners claimed that, under it, ey had the right to introduce proof in ntradiction of the indictment. Manifestly, e issue was upon the construction of the ction.

Beavers v. Haubert, 198 U. S. 77, 85, 49 ed. 950, 953, 25 Sup. Ct. Rep. 573.

If, instead of § 1014, Congress had enacted express words what the district judge ld the law to be, a removal thereunder uld not have been a violation of any con- itutional provision. It follows, even if it admitted that the judge misconstrued e statute, no constitutional guaranty was fringed.

Rawlins v. Georgia, 201 U. S. 638, 50 L. 899, 26 Sup. Ct. Rep. 560; Re Moran, 203 S. 96, ante, 105, 27 Sup. Ct. Rep. 25.

A writ of habeas corpus cannot be used to rform the functions of a writ of error or peal.

Benson v. McMahon, 127 U. S. 457, 32 L. 234, 8 Sup. Ct. Rep. 1240; Ornelas v. iz, 161 U. S. 502, 40 L. ed. 787, 16 Sup Ct. p. 689; Bryant v. United States (Ex parte yant) 167 U. S. 105, 42 L. ed. 94, 17 Sup. Rep. 744; Terlinden v. Ames, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484; Riggins v. United States, 199 U. S. 548, 50 L. ed. 303, 26 Sup. Ct. Rep. 147; Felts v. Murphy, 201 U. S. 123, 129, 50 L. ed. 689, 692, 26 Sup. Ct. Rep. 366.

Where one in custody under judgment of a court resorts to habeas corpus, two questions are open for consideration: Did the court which rendered judgment or made the order of imprisonment have jurisdiction of the subject-matter and of the person? and Did the court exceed its jurisdiction?

Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; Ex parte Parks, 93 U. S. 18, 23, 23 L. ed. 787, 788; Ex parte Siebold, 100 U. S. 371, 375, 25 L. ed. 717, 718; Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; Horner v. United States, 143 U. S. 577, 36 L. ed. 269, 12 Sup. Ct. Rep. 522; Greene v. Henkel, 183 U. S. 249, 261, 46 L. ed. 177, 189, 22 Sup. Ct. Rep. 218; Felts v. Murphy, 201 U. S. 123, 50 L. ed. 689, 26 Sup. Ct. Rep. 366; Ex parte Moran, 75 C. C. A. 396, 144 Fed. 604; Ex parte Harding, 120 U. S. 782, 30 L. ed. 824, 7 Sup. Ct. Rep. 780; Re Wilson, 140 U. S. 575, 35 L. ed 513, 11 Sup. Ct. Rep. 870.

The petitioners claim that he erred in holding the indictment sufficient, and should have heard the excluded evidence and then acted. The judge considered the validity of the indictment and sustained it. If wrongful, his action was error, and does not go to the jurisdiction.

Horner v. United States, supra.

This court decided in Beavers v. Henkel, 194 U. S. 73, 82, 48 L. ed. 882, 885, 24 Sup. Ct. Rep. 605, that a valid indictment, with proof or admission of identity, establishes probable cause sufficient to justify a warrant of removal. Such proof was before the district judge.

In Hyde v. Shine, 199 U. S. 83, 84, 50 L. ed. 97, 25 Sup. Ct. Rep. 760, it was declared well settled, that upon habeas corpus, the court will not weigh the evidence.

In Virginia one indicted for crime is not entitled to a preliminary examination before being put on trial.

Jones v. Com. 86 Va. 661, 10 S. E. 1005.

Before the district judge no question was raised as to the sufficiency of the indictment. After examination it was held valid by both judges below, and, in view of their conclusion, cannot be said to be obviously bad. In the present proceeding, neither this nor the trial court should inquire with great particularity as to technicalities. Such points should be considered and the legal sufficiency of the indictment determined only by the court in which it was found.

Benson v. Henkel, 198 U. S. 1, 10, 49 L. ed. 919, 922, 25 Sup. Ct. Rep. 569.

The highly refined objections to the indict-

ment urged in the brief for appellants were not proper matter for the nice consideration of the district judge; not because he was lacking in ability therefor, but because, in the orderly way, they should be decided by the trial court. And no court, on habeas corpus, can be required to pass upon them in advance of a trial in the court of the indictment.

Horner v. United States, supra; Riggins v. United States, 199 U. S. 547, 50 L. ed. 303, 26 Sup. Ct. Rep. 147.

Removal proceedings are but process for arrest,—means of bringing a defendant to trial.

Beavers v. Haubert, 198 U. S. 77, 87, 49 L. ed. 950, 954, 25 Sup. Ct. Rep. 573.

The action of the court below was correct.

Greene v. Henkel, supra; Beavers v. Henkel, 194 U. S. 73, 84, 48 L. ed. 882, 886, 24 Sup. Ct. Rep. 605; Benson v. Henkel, supra; Hyde v. Shine, 199 U. S. 62, 84, 50 L. ed. 90, 97, 25 Sup. Ct. Rep. 760; Benson v. McMahon, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; Ornelaz v. Ruiz, 161 U. S. 502, 508, 40 L. ed. 787, 789, 16 Sup. Ct. Rep. 689; Re Belknap, 96 Fed. 614.

Mr. Chief Justice Fuller delivered the opinion of the court:

In May, 1906, the grand jury in the United States circuit court for the middle district of Tennessee returned an indictment against thirty corporations, two partnerships, and twenty-five persons, as defendants. This indictment contained six counts. Generally speaking, the first, second, fourth, and fifth charged the defendants with violating § 1 of the act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies" [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200], and the third and sixth counts charged them under § 5440 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3676). In July, 1906, the government presented to the district judge of the eastern district of Virginia, at Richmond, a complaint made by Morgan Treat, United States Marshal, alleging that he believed James G. Tinsley stood indicted [25] as aforesaid, and *annexing a certified copy of the indictment as a part of the complaint, and praying that Tinsley might "be arrested and imprisoned and removed or bailed, as the case may be, for trial before the said circuit court of the United States for the middle district of Tennessee, and further dealt with according to law." Tinsley was arrested and taken directly before the district judge, who acted as committing magistrate as well as the judge to order removal. In the proceedings before the district judge, Tinsley admitted that he was one of the defendants named in the indictment. The government relied on the certified copy of the indictment, and offered no evidence except that; and asked for an order to be made for Tinsley's commitment and removal forthwith.

The record of those proceedings states:

"And thereupon the defendant, J. G. Tinsley, offered himself as witness in his own behalf, and, being about to be sworn, the United States, by its counsel, thereupon objected to the witness being sworn or to any testimony being given in rebuttal of the indictment in these proceedings, on the ground that, the identity of the defendant being admitted, inasmuch as the indictment on its face charges offenses against the United States, committed and triable in the jurisdiction in which the defendant stands indicted, no evidence is admissible here to impeach the indictment, and the order of commitment should be made without other proof.

"The defendant's counsel thereupon offered to prove by the defendant and other witnesses, then and there present, that the circuit court for the middle district of Tennessee had no jurisdiction over the person of said defendant touching the offense charged in said indictment, in that defendant and said other witnesses would, if permitted, testify that defendant is, and has been for many years, a resident and citizen of the city of Richmond, state of Virginia, and that defendant never, at any time, or at any place in the state of Tennessee, at the times charged in the indictment, did or performed, or was party to, or engaged in, any act or thing in the said indictment *charged as having been done and performed in any way whatsoever by this defendant in the said state of Tennessee; nor has defendant done, or performed, or been engaged in, or a party to, the same or any of them in any other place or places at any other time or times whatsoever.

"Thereupon counsel for the government renewed its objections as aforesaid:

"After hearing counsel on both sides, the court announced its conclusions as follows:

"'The conclusion reached by the court is that, in a proceeding for the arrest and removal of persons charged with a violation of the laws of the United States pursuant to § 1014 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 716), before a United States district judge, sitting in the state of Virginia, in which state there no longer exists the right of a preliminary examination upon a crime charged prior to the trial upon the merits, when said judge is called upon to act as well in the matter of the apprehension of such persons as in their removal to the

risdiction in which they have been in-icted, that upon the government's presen-ation of a sufficient indictment, regularly ound by a grand jury in a court of the Jnited States, properly charging the com-nission of an offense within the district in vhich such indictment is found, coupled vith proof of the identity of the person ndicted, it is its duty to properly bail such person for appearance before the court in vhich he is indicted, or cause him to be re-noved thereto.' "

It was then ruled that the testimony of-fered was inadmissible, and the district judge ordered that the accused either give bail or be held for removal. Tinsley de-clined to give bond, a warrant directing removal to the middle district of Tennessee was issued, and he remained in custody pending its execution. No objection was offered to the indictment at any time during the proceedings before the district judge.

The district judge should not have al-lowed himself to be controlled by the stat-utes of Virginia. In that commonwealth it appears to have been formerly required that after indictment *an examination should be had; but by subsequent legislation it was provided that where an indictment had been found, a capias should be issued for the arrest of the defendant, and no inquiry was to be made. But, when there was no indictment, a person arrested for an indicta-ble offense must be taken before a magis-trate for preliminary examination, and it was the magistrate's duty to inquire wheth-er or not there was sufficient cause for harging the accused with the offense. Pol-ard's Anno. Code, Va. §§ 3955, 3969, 4003; 'ones v. Com. 86 Va. 661, 10 S. E. 1005.

But, as hereinafter seen, the district udge, on application to remove, acts judi-ially, and that part of § 1014 of the Re-ised Statutes of the United States which ays that the proceedings are to be con-ucted "agreeably to the usual mode of rocess against offenders in such state," has o relation to the inquiry on application for emoval.

Application was then made to the circuit urt for writs of habeas corpus and cer-orari, which were granted and due returns ade. The petition alleged that Tinsley as unlawfully restrained of his liberty by e marshal, under color of authority of the nited States, by virtue of a warrant for moval, claimed to have been issued under 1014, Revised Statutes. It set forth in ll the proceedings taken before the dis-ict judge and the rulings and orders made ring the hearing. It was charged that, der and by virtue of clause 3, § 2, arti-3, of the Constitution, and of the 6th endment, he was entitled to be tried, and could only be tried for any alleged of-fense against the United States in the state and district where the offenses charged in the indictment were committed; that the offenses specified in the indictment were not committed in the middle district of Tennes-see; that none of the acts supposed to have been engaged in by petitioner were done within that district; that the indictment stated no offense and was insufficient and void. It was further alleged that the war-rant of removal was in violation of § 2 of article 3 of the Constitution *and of the 6th [28] Amendment; that the rulings of the dis-trict judge, in holding the certified copy of the indictment conclusive and in refusing to permit the introduction of any evidence on behalf of petitioner, deprived him of rights secured by the Constitution and by § 1014, Revised Statutes; and that he was deprived of his liberty without due process of law.

At the hearing before the circuit court, in addition to the record of the proceedings be-fore the district judge, an offer was made to prove by witnesses the facts set forth in the petition, but the court did not admit the same, because it was held that the cer-tified copy of the indictment, with proof of the identity of the party accused, sufficient-ly established the existence of probable cause.

In other words, the indictment was in ef-fect held to be conclusive. The circuit judge said, it is true, that probable cause must be shown in order to obtain a removal, but he held that inasmuch as the copy of the indictment alone was regarded as suf-ficient evidence of probable cause in Bea-vers v. Henkel, 194 U. S. 73, 48 L. ed. 882, 24 Sup. Ct. Rep. 605, it was sufficient in the present case. In that case, however, no evi-dence was introduced to overcome the pri-ma facie case made by the indictment ex-cept that evidence was offered as to what passed in the grand jury room, and rejected on that ground, and not because it went to the merits.

Section 1014 of the Revised Statutes reads as follows:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a su-preme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agree-ably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and im-prisoned, or bailed, as the case may be, for trial before such court of the United States

[29] as by law *has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

Obviously the first part of this section provides for the arrest of any offender against the United States wherever found, and without reference to whether he has been indicted; but when he has been indicted in a district in another state than the district of arrest, then, after the offender has been committed, it becomes the duty of the district judge, on inquiry, to issue a warrant of removal. And it has been repeatedly held that in such cases the judge exercises something more than a mere ministerial function, involving no judicial discretion. He must look into the indictment to ascertain whether an offense against the United States is charged, find whether there was probable cause, and determine whether the court to which the accused is sought to be removed has jurisdiction of the same. "The liberty of the citizen, and his general right to be tried in a tribunal or forum of his domicil, imposes upon the judge the duty of considering and passing upon those questions." Mr. Justice Jackson, then Circuit Judge, Re Greene, 52 Fed. 106. In the language of Mr. Justice Brewer, delivering the opinion in Beavers v. Henkel, supra:

"It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory [30] provisions *must be interpreted in the light of all that may be done under them. We must never forget that in all controversies, civil or criminal, between the government and an individual, the latter is entitled to reasonable protection. Such seems to have been the purpose of Congress in enacting § 1014, Rev. Stat., which requires that the order of removal be issued by the judge of the district in which the defendant is arrested. In other words, the removal is made a judicial, rather than a mere ministerial, act."

In Greene v. Henkel, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218, Greene was indicted in the district court of the United States for the southern district of Georgia. He was arrested and taken before a commissioner in the state of New York. The commissioner held that the certified copy of the indictment was conclusive evidence of probable cause, and refused to hear any evidence on the part of the defendant; and thereupon application was made to the district judge of the southern district of New York for an order of removal. That judge held that the commissioner should have heard evidence, and remanded the case. Evidence was then taken before the commissioner, and he decided that there was probable cause. Application was again made to the district judge for an order of removal, and he held that the evidence showed the existence of probable cause, and made the order accordingly. Greene thereupon presented his petition to the circuit court for a writ of habeas corpus, which was denied, and the case brought here on appeal. The evidence before the commissioner and before the district judge was not annexed to the petition nor brought up on certiorari, so that it formed no part of the record in the habeas corpus case. We held that, in the absence of the evidence, we must assume that the finding of probable cause was sustained.

But it was insisted that the offense was only that which was contained in the indictment, and, if the indictment were insufficient for any reason, that then no offense was charged upon which removal could be had. This court, however, *ruled that the [31] indictment did not preclude the government from giving evidence of a certain and definite character concerning the commission of the offense, and that the mere fact that there might be lacking in the indictment some averment of time or place or circumstance in order to render it free from technical defects would not prevent the removal if evidence were given on the hearing which supplied such defects and showed probable cause to believe the defendants guilty of the offense defectively stated in the indictment. Mr. Justice Peckham, in delivering the opinion, was careful to say that it was not held that where the indictment charged no offense against the United States or the evidence failed to show any, or, if it appeared that the offense charged was not committed or triable in the district to which the removal was sought, the judge would be justified in ordering the removal, because there would be no jurisdiction to commit or any to order the removal of the prisoner. "There must be some competent evidence to show that an offense has been committed over which the court in the other district had jurisdiction, and that the defendant

dividual named in the charge, and
e is probable cause for believing him
f the offense charged." On the
that case it was not found neces-
express an opinion upon the ques-
ther the finding of an indictment
the proceeding under § 1014, con-
vidence of the existence of probable
believing the defendant in the in-
guilty of the charge set forth.
it may be said that if the in-
were conclusive upon the accused,
be conclusive upon the government

held in Beavers v. Henkel, supra,
v. Henkel, 198 U. S. 1, 49 L. ed.
Sup. Ct. Rep. 569, Hyde v. Shine,
62, 50 L. ed. 90, 25 Sup. Ct. Rep.
well as Greene v. Henkel, supra,
indictment constituted prima facie
of probable cause, but not that it
lusive.
gard that question as specifically
l in the *present case, and we hold
indictment cannot be treated as
e under § 1014.
eing so, we are of opinion that the
offered should have been admitted.
tended that that evidence was im-
, and, if admitted, could not have
the decision of either the district
t judge. Of course, if the indict-
re conclusive, any evidence might
o be immaterial; but if the indict-
re only prima facie, then evidence
to show that no offense triable in
lle district of Tennessee had been
d by defendant in that district
be regarded as immaterial.
nstitution provides that "the trial
imes, except in cases of impeach-
all be by jury; and such trial shall
in the state where the said crimes
e been committed" (article 3, § 2);
"in all criminal prosecutions, the
shall enjoy the right to a speedy
ic trial by an impartial jury of the
d district wherein the crime shall
n committed" (Amendment 6); and,
that anyone accused shall not be
of this constitutional right, the
plied to to remove him from his
o a district in another state must
there is probable cause for believ-
to have committed the alleged of-
d in such other district. And in
is his decision does not determine
tion of guilt any more than his
t the indictment is enough for the
of removal definitely determines its

nt was entitled to the judgment
strict judge as to the existence of
cause on the evidence that might
S.

have been adduced, and even if the district judge had thereupon determined that probable cause existed, and such determination could not be revised on habeas corpus, it is nevertheless true that we have no such decision here, and the order of removal cannot be sustained in its absence. Nor can the exclusion of the evidence offered be treated as *mere error, inasmuch as the rul- [33] ing involved the denial of a right secured by statute under the Constitution.

This conclusion is fatal to the order and warrant of removal and requires a reversal of the judgment below and the discharge of appellant.

Final order reversed and cause remanded with directions to discharge appellant from custody under the order and warrant of removal, without prejudice to a renewal of the application to remove.

Mr. Justice Harlan dissented.

Mr. Justice Moody took no part in the disposition of the case.

WILLIAM De C. KESSLER
v.
MORGAN TREAT, United States Marshal, et al. (No. 370.)

SAMUEL T. MORGAN
v.
MORGAN TREAT, etc. (No. 371.)

AUSTIN B. CARPENTER
v.
MORGAN TREAT, etc. (No. 372.)

FORTESQUE WHITTLE
v.
MORGAN TREAT, etc. (No. 373.)

FRANK E. WILCOX
v.
MORGAN TREAT, etc. (No. 374.)

GEORGE BRADEN
v.
MORGAN TREAT, etc. (No. 375.)

FRANK S. ROYSTER
v.
MORGAN TREAT, etc. (No. 376.)

J. RICE SMITH
v.
MORGAN TREAT, etc. (No. 377.)

CHARLES F. BURROUGHS
v.
MORGAN TREAT, etc. (No. 378.)

CHARLES H. McDOWELL
v.
MORGAN TREAT, etc. (No. 379.)

(See S. C. Reporter's ed. 33, 34.)

These cases are governed by the decision in Tinsley v. Treat, ante, 689.

[Nos. 370, 371, 372, 373, 374, 375, 376, 377, 378, 379.]

Argued December 3, 4, 1906. Decided March 4, 1907.

APPEALS from the Circuit Court of the United States for the Eastern District of Virginia to review orders dismissing writs of habeas corpus to inquire into orders of the district judge of that district, directing the removal to another Federal district for trial of persons there charged with an offense against the United States. Reversed and remanded with directions to discharge the appellants from custody without prejudice to a renewal of the applications to remove.

Messrs. John J. Vertrees and John S. Miller argued the cause, and, with Messrs. Henry A. M. Smith and James C. Bradford, filed a brief for appellants. For their contentions see their brief as reported in Tinsley v. Treat ante, 689.

Mr. James P. Helm also filed a brief for appellant Braden:

Both tne district judge and the circuit judge erred in holding that the indictment was conclusive evidence of jurisdictional facts.

Re Greene, 52 Fed. 106; Horner v. United States, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407.

The question of jurisdiction is always open for inquiry on the plea of *nul tiel* record.

Mills v. Duryee, 7 Cranch, 481, 3 L. ed. 411; D'Arcy v. Ketchum, 11 How. 165, 13 L. ed. 648; Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475; Bischoff v. Wethered, 9 Wall. 812, 19 L. ed. 829; Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242.

Assistant Attorney General McReynolds argued the cause and filed a brief for appellees. For his contentions see his brief as reported in Tinsley v. Treat, ante, 689.

[34] *Mr. Chief Justice Fuller: The same decrees will be entered in each of these cases as in the foregoing.

Mr. Justice Harlan dissented.

Mr. Justice Moody took no part.

NICHOLAS V. HALTER and Harry ward, Plffs. in Err.,
v.
STATE OF NEBRASKA.

(See S. C. Reporter's ed. 34-4

Constitutional law—state protec national flag.

1. The protection of the natio against illegitimate uses is not so ex ly intrusted to the Federal govern to prevent the state of Nebrask making it a misdemeanor, by th July 3, 1903, to use representations flag upon articles of merchandise fo tising purposes.

Constitutional law—privileges a munities.

2. No privilege of American cit is denied by the provision of Neb. July 3, 1903, making it a misdeme use representations of the national fl articles of merchandise for advertisi poses.

Constitutional law—personal liberty

3. The right of personal liberty teed by U. S. Const., 14th Amend. infringed by the provision of Neb. 3, 1903, making it a misdemeanor representations of the national fla articles of merchandise for advertisi poses.

Constitutional law—due process of l

4. Property rights are not without due process of law, in viol U. S. Const., 14th Amend., by the p of Neb. act July 3, 1903, making it a meanor to use representations of the al flag upon articles of merchand advertising purposes.

Constitutional law—equal protectio laws.

5. The exception in favor of papers, periodicals, books, pamphle on which shall be printed representa the national flag, disconnected fr advertisement, which is made by Ne July 3, 1903, prohibiting the use o sentations of the national flag for a ing articles of merchandise, does n

NOTE.—On statutes against desecr flag—see case note to Halter v. S L.R.A.(N.S.) 1079.

As to what constitutes due proces —see notes to People v. O'Brien, 2 255; Kuntz v. Sumption, 2 L.R.A. Gannon, 5 L.R.A. 359; Ulman v. Ba 11 L.R.A. 224; Gilman v. Tucker, 1 304; Pearson v. Yewdall, 24 L. ed 436; and Wilson v. North Carolina ed. U. S. 865.

As to the validity of class legis see notes to State v. Goodwill, 6 L.R. and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of pr immunities, and protection—see Louisville Safety Vault & T. Co. v ville & N. R. Co. 14 L.R.A. 678.

such statute repugnant to U. S. Const., 14th Amend., as denying the equal protection of the laws.

[No. 174.]

Submitted January 23, 1907. Decided March 4, 1907.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which affirmed a conviction in the District Court of Douglas County, in that state, of using representations of the national flag upon articles of merchandise for advertising purposes. Affirmed.

See same case below (Neb.) 7 L.R.A. (N.S.) 1079, 105 N. W. 298.

The facts are stated in the opinion.

Mr. Sylvester R. Rush submitted the cause for plaintiffs in error:

The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties.

The Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122.

The flag is the emblem of national sovereignty and the property of the people of the United States, under the laws and Constitution of the United States.

Ruhstrat v. People, 185 Ill. 145, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41.

Can it be said that, by reason of the silence of the Federal statute on the use of the flag, state legislation is thereby permitted on that subject?

Prigg v. Pennsylvania, 16 Pet. 539, 618, 10 L. ed. 1060, 1090; Easton v. Iowa, 188 U. S. 236, 237, 47 L. ed. 458, 459, 23 Sup. Ct. Rep. 288.

Where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, is repugnant to such freedom.

Robbins v. Taxing District, 120 U. S. 493, 30 L. ed. 696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, Reversing 13 Lea, 303; Western U. Teleg. Co. v. James, 162 U. S. 655, 40 L. ed. 1106, 16 Sup. Ct. Rep. 934; United States v. E. C. Knight Co. 156 U. S. 11, 39 L. ed. 328, 15 Sup. Ct. Rep. 249; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 588, 39 L. ed. 544, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 555, 35 L. ed. 574, 11 Sup. Ct. Rep. 865, Reversing 10 L.R.A. 444, 43 Fed. 556; Leisy v. Hardin, 135 U. S. 110, 34 L. ed. 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, Reversing 78 Iowa, 286, 43 N. W. 188; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 336, 30 L. ed. 1201, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Walling v. Michigan, 116 U. S. 455, 29 L. ed. 694, 6 Sup. Ct. Rep. 454; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 687, 27 L. ed. 446, 2 Sup. Ct. Rep. 185, Affirming 12 Fed. 777; Welton v. Missouri, 91 U. S. 282, 23 L. ed. 350, Reversing 55 Mo. 288; Rhea v. Newport News & M. Valley R. Co. 50 Fed. 22; Pacific Coast S. S. Co. v. Railroad Comrs. 9 Sawy. 253, 18 Fed. 11; The Chusan, 2 Story, 455, Fed. Cas. No. 2,717; Southern Exp. Co. v. Goldberg, 101 Va. 621, 62 L.R.A. 669, 44 S. E. 893; Brennan v. Titusville, 153 U. S. 302, 38 L. ed. 723, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Smith v. Alabama, 124 U. S. 473, 31 L. ed. 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

Jurisdiction and control of the national flag have always been in the Federal government. They have never been any place else.

Ruhstrat v. People, 185 Ill. 144, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41.

If this state has a right to enact such a law, then the United States has not; the jurisdiction is either in the national or state government; it cannot rest in both; there cannot be such a thing as a divided jurisdiction.

Re Heff, 197 U. S. 488, 506, 49 L. ed. 848, 856, 25 Sup. Ct. Rep. 506.

Federal and state laws to punish counterfeiting do not vary this rule; they occupy different planes. The Federal law punishes a fraudulent act against the national government; the state law punishes a cheat and a fraud of one person or citizen upon another within its limits.

Fox v. Ohio, 5 How. 416, 12 L. ed. 215.

The same act may often be a violation of both the state and Federal law, but it is only when those laws occupy different planes. Thus, a sale of liquor may be a violation of both the state and Federal law, in that it was made by one who had not paid the revenue tax and received from the United States a license to sell, and also had not complied with the state law in reference to the matter of state license. But in that case the two laws occupy different planes,—one that of revenue, and the other that of police regulation.

Re Heff, supra.

The history of the United States discloses that the executive department of the government has at all times exercised jurisdiction over this emblem of national sovereignty. Wherever the flag is planted by the conquering armies of the United States, the sovereignty of the nation follows, and

such act of sovereignty is exclusive of the power of any state or foreign nation.

Jones v. United States, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80.

The executive, the strong arm of the government, further assumes jurisdiction to resent and punish insults to the flag, whether committed by foreign foe or any state of the Union, as an insult to the nationality for which it stands. So universally has this right been assumed and exercised by the Federal government that the people, in their capacity as citizens of a sovereign nation, demand of the United States, and not of the several states, such protection. And we apprehend that in all places where the flag is displayed by the sovereign power of the nation, the executive arm of the government has power to protect the flag in time of peace as well as in time of war, even to the killing of the person or persons who might haul it down, should it become necessary to resort to such harsh means.

Re Neagle (Cunningham v. Neagle) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658.

Where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority.

Welton v. Missouri, 91 U. S. 280, 23 L. er. 349; Ruhstrat v. People, supra.

The importance attached by this court to the use of the national flag in connection with vessels and commerce on the high seas is disclosed in the case of The Marianna Flora, 11 Wheat. 1, 6 L. ed. 405.

The act in question is in conflict with the 14th Amendment to the Federal Constitution.

Ruhstrat v. People, 185 Ill. 141, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41; People ex rel. McPike v. Van De Carr, 91 App. Div. 20, 86 N. Y. Supp. 644; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep 357; Lochner v. New York, 198 U. S. 45, 56, 49 L. ed. 937, 941, 25 Sup. Ct. Rep. 539.

The prohibitions of this section of the Constitution of the United States have reference to state action exclusively.

Virginia v. Rives (Ex parte Virginia) 100 U. S. 318, 25 L. ed. 667.

Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and, as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.

Ex parte Virginia, 100 U. S. 347, 25 L. ed. 679; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 234, 41 L. ed. 984, 17 Sup. Ct. Rep. 581; Scott v. McNeal, 154 U. S. 45, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; Missouri v. Dockery, 191 U. S. 170, 48 L. ed. 133, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53; Huntington v. New York, 118 Fed. 686; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 184.

The legislative authority cannot usurp the power to determine what is due process of law, and, on the plea of public necessity, ignore the well-established safeguards which the law of the land has heretofore recognized and enforced.

Meyers v. Shields, 61 Fed. 726; Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546.

In construing the Constitution of the United States, that which is implied is as much a part of the instrument as that which is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers,—a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the government or any branch of it by the Constitution.

Ex parte Yarbrough, 110 U. S. 658, 28 L. ed. 276, 4 Sup. Ct. Rep. 152; Legal Tender Cases, 12 Wall. 535, 20 L. ed. 307; United States v. Marigold, 9 How. 568, 13 L. ed. 261; United States v. Morris, 125 Fed. 324; Hepburn v. Griswold, 8 Wall. 612, 19 L. ed. 523.

The police power of the state cannot be consistently invoked to sustain such a law.

Smiley v. MacDonald, 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 335; Chicago, B. & Q. R. Co. v. State, 47 Neb. 548, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624, Affirmed in 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; People ex rel. McPike v. Van De Carr, 91 App. Div. 27, 86 N. Y. Supp. 644; Ruhstrat v. People, 185 Ill. 143, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41; Lochner v. New York, 198 U. S. 45, 60, 49 L. ed. 937, 942, 25 Sup. Ct. Rep. 539; 10 Law Notes, No. 4, p. 67.

Another line of decisions illustrating the principles contended for will be found in the construction of the recent acts of the legislatures of the several states throughout the country prohibiting the use of trading stamps; such laws have been declared unconstitutional by the courts of last resort.

Young v. Com. 101 Va. 859, 45 S. E. 327; State v. Dalton, 22 R. I. 79, 48 L.R.A. 776, 84 Am. St. Rep. 818, 46 Atl. 234; State v. Dodge, 76 Vt. 197, 56 Atl. 963; Ex parte

Hutchinson, 137 Fed. 950; Hewin v. Atlanta, 121 Ga. 723, 67 L.R.A. 795, 49 S. E. 765.

The flag law is void for the reason that it attempts to destroy existing property rights.

People ex rel. McPike v. Van De Carr, 178 N. Y. 429, 66 L.R.A. 189, 102 Am. St. Rep. 516, 70 N. E. 966; Re Marshall, 102 Fed. 323; Sentell v. New Orleans & C. R. Co. 166 U. S. 705, 41 L. ed. 1172, 17 Sup. Ct. Rep. 693.

The flag law is class legislation, and therefore null and void.

People ex rel. McPike v. Van De Carr, 91 App. Div. 29, 86 N. Y. Supp. 644; Lancashire Ins. Co. v. Bush, 60 Neb. 123, 82 N. W. 313; Ruhstrat v. People, 185 Ill. 147, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41.

Class legislation of the character of the act in issue, enacted by the states, which discriminates in favor of one person or set of persons and against another or others, is forbidden by the 14th Amendment.

Gulf C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 106, 46 L. ed. 92, 107, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 559, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; People v. Orange County Road Constr. Co. 175 N. Y. 90, 65 L.R.A. 33, 67 N. E. 129.

The equal protection of the laws is a pledge of the protection of equal laws.

Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. ed. 23; Sinnot v. Davenport, 22 How. 227, 243, 16 L. ed. 243, 247; Butchers' Union S. H. & L. S. L. Co. v. Crescent City, L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 626, 42 L. ed. 878, 881, 18 Sup. Ct. Rep. 488.

Mr. **Norris Brown** submitted the cause for defendant in error:

Under the police power of the state the legislature may enact laws to punish persons who desecrate the national emblem or use it for advertising a private business.

Updegraph v. Com. 11 Serg. & R. 406; Vidal v. Philadelphia, 2 How. 198, 11 L. ed. 34.

No act of Congress or provisions of the state or Federal Constitutions prohibits the legislature of Nebraska from enacting a law to prevent the desecration or misuse of the flag of the United States, and the state is left free to enact such a law.

Fox v. Ohio, 5 How. 410, 12 L. ed. 213.

The flag law is not unconstitutional as destroying existing property rights.

Patterson v. Kentucky, 97 U. S. 507, 24 L. ed. 1117; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

The flag law is not unconstitutional as class legislation.

Mugler v. Kansas, 123 U. S. 660, 31 L. ed. 210, 8 Sup. Ct. Rep. 273.

The Illinois and New York cases cited in support of the objection to the flag law of Nebraska are not precedents to be followed.

Vidal v. Girard, supra; Ex parte Siebold, 100 U. S. 389, 25 L. ed. 723; Fox v. Ohio and Patterson v. Kentucky, supra; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Davis v. State, 51 Neb. 302, 70 N. W. 984; Rosenbloom v. State, 64 Neb. 344, 57 L.R.A. 922, 89 N. W. 1053.

Mr. Justice **Harlan** delivered the opinion of the court:

This case involves the validity, under the Constitution of the United States, of an act of the state of Nebraska, approved July 3d, 1903, entitled "An Act to Prevent and Punish the Desecration of the Flag of the United States."†

***The act, among other things, makes it a[38]**

†"§ 2375g. Any person who, in any manner, for exhibition or display, shall place, or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, or ensign of the United States of America, or shall expose or cause to be exposed to public view any such flag, standard, color, or ensign, upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise, upon which shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color, or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substance on which so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon or cast contempt, either by words or act, upon any such flag, standard, color, or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding $100, or by imprisonment for not more than thirty days, or both, in the discretion of the court.

"§ 2375h. The words flag, color, ensign, as used in this act, shall include any flag, standard, ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of said flag, standard, color, or ensign, of the United States of America, or a pic-

such act of sovereignty is exclusive of the power of any state or foreign nation.

Jones v. United States, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80.

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Class legislation of the character of the act in issue, enacted by the states, which discriminates in favor of one person or set of persons and against another or others, is forbidden by the 14th Amendment.

Gulf C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 106, 46 L. ed. 92, 107, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 559, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; People v. Orange County Road Constr. Co. 175 N. Y. 90, 65 L.R.A. 33, 67 N. E. 129.

The equal protection of the laws is a pledge of the protection of equal laws.

Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. ed. 23; Sinnot v. Davenport, 22 How. 227, 243, 16 L. ed. 243, 247; Butchers' Union S. H. & L. S. L. Co. v. Crescent City, L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 626, 42 L. ed. 878, 881, 18 Sup. Ct. Rep. 488.

Mr. **Norris Brown** submitted the cause for defendant in error:

Under the police power of the state the legislature may enact laws to punish persons who desecrate the national emblem or use it for advertising a private business.

Updegraph v. Com. 11 Serg. & R. 406; Vidal v. Philadelphia, 2 How. 198, 11 L. ed. 234.

No act of Congress or provisions of the state or Federal Constitutions prohibits the legislature of Nebraska from enacting a law to prevent the desecration or misuse of the flag of the United States, and the state is left free to enact such a law.

Fox v. Ohio, 5 How. 410, 12 L. ed. 213.

The flag law is not unconstitutional as destroying existing property rights.

Patterson v. Kentucky, 97 U. S. 507, 24 L. ed. 1117; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

The flag law is not unconstitutional as class legislation.

Mugler v. Kansas, 123 U. S. 660, 31 L. ed. 210, 8 Sup. Ct. Rep. 273.

The Illinois and New York cases cited in support of the objection to the flag law of Nebraska are not precedents to be followed.

Vidal v. Girard, supra; Ex parte Siebold, 100 U. S. 389, 25 L. ed. 723; Fox v. Ohio and Patterson v. Kentucky, supra; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Davis v. State, 51 Neb. 302, 70 N. W. 984; Rosenbloom v. State, 64 Neb. 344, 57 L.R.A. 922, 89 N. W. 1053.

Mr. Justice **Harlan** delivered the opinion of the court:

This case involves the validity, under the Constitution of the United States, of an act of the state of Nebraska, approved July 3d, 1903, entitled "An Act to Prevent and Punish the Desecration of the Flag of the United States."†

***The act, among other things, makes it a[38]**

†"§ 2375g. Any person who, in any manner, for exhibition or display, shall place, or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, or ensign of the United States of America, or shall expose or cause to be exposed to public view any such flag, standard, color, or ensign, upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise, upon which shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color, or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substance on which so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon or cast contempt, either by words or act, upon any such flag, standard, color, or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding $100, or by imprisonment for not more than thirty days, or both, in the discretion of the court.

"§ 2375h. The words flag, color, ensign, as used in this act, shall include any flag, standard, ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of said flag, standard, color, or ensign, of the United States of America, or a pic-

misdemeanor, punishable by fine or imprisonment, or both, for anyone to sell, expose for sale, or have in possession for sale, any article of merchandise upon which shall have been printed or placed, for purposes of *advertisement*, a representation of the flag of the United States. It expressly excepted, however, from its operation any newspaper, periodical, book, etc., on which should be printed, painted, or placed a representation of the flag "*disconnected from any advertisement.*" 1 Cobbey's Anno. Stat. (Neb.) 1903, chap. 139.

The plaintiffs in error were proceeded against by criminal information upon the charge of having, in violation of the statute, unlawfully exposed to public view, sold, exposed for sale, and had in their possession for sale, a bottle of beer upon which, for purposes of advertisement, was printed and painted a representation of the flag of the United States.

[39] *The defendants pleaded not guilty, and at the trial insisted that the statute in question was null and void, as infringing their personal liberty guaranteed by the 14th Amendment of the Constitution of the United States, and depriving them, as citizens of the United States, of the right of exercising a privilege impliedly, if not expressly, guaranteed by the Federal Constitution; also, that the statute was invalid in that it permitted the use of the flag by publishers, newspapers, books, periodicals, etc., under certain circumstances, thus, it was alleged, discriminating in favor of one class and against others. These contentions were overruled, and the defendants, having been found guilty by a jury, were severally adjudged to pay a fine of $50 and the costs of the prosecution. Upon writ of error the judgments were affirmed by the supreme court of Nebraska, and the case has been brought here upon the ground that the final order in that court deprived the defendants, respectively, of rights specially set up and claimed under the Constitution of the United States.

It may be well at the outset to say that Congress has established no regulation as to the use of the flag, except that in the act approved February 20th, 1905, authorizing the registration of trademarks in commerce with foreign nations and among the states, it was provided that no mark shall be refused as a trademark on account of its nature "unless such mark . . . consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any state or municipality, or of any foreign nation." 33 Stat. at L. 724, § 5, chap. 592, U. S. Comp. Stat. Supp. 1905, p. 670.

The importance of the questions of constitutional law thus raised will be recognized when it is remembered that more than half of the states of the Union have enacted statutes‡ *substantially similar, in their general scope, to the Nebraska statute. That fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the states have, in their legislation, violated the Constitution of the United States. Our attention is called to two cases in which the constitutionality of such an enactment has been denied,—Ruhstrat v. People, 185 Ill. 133, 49 L.R.A. 151, 76 Am. St. Rep. 30, 57 N. E. 41; People ex rel. McPike v. Van De Carr, 178 N. Y. 425, 66 L.R.A. 189, 102 Am. St. Rep. 516, 70 N. E. 965. In the Illinois case the statute was held to be unconstitutional as depriving a citizen of the United States of the right of exercising a privilege impliedly, if not expressly, granted by the Federal Constitution, as unduly discriminating and partial in its character, and as infringing the personal liberty guaranteed by the state and Federal Constitutions. In the other case,

ture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe the same to represent the flag, color, standard, or ensign of the United States of America.

"§ 2375i. This act shall not apply to any act permitted by the statutes of the United States of America, or by the United States Army and Navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationery for use in correspondence, on any of which shall be printed, painted, or placed, said flag, disconnected from any advertisement." 1 Cobbey's Anno. Stat. (Neb.) 1903, chap. 139.

‡Ariz., Rev. Stat. 1901, p. 1295; Colo., 3 Mills's Anno. Stat., Rev. Supp. 1891-1906, p. 542; Conn., Gen. Stat. 1902, p. 387; Cal., Stat. 1899, p. 46; Del., 22 Sess. Laws, p. 90; Hawaii, Sess. Laws 1905, p. 20; Idaho, Sess. Laws 1905, p. 328; Ill., Sess. Laws 1899, p. 234; Ind., Acts 1901, p. 351; Kan., Gen. Stat. 1905, § 2442, p. 499; Me., Rev. Stat. 1903, p. 911; Md., Laws 1902, p. 720; Mass., 2 Rev. Laws 1902, p. 1742; Mich., Pub. Acts 1901, p. 139; Minn., Rev. Laws 1905, § 5180; Mo., 3 Anno. Stat. 1906, § 2352; Mont., Laws 1903, p. 143; N. H., Pub. Stat. 1901, p. 816; N. J., Laws 1904, p. 34; N. M., Laws 1903, p. 121; N. Y., Laws 1905, vol. 1, p. 973; N. Dak., Laws 1901, p. 103; Ohio, Laws 1902, p. 395; Or., Gen. Laws 1901, p. 286; R. I., Sess. Acts Jan. & Dec. 1902, p. 65; Utah, Laws 1903, p. 29; Vt., Laws 1898, p. 93; Wis., Laws 1901, p. 173; Wyo., Laws 1905, p. 86.

ecided by the court of appeals of New ork, the statute, in its application to arti- les manufactured and in existence when it ent into operation, was held to be in viola- ion of the Federal Constitution, as depriv- ng the owner of property without due proc- ss of law, and as taking private property or public use without just compensation.

In our consideration of the questions pre- ented we must not overlook certain prin- iples of constitutional construction, long go established and steadily adhered to, hich preclude a judicial tribunal from olding a legislative enactment, Federal or tate, unconstitutional and void, unless it e manifestly so. Another vital principle is hat, except as restrained by its own funda- nental law, or by the supreme law of the and, a state possesses all legislative power onsistent with a republican form of gov- rnment; therefore each state, when not thus restrained, and so far as this court is oncerned, may, by legislation, provide not nly for the health, morals, and safety of ts people, but for the common good, as in- olved in the well-being, peace, happiness, nd prosperity of the people.

Guided by these principles, it would seem ifficult to hold that the statute of Nebras- a, in forbidding the use of the flag of the nited States for purposes of mere adver- isement, infringes any right protected by he Constitution of the United States, or hat it relates to a subject exclusively com- itted to the national government. From he earliest periods in the history of the uman race, banners, standards, and en- gns have been adopted as symbols of the ower and history of the peoples who bore em. It is not, then, remarkable that the merican people, acting through the legis- tive branch of the government, early in eir history, prescribed a flag as symbol- al of the existence and sovereignty of the ation. Indeed, it would have been extraor- nary if the government had started this untry upon its marvelous career without ving it a flag to be recognized as the em- em of the American Republic. For that ng every true American has not simply appreciation, but a deep affection. No merican, nor any foreign-born person who joys the privileges of American citizen- ip, ever looks upon it without taking pride the fact that he lives under this free gov- nment. Hence, it has often occurred that sults to a flag have been the cause of war, d indignities put upon it, in the presence those who revere it, have often been re- nted and sometimes punished on the spot. It may be said that, as the flag is an em- em of national sovereignty, it was for ngress alone, by appropriate legislation, prohibit its use for illegitimate purposes. e cannot yield to this view. If Congress has not chosen to legislate on this subject, and if an enactment by it would supersede state laws of like character, it does not follow that, in the absence of national legislation, the state is without power to *act.[42] There are matters which, by legislation, may be brought within the exclusive control of the general government, but over which, in the absence of national legislation, the state may exert some control in the interest of its own people. For instance, it is well established that, in the absence of legislation by Congress, a state may, by different methods, improve and protect the navigation of a water way of the United States, wholly within the boundary of such state. So, a state may exert its power to strengthen the bonds of the Union, and therefore, to that end, may encourage patriotism and love of country among its people. When, by its legislation, the state encourages a feeling of patriotism towards the nation, it necessarily encourages a like feeling towards the state. One who loves the Union will love the state in which he resides, and love both of the common country and of the state will diminish in proportion as respect for the flag is weakened. Therefore a state will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it. By the statute in question the state has in substance declared that no one subject to its jurisdiction shall use the flag for purposes of trade and traffic,—a purpose wholly foreign to that for which it was provided by the nation. Such a use tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of national power and national honor. And we cannot hold that any privilege of American citizenship or that any right of personal liberty is violated by a state enactment forbidding the flag to be used as an advertisement on a bottle of beer. It is familiar law that even the privileges of citizenship and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good. Nor can we hold that anyone has a right of property which is violated by such an enactment as the one in question. If it be said that there is a right of property *in[43] the tangible thing upon which a representation of the flag has been placed, the answer is that such representation—which, in itself, cannot belong, as property, to an individual—has been placed on such thing in violation of law, and subject to the power of government to prohibit its use for purposes of advertisement.

Looking, then, at the provision relating to the placing of representations of the flag upon articles of merchandise for purposes of advertising, we are of opinion that those who enacted the statute knew, what is known of all, that to every true American the flag is the symbol of the nation's power, —the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the state erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each state in every legal way to encourage its people to love the Union with which the state is indissolubly connected.

Another contention of the defendants is that the statute is unconstitutional in that, while applying to representations of the flag placed upon articles of merchandise for purposes of advertisement, it does not apply to a newspaper, periodical, book, pamphlet, etc., on any of which shall be printed, painted, or placed, the representation of the flag, disconnected from any advertisement. These exceptions, it is insisted, make an arbitrary classification of persons, which, in legal effect, denies to one class the equal protection of the laws.

It is well settled that, when prescribing a rule of conduct for persons or corpora-
[44]tions, a state may, consistently with *the 14th Amendment, make a classification among its people based "upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection." Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 159, 160, 165, 41 L. ed. 666, 669, 670, 671, 17 Sup. Ct. Rep. 255. In Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30, there was a difference of opinion in the court as to what was necessary to be decided, but all agreed that a state enactment regulating the charges of a certain stock-yards company, and which exempted other like companies from its operation, was a denial of the equal protection of the laws, and forbidden by the 14th Amendment. In Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 552, 562-564, 46 L. ed. 679, 686, 691, 692, 22 Sup. Ct. Rep. 431, 436, 440, 441, the question arose as to the validity, under the equality clause of the Constitution, of a statute of Illinois, forbidding, under penalty, the existence of combinations of capital, skill, or acts for certain specified purposes, but exempting from its operation agricultural products or live stock while in the hands of the producer. By reason of this exemption the statute was adjudged to operate as a denial of the equal protection of the laws, and was, therefore, void. The court observed that such a statute was not a legitimate exertion of the power of classification, rested upon no reasonable basis, was purely arbitrary and therefore denied the equal protection of the laws to those against whom it discriminated. It said: "We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill, or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

*The present case is distinguishable from[45] the Connolly Case. The classification there involved was of persons alike engaged in domestic trade, which trade, the court said, was, of right, "open to all, subject to such regulations, applicable alike to all in like conditions, as the state may legally prescribe." Now, no one can be said to have the right, secured by the Constitution, to use the country's flag merely for purposes of advertising articles of merchandise. If everyone was entitled of right to use it for such purposes, then, perhaps, the state could not discriminate among those who so used it. It was for the state of Nebraska to say how far it would go by way of legislation for the protection of the flag against improper use,—taking care, in such legislation, not to make undue discrimination against a part of its people. It chose not to forbid the use of the flag for the exceptional purposes specified in the statute, prescribing the fundamental condition that its use for any of those purposes should be "disconnected from any advertisement." All are alike forbidden to use the flag as an advertisement. It is easy to be seen how a representation of the flag may be wholly disconnected from an advertisement, and be used upon a newspaper, periodical, book, etc., in such way as not to arouse a feeling

indignation nor offend the sentiments and elings of those who reverence it. In any ent, the classification made by the state not be regarded as unreasonable or arrary, or as bringing the statute under demnation as denying the equal protecn of the laws.

It would be going very far to say that the tute in question had no reasonable contion with the common good and was not omotive of the peace, order, and wellng of the people. Before this court can ld the statute void it must say that, and, addition, adjudge that it violates rights ured by the Constitution of the United ates. We cannot so say and cannot so judge.

Without further discussion, we hold that e provision against the use of representaons of the flag for advertising articles of erchandise is not repugnant to the Constition of the United States. It follows that e judgment of the state court must be afrmed.

It is so ordered.

Mr. Justice Peckham dissented.

ITIZENS' SAVINGS & TRUST COMPANY, Appt.,
v.
LINOIS CENTRAL RAILROAD COMPANY, Belleville & Southern Illinois Railroad Company, and St. Louis, Alton, & Terre Haute Railroad Company.

(See S. C. Reporter's ed. 46–59.)

urts—jurisdiction of circuit court—proper district for suit—bringing in absent defendants.

1. A suit to cancel and annul certain eds and leases of the property of a railway npany lying wholly within the eastern trict of Illinois may be brought and intained in the Federal circuit court for t district against defendants who are abitants of the northern district of Illis, as being a suit to remove an "encumnce or lien or cloud upon the title to l or personal property within the dist where such suit is brought," within meaning of the act of March 3, 1875 Stat. at L. 470, 472, chap. 137, U. S. np. Stat. 1901, p. 513), § 8, authoriz the making of an order in such suits to g in absent defendants who are not inhabitants of, or found within, the district, and who do not voluntarily appear.

Appearance—general or special—waiver.

2. The benefit of the qualified appearance by defendants at the time of filing pleas to the jurisdiction is not waived by arguing the merits of the case as disclosed by the bill on the hearing as to the sufficiency of such pleas, where there was no motion for the dismissal of the bill for want of equity, and the discussion of the merits was permitted or invited by the court in order that it might be informed on that question if it concluded to consider the merits along with the question of the sufficiency of the pleas.

[No. 238.]

Submitted January 7, 1907. Decided March 4, 1907.

APPEAL from the Circuit Court of the United States for the Eastern District of Illinois to review a judgment dismissing, for want of jurisdiction, a suit to cancel and annul certain deeds and leases of the property of a railway company lying wholly within that district, against defendants who are inhabitants of the northern district of Illinois. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Messrs. Edward C. Eliot and William B. Sanders submitted the cause for appellant:

The circuit court of the eastern district of Illinois has jurisdiction of this suit because it is a suit brought to enforce an equitable lien upon or claim to, or to remove an encumbrance or lien or cloud upon the title to, real estate within the Eastern district of Illinois, and comes within § 8 of the act of March 3, 1875.

Jellenik v. Huron Copper Min. Co. 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559; Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 33 L. ed. 178, 9 Sup. Ct. Rep. 781; Evans v. Charles Scribner's Sons, 58 Fed. 303; Cowell v. City Water Supply Co. 96 Fed. 769; McBee v. Marietta & N. G. R. Co. 48 Fed. 243; Castello v. Castello, 4 McCrary, 543, 14 Fed. 207; Single v. Scott Paper Mfg Co. 55 Fed. 553.

Section 738 of U. S. Rev. Stat. has never been confined to actions which were strictly local at common law.

McBurney v. Carson, 99 U. S. 567, 25 L. ed. 378; Goodman v. Niblack, 102 U. S. 556, 26 L. ed. 229; Greeley v. Lowe, 155 U. S. 58, 70, 39 L. ed. 69, 74, 15 Sup. Ct. Rep. 24.

The various states, in the exercise of their arbitrary right to control the venue of suits within their borders, have enacted statutes, the language of which is sometimes more restricted, and sometimes broader in effect, than the language of § 738. In deciding the

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OTE.—As to the proper Federal district suit—see note to Roberts v. Lewis, 36 d. U. S. 579.

s to waiver of right as to Federal dist in which suit may be brought—see to Memphis Sav. Bank v. Houchens, C. C. A. 192

effect of the words used in § 738 some of the state decisions may be of benefit.

McLaughlin v. McCrory, 55 Ark. 442, 29 Am. St. Rep. 56, 18 S. W. 762; Adams v. Cowles, 95 Mo. 501, 6 Am. St. Rep. 74, 8 S. W. 711; Acker v. Leland, 96 N. Y. 383; Chapin v. Dodds, 104 Mich. 232, 62 N. W. 351; McKenzie v. Bacon, 38 La. Ann. 764; Marcum v. Powers, 10 Ky. L. Rep. 380, 9 S. W. 255; Quarl v. Abbett, 102 Ind. 233, 52 Am. Rep. 662, 1 N. E. 476; Lane v. Innes, 43 Minn. 141, 45 N. W. 4; Burrall v. Eames, 5 Wis. 260; Gartrell v. Stafford, 12 Neb. 545, 41 Am. St. Rep. 767, 11 N. W. 732; Owens v. Hall, 13 Ohio St. 571; Harris v. Palmore, 74 Ga. 273.

A proceeding *in rem*, strictly construed, is one taken directly against the property, in which the property itself is actually impleaded, as in the case of a libel in admiralty. But, to determine the locality of an action, a proceeding *in rem* is construed more broadly, and embraces many actions brought against individual defendants,—proceedings which properly, perhaps, should be called quasi *in rem*.

Pennoyer v. Neff, 95 U. S. 734, 24 L. ed. 572.

Except as limited by certain state statutes, there are few suits "local" at common law which cannot, under the modern doctrines of equity, also be brought in the jurisdiction in which the defendant can be served.

Brown, Jurisdiction of Courts, pp. 167, 171, 172; Wharton, Confl. L. pp. 641, 650; Story, Confl. L. § 544.

A suit for the specific performance of a contract is less "local" in its nature than a suit to set aside a deed secured by fraud; but the former has been regarded as a "local" proceeding, as well as one which could be made "transitory."

Boswell v. Otis, 9 How. 336, 13 L. ed. 164.

The defendant railroad companies have waived the special appearance and have entered a general appearance.

Stanton v. Haverhill Bridge, 47 Vt. 172; St. Louis, I. M. & S. R. Co. v. Barnes, 35 Ark. 95; 3 Cyc. Law & Proc. p. 504; 2 Enc. Pl. & Pr. p. 636; Porter v. Chicago & N. W. R. Co. 1 Neb. 14.

Mr. J. M. Dickinson submitted the cause for appellees. Mr. Blewett Lee was on the brief:

The authorities generally upon the jurisdiction of equity over suits affecting real property in another state or country will be found collected in an elaborate note in Proctor v. Proctor, 69 L.R.A. 673.

The court below had no jurisdiction.

Massie v. Watts, 6 Cranch, 148, 158, 3 L. ed. 181, 185; Briggs v. French, 1 Sumn. 504, Fed. Cas. No. 1,870; Remer v. Mackay, 36 Fed. 87; Hart v. Sansom, 110 U. S. 151, 155, 28 L. ed. 101, 103, 3 Sup. Ct. Rep. 586; Montgomery v. United States, 36 Fed. 5; Western U. Teleg. Co. v. Pittsburg, C. C. & St. L. R. Co. 137 Fed. 437; Muller v. Dows, 94 U. S. 444, 449, 24 L. ed. 207, 209; International Bridge & Tramway Co. v. Holland Trust Co. 26 C. C. A. 469, 52 U. S. App. 240, 81 Fed. 422; Miller v. Rickey, 127 Fed. 588; Municipal Invest. Co. v. Gardiner, 62 Fed. 954; State ex rel. Campbell v. Superior Court, 7 Wash. 306, 34 Pac. 1103; Johnson v. Gibson, 116 Ill. 294, 6 N. E. 205; White Star Min. Co. v. Hultberg, 220 Ill. 599, 77 N. E. 327; Williams v. Fitzhugh, 37 N. Y. 449; Ellis v. Reynolds, 35 Fed. 394; Memphis Sav. Bank v. Houchens, 52 C. C. A. 174, 115 Fed. 108; Bailey v. Ryder, 10 N. Y. 370; —— v. Lindsey, 15 Ves. Jr. 91; Hibbert v. Hibbert, 3 Meriv. 681; Houlditch v. Donegal, 8 Bligh, N. R. 301, 2 Clark & F. 470; Frost v. Spitley, 121 U. S. 552, 556, 30 L. ed. 1010, 1012, 7 Sup. Ct. Rep. 1129; Mitchell v. Furman, 180 U. S. 402, 428, 45 L. ed. 594, 608, 21 Sup. Ct. Rep. 430.

No general appearance was entered.

Wabash Western R. Co. v. Brow, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126; Thomson v. McMorran Mill. Co. 132 Mich. 591, 94 N. W. 191.

Mr. Justice Harlan, delivered the opinion of the court:

This suit in equity was brought in the circuit court of the United States for the eastern district of Illinois against the Illinois Central Railroad Company, the Belleville & Southern Illinois Railroad Company, the St. Louis, Alton, & Terre *Haute Rail-[687] road Company, all Illinois corporations (to be hereafter called, respectively, the Illinois, the Belleville, and Terre Haute companies), and the United States Trust Company, a New York corporation. The last-named corporation was never served with process and did not appear in the suit. The case presents a question as to the jurisdiction of the court below.

The plaintiff, an Ohio corporation, is the holder of 400 shares of the common stock of the Belleville company, and sues as well in its own as on behalf of all other stockholders of that company, or beneficiaries, who may choose to come in and bear their proportion of the cost and expenses of the proceedings. Assuming the allegations of the bill to be true, the suit is not a collusive one, and could be properly brought by a stockholder of the Belleville company, making that company a defendant.

The bill refers to various instruments, deeds, and leases, as follows: A deed of October 1st, 1895, between the Terre Haute

mpany, the Illinois company, and the illeville company, whereby the railroad d properties of the Belleville company, en held by the Terre Haute under a ase executed in 1866, were transferred to e Illinois company, for a period of ninety-ne years; a deed of September 10th, 1897, which the Belleville and Terre Haute mpanies were parties, and which purport- to transfer the title to all the railroad operties of the former to the latter com- ny; a lease of September 15th, 1897, by e Terre Haute company to the Illinois entral Railroad Company, confirming the ove lease of October 1st, 1895, and cov- ing, among other properties, the Belleville ilroad, extending from Belleville, in St. lair county, Illinois, to Duquoin, Perry unty, in the same state; and a deed of ebruary 17th, 1904, between the Terre aute company, and the Illinois company, urporting to convey to the latter company ll the railroad properties, corporate rights nd franchises of the former company.

*The plaintiff prayed that these leases and eeds, so far as they affect, or purport to ffect, the properties, franchises, rights, or abilities of the Belleville company, be can- led and declared void, and that that com- any be required to return and account for hatever consideration it may have received nder such leases and deeds to the party parties from whom the consideration may ave moved.

The bill charges, in substance, that said eeds were illegally and fraudulently pro- ured by the Illinois Central Railroad Com- any, and by means of those instruments, nd by various improper schemes, that com- any has acquired not only complete control ver and possession of the Belleville com- any and all its properties, but has man- ged, and is continuing to manage, those roperties in its own interest and in total isregard of the rights of holders of the ommon stock of the Belleville company. ndeed, it is charged that what the Illinois entral Railroad Company has done, is do- ig (and, unless restrained, will continue do), has practically destroyed the value such stock.

The plaintiff also prayed for a decree or- ring the defendant, the Illinois Central ailroad Company, to account for and pay er to the Belleville company, or to a re- iver to be appointed for that company, ch proportion of the yearly gross earn- gs as the Belleville company is entitled under the lease executed by and between e Belleville company and the Terre Haute ailroad Company, bearing date October 1st, 66; such accounting to cover each fiscal ar, or part thereof, from the time when e Illinois Central Railroad Company first acquired the railroad properties of the Belleville company as lessee or sublessee under the lease executed on or about the 1st of April, 1896, up to the time of such accounting; further, for "an order appointing a receiver for the Belleville & Southern Illinois Railroad Company, with the usual powers of such receivers; and that the Illinois Central Railroad Company, through its officers and agents, be ordered to surrender and deliver to said receiver all the *corporate as- [49] sets, books, papers, and everything that rightfully belongs to the Belleville & Southern Illinois Railroad Company, and that the Illinois Central Railroad Company be ordered to account to such receiver, as is hereinbefore prayed. That the defendant, the Illinois Central Railroad Company, its officers and agents, be restrained from further violating the rights of your orator, and be ordered, directed, and restrained in particular from interfering in any way with said receiver, or with the operation of said Belleville company as an independent and separate railroad company; and for such other and further relief as the equity of the case may require."

Process in the case against the Illinois company was served upon its ticket agent at East St. Louis, "there being no president, vice president, secretary, or treasurer of that company found" in the district; and against the Belleville and Terre Haute companies, upon a director of each company, at Pinkneyville, Illinois, there being no president, vice president, secretary, or treasurer of either of those companies found in the district.

The Belleville company pleaded—especially appearing, under protest, for the purposes of its plea, and no other—that the court below was without jurisdiction to proceed against it, in that the defendant was an inhabitant of the northern division of the northern district of Illinois, having its residence in that division and district at Chicago, where its corporate meetings were held and its corporate business transacted.

Similar pleas were filed by the Terre Haute company and the Illinois Central Railroad Company, each specially appearing under protest for the purpose only of denying the jurisdiction of the court below, and each company claiming to be an inhabitant and resident of the northern district of Illinois.

By its final order the court sustained the pleas to the jurisdiction, and dismissed the suit.

This case is here upon a certificate as to the jurisdiction of the circuit court.

The eastern district of Illinois was created by the act of Congress approved March 3d, 1905, chap. 1427. 33 Stat. at L. 992, 995, U. S. Comp. Stat. Supp. 1905, p. 93. The present suit in equity was, as we have stat-

ed, instituted in the circuit court for that district, but its jurisdiction was denied by the judgment below upon the ground solely that each defendant railroad corporation was shown to be an inhabitant of the northern district of Illinois, not of the eastern district, and, therefore, this suit was not local to the latter district.

By the 8th section of the act of March 3d, 1875, determining the jurisdiction of the circuit courts of the United States, it was provided: "That when, in any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to *remove any encumbrance or lien or cloud upon the title to, real or personal property within the district where such suit is brought,* one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or, where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be al-
[54] lowed by the court, in its discretion, *and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district," etc. 18 Stat. at L. 470, 472, chap. 137, U. S. Comp. Stat. 1901, p. 513.

These provisions were substantially those embodied in § 738 of the Revised Statutes, except that the act of 1875 embraced (as § 738 did not) suits in equity "to remove any encumbrance or lien or cloud upon the title to real or personal property." Both § 738 and the act of 1875 related to legal and equitable liens or claims on real and personal property *within the district where the suit was brought.*

The repealing clause of the judiciary act of 1887, 1888 (24 Stat. at L. 552, chap. 373, 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), did not reach the 8th section of the act of 1875. That section is still in force, as was expressly held in Jellenik v. Huron Copper Min. Co. 177 U. S. 1, 10, 44 L. ed. 647, 650, 20 Sup. Ct. Rep. 559.

We are then to inquire as to the scope of the 8th section of the above act of 1875. And that inquiry involves the question whether this suit is one "to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance or lien or cloud upon the title to, real or personal property" within the eastern district of Illinois where the suit was brought.

In Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 33 L. ed. 178, 9 Sup. Ct. Rep. 781, we had occasion to examine the provisions of the act of 1875. A question there arose as to the jurisdiction of a circuit court of the United States to render a decree annulling a trust deed and chattel mortgage covering property within the district where the suit was brought, in which suit the defendants did not appear, but were proceeded against in the mode authorized by the above act of 1875. This court said: "The *previous statute gave the above rem- [55]
edy only in suits 'to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought,' while the act of 1875 gives it also in suits brought 'to remove any encumbrance or lien or cloud upon the title to' such property. Rev. Stat. § 738; 18 Stat. at L. 472, chap. 137, § 8, U. S. Comp. Stat. 1901, p. 513. We are of opinion that the suit instituted by the furnace company against the iron works and others belonged to the class of suits last described. *The trust deed and chattel mortgage in question embraced specific property within the district in which the suit was brought.* The furnace company, in behalf of itself and other creditors of the iron works, claimed an interest in such property as constituting a trust fund for the payment of the debts of the latter, and the right to have it subjected to the payment of their demands. In Graham v. La Crosse & M. R. Co. 102 U. S. 148, 161, 26 L. ed. 106, 111, this court said that 'when a corporation became insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of the stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds which, in other circumstances, are as much the absolute property of the corporation as any man's property is his.' See also Mumma v. Potomac Co. 8 Pet. 281, 286, 8 L. ed. 945, 947; Mer-

County v. Allen, 103 U. S. 498, 509, 26 d. 498, 502; Wabash, St. L. & P. R. Co. lam, 114 U. S. 587, 594, 29 L. ed. 235, 5 Sup. Ct. Rep. 1081; 2 Story, Eq. Jur. 52; 1 Perry, Tr. § 242. The trust deed chattel mortgage executed by the iron ks created a lien upon the property in or of Wheeler, Carson, Hill, and the Kea- Lumber Company, superior to all other litors. The furnace company, in behalf itself and other unsecured creditors, as l as Wheelock, denied the validity of l's lien as against them. That lien was refore an encumbrance or cloud upon the e, to their prejudice. Until such lien or umbrance was removed, they could not w the extent of their interest in the perty or in the proceeds of its sale. The e made by the original, as well *as cross t, seems to be within both the letter and spirit of the act of 1875."

A recent case is that of Jellenik v. Huron pper Min. Co. supra. That was a suit by ckholders of a Michigan corporation. Its ect, as the bill disclosed, was to remove cloud that had come upon their title to shares of stock held by them. The is- s in the case made it necessary to deter- ne the scope of the above act of 1875, p. 137. This court said: "Prior to the sage of the above act of March 3, 1875, authority of a circuit court of the ited States to make an order directing a endant—who was not an inhabitant of found within the district, and who did voluntarily appear—to appear, plead, wer, or demur, was restricted to suits equity brought to enforce legal or equi- le liens or claims against real or per- al property within the district. Rev. t. § 738. But that act extended the hority of the court to a suit brought 'to ove any encumbrance or lien or cloud n the title to real or personal property hin the district where such suit is ught.' One of the objects of the present was to remove an encumbrance or cloud n the title to certain shares of the stock a Michigan corporation. No question nade as to the jurisdiction of the court far as it rests upon the diverse citizen- of the parties. The plaintiffs alleged t they were the equitable owners of that k, although the legal title was in cer- of the defendants. The relief asked a decree establishing their rightful ti- and ownership; and, in order that such ecree might be obtained, the defendants rred to were ordered to appear, plead, wer, or demur; but, as they refused to so, the circuit court decided that it could proceed further. That court was of ion that 'the shares of stock in question not personal property within the district within the purview of the statute of the United States authorizing the bringing in by publication of notice to nonresident defendants who assert some right or claim to the property which is the subject of suit.' 82 Fed. 778, 779. *The proper forum, the [57] court said, for the litigation of the question involved, would be in the state of which the defendants were citizens. The question to be determined on this appeal is whether the stock in question is personal property within the district in which the suit was brought. If it is, then the case is embraced by the act of 1875, chap. 137, and the circuit court erred in dismissing the bill." Again: "It is sufficient for this case to say that the state under whose laws the company came into existence has declared, as it lawfully might, that such stock is to be deemed personal property. That is a rule which the circuit court of the United States, sitting in Michigan, should enforce as part of the law of the state in respect of corporations created by it. The stock held by the defendants residing outside of Michigan who refused to submit themselves to the jurisdiction of the circuit court being regarded as personal property, the act of 1875 must be held to embrace the present case if the stock in question is 'within the district' in which the suit was brought. Whether the stock is in Michigan, so as to authorize that state to subject it to taxation as against individual shareholders domiciled in another state, is a question not presented in this case, and we express no opinion upon it. But we are of opinion that it is within Michigan for the purposes of a suit brought there against the company —such shareholders being made parties to the suit—to determine whether the stock is rightfully held by them. The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicil of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner. This principle is not affected by the fact that the defendant is authorized by the laws of Michigan to have an office in another state, at which a book showing the transfers *of stock may be [58] kept." See also Dick v. Foraker, 155 U. S. 404, 39 L. ed. 201, 15 Sup. Ct. Rep. 124.

These decisions, we think, make it clear that this suit comes within the act of 1875, as one to remove an encumbrance or cloud upon the title to real property within the eastern district of Illinois. The railroad in

question *is wholly within that district*, although the defendant corporations, including the Belleville company, may hold their annual or other meetings in Chicago. The bill seeks the cancelation of the deeds and leases under and by authority of which the properties of the Belleville company are held and managed in the interest, as is alleged, of the Illinois Central Railroad Company, and to the destruction of the rights of the stockholders of the Belleville company. The bill also, as we have seen, prays for the appointment of a receiver of the Belleville company, and the surrender and delivery to such receiver of all its corporate assets, books, papers, and everything that rightfully belongs to it, and account to such receiver, as prayed; also, that the Illinois Central Railroad Company be restrained from interfering in any way with the receiver, or with the operation of the Belleville railroad as an independent, separate company. In addition, there is a prayer in the bill for general relief. If the deeds and leases in question are adjudged to be void, the entire situation, as to the possession and control of the Belleville railroad properties, will be changed, and the alleged encumbrances upon the properties of the Belleville company will be removed. We express no opinion upon the question whether, upon its own showing, or in the event the allegations of the bill are sustained by proof, the plaintiff is entitled to a decree giving the relief asked by it. There was no demurrer to the bill as being insufficient in equity. The only inquiry now is whether, looking at the allegations of the bill, the suit is of such a nature as to bring it within the act of 1875, *as one to remove encumbrances or clouds upon real or personal property within the district where the suit was brought, and, therefore, one local to* [59] *such district*. The court below held *that the suit was not one which could be brought and maintained against the defendant corporations found to be inhabitants of another district, and not voluntarily appearing in the suit; and this, notwithstanding the railroad in question is wholly within the district where the suit was brought. 18 Stat. at L. 472, chap. 137, U. S. Comp. Stat. 1901, p. 513; 25 Stat. at L. 436, chap. 866. If the suit was within the terms of the act of 1875, then the circuit court of the eastern district of Illinois, although the defendant corporations may be inhabitants of another district in Illinois, could proceed to such an adjudication as the facts would justify, subject, of course, to the condition prescribed by the 8th section of that act, that any adjudication affecting absent defendants without appearance should affect only such property within the district as may be the subject of the suit and under the jurisdiction of the court.

The plaintiff contends that this condition was waived, and the general appearance of the defendants entered, when their counsel at the hearing as to the sufficiency of the pleas to the jurisdiction, argued the merits of the case as disclosed by the bill. This is too harsh an interpretation of what occurred in the court below. There was no motion for the dismissal of the bill for want of equity. The discussion of the merits was permitted or invited by the court in order that it might be informed on that question in the event it concluded to consider the merits along with the question of the sufficiency of the pleas to the jurisdiction. We are satisfied that the defendants did not intend to waive the benefit of their qualified appearance at the time of filing the pleas to the jurisdiction.

We adjudge that the suit is of such a nature as to bring it within the jurisdiction of the circuit court for the eastern district, under the act of 1875. The judgment must, therefore, be reversed, and the cause remanded, that the plaintiff may proceed, as it may be advised, with the preparation of its case under the act of 1875.

It is so ordered.

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*WILMINGTON STAR MINING COMPANY, Plff. in Err.,
v.
MINNIE FULTON.

(See S. C. Reporter's ed. 60-79.)

Error to circuit court—jurisdiction—Federal question.

1. Color for defendant's contention that the requirements of the Illinois mining act of April 18, 1899, as to licensed employees, are repugnant to the Federal Constitution, when applied to the first count in the declaration, will sustain a writ of error from the Supreme Court of the United States to a circuit court, as against a motion to dismiss, based on the theory that the first count in the declaration charges a violation of duty imposed by the statute directly upon the mine owner, irrespective of the statutory requirements as to licensed employees.

NOTE.—On direct review of circuit or district court judgments in the Federal Supreme Court—see note to Gwin v. United States, 46 L. ed. U. S. 741.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 665; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed.

stitutional law—privileges and im-unities.

2. The privileges and immunities of a e owner as a citizen of the United tes are not invaded in violation of U. S. st. 14th Amend. by the provisions of the ois mining act of April 18, 1899, impos- upon mine owners responsibility for the ults of mine managers and mine ex- iners, who are required by that act to be cted by the mine owners from those ling licenses issued by the state mining rd created by such statute, where it is obligatory upon the mine owner to ct a particular individual, or to retain when selected if found incompetent.

stitutional law—due process of law.

3. The imposition upon mine owners by Illinois mining act of April 18, 1899, of onsibility for the defaults of mine nagers and mine examiners, who are re- red by that act to be selected by the e owners from those holding licenses is- d by the state mining board created by h act, does not deprive them of their perty without due process of law, in ation of U. S. Const. 14th Amend., re it is not obligatory upon a mine own- to select a particular individual, or to in one when selected if found incompe- t.

stitutional law—equal protection of the ws.

4. The selection of mine owners as a s upon which to impose responsibility the defaults of certain employees who required by the Illinois mining act of il 18, 1899, to be selected from those ling licenses issued by the state mining rd created by that act, does not render legislation repugnant to U. S. Const. Amend., as denying the equal pro- ion of the laws.

mmate cause—concurring causes—ex- osion of mine gas.

5. A mine owner is not absolved from onsibility for his neglect to perform his utory duty to prevent the accumulation angerous gases, which led to an ex- ion, because there was another efficient e contributing to the accident for which covery could not, under the declaration, ad.

l—requested instructions—lack of sup- rt in evidence.

6. Requested instructions based upon ypothesis which there is no evidence ing to support are properly refused.

Trial—requested instructions—lack of support in evidence.

7. Evidence tending to justify the inference that a mine employee who was allowed to enter a roadway without warning knew, before entering, that it had not been cleared of gas, does not require the giving of a requested instruction in an action for the death of such employee as the result of an explosion, which is based on the assumption that such employee, when killed, was wilfully endangering the lives or health of others, or the security of the mine or its machinery, or was recklessly disregarding his personal safety.

Appeal—prejudicial error—rulings on pleadings—striking out.

8. Permitting the jury, over objections raised by a motion to strike, to take into consideration, in reaching the verdict, counts in a declaration which had not been supported by any evidence, is prejudicial error, where it is impossible from the record to say upon which counts of the declaration the verdict was based, notwithstanding the provision of the Illinois practice act, § 57, that when an entire verdict is given on several counts it will not be set aside or reversed because of any defective count, if one or more of the counts be sufficient to sustain the verdict.

[No. 139.]

Argued and submitted January 7, 1907. Decided March 4, 1907.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment for plaintiff in an action for the death of a mine employee as the result of an explosion, which action had been removed to that court from the Circuit Court of Grundy County, in that state. Reversed and remanded for further proceedings.

See same case below on former writ of error, 68 L.R.A. 168, 66 C. C. A. 247, 133 Fed. 190.

The facts are stated in the opinion.

Mr. **William P. Sidley** argued the cause, and, with Messrs. Charles S. Holt and Arthur D. Wheeler, filed a brief for plaintiff in error:

The supreme court of Illinois has interpreted the mining act of this state, passed in 1899, as rendering the mine owner or operator liable in damages for death or injury resulting from the violation by any mine

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3. 436; and Wilson v. North Carolina, . ed. U. S. 865.

to the validity of class legislation—see to State v. Goodwill, 6 L.R.A. 621; and e v. Loomis, 21 L.R.A. 789.

to constitutional equality of privileges, unities, and protection—see note to sville Safety Vault & T. Co. v. Louis- & N. R. Co. 14 L.R.A. 579.

statutory regulations for the protection and safety of workmen in mines—see note to Consolidated Coal & Min. Co. v. Floyd, 25 L.R.A. 848.

On liability for negligence in the escape and explosion of gas—see note to Ohio Gas Fuel Co. v. Andrews, 29 L.R.A. 337.

On the statutory duty to ventilate and keep mine free from gas—see note to Deserant v. Cerillos Coal R. Co. 44 L. ed. U. S. 1127.

official, *i. e.*, the mine manager, hoisting engineer, or mine examiner, of any duty imposed by the act upon such official.

See Henrietta Coal Co. v. Martin, 221 Ill. 460, 77 N. E. 902.

Such interpretation by the highest court of the state is final and conclusive as to the meaning of the act.

A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 566, 42 L. ed. 858, 18 Sup. Ct. Rep. 445.

As thus interpreted, the act is in contravention of the 14th Amendment for the following reasons:

(a) It destroys the relationship between the owner and mine official upon which the doctrine of *respondeat superior* is based, by compelling the official's employment under penalty, and then directly imposing duties upon him instead of permitting their delegation by the employer. To hold the owner of the mine liable under such circumstances for the official's defaults is to make one man answerable for the acts of another over whom he has no control, and thereby to deny to him inherent and inalienable rights, and abridge his privileges and immunities as a citizen of the United States.

Durkin v. Kingston Coal Co. 171 Pa. 193, 29 L.R.A. 808, 50 Am. St. Rep. 801, 33 Atl. 237; Williams v. Thacker Coal & Coke Co. 44 W. Va. 599, 40 L.R.A. 812, 30 S. E. 107; Redstone Coke Co. v. Roby, 115 Pa. 368, 8 Atl. 593; Colorado Coal & I. Co. v. Lamb, 6 Colo. App. 255, 40 Pac. 251; Fulton v. Wilmington Star Min. Co. 68 L.R.A. 168, 66 C. C. A. 247, 133 Fed. 198.

(b) No recognized principle of law permits an employer to be held liable for the acts of a compulsory servant.

14 Am. & Eng. Enc. Law, p. 809; 20 Am. & Eng. Enc. Law, 2d ed. p. 180; Reno, Employers' Liability Acts, 33; James v. San Francisco, 6 Cal. 528, 65 Am. Dec. 526; Frazier v. New York, N. H. & H. R. Co. 180 Mass. 427, 62 N. E. 731; Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique, 182 U. S. 406, 45 L. ed. 1155, 21 Sup. Ct. Rep. 831; Carruthers v. Sydebotham, 4 Maule & S. 85; Crisp v. United States & A. S. S. Co. 124 Fed. 748; Harrison v. Hughes, 60 C. C. A. 442, 125 Fed. 860.

(c) The act, by fixing upon the mine owner a civil liability not imposed upon other employers of labor in Illinois, whereby his property may be taken to pay for a stranger's defaults, deprives him of liberty and property without due process of law, and denies to him the equal protection of the laws.

Millett v. People, 117 Ill. 301, 57 Am. Rep. 869, 7 N. E. 631; Cooley, Const. Lim. 1st ed. 352, 353, 391, 393; Vanzant v. Waddel, 2 Yerg. 269; Wally v. Kennedy, 2 Yerg. 554, 24 Am. Dec. 511; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 104, 105, 43 L. ed. 912, 913, 19 Sup. Ct. Rep. 609; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255.

The fact that the Illinois mining act m[illegible] be regarded as a police measure does n[illegible] prevent the application of the constitution[illegible] guaranty in question.

Connolly v. Union Sewer Pipe Co. 184 [illegible] S. 558, 46 L. ed. 689, 22 Sup. Ct. Rep. 431.

The constitutional provision for the s[illegible]curity of person and property should [illegible] liberally construed.

Boyd v. United States, 116 U. S. 635, [illegible] L. ed. 752, 6 Sup. Ct. Rep. 524; Gulf, C. [illegible] S. F. R. Co. v. Ellis, supra.

The act is wholly void by reason of th[illegible] unconstitutional provision in question, [illegible] it cannot be presumed that its framer[illegible] would have enacted it without this provi[illegible]sion, which alone deals with the subject [illegible] civil liability for its violation.

Connolly v. Union Sewer Pipe Co. 184 [illegible] S. 565, 46 L. ed. 692, 22 Sup. Ct. Rep. 431.

A wilful act, as used in the mining st[illegible]ute, means that the person performing [illegible] act knows what he is doing, and intends [illegible] do what he is doing, and is a free age[illegible] An act consciously performed is wilfully performed under this statute.

Odin Coal Co. v. Denman, 185 Ill. 413, 57 Am. St. Rep. 45, 57 N. E. 192; Carterville Coal Co. v. Abbott, 181 Ill. 502, 55 N. E. 131; Southern R. Co. v. Carroll, 71 C. C. A. 88, 138 Fed. 638.

Fulton's act, being wilful and such as to endanger the lives and health of persons working in the mine, and the security of the mine and the machinery therein, as evidenced by the result of the explosion on this occasion, was unlawful within the meaning of § 31 of the act. It therefore barred the right of recovery herein.

Heland v. Lowell, 3 Allen, 407, 81 Am. Dec. 670; Hall v. Corcoran, 107 Mass. 251, 9 Am. Rep. 30; Holman v. Johnson, 1 Cowp. 343; Coppell v. Hall, 7 Wall. 558, 19 L. ed. 248; Gilmore v. Fuller, 198 Ill. 130, 60 L.R.A. 286, 65 N. E. 84.

The obligation upon the mine owner to employ certificated mine officials having prescribed duties, under penalty of fine and imprisonment, constitutes compulsory employment; and to hold the mine owner liable, not for the mere negligence of their officials, but for their wilful violation of positive duties imposed upon them, is contrary to a principle of natural notice, and hence vitiates any statute of which it forms a part.

The China (The China v. Walsh) 7 Wall. 53, 19 L. ed. 67; The Maria, 1 W. Rob. 105.

One good count is not sufficient to sus-
in this judgment.
Maryland use of Markley v. Baldwin, 112
S. 493, 28 L. ed. 823, 5 Sup. Ct. Rep. 278;
hat Cheer Coal Co. v. Johnson, 6 C. C. A.
8, 12 U. S. App. 490, 56 Fed. 813.
The jurisdiction of this court depends
on the existence of a substantial claim
at a state law is in contravention of the
nstitution of the United States, and not
on the soundness of such claim. When
risdiction is so acquired the court will
nsider all questions properly raised upon
e record.
Holder v. Aultman, M. & Co. 169 U. S.
, 89, 42 L. ed. 671, 672, 18 Sup. Ct. Rep.
9; Penn Mut. L. Ins. Co. v. Austin, 168 U.
685, 695, 42 L. ed. 626, 630, 18 Sup. Ct.
p. 223; Loeb v. Columbia Twp. 179 U. S.
7, 45 L. ed. 285, 21 Sup. Ct. Rep. 174; Con-
lly v. Union Sewer Pipe Co. 184 U. S.
4, 46 L. ed. 683, 22 Sup. Ct. Rep. 431.
Mr. **Arthur J. Eddy** submitted the cause
r defendant in error. Messrs. P. C. Haley
d E. C. Wetten were on the brief:
When an entire verdict is given on several
unts it will not be set aside or reversed
cause of any defective count, if one or
ore of the counts be sufficient to sustain
e verdict.
Chicago v. Lonergan, 196 Ill. 520, 63 N. E.
18; Consolidated Coal Co. v. Scheiber, 167
l. 543, 47 N. E. 1052; Chicago & A. R. Co.
Anderson, 166 Ill. 575, 46 N. E. 1125.
The constitutional question raised in this
se is not a substantial point upon which
e determination of the case depends.
Western U. Teleg. Co. v. Ann Arbor R.
o. 178 U. S. 239, 243, 244, 44 L. ed. 1052,
054, 20 Sup. Ct. Rep. 867; Lampasas v.
ell, 180 U. S. 276, 282, 45 L. ed. 527, 530, 21
up. Ct. Rep. 368; Gibbs v. Crandall, 120
. S. 105, 108, 30 L. ed. 590, 591, 7 Sup.
t. Rep. 497; Starin v. New York, 115 U. S.
48, 257, 29 L. ed. 388, 390, 6 Sup. Ct. Rep.
8; New Orleans v. Benjamin, 153 U. S. 411,
24, 38 L. ed. 764, 769, 14 Sup. Ct. Rep. 905;
ittle York Gold-Washing & Water Co. v.
eyes, 96 U. S. 199, 203, 204, 24 L. ed. 656,
59.
Even if the court should be inclined to
old portions of the mining law unconsti-
utional, it would not necessarily invalidate
e entire act, and if any count of the dec-
ration is based on a section of the act
eld to be constitutional, it will be suffi-
ent to sustain the action.
Loeb v. Columbia Twp. 179 U. S. 472, 490,
L. ed. 280, 290, 21 Sup. Ct. Rep. 174;
amond Glue Co. v. United States Glue
. 187 U. S. 611, 617, 47 L. ed. 328, 333, 23
p. Ct. Rep. 206.
The mining act of Illinois is not repug-
nant to the Constitution of the United States.

Chicago, W. & V. Coal Co. v. People, 181 Ill. 278, 48 L.R.A. 554, 54 N. E. 961; Henrietta Coal Co. v. Martin, 221 Ill. 460, 77 N. E. 902; Sherlock v. Alling, 93 U. S. 99, 105, 108, 23 L. ed. 819, 821, 822; Consolidated Coal Co. v. Seniger, 179 Ill. 375, 53 N. E. 733; Wellston Coal Co. v. Smith, 65 Ohio St. 70, 55 L.R.A. 99, 87 Am. St. Rep. 547, 61 N. E. 143; Huffcut, Agency, chap. 19, p. 286; Riverton Coal Co. v. Shepherd, 207 Ill 399, 69 N. E. 921; Schmalstieg v. Leavenworth Coal Co. 65 Kan. 753, 59 L.R.A. 707, 70 Pac. 888.

The supreme court of Illinois has construed the mining act in a great many cases, and has always sought to effectuate the evident purpose of the framers of the Constitution and the legislature to protect the operative coal miner as far as possible in his dangerous occupation, and to provide for those dependent upon him in case of his death through failure on the part of the mine owner and his representatives to fulfil the duties required by the statute.

Chicago, W. & V. Coal Co. v. People, 181 Ill. 276, 48 L.R.A. 554, 54 N. E. 961; Carterville Coal Co. v. Abbott, 181 Ill. 502, 55 N. E. 131; Deserant v. Cerillos Coal R. Co. 178 U. S. 409, 420, 44 L. ed. 1127, 1133, 20 Sup. Ct. Rep. 967; Odin Coal Co. v. Denman, 185 Ill. 417, 76 Am. St. Rep. 45, 57 N. E. 192.

The word "wilful," as used in the statute, has repeatedly and universally been held by the supreme court of Illinois to mean that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this: that he knows what he is doing, and intends to do what he is doing, and is a free agent. An act consciously omitted is wilfully omitted in the meaning of the word, "wilful" as used in these enactments of the legislature relative to the duty of mine owners. Where an owner, operator, or manager so constructs or equips his mine that he knowingly operates it without conforming to the provisions of this act, he wilfully disregards its provisions, and wilfully disregards the safety of miners employed therein.

Odin Coal Co. v. Denman, 185 Ill. 418, 76 Am. St. Rep. 45, 57 N. E. 192; Carterville Coal Co. v. Abbott, supra; Illinois C. R. Co. v. Leiner, 202 Ill. 631, 95 Am. St. Rep. 266, 67 N. E. 398; Donk Bros. Coal & Coke Co. v. Stroff, 200 Ill. 489, 66 N. E. 29; Donk Bros. Coal & Coke Co. v. Peton, 192 Ill 45, 61 N. E. 330; Spring Valley Coal Co. v. Rowatt, 196 Ill. 160, 63 N. E. 649

The decisions of the highest courts of a

state construing a statute of such state are conclusive and as binding as the text of the law, especially where the act is passed in conformity to the requirement of the state Constitution, and the statute itself relates entirely to local policy.

Balkam v. Woodstock Iron Co. 154 U. S. 177, 189, 38 L. ed. 953, 957, 14 Sup. Ct. Rep. 1010; Bauserman v. Blunt, 147 U. S. 647, 654, 37 L. ed. 316, 318, 13 Sup. Ct. Rep. 466; Norton v. Shelby County, 118 U. S. 425, 440, 30 L. ed. 178, 185, 6 Sup. Ct. Rep. 1121; Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. 173 U. S. 99, 112, 43 L. ed. 628, 633, 19 Sup. Ct. Rep. 341; Yazoo & M. Valley R. Co. v. Adams, 181 U. S. 580, 583, 45 L. ed. 1011, 1012, 21 Sup. Ct. Rep. 729.

It is the established and universal rule of this court that it will not take jurisdiction of a case unless the constitutional point involved in the controversy is a real and substantial point upon the determination of which the result of the suit depends.

Western U. Teleg. Co. v. Ann Arbor R. Co. 178 U. S. 239, 243, 244, 44 L. ed. 1052, 1054, 20 Sup. Ct. Rep. 867; Lampasas v. Bell, 180 U. S. 276, 282, 45 L. ed. 527, 21 Sup. Ct. Rep. 368; Gibbs v. Crandall, 120 U. S. 105, 108, 30 L. ed. 590, 591, 7 Sup. Ct. Rep. 497; Starin v. New York, 115 U. S. 248, 257, 29 L. ed. 388, 390, 6 Sup. Ct. Rep. 28; New Orleans v. Benjamin, 153 U. S. 411, 424, 38 L. ed. 764, 769, 14 Sup. Ct. Rep. 905; Little Rock Gold-Washing & Water Co v. Keyes, 96 U. S. 199, 203, 204, 24 L. ed. 656, 659.

This court, we believe, will, upon its own motion, refuse to take jurisdiction of a case where it appears that the judicial power of the court does not extend, even if not moved to do so by either party to the controversy.

Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 384, 28 L. ed. 462, 464, 4 Sup. Ct. Rep. 510.

Mr. Justice White delivered the opinion of the court:

On January 27, 1901, Samuel Fulton, while working as a trackman and mine laborer in a mine operated by the Wilmington Star Mining Company, in Grundy county, Illinois, was killed by an explosion of mine gas. Minnie Fulton, the widow, on behalf of herself and children, brought this action against the mining company in a court of the state of Illinois to recover damages for the death of her husband. Because of diversity of citizenship the case was removed to the circuit court of the United States for the northern district of Illinois.

The counts of the petition upon which the cause was ultimately tried were eight in number, and in each was set out a specified act of negligence averred to have been the proximate cause of the accident and to have constituted wilful failure to perform specified statutory duties. In count 1 it was alleged that the mining company failed to maintain in the mine currents of fresh air sufficient for the health and safety of Fulton. Count 2 charged the failure to maintain crosscuts in the mine at proper distances apart, to secure the best ventilation at the face of the working places. In count 3 the company was charged with having failed to build all necessary stoppings in a substantial manner to close crosscuts connecting the inlet and outlet air courses in the mine. In count 4 the negligence set up was the failure to have the place in the mine where Fulton was expected to pass and to work inspected before Fulton was permitted to enter the mine, to ascertain whether there were accumulations of gas therein. In count 5 it was charged that the mining company, with knowledge of the existence of an accumulation of dangerous gases in the mine and its unsafe condition when Fulton, in the course of his employment, entered the mine on the morning of his death, wilfully, failed and neglected to prevent Fulton from entering the mine to work therein before the dangerous gases had been removed and the conditions in the mine rendered safe, said Fulton not being then and there under the direction of the mine manager. In count 6 it was charged that the mining company, on the morning of the accident, had knowledge that a valve attachment of a certain steam pipe used to conduct steam generated for the purpose of running a ventilating fan in the mine had become accidentally broken or lost, whereby the air currents in the mine became obstructed and stopped, and a large quantity of dangerous gas was permitted to accumulate in the mine at the place where Fulton was required to pass and to work. And it was further charged that, although having such knowledge, the mining company wilfully failed and neglected to order the withdrawal of Fulton from the mine and prohibit his return thereto until thorough ventilation had been established. In count 7 the negligence charged was that the mining company permitted Fulton to enter the mine before the mine examiner had visited it and seen that the air current was traveling in proper course and in proper quantity, and before the accumulation of dangerous gas, then in the mine, had been broken up or removed therefrom. In count 8 it was charged that the mining company had knowledge that accumulations of gas existed in the mine, yet it wilfully failed and neglected to place a conspicuous mark at the

ce in the mine where accumulations of existed, as a notice to Fulton and other ployees to keep out, whereby Fulton ed to receive the statutory notice and rning of the existence of accumulated gas, did not know of the dangerous condi- of the mine when he proceeded to work and near the place in the mine where h dangerous accumulation of gas existed. 'o the various counts the defendant aded the general issue. The case was ice tried by a jury. On the first trial, the close of the evidence for the plain-, the jury was instructed to find for defendant. This judgment was reversed the circuit court of appeals for the sev- th circuit. 68 L.R.A. 168, 66 C. C. A. 247, 3 Fed. 193. The second trial resulted in verdict for the plaintiff and an entry of judgment which is here assailed.

On the trial it was testified that the sink- of the shaft in the mine where Fulton t his death was commenced in the month April or May, 1900. Fulton worked for veral months at the mine before the ac- dent, at first assisting in sinking the aft. The mine is what is known as a ng-wall mine, in which, it was testified, osscuts were not employed. Crosscuts are ed in what is known as a room and pillar ine. In that class of mines parallel en- ies are run, and after proceeding a certain stance—usually 60 feet—a road is cut cross, connecting the parallel entries, to ermit of a circulation of air. After going nother 60 feet a new crosscut is made and e openings of the prior crosscut are opped up, thus carrying the circulation of ir to the new crosscut. The mine in ques- on was not thus intended to be constructed. rom the bottom of the main or hoist- g shaft towards the north, south, east, nd west radiated four main headings or adways, and it was contemplated to con- truct a circular road connecting the outer nds of these four main roads so as to cause complete circulation of air around the ine and through the *roadways. About 300 et to the eastward of the main shaft was ituated an air or escapement shaft. At the ime of the accident the roads radiating orth, east, and west had been completed, ut the circular roadway had only been ompleted between the outer edges of the ast and north roads. Gas usually made its resence known in the west roadway after oing 50 or 60 feet from the bottom of the ain shaft. For some time before the ac- ident men were employed at or near the nd of this road, continuing the circular oad towards the northeast, and Fulton per- rmed the work of track laying. In conse- uence of the noncompletion of the circular adway and the absence of natural ventila- tion in the west roadway, a ventilating fan was used to force air through air boxes to the places where the men were working in that roadway, "so as to give them air and keep the gases out." Whilst there is some confusion in the description of the situation and operation of the ventilating fan, we take it that it was as follows: The far was situated at the bottom of the shaft and was operated by a small engine in close proximity to the fan. The steam to work this engine was carried down from the boilers above, the steam pipe passing down the main shaft to the fan engine at the bottom. To turn on the steam to this engine and set it in motion there was a valve controlled by a wheel. There was another valve by which the accumulation of condensed water could be let off so as to enable the apparatus to be reached by live steam. This valve was intended also to be moved by a wheel, but that appliance had not been put on, and, therefore, in order to turn the valve the use of a wrench was necessary. A wrench used for this purpose was kept near the fan.

The mine manager stopped the fan about 4 o'clock on Saturday afternoon. On the next day (Sunday) Fulton and the mine manager descended the shaft together. The fan had not started when they reached the bottom of the shaft. The mine manager attempted to start the fan, but could not find the wrench, and there was a delay of a minute or two *while he went up the shaft [68] and secured a wrench. When the fan was started the mine examiner and several other employees who had descended the mine just ahead of Fulton and the mine manager were with the latter in the immediate vicinity of the fan. At that time, as testified to by the mine manager, he believed there was gas in the west roadway. Soon after the starting of the fan Fulton and a helper proceeded along the west roadway with pit lamps—naked lights—on their caps, pushing a car loaded with track material. In a few minutes the explosion occurred which caused the death of Fulton and seriously injured the helper. There was contradictory evidence as to the instructions given by the mine manager to Fulton at the time he started into the west roadway. One version was that Fulton was told to wait awhile, until an examination had been made by the mine manager with a safety lamp. Another version implied from the evidence was that Fulton, entirely of his own volition, proceeded to the place where he was injured; and still another hypothesis was that Fulton was directed to proceed with the work without any caution. At the time of the explosion the mine manager, mine ex-

aminer, and others were in the south roadway.

After the entry of judgment the cause was brought direct to this court on the ground that a constitutional right was claimed in the court below and denied.

The errors assigned which have been argued at bar present for consideration the following questions:

First, the constitutionality of the Illinois mining act of 1899, upon which this action was founded.

Second, the correctness of instructions to the jury on the subject of the proximate cause of the accident in the event Fulton went into the west roadway by direction of the mine manager.

Third, the correctness of a refusal to instruct the jury to return a verdict for the defendant if they found that "Fulton, at the time he was killed, was engaged in a wilful act which endangered the lives or health of persons working in the mine [69] *with him or the security of the mine or its machinery, and that such wilful act on his part contributed to his death."

Fourth, the correctness of a refusal to instruct the jury that, if the death of Fulton resulted in part from his reckless disregard of consequences, in view of his own surroundings, the plaintiff could not recover.

Fifth, the correctness of the overruling of motions to strike out the 2d and 3d counts of the declaration, and of the refusal to instruct the jury that no recovery could be had on these counts, because no evidence had been introduced to support the same.

Sixth, the correctness of the refusal to give the following instructions:

"If you believe from the evidence that the decedent, Fulton, just before the time of his death, entered the mine to work therein under the direction of the mine manager, Wilson, then you are directed to find the defendant 'not guilty,' even though you may further believe from the evidence that all the conditions of the mine had not been made safe at such time, as charged in the declaration."

Seventh, the correctness of the overruling of a motion to strike out the 5th count of the declaration, and in refusing to instruct the jury that no recovery could be had under said count, because no basis existed in the evidence for the asserted liability.

Eighth, the correctness of the overruling of a motion to strike out the 6th count of the declaration and a request for an instruction that no evidence had been introduced of any neglect as to the fan or machinery whereby the air currents of the mine became obstructed and stopped.

Before considering these alleged errors, however, we must dispose of a motion to dismiss. It is urged that as the direct appeal to this court rests alone upon the assertion of the repugnancy of the Illinois mining act to the Constitution of the United States, and as the claim of repugnancy is alone based upon certain provisions of that act providing for licensing *mine man- [70] agers and examiners, defining their duties, and compelling mine owners to employ only licensed managers and examiners, the writ of error should be dismissed, because there is ground broad enough to sustain the judgment wholly irrespective of the provisions of the Illinois act just referred to, which are asserted to be repugnant to the Constitution of the United States. This proposition is based upon the contention that the 1st count of the declaration charges a violation of duty imposed by the statute directly upon the mine owner, irrespective of the requirements of the statute as to licensed employees. But issue is taken on behalf of the plaintiff in error in respect to the correctness of this contention, and it is insisted that the 1st count is open to the same objections which are urged against the others. We think the motion to dismiss is without merit, because there is color for the contention as to the unconstitutionality of the statute, as well in respect to the first as to the other counts of the declaration.

We come, then, to consider the first assigned error, *viz.*, the constitutionality of the Illinois mining act approved April 18, 1899, in force July 1, 1899, entitled, "An Act to Revise the Laws in Relation to Coal Mines and Subjects Relating Thereto, and Providing for the Health and Safety of Persons Employed Therein." Ill. Rev. Stat. chap. 93.

It is conceded that the statute in question has been authoritatively interpreted by the supreme court of Illinois as imposing upon mine owners responsibility for the defaults of mine managers and mine examiners,—employees who are required by the statute to be selected by the mine owners from those holding licenses issued by the state mining board created by the statute. And it is an alleged incompatibility between such responsibility of the mine owner and the obligation imposed upon the mine owner to employ only persons licensed by the state, and the nature and character of the duties which the statute imposes upon them, upon which is based the asserted repugnancy of the statute to the 14th Amendment.

*Section 29 of article 4 of the Illinois Constitution of 1870 is as follows:

"It shall be the duty of the general as-
embly to pass such laws as may be neces-
ary for the protection of operative miners
y providing for ventilation when the same
ay be required and the construction of es-
apement shafts, with such other appliances
s may secure safety in all coal mines, and
o provide for the enforcement of said laws
y such penalties and punishments as may
e deemed proper."

In carrying out this constitutional re-
uirement the general assembly of Illinois
as, from time to time, legislated for the
rotection of miners. The act of 1899,
ere assailed as repugnant to the Constitu-
ion of the United States, as said by the
ourt of appeals for the seventh circuit (68
.R.A. 168, 66 C. C. A. 247, 133 Fed. 197),
rew out of the desire "that every precau-
ion should be taken against the unusual
azards and dangers incident to the inhabit-
ncy of mines. It was intended, and in-
ended rightly, to protect with all known
xpedients every person whose occupation
equired him to labor in these subterranean
ooms and roadways."

The act is lengthy, covering 47 pages of
rint in the appendix to one of the briefs.
n substance it created a state mining board,
uthorized that body to examine candidates
or the position of state inspector of mines,
nd to certify the names of the successful
andidates to the governor, in whom was
ested the power of appointment. Moreover,
he statute fixed the qualifications of mine
anagers, hoisting engineers, and mine ex-
miners, required candidates for such posi-
ions to be examined by the state board, and
ertificates to be furnished to those found
ompetent, and made it unlawful in the
peration of a coal mine to employ or suffer
ny person, other than one possessing the
roper certificate, to serve as a mine man-
ger, hoisting engineer, or mine examiner.
ection 16 prescribed in detail the duties of
ine managers and miners; § 17 set forth
e duties of hoisting engineers; and by
18 the duties of mine examiners are pre-
ribed. Interspersed, *however, throughout
e remainder of the act, are found, in sec-
ons relating to the subject of ventilation,
owder and blast, place of refuge, etc., re-
irements to be observed in effect supple-
enting the sections prescribing in detail
e duties to be performed by the employees
ove mentioned. We think the omissions
duty charged in the various counts in
e declaration are embraced in those in
rms laid upon the mine manager or mine
aminer. Considering this act, the supreme
urt of Illinois, in Henrietta Coal Co. v. Mar-
, 221 Ill. 460, 77 N. E. 902, first commented
on the decisions in Durkin v. Kingston
al Co. 171 Pa. 193, 29 L.R.A. 808, 50 Am.
St. Rep. 801, 33 Atl. 237, and Williams v. Thacker Coal & Coke Co. 44 W. Va. 599, 40 L.R.A. 812, 30 S. E. 107, which cases dealt with statutes which, in their general purpose, were similar to the Illinois act. The Illinois court declined, however, to hold, as was done in the cases referred to, that, where a statute directly imposed duties upon a mine manager, the negligence of such mine manager could not be imputed to the owner, and, indeed, that the owner could not be made responsible for the act of such employee without causing the statute to be unconstitutional. The Illinois court expressly held that, under the Illinois mining act, a mine manager and mine examiner were vice principals of the owner, and were engaged in the performance of duties which the owner could not delegate to others in such manner as to relieve himself from responsibility. Observing that, in a number of its former decisions, the Illinois court had assumed the law to mean what it expressly decided in the Henrietta Case it did mean, *viz.*, that, in respect to the duties devolved upon the mine manager and mine examiner, those persons stood for the mine owner and were vice principals, performing those duties. The court said:

"The fact that the proprietor, if he employs men to act in these capacities, is required to employ those who have obtained the certificate from the state mining board, is without significance. The purpose of that provision was, so far as possible, to guard against the possibility of the proprietor employing *incompetent, intemperate, negligent, [73] or disreputable persons, and not to enable the operator to shift to his employees his responsibility for the management of the mine.

"The object of the mining act, as we gather from its various provisions, is to protect, so far as legislative enactment may, the health and persons of men employed in the mines of the state while they are in the mines. The principal measures prescribed for this purpose require the exercise of greater precaution and care on the part of the mine owner for the safety of the miners than was required by the common law. To hold that he may shift his liability to any person employed by him as examiner or manager who holds the certificate of the state mining board is to lessen his responsibilities, and defeat, in great part, the beneficent purposes of the act. To hold him liable for a wilful violation of the act, or a wilful failure to comply with its provisions on the part of his examiner or manager, is to give force and effect to the statute according to the intent of its makers, and to prolong the lives and promote the safety and well-being of the miners."

Accepting this interpretation of the Illinois statute, and in view of the ruling in Consolidated Coal Co. v. Seniger, 179 Ill. 370, 374, 375, 53 N. E. 733, that it is not obligatory upon a mine owner to select a particular individual, or to retain one when selected, if found incompetent, we think the act is not repugnant to the 14th Amendment in any particular. In legal effect, duties are imposed upon the mine owner, customarily performed for him by certain employees,—duties which substantially relate to the furnishing of a reasonably safe place for the workmen. The subject was one peculiarly within the police power of the state, and the enactment of the regulations counted upon we think was an appropriate exercise of such power. The use and enjoyment of mining property being subject to the reasonable exercise of the police power of the state, certainly the rights, privileges, and immunities of a mine owner as a citizen of the United States were not invaded by the [74]regulations in question, and the *imposition of liability upon the owner for the violation of such regulations, being an appropriate exercise of the police power, was not wanting in due process. And even although the liability imposed upon the mine owner to respond in damages for the wilful failure of the mine manager and mine examiner to comply with the requirements of the statute was not in harmony with the principles of the common law applicable to the relation of master and servant, it being competent for the state to change and modify those principles in accord with its conceptions of public policy, we cannot infer that the selection of mine owners as a class upon which to impose the liability in question was purely arbitrary and without reason. And the views just expressed also adequately dispose of the contention that, by the statute, the mine owner was denied the equal protection of the laws.

The asserted error next to be considered relates to instructions to the jury on the subject of the proximate cause of the accident in the event Fulton went into the west roadway by direction of the mine manager. In the course of the charge to the jury the court said:

"If you believe from the evidence that Wilson, the mine manager, directed Fulton to go into the west roadway, and that said Fulton did so in obedience to such order, and such order was the proximate cause of Fulton's death, without the giving of which Fulton would not have been killed, then the jury is instructed that the plaintiff cannot recover in this case, and the verdict should be for the defendant. You will note there that it follows, if you believe that this instruction, if there was one, to Fulton, was the proximate cause of his death, note that in passing upon that question you must determinate whether, first, if there was gas there at that time; and whether, if there was, that was or was not the proximate cause of his death. Now, by proximate cause is meant efficient cause. In other words, if the gas had not been there, would his death have followed? And was gas being there necessary to his death? Or was the instruction, if there was *one there, wilfully sending[75] him there, the thing which caused his death; which was the greater cause? That is a question of fact for you to determine.

. . . . .

"I said it was for them to determine what was the proximate cause if there was an order for this deceased to go into the mine, or whether it was the gas being there. Let the instruction be what I stated now, the last time; that covers it."

It is contended that the effect of the definitions of proximate cause, made as above, was to hopelessly confuse the jury. While it must be conceded that the instruction was greatly wanting in clearness, yet we think no prejudicial error was committed. Looking at the criticized instructions in connection with the context of the charge, it is clear that it was understood by all as importing that the mining company was at fault for the existence of the accumulated gas, resulting in the explosion which caused the death of Fulton, since to have allowed the gas to accumulate was a disregard of the positive duty towards Fulton imposed by the statute. Now, conceding that the mine manager ordered Fulton into the west roadway, and conceding, further, that such order of the manager was one of the causes of the accident, for which no recovery could be had because not counted on in the declaration, what follows? Simply this, that two concurring causes contributed to the death of Fulton,—one, the order of the mine manager, for which recovery could not be had under the declaration, and the other, the neglect by the mine owner to perform his statutory duty to prevent the accumulation of the dangerous gases which led to the accident. But, because one of the efficient causes, the order of the mine manager, under the pleadings, did not give rise to a right of recovery, it did not follow that therefore the owner was absolved from responsibility for the cause of the accident for which he was liable. Washington & G. R. Co. v. Hickey, 166 U. S. 521, 41 L. ed. 1101, 17 Sup. Ct. Rep. 661.

We next consider two contentions: a. That the trial court erred in refusing to instruct the jury to return a verdict for the defendant if they found that Fulton, at the time he was killed, was engaged in a vio-

on of the statute which contributed to his ath; that is, the doing of a wilful act hich endangered his life and the lives or alth of persons working in the mine with m, and which jeopardized the security of e mine or its machinery; and, b. That the urt also erred in refusing to instruct that the death of Fulton resulted in part from s reckless disregard of consequences in ew of his known surroundings, the plainff could not recover.

Leaving out of view the contention that e first requested instruction was rightly fused because too general, and bearing in ind that in an action to recover damages nder the Illinois mining act a mine owner deprived of the defense of contributory egligence (Carterville Coal Co. v. Abbott, 81 Ill. 495, 502, 503, 55 N. E. 131), and asuming that the refused instruction might roperly have been given if the tendency of he proof justified it, we think the instruction was rightly refused, because we are of pinion that there was no evidence tending o show the doing by Fulton of a wilful act f the character contemplated by the statte, or a reckless disregard by him of his ersonal safety. While the evidence might ave justified the inference that Fulton, beore entering the west roadway, knew that had not been cleared of gas, yet it canot be inferred that Fulton and his helper uspected that gas had so permeated the oadway as to render it perilous to life to o to the point where the explosion ocurred. The jury had been instructed that here could be no recovery if the proof esablished the contention of the mining comany that Fulton entered the part of the ine in which he was killed against or conrary to caution given him by the mine anager, and, if Fulton was permitted to nter the west roadway without caution, it impossible, on this record, to infer that he jury would have been justified in findg that it was obvious that to enter the est roadway was so hazardous as to give upport to the conclusion that Fulton willy and recklessly went to his destruction.

*It is asserted that the court erred in reusing to give the following instructions:

"If you believe from the evidence that the cedent Fulton, just before the time of his ath, entered the mine to work therein unr the direction of the mine manager, Wiln, then you are directed to find the deodant, 'not guilty,' even though you may rther believe from the evidence that all e conditions of the mine had not been de safe at such time, as charged in the laration."

The requested charge was based upon the t paragraph of that portion of § 18 (b) of Illinois mining act, dealing with the duties of mine examiners, reading as follows:

"To post danger notices. (b) When working places are discovered in which accumulations of gas, or recent falls, or any dangerous conditions exist, he shall place a conspicuous mark thereat as notice to all men to keep out, and at once report his finding to the mine manager.

"No one shall be allowed to remain in any part of the mine through which gas is being carried into the ventilating current, nor to enter the mine to work therein, except under the direction of the mine manager, until all conditions shall have been made safe."

We construe this provision of the statute as relating to steps to be taken when a mine or a portion thereof is discovered to be unsafe, and as relating to the necessary work to be done in the mine under the immediate supervision and direction of the mine manager to remedy the unsafe condition. As, however, there is no proof tending to show that Fulton, in entering and working in the mine, came under any of these conditions, we think the instruction was rightly refused.

The remaining assignments assert the commission of error by the trial court in overruling motions to strike out the 2d, 3d, and 6th counts of the declaration, and in refusing to instruct the jury that no recovery could be had under any of those counts, because no evidence had been introduced tending to establish the commission of the particular *acts of neg- [78] ligence charged in those counts. Such counts, as we have seen, related to the failure to construct crosscuts and stoppings in the mine, and to an alleged defect resulting from the absence of a wheel, and the consequent necessity of using a wrench for the purpose of opening a valve to allow condensed steam to escape as a prerequisite to the movement of the ventilating fan. We are constrained to the conclusion that prejudicial error was committed in these particulars. We think it is extremely doubtful whether there was any evidence in the record even tending to establish that, in a long-wall mine of the character of the one here in question, crosscuts and stoppings thereof were essential. But be this as it may, certain is it that there is no evidence whatever in the record tending to support the claim that the absence of crosscuts and stoppings in the mine in question was in any wise the cause of the accumulations of gas or the retention of the accumulated gas from the explosion of which Fulton was killed. We are also of opinion that there was nothing in the evidence which would have justified the inference that the ab-

sence of the wheel from the valve, forming part of the mechanism to operate the ventilating fan, was the proximate cause of the presence of the gas in the west roadway where Fulton was killed. The uncontradicted testimony showed that but a very brief interval, a minute or two, elapsed before a wrench was obtained, and the distance to the point where the gas had accumulated precludes the possibility of saying that the evidence tended to show that the absence of the wheel could have been the proximate cause of the accident. Under this condition of things we find it impossible to say that prejudicial error did not result. Maryland use of Markley v. Baldwin, 112 U. S. 490, 493, 28 L. ed. 822, 823, 5 Sup. Ct. Rep. 278. And, of course, in a case like the one we are considering, we cannot maintain the verdict, as might be done in a criminal case, upon a general verdict of guilty upon all the counts of an indictment. Goode v. United States, 159 U. S. 663, 40 L. ed. 297, 16 Sup. Ct. Rep. 136. Nor does § 57 of the Illinois practice act, chap. [79] 110, Rev. Stat. Illinois, support *the contention that errors of the character of those we have just been considering must be treated as not prejudicial. The section relied upon is as follows:

"Whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts . . . be sufficient to sustain the verdict."

This section has been held not to relate to counts which are vitally defective, but as only providing that where a declaration consists of several counts, and some of the counts contain defects not vital, and yet subject to be assailed by demurrer, a party cannot wait until after the close of the evidence at the trial, and, *a fortiori*, after verdict, and then for the first time question the sufficiency of the counts. Chicago v. Lonergan, 196 Ill. 518, 63 N. E. 1018; Consolidated Coal Co. v. Scheiber, 167 Ill. 539, 47 N. E. 1052. This statute, of course, lends no support to the contention here made that where a jury is wrongfully permitted, over the objection of the opposing party, to take into consideration, in reaching a verdict, counts of a declaration which have not been supported by any evidence, and where it is impossible from the record to say upon which of the counts of the declaration the verdict was based, that the judgment entered under such circumstances can be sustained upon the theory that substantial rights of the objecting party had not been invaded.

The judgment of the Circuit Court is therefore reversed, and the case remanded to that court for further proceedings consistent with this opinion.

*UNITED STATES EX REL. WILLIS C. [80] WEST, Plff. in Err.,

v.

ETHAN A. HITCHCOCK.

(See S. C. Reporter's ed. 80–86.)

Indians—adoption into tribe—control by Department of the Interior.

1. A regulation of the Department of the Interior that the adoption of a person into an Indian tribe must be approved by the Indian Office to be valid can hardly be said to be beyond the power of that Department to adopt, in view of the provision of U. S. Rev. Stat. § 463, U. S. Comp. Stat. 1901, p. 262, that the "Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of the Indian relations."

Mandamus—to Secretary of Interior—Indian allotments.

2. The Secretary of the Interior will not be compelled by mandamus to approve the relator's selection, as an adopted member of the Wichita tribe, of certain lands out of those ceded to the United States by the Wichita and affiliated bands of Indians, under the agreement of June 4, 1891, ratified by the act of March 2, 1893 (28 Stat. at L. 876, 895–897, chap. 199), where the Secretary's answer, though not in terms denying the averments of the petition as to the relator's membership in the tribe, alleges that he had, on a specified date, reached and announced a decision that such relator was not a member of the tribe, and therefore was not entitled to an allotment.

[No. 194.]

Argued January 30, 1907. Decided March 4, 1907.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, denying mandamus to require the Secretary of the Interior to approve the selection by the relator, as an adopted member of the Wichita tribe, of 160 acres of land out of the lands ceded to the United States by those Indians. Affirmed.

See same case below, 26 App. D. C. 228.

The facts are stated in the opinion.

NOTE.—As to when mandamus is the proper remedy—see notes to United States ex rel. International Contracting Co. v. Lamont, 39 L. ed. U. S. 160; M'Cluny v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie, 3 L.R.A. 54; Burnsville Turnp. Co. v. State, 3 L.R.A. 265; State ex rel. Charleston, C. & C. R. Co. v. Whitesides, 3 L.R.A. 777; and Ex parte Hurn, 13 L.R.A. 120.

Messrs. William H. Robeson and Samuel L. Putman argued the cause, and, with Mr. William C. Shelley, filed a brief for plaintiff in error:

The answer of the Secretary must be held by the court to be an admission that the averments of the petition as to the adoption are true.

Creager v. Hooper, 83 Md. 490, 35 Atl. 59; People ex rel. Sunderlin v. Ovenshine, 1 How. Pr. 164; People ex rel. Hemstreet v. Crabb, 156 Ill. 155, 40 N. E. 319.

In so far as it is consistent with the power of supervision necessarily vested in the political branches of the government, the various Indian tribes, within their own territory, retain the right to regulate and control their internal affairs.

Re Sah Quah, 31 Fed. 329; United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; Earl v. Godley (Earl v. Wilson) 42 Minn. 361, 7 L.R.A. 125, 18 Am. St. Rep. 517, 44 N. W. 254; 20 Ops. Atty. Gen. 711; Sloan v. United States, 95 Fed. 67; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 9, 20 Sup. Ct. Rep. 1; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; Turner v. Fish, 28 Miss. 96; Nofire v. United States, 164 U. S. 657, 58, 661, 662, 41 L. ed. 588-590, 17 Sup. Ct. Rep. 212; United States v. Rogers, 4 How. 87, 11 L. ed. 1105; Roff v. Burney, 168 U. S. 218, 42 L. ed. 442, 18 Sup. Ct. Rep. 60; O'Brien v. Bugbee, 46 Kan. 1, 26 Pac. 428; Seneca Nation v. Lehly, 55 Hun, 83, 8 N. Y. Supp. 245.

The usages and customs of the tribe from time immemorial are the laws of the tribe nevertheless, and are as binding as if written, and require only to be averred and proved as other facts.

Turner v. Fish, supra.

The executive officers of the United States Government have no inherent right to sit in judgment upon the question of tribal membership, but the tribe itself is supreme as to that question, as it is admitted to have been in the early history of America; and such right of supervision as may now be claimed to exist must exist alone by virtue of some law of Congress as to that particular tribe, or some treaty between that tribe and the United States, conferring such authority. In the absence of such express delegation of authority, the tribe remains sovereign.

Stephens v. Cherokee Nation, 174 U. S. 5, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722.

Vested rights are involved.

Stephens v. Cherokee Nation, 174 U. S. 1, 43 L. ed. 1047, 19 Sup. Ct. Rep. 722.

Assistant Attorney General Campbell and Fred H. Barclay argued the cause, and, with Mr. Jesse C. Adkins, filed a brief for defendant in error:

It was for the Secretary to determine whether the relator was an adopted member of the tribe; and, of course, it is elementary law that when, in such a case, the Secretary has determined that or any question so committed to him, it is immaterial whether his determination is right or wrong; that is a matter which cannot be considered by the courts, and his decision cannot be reviewed by them.

De Cambra v. Rogers, 189 U. S. 119, 122, 47 L. ed. 734, 735, 23 Sup. Ct. Rep. 519; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 325, 47 L. ed. 1074, 1078, 23 Sup. Ct. Rep. 698.

The decision of the court of appeals in this case, that the duty of the Secretary of the Interior in approving or disapproving the selection in question was one involving the exercise of judgment and discretion, is fully supported by the authorities.

United States v. Missouri, K. & T. R. Co. 141 U. S. 358, 375, 35 L. ed. 766, 771, 12 Sup. Ct. Rep. 13; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 511, 33 L. ed. 687, 694, 10 Sup. Ct. Rep. 341; Runkle v. United States, 122 U. S. 543, 557, 30 L. ed. 1167, 1171, 7 Sup. Ct. Rep. 1141.

Mandamus should not issue in cases of doubtful right, but only when the legal right of the party to that which he demands has been clearly established.

Life & Fire Ins. Co. v. Wilson, 8 Pet. 291, 302, 8 L. ed. 949, 953; Reeside v. Walker, 11 How. 272, 289, 13 L. ed. 693, 700.

The Indian tribes sustain relations of complete dependency toward the United States, are wards of the government, and are subject to such full control as may be prescribed by the sovereign guardian.

Cherokee Nation v. Georgia, 5 Pet. 1, 16, 17, 8 L. ed. 25, 30, 31; United States v. Kagama, 118 U. S. 375, 383-385, 30 L. ed. 228, 231, 6 Sup. Ct. Rep. 1109; Choctaw Nation v. United States, 119 U. S. 1, 27, 30 L. ed. 306, 314, 7 Sup. Ct. Rep. 75; Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 653-655, 34 L. ed. 295, 300, 301, 10 Sup. Ct. Rep. 965; Stephens v. Cherokee Nation, 174 U. S. 445, 486-488, 43 L. ed. 1041, 1056, 1057, 19 Sup. Ct. Rep. 722; Lone Wolf v. Hitchcock, 187 U. S. 553, 565-568, 47 L. ed. 299, 306, 307, 23 Sup. Ct. Rep. 216.

A stranger cannot acquire the status of a tribal Indian, by marriage or adoption, without the Federal sanction.

Swift v. McLaughlin, 19 Mont. 300, 48 Pac. 234.

Adoptions by the Wichita and affiliated bands of Indians, or either of them, are subject to approval or disapproval by the Secretary of the Interior under the juris-

diction and authority expressly conferred, and the duty laid, upon him by law.

United States v. Macdaniel, 7 Pet. 1, 8 L. ed. 587; Dastervignes v. United States, 58 C C. A. 346, 122 Fed. 30.

The now long-continued practice, established by the evidence, of regulating and controlling these Indian adoptions, pursuant to the executive interpretation of the sections of the Revised Statutes in question, will not be disturbed by the courts unless manifestly erroneous.

United States v. Finnell, 185 U. S. 236, 243, 244, 46 L. ed. 890, 893, 22 Sup. Ct. Rep. 633; Hawley v. Diller, 178 U. S. 476, 488, 44 L. ed. 1157, 1161, 20 Sup. Ct. Rep. 986; United States v. Johnston, 124 U. S. 236, 253, 31 L. ed. 389, 396, 8 Sup. Ct. Rep. 446; United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588, 589; United States ex rel. Wedderburn v. Bliss, 12 App. D. C. 485.

The power and authority to determine what persons are entitled to allotments under article 2 of the agreement must necessarily rest with some officer or tribunal; and, in the absence of other designation, it follows that Congress intended the exercise of jurisdiction to that end by the tribunal or authority having supervision and control of the Indians and their affairs, as well as, with respect to the disposition of the relinquished lands, by the authorities having control of such matters.

Catholic Bishop v. Gibbon, 158 U. S. 155, 167, 39 L. ed. 931, 936, 15 Sup. Ct. Rep. 779; Indian Allotments, 28 Land Dec. 567.

The sale and disposition of the public domain is under the jurisdiction of the Commissioner of the General Land Office, subject to the direction of the Secretary of the Interior.

Knight v. United Land Asso. 142 U. S. 161, 177, 35 L. ed. 974, 12 Sup. Ct. Rep. 258.

The selection of allotments under article 2 of the agreement is not complete until "approved" by the Secretary of the Interior. The word "approved," in that connection, confers a judicial power and duty upon that officer.

Wisconsin C. R. Co. v. Price County, 133 U S 496, 511, 513, 33 L. ed. 687, 694, 695, 10 Sup. Ct. Rep. 341; United States v. Missouri, K. & T. R. Co. 141 U. S. 358, 375, 376, 35 L. ed. 766, 771, 772, 12 Sup. Ct. Rep. 13.

In making these regulations the Secretary of the Interior was acting for the President.

Runkle v. United States, 122 U. S. 543, 557, 30 L. ed. 1167, 1171, 7 Sup. Ct. Rep. 1141.

These rules and regulations, made pursuant to law, have the force and effect of law, and the courts take judicial notice of them.

United States v. Eliason, 16 Pet. 291, 302, 10 L. ed. 968, 972; Gratiot v. United States, 4 How. 80, 117, 11 L. ed. 884, 901; Ex parte Reed, 100 U. S. 13, 22, 25 L. ed. 538, 539; Kurtz v. Moffitt, 115 U. S. 503, 29 L. ed. 462, 6 Sup. Ct. Rep. 148; Caha v. United States, 152 U. S. 211, 221, 38 L. ed. 415, 419, 14 Sup. Ct. Rep. 513; Boske v. Comingore, 177 U. S. 459, 467, 470, 44 L. ed. 846, 849, 850, 20 Sup. Ct. Rep. 701; Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 309, 47 L. ed. 1064, 1070, 23 Sup. Ct. Rep. 692; 21 Ops. Atty. Gen. 122; United States v. Barrows, 1 Abb. (U. S.) 351, Fed. Cas. No. 14,529; Low v. Hanson, 72 Me. 104.

Mr. Justice Holmes delivered the opinion of the court:

This is a petition for mandamus to require the Secretary of the Interior to approve the selection and taking of 160 acres by the relator out of the lands ceded to the United States by the Wichita and affiliated bands of Indians, under an agreement of June 4, 1891, ratified by the act of Congress of March 2, 1895, chap. 188, 28 Stat. at L. 876, 895–897. The petition alleges that the relator is a white man, married to a Wichita woman, and thereby a member of the tribe, and that his adoption was confirmed and recognized in various ways set forth. By the second article of the agreement, as part of the consideration, the United States agreed that there should be allotted to each member of the said bands, native and adopted, 160 acres out of the said lands, to be selected by the members, with qualifications not in question here. The fourth article contains provisions as to the title to allotments when they "shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior." After a demurrer to the petition, which was overruled (19 App. D. C. 333), the Secretary answered, alleging that he had examined and considered the application of the relator, and on July 3, 1901, had reached and announced a decision that the relator was not a member of the tribe, and thereupon had denied the application. The relator moved for a peremptory mandamus, which was denied, and filed a demurrer, which was overruled, and thereupon pleaded that the Secretary did not by the decision alleged, decide that the relator was not a member of the tribe, and for that reason deny him the allotment. Issue was joined and evidence taken, and after a hearing judgment was entered for the respondent and the petition dismissed. The judgment was affirmed on appeal (26 App. D. C. 296), and the case was brought to this court. The issues here are those raised by the plea, the demurrer to the answer, and the motion for a peremptory writ.

it is argued that the answer admits the erments of the petition, as it does not ay them in terms, and that therefore it ust be taken that there was no question ncerning the relator's membership for the cretary to decide. His *identity was not sputed, nor, it is said, the acts of adoption at took place long before the relator aped to have his selection approved, and, erefore, the Secretary's duty was merely nisterial, to carry out the mandate of the t. But the admission, at most, is only the mission implied by a plea of estoppel by dgment. In truth it hardly goes so far as at; for when a party says that he is the oper person to decide the question raised, d that he has decided it against the parraising it, he hardly can be said to admit at his decision was wrong.

The approval of the Secretary, required the agreement, must include, as one of elements, the recognition of the applint's right. If a mere outsider were to ake a claim, it would have to be rejected someone, and the Secretary is the natul, if not the only, person to do it. No list authentic determination of the parties titled is referred to by the agreement, as to narrow the Secretary's duty to entification or questions of descent in case subsequent death. The right is conferred on the members of the bands, but the artainment of membership is left wholly large. No criteria of adoption are stated. he Secretary must have authority to de-de on membership in a doubtful case, and, he has it in any case, he has it in all. urthermore, as his decision is not a matter any particular form, his answer saying at he has decided the case is enough; for en if he had not decided it before, such answer would announce a decision suffiently by itself.

But the answer was not confined to a genal allegation that the Secretary had deded the case. It gave the date of the cision, and the relator, under his plea, put e decision in evidence. It was a letter hich seemed to admit that the relator had en adopted by the Indians as a member their tribe, but assumed that the adopon must have been approved by the Indian fice to be valid, as provided by a regulaon of that Department. The relator conds that the validity of the adoption was matter purely of *Indian law or custom, d that the Department could not take it der control. Probably it would have been fortunate for the Indians if such control d not been exercised, as the temptation white men to go through an Indian marge for the purpose of getting Indian hts is sufficiently plain. We are disposed think that authority was conferred by the general words of the statutes. Rev. Stat. §§ 441, 463, U. S. Comp. Stat. 1901, pp. 252, 262. By the latter section: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations." We should hesitate a good deal, especially in view of the long-established practice of the Department, before saying that this language was not broad enough to warrant a regulation obviously made for the welfare of the rather helpless people concerned. The power of Congress is not doubted. The Indians have been treated as wards of the nation. Some such supervision was necessary, and has been exercised. In the absence of special provisions, naturally it would be exercised by the Indian Department.

However, it hardly is necessary to pass upon that point. Although the answer gave the decision a date, that did not open it for consideration. If the Secretary had authority to pass on the relator's right to select land, his jurisdiction did not depend upon his decision being right. By alleging that he had denied the application he did not invoke the revision of his reasons by a court, even when he saw fit to add the date. He raised no question of law, but simply stood on his authority and put forward his decision as final. As we have implied, such an answer affirms not merely the past but the present determination of the answering tribunal, and must be assumed to be based on reasons that the respondent deems adequate. Even if those given in the letter of July 3, 1901, had been bad, they could not be taken to exhaust the Secretary's grounds. He has not disclosed to *the court [86] any statement of those grounds purporting to be exhaustive and complete, and the court cannot make an inquisition into his mental processes to see whether they were correct. See De Cambra v. Rogers, 189 U. S. 119, 122, 47 L. ed. 734, 735, 23 Sup. Ct. Rep. 519.

We doubt if Congress meant to open an appeal to the courts in all cases where an applicant is dissatisfied. Of course the promise of the United States that there shall be allotted 160 acres to each member of the Wichita band may be said to confer an absolute right upon every actual member of the band. But someone must decide who the members are. We already have expressed the opinion that the primary decision must come from the Secretary. There is no indication of an intent to let applicants go farther. There are insuperable difficulties in the way of at least this form

of suit, and the Department of the Interior generally has been the custodian of Indian rights.

Judgment affirmed.

VUKO PEROVICH, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 86-92.)

Trial—directing verdict in criminal case—proof of corpus delicti.

1. The trial court properly refuses to instruct the jury to bring in a verdict of not guilty in a homicide case, on the theory that the *corpus delicti* has not been proved, although there was no witness to the homicide, and the identification of a partly burned body as that of the victim was not perfect, where, taking all the circumstances together, there is clearly enough evidence to warrant the jury in finding that such body was that of the deceased, and that he had been killed by the defendant.

Evidence—voluntary confessions.

2. The deputy marshal may testify as to conversations between himself and the defendant in a criminal case which were not induced by duress, intimidation, or other improper influences, but were perfectly voluntary.

Appeal—discretionary decision—refusal to appoint interpreter.

3. The refusal to appoint an interpreter when the defendant in a criminal case is testifying is not prejudicially erroneous where it does not appear from the answers made by the witness that there was any abuse of the discretionary power lodged in the trial court.

Trial—requested instructions—emphasizing single fact.

4. The trial court is not required to give a requested instruction in a criminal case which singles out and emphasizes an isolated fact.

[No. 405.]

Submitted January 21, 1907. Decided March 11, 1907.

IN ERROR to the District Court of the United States for the Third Division of the Territory of Alaska to review a conviction of homicide. Affirmed.

The facts are stated in the opinion.

No counsel for plaintiff in error.

Assistant Attorney General Cooley submitted the cause for defendant in error:

An admission of a fact not in itself involving criminal intent is not to be rejected as evidence merely because it may, when taken in connection with other facts, tend to establish guilt.

People v. Velarde, 59 Cal. 457; State v. Red, 53 Iowa, 74, 4 N. W. 831; People v. Parton, 49 Cal. 632; Ferguson v. State, 31 Tex. Crim. Rep. 93, 19 S. W. 901; People v. McCallam, 103 N. Y. 596, 9 N. E. 502.

Whether or not the appointment of an interpreter is necessary is within the sound discretion of the trial court.

Schall v. Eisner, 58 Ga. 190; State v. Severson, 78 Iowa, 653, 43 N. W. 533.

It is not the law that the *corpus delicti* must be distinctly proved, either by direct evidence of the fact or by inspection of the body, because that would eliminate proof of the *corpus delicti* by circumstantial evidence.

Com. v. Webster, 5 Cush. 295, 52 Am. Dec. 711; State v. Williams, 52 N. C. (7 Jones, L.) 446, 78 Am. Dec. 248.

The fact that the defendant was known to be near the place of the crime at the time the murder is supposed to have been committed is to be considered, not separately, but in connection with the other facts in the case.

Scott v. Lloyd, 9 Pet. 418, 459, 9 L. ed. 178, 193; Coffin v. United States, 162 U. S. 664, 675, 40 L. ed. 1109, 1113, 16 Sup. Ct. Rep. 943.

Mr. Justice Brewer delivered the opinion of the court:

On July 17, 1905, Vuko Perovich, now plaintiff in error, was indicted in the United States district court of Alaska, third division, for the murder of Jacob Jacmi. The trial, on August 5, 1905, resulted in a verdict of "guilty of murder in the first degree, and that he suffer death." Motions for a new trial and arrest of judgment having been overruled, he was, on September 15, 1905, sentenced to be hanged. To review that judgment this writ of error was sued out. The record was filed in this court on September 24, 1906, and on application the case was advanced for hearing on January 21, 1907. No counsel appeared for plaintiff in error and no brief was or has been filed in his behalf. The case was submitted by the government on its brief. Although unaided by counsel for plaintiff in error, we have

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NOTE.—On the proof of *corpus delicti* in criminal cases—see notes to Bines v. State, 68 L.R.A. 33, and Dimmick v. United States, 70 C. C. A. 156.

On the admissibility of confessions in evidence—see notes to Hopt v. Utah, 28 L. ed. U. S. 262, and Bram v. United States, 43 L. ed. U. S. 568.

As to refusing requested instructions—see note to International & G. N. R. Co. v. Keenan, 9 L.R.A. 703.

refully examined the record and considered the assignments of error.

The testimony in the case was circumantial. No witness saw the killing. Inced, the first and principal question is hether there was a homicide. Jaconi was fisherman, living alone in a log cabin vered by a tent, about midway between airbanks and Chena, a distance of about miles from each place. On October 28, 904, the last time he was seen alive, he as at Fairbanks between 1 and 2 o'clock the afternoon, and had in his possession everal nuggets, a Yukon gold ring, a gold hain, watch charm, and some money, art of which he deposited in a bank. In he early morning of October 29 the dogs of he deceased were heard barking, and two hots from a gun were heard in the direcion of his cabin. On that day about noon ne who had been the partner of Jaconi rrived at his camp and found the cabin in hich the deceased had lived partially detroyed by fire and the fire still burning. n the rear where the bunk had been he saw he back part of a head, a leg bone, and he trunk of a man. The head was sunken n the chest. While the cabin was not toally destroyed, it was burned more towards he back where the bunk had been, and the round in the vicinity of the bunk was aturated with oil. It appeared that Jaconi ad in his cabin about one and one-half allons of olive oil. On that day or the ext several witnesses were at the cabin nd saw *the skull and the other parts of he skeleton, still smoking, and the bones burned that they crumbled to pieces hen touched. Some two weeks before the re the defendant had said to a witness at he was broke, but knew where he uld get some money if he had a partner go with him, as there was a man who ved about 5 miles from Chena who had 00, a watch and chain, a ring and a gun. n October 15 he was at the cabin of Jaoni about daylight. At that time he said the former partner of Jaconi, when ked what he wanted, that he was travelg and looking for a job. On October 20 fendant and a witness went to Chena d on their way stopped at the cabin Jaconi. After leaving, defendant told tness that he had been there several nes before, and that the deceased had a l of money, and that he would lick him th an ax some day and throw him in water, or that he would make a fire l burn everything up. On October 28, the on which Jaconi was last seen, the dedant was at Fairbanks, and said he was g to the cabin of one of his countrymen to see if he could find anything in it. On October 29, between half past 3 and 4 o'clock in the afternoon, he arrived at a camp about 20 miles from Chena. He had a rifle and a canvas bag in his possession, a Yukon ring and a gold watch and chain. He made different and contradictory statements about the watch. On November 5 he was arrested, having in his possession $5 and a gold watch. He said that he traded a nugget chain with two men for a sack of clothes and the watch. Later a sack of clothes was found where he had left it. He said that he and his partner had made the chain, and that he had bought his partner's interest in it. His partner testified that they owned the nugget chain, and that it had never been out of his possession after it was made. Several of these articles and others found in possession of the defendant were identified as the property of Jaconi. Other circumstances of a similar nature were also shown in evidence.

It is assigned for error that the court overruled a motion *to instruct the jury to [91] bring in a verdict of not guilty for the reason that the *corpus delicti* had not been proved. This motion was made after the plaintiff had rested, and, upon its being overruled, the defendant proceeded to offer testimony. The motion was not thereafter renewed. Without resting upon the proposition that introducing testimony after such a motion has been overruled is a waiver of any exception to the action of the court (Union P. R. Co. v. Daniels [Union P. R. Co. v. Snyder] 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756; Runkle v. Burnham, 153 U. S. 216, 38 L. ed. 694, 14 Sup. Ct. Rep. 837; Hansen v. Boyd, 161 U. S. 397, 40 L. ed. 746, 16 Sup. Ct. Rep. 571), we are of the opinion that neither at that time nor at the close of all the testimony would the court have been justified in withdrawing the case from the jury. While it is true there was no witness to the homicide and the identification of the body found in the cabin was not perfect, owing to its condition, caused by fire, yet, taking all the circumstances together, there was clearly enough to warrant the jury in finding that the partially burned body was that of Jaconi and that he had been killed by the defendant. Upon this question the case of Com. v. Williams, 171 Mass. 461, 50 N. E. 1035, is closely in point and instructive. While the particular facts are not identical, the character and scope of the testimony are substantially the same.

Again, it is alleged that there was error in overruling a motion made by defend-

ant to strike out all the testimony given by a deputy marshal of conversations between him and the defendant. As these conversations were not induced by duress, intimidation, or other improper influences, but were perfectly voluntary, there is no reason why they should not have been received.

Other matters referred to in the assignment of errors require but slight notice. One is that the court erred in refusing to appoint an interpreter when the defendant was testifying. This is a matter largely resting in the discretion of the trial court, and it does not appear from the answers made by the witness that there was any abuse of such discretion.

Error is also alleged in refusing an in-
[92] struction as to the *evidence necessary to establish the *corpus delicti*. It is enough, in answer to this objection, to refer to the summary of the testimony we have already given, and to note the fact that the court instructed that the evidence must be such as to satisfy the jury beyond a reasonable doubt.

The defense asked one or two instructions, such as this: "The fact that Jacob Jaconi has not been seen since the 28th day of October, 1904, does not create a presumption of his death." Singling out a single matter and emphasizing it by special instruction as often tends to mislead as to guide a jury. Doubtless the isolated fact that Jaconi had not been seen would not of itself establish the fact of his death. It is only a circumstance which, taken in connection with the other facts in the case, tends to prove the death. It is merely one link in a long chain, and the court is seldom called upon by special instructions to single out any single link in a chain, and affirm either its strength or weakness. Grand Trunk R. Co. v. Ives, 144 U. S. 408, 433, 36 L. ed. 485, 494, 12 Sup. Ct. Rep. 679; Rio Grande Western R. Co. v. Leak, 163 U. S. 280, 288, 41 L. ed. 160, 162, 16 Sup. Ct. Rep. 1020.

Objection is made to the instruction in reference to reasonable doubt. This instruction is taken from the charge of Chief Justice Shaw to the jury in Com. v. Webster, 5 Cush. 295, 320, 52 Am. Dec. 711, and that case has been cited with approval by this court. Miles v. United States, 103 U. S. 304, 312, 26 L. ed. 481, 484.

These are all the questions which we deem it necessary to notice, and while we should have been glad to have had the assistance of counsel for plaintiff in error, yet we are satisfied from our examination of the record that the defendant was properly convicted, and the judgment is affirmed.

*JAY DELAMATER, Plff. in Err., [
v.
STATE OF SOUTH DAKOTA.

(See S. C. Reporter's ed. 93-104.)

Commerce—in intoxicating liquors—license tax on traveling salesmen—Wilson act.

The annual license charge imposed by a state law upon the business of selling or offering for sale intoxicating liquors within the state by any traveling salesman who solicits orders in quantities of less than 5 gallons cannot be regarded, when applied to interstate transactions, repugnant to the commerce clause of the Federal Constitution, in view of the provisions of the Wilson act of August 8, 1890 (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), that intoxicating liquors coming into the state shall be as completely under its control as if manufactured therein.

[No. 149.]

Argued January 10, 11, 1907. Decided March 11, 1907.

IN ERROR to the Supreme Court of the State of South Dakota to review a judgment which affirmed a conviction in the Circuit Court of Potter County, in that state, of soliciting orders for intoxicating liquors without having paid the annual license fee imposed by the law of the state. Affirmed.

See same case below (S. D.) 104 N. W. 537.

The facts are stated in the opinion.

Mr. Herbert Jackson argued the cause and filed a brief for plaintiff in error:

Liquor is a legitimate subject of interstate commerce.

NOTE.—On peddlers and drummers as related to interstate commerce—see notes to Stockard v. Morgan, 46 L. ed. U. S. 786, and Re Spain, 14 L.R.A. 97.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCaun & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

State licenses or taxes as affecting interstate commerce—see notes to Rothrauf v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Butterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Telegraph Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On commerce in intoxicating liquors—see notes to State v. Creeden, 7 L.R.A. 200; State ex rel. Cochran v. Winters, 10 L.R.A. 616; and Rhodes v. Iowa, 42 L. ed. U. S. 1089.

Leisy v. Hardin, 135 U. S. 100, 110, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Rhodes v. Iowa, 170 U. S. 412, 414, 42 L. ed. 1088, 1092, 18 Sup. Ct. Rep. 664; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062.

The statute complained of is a direct interference with interstate commerce.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 524, 31 L. ed. 700, 720, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Robbins v. Taxing District, 120 U. S. 489–502, 30 L. ed. 694–699, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Corson v. Maryland, 120 U. S. 502, 506, 30 L. ed. 699, 701, 1 Inters. Com. Rep. 50, 7 Sup. Ct. Rep. 655; Brennan v. Titusville, 153 U. S. 289, 308, 38 L. ed. 719, 725, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Caldwell v. North Carolina, 187 U. S. 622, 624, 47 L. ed. 336, 337, 23 Sup. Ct. Rep. 229; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 451, 48 L. ed. 254, 258, 24 Sup. Ct. Rep. 151; Rhodes v. Iowa, 170 U. S. 412–438, 42 L. ed. 1088–1100, 18 Sup. Ct. Rep. 664; Vance v. W. A. Vandercook Co. 170 U. S. 438, 468, 42 L. ed. 1100, 1111, 18 Sup. Ct. Rep. 674; American Exp. Co. v. Iowa, 196 U. S. 133, 146, 49 L. ed. 417, 423, 25 Sup. Ct. Rep. 182.

Was the regulation imposed by § 2834 of the Revised Political Code of South Dakota a tax on interstate commerce?

Robbins v. Taxing District, supra; S. D. Sess. Laws, 1901, p. 246; Caldwell v. North Carolina, 187 U. S. 622, 633, 47 L. ed. 336, 341, 23 Sup. Ct. Rep. 229; American Exp. Co. v. Iowa, supra.

Was § 2834 of the Revised Political Code of South Dakota a police regulation?

Austin v. Tennessee, 179 U. S. 343, 388, 45 L. ed. 224, 243, 21 Sup. Ct. Rep. 132; American Exp. Co. v. Iowa, supra; Cook v. Marshall County, 196 U. S. 261, 275, 49 L. ed. 471, 476, 25 Sup. Ct. Rep. 233; Schollenberger v. Pennsylvania (Paul v. Pennsylvania) 171 U. S. 1–30, 43 L. ed. 49–60, 18 Sup. Ct. Rep. 757.

Mr. **Aubrey Lawrence** argued the cause, and, with Mr. Philo Hall, filed a brief for defendant in error:

The law is a license law, and not a tax law.

17 Am. & Eng. Enc. Law, 2d ed. p. 223; 1 Am. & Eng. Enc. Law, 2d ed. pp. 774, 775; State ex rel. Grigsby v. Beuchler, 10 S. D. 156, 72 N. W. 114.

The law is one within the police powers of the state, and thus subject to different rules than laws concerning the ordinary modes of commerce.

Freund, Pol. Power, § 10, p. 7; License Cases, 5 How. 523, 12 L. ed. 265; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Foster v. Kansas, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97.

The soliciting is a part of the sale.

Lang v. Lynch, 4 L.R.A. 831, 38 Fed. 489; Brown v. Wieland, 116 Iowa, 711, 61 L.R.A. 418, 89 N. W. 17.

Where a resident citizen engages in a general business, subject to a particular tax, the act levying that tax or license is not void because of conflict with the interstate commerce act, because the business consists in negotiating sales between residents and nonresidents.

Ex parte Taylor, 58 Miss. 478, 38 Am. Rep. 336; Bates v. Mobile, 46 Ala. 158; Mason v. Cumberland, 92 Md. 461, 48 Atl. 136; Washington v. McGeorge, 146 Pa. 248, 23 Atl. 222; Ficklen v. Taxing District, 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810.

As a general proposition and principle the legislature has the power to impose occupation licenses or taxes.

17 Am. & Eng. Enc. Law, 2d ed. p. 222; Bates v. Mobile; Mason v. Cumberland; and Washington v. McGeorge,—supra; 7 Cyc. Law & Proc. pp. 437–439; Westheimer v. Weisman, 60 Kan. 753, 57 Pac. 969, 8 Kan. App. 75, 54 Pac. 332; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; Plumley v. Massachusetts, 155 U. S. 471, 39 L. ed. 227, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Hopkins v. United States, 171 U. S. 591, 43 L. ed. 296, 19 Sup. Ct. Rep. 40; Com. v. Gardner, 133 Pa. 284, 7 L.R.A. 669, 19 Am. St. Rep. 645, 19 Atl. 550; State ex rel. Henshall v. Ludington, 33 Wis. 107; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265.

In order to render a law unconstitutional the interference with the interstate commerce clause must be direct, and not indirect.

Hopkins v. United States; Sherlock v. Alling; and Ficklen v. Taxing District,—supra; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

In order to declare a legislative act unconstitutional, it must be clearly and plainly established to be a plain and palpable violation of the Constitution.

Plumley v. Massachusetts, supra; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Mugler v. Kansas, 123 U. S. 664, 31 L. ed. 211, 8 Sup. Ct. Rep. 273.

Mr. **S. M. Howard** also argued the cause and filed a brief for defendant in error:

The purpose of Congress in enacting the Wilson act was clearly to allow the state laws to operate upon intoxicating liquors

shipped into one state from another, notwithstanding it remains in the original package.

Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Vance v. W. A. Vandercook Co. 170 U. S. 445, 42 L. ed. 1103, 18 Sup. Ct. Rep. 674; Minneapolis Brewing Co. v. McGillivray, 104 Fed. 258; Re Bergen, 115 Fed. 339; Jervey v. The Carolina, 66 Fed. 1013; Lottery Case (Champion v. Ames) 188 U. S. 361, 47 L. ed. 503, 23 Sup. Ct. Rep. 321; Fred Miller Brewing Co. v. Stevens, 102 Iowa, 60, 71 N. W. 186.

No new powers were conferred upon the state by the Wilson act, but that act was simply a recognition that the several states always had possessed and always had retained this power.

Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 564, 35 L. ed. 577, 11 Sup. Ct. Rep. 865; Rhodes v. Iowa, supra; Ex parte Edgerton, 59 Fed. 115; Re Langford, 4 Inters. Com. Rep. 437, 57 Fed. 575; Jervey v. The Carolina, supra; State v. Lord, 66 N. H. 479, 29 Atl. 556; Corbin v. McConnell, 71 N. H. 352, 52 Atl. 447.

The importer of intoxicating liquors can sell only on the terms prescribed by the local statutes.

Reymann Brewing Co. v. Brister, 179 U. S. 455, 45 L. ed. 274, 21 Sup. Ct. Rep. 201; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; Re Rahrer and Minneapolis Brewing Co. v. McGillivray, supra; Indianapolis v. Bieler, 138 Ind. 30, 36 N. E. 857; Com. v. Calhane, 154 Mass. 116, 27 N. E. 881; People v. Voorhis, 131 Mich. 398, 91 N. W. 624; State v. Bixman, 162 Mo. 1, 62 S. W. 828; State v. Lord, supra; Equitable Loan & Secur. Co. v. Edwardsville, 143 Ala. 182, 111 Am. St. Rep. 34, 38 So. 1016; Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552.

The statute in question is a proper exercise of the police power of the states.

Harrell v. Speed, 113 Tenn. 224, 1 L.R.A. (N.S.) 639, 106 Am. St. Rep. 814, 81 S. W. 840; License Cases, 5 How. 508, 509, 12 L. ed. 257, 258; Re Rahrer, supra; State ex rel. Bartlett v. Fraser, 1 N. D. 425, 3 Inters. Com. Rep. 577, 48 N. W. 343; Rhodes v. Iowa, 170 U. S. 425, 42 L. ed. 1095, 18 Sup. Ct. Rep. 664; License Cases, 5 How. 504, 12 L. ed. 256; Bartemeyer v. Iowa, 18 Wall. 129, 21 L. ed. 929; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Foster v. Kansas, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Eilenbecker v. District Court, 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; United States ex rel. Hover v. Ronan, 33 Fed. 117; Gray v. Connecticut, 159 U. S. 74, 40 L. ed. 80, 15 Sup. Ct. Rep. 985; License Tax Cases, 5 Wall. 462, 12 L. ed. 497; Miller v. Ammon, 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. Rep. 884; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; Reymann Brewing Co. v. Bristor, 92 Fed. 28; Territory v. Connell, 2 Ariz. 339, 16 Pac. 209; Re Guerrero, 69 Cal. 88, 10 Pac. 261; Dennehy v. Chicago, 120 Ill. 627, 12 N. E. 227; Haggart v. Stehlin, 137 Ind. 43, 22 L.R.A. 577, 35 N. E. 997; Thomasson v. State, 15 Ind. 449; O'Dea v. State, 57 Ind. 31; Mason v. Lancaster, 4 Bush, 406; State v. Boston Club, 45 La. Ann. 585, 20 L.R.A. 185, 12 So. 895; State v. Mattle, 48 La. Ann. 728, 19 So. 748; Keller v. State, 11 Md. 525, 69 Am. Dec. 220; Com. v. Fredericks, 119 Mass. 199; Com. v. Bennett, 108 Mass. 27; Com. v. Martin, 108 Mass. 29, note; Com. v. Blackington, 24 Pick. 352; Wolf v. Lansing, 53 Mich. 387, 19 N. W. 38; Kitson v. Ann Arbor, 23 Mich. 325; Rochester v. Upman, 19 Minn. 108, Gil. 78; Winona v. Whipple, 24 Minn. 61; State v. Coke, 24 Minn. 247, 31 Am. Rep. 344; Pierce v. State, 13 N. H. 536; Ingersoll v. Skinner, 1 Denio, 540; Doberneck's Application, 35 Pa. L. J. 476; Boyle's Retail Liquor License, 190 Pa. 577, 45 L.R.A. 399, 42 Atl. 1025; State v. Peckham, 3 R. I. 289; Charleston v. Ahrens, 4 Strobh. L. 341; State v. Brennan, 2 S. D. 384, 50 N. W. 625; Territory ex rel. McMahon v. O'Connor, 5 Dak. 397, 3 L.R.A. 355, 41 N. W. 746; Elk Point v. Vaughn, 1 Dak. 113, 46 N. W. 577; Minneapolis Brewing Co. v. McGillivray, 104 Fed. 258; State v. Delamater (S. D.) 104 N. W. 537; Bancroft v. Dumas, 21 Vt. 456; State ex rel. Henshall v. Ludington, 33 Wis. 107; Tenney v. Lenz, 16 Wis. 566; Pabst Brewing Co. v. Crenshaw, supra; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; People v. Grisnbach, 211 Ill. 39, 71 N. E. 874; Equitable Loan & Secur. Co. v. Edwardsville and State v. Brennan, supra; State ex rel. Grigsby v. Buechler, 10 S. D. 156, 72 N. W. 114.

The statute in question is a license law, and not a tax or revenue law.

17 Am. & Eng. Enc. Law, 2d ed. p. 223; Straub v. Gordon, 27 Ark. 625; Ex parte Marshall, 64 Ala. 267; Territory v. Connell, supra; Henry v. State, 26 Ark. 523; State v. Doherty, 3 Idaho, 384, 29 Pac. 855; East St. Louis v. Wehrung, 46 Ill. 392; United States Distilling Co. v. Chicago, 112 Ill. 19; Thomasson v. State, supra; Com. v. Fowler, 96 Ky. 166, 33 L.R.A. (illegible), 28 S. W. 439; Keller v. State, supra; Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; State v. (illegible)

lein, 22 Minn. 328; State ex rel. Troll v. Iudson, 78 Mo. 302; Pleuler v. State, 11 Ieb. 569, 10 N. W. 481; People ex rel. Einsld v. Murray, 4 App. Div. 185, 38 N. Y. upp. 909; Senior v. Ratterman, 44 Ohio t. 661, 11 N. E. 321; Adler v. Whitbeck, 44 hio St. 539, 9 N. E. 672; State v. Hipp, 38 hio St. 225; 21 Am. & Eng. Enc. Law, 2d l. p. 774; Indianapolis v. Bieler, 138 Ind. 30, 6 N. E. 857; East St. Louis v. School Trusees, 102 Ill. 489, 40 Am. Rep. 606; Society or Savings v. Coite, 6 Wall. 594, 18 L. ed. 07; Hamilton Mfg. Co. v. Massachusetts, Wall. 632, 18 L. ed. 904; Provident Inst. v. Massachusetts, 6 Wall. 11, 18 L. ed. 907; Pullman Southern ar Co. v. Nolan, 22 Fed. 276; Goldsmith v. Iuntsville, 120 Ala. 182, 24 So. 509; Capital City Water Co. v. Board of Revenue, 17 Ala. 303, 23 So. 970; Burch v. Savannah, 2 Ga. 596; Rome v. McWilliams, 52 Ga. 51; Decker v. McGowan, 59 Ga. 805; Johnton v. Macon, 62 Ga. 645; Mutual Reserve Iund Life Asso. v. Augusta, 109 Ga. 73, 35 . E. 71; Scottish Union & Nat. Ins. Co. . Herriott, 109 Iowa, 606, 77 Am. St. Rep. 48, 80 N. W. 665; Re Martin, 62 Kan. 638, 4 Pac. 43; Louisville City R. Co. v. Louisville, 4 Bush, 478; Blanks v. Bastrop, 18 a. Ann. 534; New Orleans v. Louisiana Sav. Bank & S. D. Co. 31 La. Ann. 637; Wintz v. Girardey, 31 La. Ann. 381; New Orleans v. Metropolitan Loan Sav. & Pledge Bank, 31 La. Ann. 310; Walters v. Duke, 31 a. Ann. 668; State v. Citizens' Bank, 52 a. Ann. 1086, 27 So. 709; Municipality No. 2 v. Dubois, 10 La. Ann. 56; State v. Western U. Teleg. Co. 73 Me. 518; Com. v. Lancaster Sav. Bank, 123 Mass. 493; Orton v. Brown, 35 Miss. 426; State v. Camp Sing, 8 Mont. 128, 32 L.R.A. 635, 56 Am. St. Rep. 51, 44 Pac. 516; Ex parte Cohn, 13 Nev. 24; State v. Adams Exp. Co. 3 Ohio Dec. Reprint, 326; Baker v. Cincinnati, 11 Ohio St. 534; Florida C. & P. R. Co. v. Columbia, 4 S. C. 266, 32 S. E. 408; Howe Mach. Co. v. Cage, 9 Baxt. 518; State v. Crawford, 2 Head, 460; Taylor v. Vincent, 12 Lea, 282, 7 Am. Rep. 338; Knoxville & O. R. Co. v. Harris, 99 Tenn. 684, 53 L.R.A. 921, 43 S. W. 115; Ex parte Gregory, 1 Tex. App. 753; Thompson v. State, 17 Tex. App. 253; Texas Bkg. & Ins. Co. v. State, 42 Tex. 636; State ex rel. Grigsby v. Buechler, 10 S. D. 56, 72 N. W. 114; Anderson v. Brewster, 4 Ohio St. 576, 9 N. E. 683.

The license required is an occupation license, and therefore a part of the internal machinery of the state, and is not subject to the commerce powers of Congress.

Nathan v. Louisiana, 8 How. 73, 12 L. ed. 2; Paul v. Virginia, 8 Wall. 184, 19 L. ed. 361; State Tonnage Tax Cases (Cox v. Pott) 12 Wall. 213, 224, 20 L. ed. 373, 377; Ward v. Maryland, 12 Wall. 428, 20 L. ed. 452; Cook v. Pennsylvania, 97 U. S. 569, 24 L. ed. 1016; Wheeling, P. & C. Transp. Co. v. Wheeling, 99 U. S. 279, 25 L. ed. 414; Trade-Mark Cases, 100 U. S. 95, 25 L. ed. 552; Kirtland v. Hotchkiss, 100 U. S. 499, 25 L. ed. 562; Duer v. Small, 4 Blatchf. 267, Fed. Cas. No. 4,116; United States v. Steffens, 16 Off. Gaz. 1000; 17 Am. & Eng. Enc. Law, 2d ed. p. 222; 21 Am. & Eng. Enc. Law, 2d ed. p. 776; State v. Delamater (S. D.) 104 N. W. 537; State v. Klectzen, 8 N. D. 286, 78 N. W. 984; Elk Point v. Vaughn, 1 Dak. 115, 46 N. W. 577; Territory v. Webster, 5 Dak. 351, 40 N. W. 535.

Control of intoxicating liquors is within the police power of the state.

Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 547, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; License Cases, 5 How. 508, 509, 12 L. ed. 257, 258; State v. Delamater, supra; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; United States ex rel. Hover v. Ronan, 33 Fed. 117; Gray v. Connecticut, 159 U. S. 74, 40 L. ed. 80, 15 Sup. Ct. Rep. 985; License Tax Cases, 5 Wall. 462, 18 L. ed. 497; Miller v. Ammon, 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. Rep. 884; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Reymann Brewing Co. v. Bristor, 92 Fed. 28; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Mugler v. Kansas, 123 U. S. 662, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; Westheimer v. Weisman, 8 Kan. App. 75, 54 Pac. 332; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Foster v. Kansas, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97; Black, Intoxicating Liquors, §§ 24–26, pp. 31–35; Theo. Hamm Brewing Co. v. Foss, 16 S. D. 162, 91 N. W. 584.

Mr. Justice **White** delivered the opinion of the court:

A firm established in St. Paul, Minnesota, which was engaged in dealing in intoxicating liquors, employed Delamater, the plaintiff in error, as a traveling salesman. As such salesman Delamater, in the state of South Dakota, carried on the business of soliciting orders from residents of that state for the purchase, from the firm in St. Paul, of intoxicating liquors in quantities of less than 5 gallons. The course of dealing was this: The orders were procured in the form of proposals to buy, and when accepted by the firm the liquor was shipped from St. Paul to the persons in South Dakota who made the proposals, at their risk and cost, on sixty days' credit. At the time Delamater engaged in South Dakota in the business just stated the law of that state im-

posed an annual license charge upon "the business of selling or offering for sale" intoxicating liquors within the state, "by any traveling salesman who solicits orders by the jug or bottle in lots less than 5 gallons." A violation of the statute was made a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. Delamater, not having paid the license charge, was prosecuted under the statute. At the trial, although the uncontradicted proof established the carrying on of business within the state, as above mentioned, Delamater requested a binding instruction to the jury in his favor, on the [97]ground that the statute did not apply, *and if it did, that it was void because repugnant to the commerce clause of the Constitution of the United States. Exception was taken to the refusal to give the instruction. The Federal ground was reiterated in motions to arrest and for a new trial, and the supreme court of the state, to which the cause was taken, in affirming the judgment of conviction, expressly considered and disposed of such Federal ground. 104 N. W. 537.

All the assignments of error involve the proposition that the state statute, as construed and applied by the court below, is repugnant to the commerce clause of the Constitution. It is manifest, as the subject dealt with is intoxicating liquors, that the decision of the cause does not require us to determine whether the restraints which the statute imposes would be a direct burden on interstate commerce if generally applied to subjects of such commerce, but only to decide whether such restraints are a direct burden on interstate commerce in intoxicating liquors as regulated by Congress in the act commonly known as the Wilson act. 26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177. For this reason we at once put out of view decisions of this court, which are referred to in argument and which are noted in the margin,† because they concerned only the power of a state to deal with articles of interstate commerce other than intoxicating liquors, or which, if concerning intoxicating liquors, related to controversies originating before the enactment of the Wilson law.

The general power of the states to control and regulate the business of dealing in or soliciting proposals within their borders for the purchase of intoxicating liquors is beyond question. With the existence of this general power we are *not, therefore, con-[98] cerned. We are hence called upon only to consider whether the general power of the state to control and regulate the liquor traffic and the business of dealing or soliciting proposals for the dealing in the same within the state was inoperative as to the particular dealings here in question, because they were interstate commerce, and therefore could not be subjected to the sway of the state statute without causing that statute to be repugnant to the commerce clause of the Constitution of the United States.

It is well at once to give the text of the Wilson act, which is as follows (26 Stat. at L. 313, chap. 728):

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

It is settled by a line of decisions of this court, noted in the margin,‡ that the pur-

†Robbins v. Taxing District, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Corson v. Maryland, 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50, 7 Sup. Ct. Rep. 655; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. [illegible]; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. [illegible], 14 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. [illegible]; Caldwell v. North Carolina, 187 U. S. [illegible], 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; Rearick v. Pennsylvania, 203 U. S. 507, ante, [illegible], 27 Sup. Ct. Rep. 159.

‡Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. [illegible]; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, [illegible] Sup. Ct. Rep. 182; Adams Exp. Co. v. Iowa, 196 U. S. 147, 49 L. ed. 424, 25 Sup. Ct. Rep. 185; Pabst Brewing Co. v. Crenshaw, [illegible] U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552; Foppiano v. Speed, 199 U. S. [illegible], [illegible] L. ed. 288, 26 Sup. Ct. Rep. 128; Hayman v. Southern R. Co. 203 U. S. 270, ante, [illegible], 27 Sup. Ct. Rep. 104.

se of the Wilson act, as a regulation by ongress of interstate commerce, was to low the states, as to intoxicating liquors, hen the subject of such commerce, to exert ampler power than could have been exersed before the enactment of the statute. other words, that Congress, sedulous to event its exclusive right to regulate comerce from interfering with the power of e states over intoxicating liquor, by the Vilson act adopted a special rule enabling e states to extend their authority as to ach liquor shipped *from other states beore it became commingled with the mass f other property in the state by a sale in e original package.

The proposition relied upon, therefore, hen considered in the light of the Wilson ct, reduces itself to this: Albeit the state f South Dakota had power within its territory to prevent the sale of intoxicating quors, even when shipped into that state rom other states, yet South Dakota was anting in authority to prevent or reguate the carrying on within its borders of he business of soliciting proposals for the urchase of liquors, because the proposals ere to be consummated outside of the tate, and the liquors to which they related ere also outside the state. This, howver, but comes to this: That the power exted to prevent sales of liquor, even when rought in from without the state, and yet here was no authority to prevent or reguate the carrying on of the accessory busiess of soliciting orders within the state. Aside, however, from the anomalous situaion to which the proposition thus conduces, e think to maintain it would be repugnant o the plain spirit of the Wilson act. That ct, as we have seen, manifested the conction of Congress that control by the tates over the traffic of dealing in liquor within their borders was of such importance hat it was wise to adopt a special regulaion of interstate commerce on the subject. When, then, for the carrying out of this urpose, the regulation expressly provided hat intoxicating liquors coming into a state hould be as completely under the control f a state as if the liquor had been manuactured therein, it would be, we think, a isregard of the purposes of Congress to old that the owner of intoxicating liquors n one state can, by virtue of the commerce lause, go himself or send his agent into uch other state, there, in defiance of the aw of the state, to carry on the business f soliciting proposals for the purchase of ntoxicating liquors.

Passing from these general considerations, et us briefly more particularly notice some f the arguments relied upon.

As we have stated, decisions of this court interpreting the *Wilson act have held that[100] that law did not authorize state power to attach to liquor shipped from one state into another before its arrival and delivery within the state to which destined. From this it is insisted, as none of the liquor covered by the proposals in this case had arrived and been delivered within South Dakota, the power of the state did not attach to the carrying on of the business of soliciting proposals, for, until the liquor arrived in the state, there was nothing on which the state authority could operate. But this is simply to misapprehend and misapply the cases and to misconceive the nature of the act done in the carrying on the business of soliciting proposals. The rulings in the previous cases to the effect that, under the Wilson act, state authority did not extend over liquor shipped from one state into another until arrival and delivery to the consignee at the point of destination, were but a recognition of the fact that Congress did not intend, in adopting the Wilson act, even if it lawfully could have done so, to authorize one state to exert its authority in another state by preventing the delivery of liquor embraced by transactions made in such other state. The proposition here relied on is widely different, since it is that, despite the Wilson act, the state of South Dakota was without power to regulate or control the business carried on in South Dakota of soliciting proposals for the purchase of liquors, because the proposals related to liquor situated in another state. But the business of soliciting proposals in South Dakota was one which that state had a right to regulate, wholly irrespective of when or where it was contemplated the proposals would be accepted or whence the liquor which they embraced was to be shipped. Of course, if the owner of the liquor in another state had a right to ship the same into South Dakota as an article of interstate commerce, and, as such, there sell the same in the original packages, irrespective of the laws of South Dakota, it would follow that the right to carry on the business of soliciting in South Dakota was an incident to the right to ship and sell, which could not be burdened *without di-[101] rectly affecting interstate commerce. But, as by the Wilson act, the power of South Dakota attached to intoxicating liquors, when shipped into that state from another state, after delivery, but before the sale in the original package, so as to authorize South Dakota to regulate or forbid such sale, it follows that the regulation by South Dakota of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, even though such liquors were situated in other states, cannot

be held to be repugnant to the commerce clause of the Constitution, because directly or indirectly burdening the right to sell in South Dakota,—a right which, by virtue of the Wilson act, did not exist.

2. Nor is there merit in the arguments based on the ruling in Vance v. W. A. Vandercook, 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674. The controversies in that case and the matters therein decided were recapitulated in Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552, as follows (p. 25, L. ed. p. 928, Sup. Ct. Rep. p. 553):

"In Vance v. W. A. Vandercook Co. supra, the operation of a liquor law of South Carolina was considered. By the act in question the state of South Carolina took exclusive charge of the sale of liquor within the state, appointed its agents to sell the same, and empowered them to purchase the liquor which was to be brought into the state for sale. The fact was that, by the act in question, the state of South Carolina, instead of forbidding the traffic in liquor, authorized it, and engaged in the liquor business for its own account, using it as a source of revenue. The act, in addition, affixed prerequisite conditions to the shipment into South Carolina from other states of liquor to a consumer who had purchased it for his own use, and not for sale. Considering the Wilson act and the previous decisions applying it, . . . in so far as it took charge in behalf of the state of the sale of liquor within the state, and made such sale a source of revenue, was not an interference with interstate commerce. In so far, however, as the state law imposed burdens on the right to ship liquor from another state to a resident of South [102] Carolina, intended *for his own use, and not for sale within the state, the law was held to be repugnant to the Constitution, because the Wilson act, whilst it delegated to the state plenary power to regulate the sale of liquors in South Carolina shipped into the state from other states, did not recognize the right of a state to prevent an individual from ordering liquors from outside of the state of his residence for his own consumption, and not for sale."

It having been thus settled that under the Wilson act a resident of one state had the right to contract for liquors in another state and receive the liquors in the state of his residence for his own use, therefore, it is insisted, the agent or traveling salesman of a nonresident dealer in intoxicating liquors had the right to go into South Dakota and there carry on the business of soliciting from residents of that state orders for liquor, to be consummated by acceptance of the proposals by the nonresident dealer. The premise is sound, but the error lies in the deduction, since it ignores the broad distinction between the want of power of a state to prevent a resident from ordering from another state liquor for his own use, and the plenary authority of a state to forbid the carrying on within its borders of the business of soliciting orders for intoxicating liquors situated in another state, even although such orders may only contemplate a contract to result from final acceptance in the state where the liquor is situated. The distinction between the two is not only obvious, but has been foreclosed by a previous decision of this court. That a state may regulate and forbid the making within its borders of insurance contracts with its citizens by foreign insurance companies or their agents is certain. Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207. But that this power to prohibit does not extend to preventing a citizen of one state from making a contract of insurance in another state is also settled. Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427. In Nutting v. Massachusetts, 183 U. S. 553, 46 L. ed. 324, 22 Sup. Ct. Rep. 238, the court was called upon to consider these two subjects,—that is, the power of the state, on the one *hand, to for- [103] bid the making within the state of contracts of insurance with unauthorized insurance companies, and the right of the individual, on his own behalf, to make a contract with such insurance companies in another state as to property situate within the state of residence. The case was brought to this court to review a conviction of Nutting, a citizen of Massachusetts, for having negotiated insurance with a company not authorized to do business in Massachusetts, contrary to the statutes of that state. Briefly, the facts were that Nutting, an insurance broker, solicited in Massachusetts a contract of insurance on property belonging to McKie situated in that state. The proposal was accepted outside of the state of Massachusetts and the policy also issued outside of that state. The contention of the plaintiff in error was that, as the contract was consummated outside of Massachusetts, the conviction was repugnant to the 14th Amendment, because the acts done did not fall within the general principle announced in Hooper v. California, supra, but were within the ruling in Allgeyer v. Louisiana. The conviction was affirmed, not because the contract was consummated in Massachusetts, but upon the ground that the right of an individual to obtain insurance for himself outside of the state of his residence did not sanction the conduct of Nutting, as an insurance broker, in carry-

e business in Massachusetts of so-
nauthorized insurance. After re-
he Hooper and Allgeyer decisions
ing out that there was no conflict
the two cases, the court said (p.
. p. 327, Sup. Ct. Rep. p. 240):
s well said by the supreme judicial
Massachusetts: 'While the legis-
not impair the freedom of McKie
ith whom he will contract, it can
he foreign insurers from sheltering
s under his freedom in order to
ntracts which otherwise he would
thought of making. It may pro-
only agents of the insurers, but
ers, from soliciting or intermed-
such insurance, and for the same
175 Mass. 156, 78 Am. St. Rep.
. E. 895."
ling thus made is particularly per-
the subject of intoxicating liquors
ower of the state in respect there-
e have seen, the right of the states
it the sale of liquor within their
jurisdictions in and by virtue of
tion of commerce embodied in the
t is absolutely applicable to liquor
om one state into another, after
nd before the sale in the original
It follows that the authority of
, so far as the sale of intoxicating
thin their borders is concerned, is
mplete as is their right to regu-
n their jurisdiction the making of
of insurance. It hence must be
authority of the states to forbid
nonresident liquor dealers from
ithin their borders to solicit con-
the purchase of intoxicating li-
ich otherwise the citizen of the
uld not have thought of mak-
it be as complete and effica-
is such authority in relation to
of insurance, especially in view
ceptions of public order and social
which it may be assumed lie at
tion of regulations concerning the
iquor.
ontention that the law of South
as a taxing law, and not a police
, and therefore not within the
f the Wilson act, is in conflict
urpose of that law as interpreted
upreme court of South Dakota.
el. Grigsby v. Buechler, 10 S. D.
W. 114. Besides, the contention
ed by the ruling of this court in
wing Co. v. Crenshaw, supra.

EF JUSTICE dissents.

*UNITED STATES, Appt., [105]
v.
BETHLEHEM STEEL COMPANY.

(See S. C. Reporter's ed. 105-122.)

Contracts—construction—prior negotiations.

1. Recourse may be had to the prior negotiations between the parties, where it is doubtful whether a penalty or liquidated damages were meant by a clause in the written contract relating to the payment of damages for its nonfulfilment.

Damages—liquidated or penalty.

2. Liquidated damages, and not a penalty, must be deemed intended by the clause in a contract with the government for the construction of certain disappearing gun carriages, executed when war was imminent, providing for a deduction of $35 from the purchase price for each day's delay in delivery, where the government had accepted the proposal at the highest price for delivery in the shortest time, and the sum named was arrived at, to the knowledge of the bidder, by computing the average difference in time of delivery between the price bid for slow delivery of the carriages and the price under the accepted bid.

[No. 188.]

Argued January 28, 29, 1907. Decided March 11, 1907.

APPEAL from the Court of Claims to review a judgment for the recovery from the United States of a sum deducted, as a penalty for delay in delivery, from the contract price for certain disappearing gun carriages. Reversed and remanded with directions to dismiss the petition.

See same case below, 41 Ct. Cl. 19.

Statement by Mr. Justice Peckham:

The Bethlehem Steel Company recovered a judgment in the court of claims (41 Ct. Cl. 19) for the sum of $21,000 against the appellant, from which judgment the United States has appealed to this court.

The company filed its petition in the court of claims, seeking to recover a balance which

NOTE.—On merger of preliminary negotiations and agreements in written contract —see notes to Diven v. Johnson, 3 L.R.A. 308; and Union Mut. L. Ins. Co. v. Mowry, 24 L. ed. U. S. 674.

On the merger of contracts generally—see note to Riedinger v. Diamond Match Co. 60 C. C. A. 6.

As to when damages are liquidated—see notes to Hathaway v. Lynn, 6 L.R.A. 551; King Iron Bridge & Mfg. Co. v. St. Louis, 10 L.R.A. 826; Condon v. Kemper, 13 L.R.A. 671; and Tayloe v. Sandiford, 5 L. ed. U. S. 384.

it alleged was due from the United States on a contract, which had been entered into by the company with Brigadier General Flagler, Chief of Ordnance, in behalf of and for the United States, for the construction of certain gun carriages which the company alleged had been constructed according to the contract, and for which the government had failed to pay the full amount which became due upon its performance.

The facts were found by the court of claims, from which it appears that the government, on the 8th day of March, 1898, advertised for proposals for the construction of six disappearing gun carriages, and the [106] specifications accompanying *the advertisement set forth the character and extent of the work. The claimant, in response to the advertisement, submitted four distinct sealed proposals to the War Department for the construction of such carriages. By the first proposal the company agreed to furnish five or more gun carriages for the sum of $31,000 each, the first to be delivered within six months of the date of contract, to be followed by two carriages every three months thereafter. By the second proposal the company offered to furnish the same number for the sum of $33,000 each, the first to be delivered within five months from date of contract, to be followed at the rate of one carriage every month thereafter. By the third proposal the offer was to furnish the same number for the sum of $35,000 each, the first to be delivered within four months, and the second within five months of date of contract; the remaining carriages to follow at the rate of three carriages every two months thereafter. By the fourth proposal the offer was to furnish the same number for the sum of $36,000 each, the first to be delivered in four months, the second in five months, and the remaining carriages at the rate of two carriages every month thereafter.

These alternative proposals were made in consequence of a letter written the company by the Chief of Ordnance, dated March 11, 1898, of which the following is a copy:

Office of the Chief of Ordnance,
United States Army,
Washington, March 11, 1898.

Gentlemen:—

It is suggested that in making bids for carriages you estimate, first, on the price of carriages under the supposition that the works will run for twenty-four hours; second, that later, if it be found advantageous, the ordinary working hours may be observed. It is considered best that bids should be made for carriages by numbers; as, for instance, so much for five 8-inch carriages, for six, eight, etc. Therefore it is considered judicious that bids should be made for rapid *delivery of a certain number of car- [107] riages or for less rapid delivery of the same. It should be understood, however, that time will be considered very important.

Respectfully,
D. W. Flagler,
Brig. Gen., Chief of Ordnance.

The following are the further findings of the court of claims:

4. The defendants, through the War Department, accepted proposal No. 4 of the claimant company.

5. In drawing up the contract between the United States and the claimant company a slight modification of proposal No. 4 was decided upon, which was as follows:

Whereas in proposal No. 4 claimant company was to deliver five or more carriages, the first in four months, the second in five months, and the remaining ones to follow at the rate of two carriages per month. In drawing up the contract this was changed so as to provide for the delivery of one carriage in four months (as proposed) and five carriages in six months from the date of contract, thus reducing the time of delivery of all the carriages from seven to six months, this reduction of the total delivery being offset by the increased latitude given claimant company as to intermediate deliveries.

6. On April 4, 1898, the Ordnance Department transmitted a form of contract of even date to the claimant company for execution and return by letter, as follows:

"Office of the Chief of Ordnance,
United States Army,
Washington, April 4, 1898.

The Bethlehem Iron Co.,
South Bethlehem, Pa.

"Gentlemen:—

"I am instructed by the Chief of Ordnance to transmit herewith contract, in quintuplicate, dated the 4th instant, for six 12-inch disappearing gun carriages, model 1896, for execution and return to this office.

Respectfully,
R. Birnie,
Capt., Ord. Dept., U. S. A."

*To this letter the claimant company made reply on April 5, 1898:

"The Bethlehem Iron Company,
South Bethlehem, Pa., April 5, 1898.

Chief of Ordnance, U. S. A.,
War Department, Washington, D. C.

"Sir:—

"We have examined the contract form covering six disappearing gun carriages, model 1896, for 12- B. L. rifles, for which we submitted prop under the date of

write to call your attention to
ıuse, relating to our liability on
any patent rights granted by
States, is not struck out, as has
ı the case of previous contracts
s.

note that the penalty men-
ıe contract for each day of de-
ery of each carriage is $75 in-
, as is stipulated in the instruc-
lers and specifications.

our bid under the understand-
penalty for nondelivery was to
ay, and we respectfully request
tract forms may be modified in
vith this understanding.

n herewith the contract forms,

tfully,
Bethlehem Iron Company,
V. Davenport,
Second Vice President."

ı the claimant company was in-
ıe Chief of Ordnance, by letter
898, as follows:

f the Chief of Ordnance,
United States Army,
Washington, April 9, 1898.
m Iron Company,
South Bethlehem, Pa.

—

o your letter of April 5, 1898,
ıtract forms, I have the honor
u that *your request in regard
lity on account of patent rights
ıplied with and the third para-
en stricken out.

to the penalty for delay in de-
$75 per day instead of
, I have to state that the
unt is the average differ-
e of delivery between your
y bid for slow delivery of
ges and the price under the
The Department feels it to
this average difference should
bed penalty; but, if you should
d of taking the average differ-
e exact difference per day for
lar carriage should be pre-
forms will be altered accord-

ıcts are returned, hoping this
vill be satisfactory.

Respectfully,
D. W. Flagler,
General, Chief of Ordnance."

it was found that an error had
n the above computation, in
per day deduction provided for
een $35 instead, and the claim-
was duly informed of this by
letter dated April 16, 1898, which is as follows:

"Office of the Chief of Ordnance,
United States Army,
Washington, April 16, 1898.
The Bethlehem Iron Company,
South Bethlehem, Pa.
(Through the Inspector of Ordnance, U. S. A.)

"Gentlemen:—

"Referring to my letter, No. 21985, of the 9th instant, I would invite your attention to the fact that an error was made in the computation in the amount of the deduction in price per day of delay in delivery of 12-inch disappearing carriages, L. F., model of 1896, recently ordered from you, and to inform you that the contract should read that such deduction in price should be $35 per day of delay in *delivery, in accordance [110] with principle stated in my above-mentioned letter.

Respectfully,
D. W. Flagler,
Brigadier General, Chief of Ordnance."

Before signing the contract in its present form the claimant company, by communication on April 20, 1898, requested that the same should be modified in some respects, which request is contained in the following communication:

"The Bethlehem Iron Company,
South Bethlehem, Pa., April 20, 1898.
Chief of Ordnance, U. S. A.,
War Department, Washington, D. C.

"Sir:—

"Referring to the forms of contract for six 12-inch disappearing gun carriages, carrying the date of April 4, 1898, which have recently been received, but not yet executed, and to the conversation which the writer had with you on Thursday last, we beg to state that on further carefully considering the possibilities of the case we do not believe that we will be able to deliver the six carriages within six months, as called for by the proposed contract. We will, however, undertake to complete, in accordance with our bid, the delivery of the first carriage in four months, the second within five months, and the remaining four at the rate of two per month, thus making the total time of delivery of the six carriages seven instead of six months, it being understood that no penalty will be charged against us for the one month of delay which will thus accrue on the fifth and sixth carriages.

"By agreeing to this proposition the Department will be the gainer, in that the second carriage will be due at the end of the fifth month, while, as the contract now reads, it would not be due until the end of the sixth month.

"With the above understanding confirmed,

we will execute the contract as it now stands, except as to the amount of penalty for delay in delivery, which, in accordance with your letter of April 16, will be $35 instead of $75 per day.

[111] *"We return the contract forms in order that the change as regards penalty may be made.

"We remain, respectfully,
The Bethlehem Iron Company,
R. W. Davenport,
Second Vice President."

To which letter the following reply was made:

"Office of the Chief of Ordnance,
United States Army,
Washington, April 25, 1898.

The Bethlehem Iron Company,
South Bethlehem, Pa.
(Through Inspector of Ordnance, U. S. A.)

"Gentlemen:—

"In reply to your letter of the 20th instant, I have the honor to inform you that the schedule of deliveries of 12-inch disappearing carriages contained therein will, in view of the earlier resulting delivery of the second carriage, be accepted in lieu of the schedule in the contract, without enforcement of penalties which would result from the change of schedule.

"The amount of the penalty for delay in delivery is changed from $75 to $35 per day in accordance with my letter of the 16th instant, and the contract forms are returned herewith for execution.

Respectfully,
D. W. Flagler,
Brigadier General, Chief of Ordnance."

The above correction was therefore made in the said contract, and the same was duly signed and executed by the claimant company and immediately transmitted to the War Department. A copy of said contract is annexed to and made part of the petition.

The following are the material portions of the contract:

"Under advertisement dated , 189 , the said parties of the first part do hereby [112] contract and engage with the said *United States to manufacture, for the Ordnance Department, U. S. Army, in accordance with said instructions to bidders, as amended, specifications, and drawings, all of which are hereto attached and form part of this contract.

"Six (6) disappearing gun carriages, model 1896, for 12-inch B. L. rifles, drawings dated April 27 and June 19, 1896 (latest revision July 14 and December 30, 1897), at thirty-six thousand dollars ($36,000) each, free on board cars at South Bethlehem, Pa.

"The first carriage to be delivered within four (4) months from date of this contract, and the remaining five (5) carriages within six (6) months from date of this contract.

"It is further stipulated and agreed that the party of the first part will furnish such limited additional number of these carriages, at the price and rate of delivery stated, as the party of the second part may desire, under available appropriations.

. . . .

"It is further stipulated and agreed that if any carriage herein contracted for is not delivered by the party of the first part at the times specified herein, there will be deducted, in the discretion of the Chief of Ordnance, thirty-five ($35) dollars per day from the price to be paid therefor for each day of delay in delivery of each carriage, respectively. But if at any time the Chief of Ordnance shall decide that continuous and great delay or other serious default has occurred, he may, to protect the interests of the United States, apply the provisions of the 5th section of the regular contract form and waive further *per diem* deduction in price.

"All penalties incurred under this contract shall be offset against any payments falling due to the said party of the first part.

"The work must pass the required inspection at all stages of its progress, and be approved by the officers of the Ordnance Department before being accepted and paid for by the United States.

(Signed by the parties.)"

. . . . . .

*7. Thereupon the Bethlehem Iron Company proceeded to manufacture the said gun carriages, and ultimately delivered them to the United States, and they were accepted by the latter. The following table gives first, the date fixed by the said contract for the delivery of each one of said carriages; second, the date of its delivery, and, third, the extent of the delay in its delivery.

No. of carriage	Date for d'liv'ry fix'd by c'ntract	Date of delivery (actual)	Extent of delay
16	Aug. 4, 1896 . . .	Jan. 28, 1899 . . .	177 days
17	Sept. 4, 1896 . . .	Mar. 6, 1899 . . .	183 "
18	Oct. 4, 1896 . . .	Apr. 13, 1899 . . .	191 "
19	Oct. 4, 1896 . . .	Mar. 18, 1899 . . .	165 "
20	Nov. 4, 1896 . . .	Apr. 29, 1899 . . .	176 "
21	Nov. 4, 1896 . . .	May 27, 1899 . . .	204 "
	Total delay . .	. . . . .	1096 days

Of the above days of delay, which amounted in the aggregate to 1,096 days, the United States, through the Chief of its Bureau of Ordnance, decided that the Bethlehem Iron Company was responsible for delays to the extent of 100 days upon each of the six disappearing gun carriages, or 600 days in all, but did not charge said company with the

of said days, or 496 days in all; at the stipulated sum of deduction per day for each day of delay in the y of each gun carriage, amounted sum of $21,000, which sum was de- from the payments made the claim- mpany, and the balance, or the sum 5,000, was paid over to the claimant ay, who receipted for said payment protest.

he court finds as the ultimate fact he defendants' officers hindered and d the claimant in the performance of ork by changes in the plans of con- on, as alleged in the petition, and in s other ways; but the court also finds he claimant contributed to the delay e completion of the work by being in- ntly equipped and prepared to com- it within the time prescribed in the et and by taking other work to the ion of that referred to in these find- and the court further finds that the ctions in the process of manufacture o involved and intermerged that it is sible, on the evidence produced, for the to ascertain and determine whether efendants should be charged with a r proportion of the delays set forth in regoing table in Finding 7 than those ed by the defendants' officers, to wit, ys out of the total amount of delays, , 1,096 days.

oes not appear that the defendants eady to use the gun carriages herein- described at the time when they were delivered by the claimant; nor does ear that they could have used them ir fortifications if they had been de- l at an earlier day. Nor does it ap- hat the defendants suffered any injury nage whatever by the delay of the nt in delivering the said gun carriages before set forth.

Conclusion of Law.

n the foregoing findings of fact the decides, as a conclusion of law, that aimant recover judgment in the sum nty-one thousand dollars ($21,000).

stant Attorney General **Van Orsdel** ttorney General **Bonaparte** argued the and, with Mr. Franklin W. Collins, brief for appellant:

e was of the essence of the contract. lor v. Longworth, 14 Pet. 172–174, 10 405, 406; Jones v. United States, 96 24, 24 L. ed. 644; Secombe v. Steele, w. 94–104, 15 L. ed. 833–836; Brown aranty Trust & S. D. Co. 128 U. S. 4, 32 L. ed. 468–471, 9 Sup. Ct. Rep.

her the government nor the court, in terpretation of the contract, is to be ded by the use of the technical term lty."

Davis v. United States, 17 Ct. Cl. 201; Haliday v. United States, 33 Ct. Cl. 453; Edgar & Thompson Foundry & Mach. Works v. United States, 34 Ct. Cl. 218.

Cases are numerous where the courts have held the sum stipulated to be paid on breach of the agreement to be, from the nature of the case, a penalty, notwithstanding the strongest language showing the intention of the parties to be that it should be paid in full as liquidated damages.

Boys v. Ancell, 5 Bing. N. C. 391; Davies v. Penton, 6 Barn. & C. 216; Horner v. Flintoff, 9 Mees. & W. 678; Reindel v. Schell, 4 C. B. N. S. 97; Page, Contr. 1905, § 1172; Robinson v. Centenary Fund, 68 N. J. L. 723, 54 Atl. 416; Illinois C. R. Co. v. Southern Seating & Cabinet Co. 104 Tenn. 568, 50 L.R.A. 729, 78 Am. St. Rep. 933, 58 S. W. 303; Clark v. Barnard, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878; Jaqua v. Headington, 114 Ind. 309, 16 N. E. 527.

On the other hand, cases are numerous in which the parties have used the term "penalty," which seems on its face to import a forfeiture rather than a valuation of damage, yet the courts have held that the stipulated sum was, from the very nature of the case, to be considered as liquidated damages, and recoverable in full.

Sainter v. Ferguson, 7 C. B. 716; Leighton v. Wales, 3 Mees. & W. 545; Sparrow v. Paris, 7 Hurlst. & N. 594; Page, Contr. 1905, § 1172; Robinson v. Centenary Fund and Illinois C. R. Co. v. Southern Seating & Cabinet Co. supra; Clark v. Barnard, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878; Jaqua v. Headington, supra; Addison, Contr. 10th ed. 1903, p. 264; Ward v. Hudson River Bldg. Co. 125 N. Y. 230, 26 N. E. 256; Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 713.

How the court of claims arrived at its conclusion of law in this case, in view of its decision in the case of the Phœnix Iron Co. v. United States, 39 Ct. Cl. 526, and the decisions therein cited, is not apparent.

Why should this court be asked to make a better contract for the parties herein than they have made for themselves?

Clement v. Cash, 21 N. Y. 253; Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240.

Courts have rarely refused to peer beneath the surface of things to ascertain the reasonableness of the transaction, particularly where, from the nature of the agreement, it is clear that any attempt to arrive at the actual damages would be difficult, if not impossible.

Davis's Case, 17 Ct. Cl. 201; Gay Mfg. Co. v. Camp, 13 C. C. A. 137, 25 U. S. App. 134, 65 Fed. 794.

The courts have seldom failed not only to scrutinize the agreement itself, but the transactions out of which the same grew, with great care, and not infrequently evidence *aliunde* of the contract has had determining force.

Davis v. United States, 17 Ct. Cl. 201; Tayloe v. Sandiford, 7 Wheat. 13-17, 5 L. ed. 384-386; Edgar & Thompson Foundry & Mach. Works v. United States, 34 Ct. Cl. 205; Gay Mfg. Co. v. Camp, 13 C. C. A. 137, 25 U. S. App. 134, 65 Fed. 800.

Mr. James H. Hayden argued the cause and filed a brief for appellee:

The contract in suit is free from ambiguity and the parties are bound by it. Resort cannot be had to their transactions which occurred while the contract was *in fieri*, for the purpose of showing that they intended something different from the import of the language employed in the instrument.

Simpson v. United States, 172 U. S. 372, 379, 43 L. ed. 482, 484, 19 Sup. Ct. Rep. 212; Brawley v. United States, 96 U. S. 168, 173, 24 L. ed. 622, 624; Van Buren v. Digges, 11 How. 461, 466, 13 L. ed. 771, 773; Harvey v. United States, 8 Ct. Cl. 506.

If they were relevant matter, the negotiations of the parties which preceded the execution of the contract would not sustain the contention of the United States, to the effect that the stipulation concerning penalty was intended to provide for a deduction, as liquidated damages, or something else.

Dakin v. Williams, 17 Wend. 447.

The contract is to be interpreted as one which provided for a forfeiture or penalty, in case of the contractor's default.

Tayloe v. Sandiford, 7 Wheat. 13, 17, 5 L. ed. 384, 385; Spencer v. Tilden, 5 Cow. 150; Van Buren v. Digges, 11 How. 461, 13 L. ed. 771; L. P. & J. A. Smith Co. v. United States, 34 Ct. Cl. 472; Gay Mfg. Co. v. Camp, 13 C. C. A. 137, 25 U. S. App. 134, 65 Fed. 800; Haliday v. United States, 33 Ct. Cl. 465; Davis v. United States, 17 Ct. Cl. 201; Edgar & Thompson Foundry & Mach. Works v. United States, 34 Ct. Cl. 205; 15 Ops. Atty. Gen. 418; 21 Ops. Atty. Gen. 28; 19 Am. & Eng. Enc. Law, 2d ed. p. 411.

No slight conjecture would justify the court in saying that the parties were mistaken in the import of the terms that they employed.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

It is objected on the part of the company that, as the contract in question is, as asserted, plain and unambiguous in its terms, no reference can be made to other evidence or to documents which do not form part of the contract. The general rule that prior negotiations are merged in the terms of a written contract between the parties is referred to, and it is insisted that, under that rule, the various letters passing between the *parties prior to the execution of the[111] contract are not admissible.

The rule that prior negotiations are merged in the contract is general in its nature, and, we think, does not preclude reference to letters between the parties prior to the execution of the contract in this case. The language employed in this contract for a deduction, in the discretion of the Chief of Ordnance, of $35 per day from the price to be paid for each day of delay in the delivery of each gun carriage, respectively, taken in connection with the subject-matter of the contract, leaves room for the construction of that language in order to determines which was intended, a penalty or liquidated damages. While it is claimed that there is really no doubt as to the proper construction of the contract, even if the contract alone is to be considered, yet we think that much light is given as to the true meaning of language that is not wholly free from doubt by a consideration of the correspondence between the parties before the final execution of the contract itself. Under such circumstances we think it never has been held that recourse could not be had to the facts surrounding the case and to the prior negotiations for the purpose of determining the correct construction of the language of the contract. Simpson v. United States, 199 U. S. 397-399, 50 L. ed. 245, 246, 26 Sup. Ct. Rep. 54. In Brawley v. United States, 96 U. S. 168-173, 24 L. ed. 622-624, the court says: "Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties may have used particular terms."

It is not for the purpose of making a contract for the parties, but to understand what contract was actually made, that, in cases of doubt as to the meaning of language actually used, prior negotiations may sometimes be referred to.

There has, in almost innumerable instances, been a question as to the meaning of language used in that part of a contract which related to the payment of damages for its nonfulfilment, whether the provision therein made was one for liquidated damages or whether it meant a penalty simply, the damages to be proved up to the amount of the penalty. This contract might be considered as being one of that class where a

ıbt might be claimed, if nothing but the ıtract were examined. The courts at one ıe seemed to be quite strong in their ws and would scarcely admit that there ır was a valid contract providing for uidated damages. Their tendency was to ıstrue the language as a penalty, so that thing but the actual damages sustained the party aggrieved could be recovered. bsequently the courts became more toler- t of such provisions, and have now become ongly inclined to allow parties to make ir own contracts, and to carry out their entions, even when it would result in the overy of an amount stated as liquidated mages, upon proof of the violation of the ntract, and without proof of the damages tually sustained. This whole subject is viewed in Sun Printing & Pub. Asso. v. oore, 183 U. S. 642, 669, 46 L. ed. 366, 380, Sup. Ct. Rep. 240, where a large number authorities upon this subject are referred . The principle decided in that case is uch like the contention of the government rein. The question always is, What did e parties intend by the language used? hen such intention is ascertained it is or- narily the duty of the court to carry it t. See also Clement v. Cash, 21 N. Y. 3, 257; Little v. Banks, 85 N. Y. 258, 266. The government, at the time of the exe- tion of this contract (which was dated pril 4, 1898), was making preparation for e expected war with Spain, which was im- ment, and which was declared by Congress few days thereafter. The government was idently desirous of obtaining the con- ruction of these gun carriages as early as was reasonably possible, and it was pre- red to pay an increased price for speed. e acceptance of the proposal at the high- price for the delivery of the carriages in shortest time is also evidence of the im- rtance with which the government officers garded the element of speed. There can no doubt as to its importance in their inion, or that such opinion was *communi- ed to the company. In the light of this t an examination of the language of the tract itself upon the question of deduc- ıs for delay in delivery renders its mean- quite plain. It is true that the word nalty" is used in some portions of the tract, although in the clause providing the $35 per day deduction that word is used, nor are the words "liquidated dam- " to be found therein. The word "pen- " is used in the correspondence, even by officers of the government, but we think evident that the word was not used in contract nor in the correspondence as ative of the technical and legal differ- between penalty and liquidated dam- . It was used simply to provide that the amount named might be deducted if there were a delay in delivery. Either expression is not always conclusive as to the meaning of the parties. Little v. Banks, supra; Ward v. Hudson River Bldg. Co. 125 N. Y. 230, 26 N. E. 256. What was meant by the use of the language in question in this case is rendered, as we think, still more certain by the manner in which the $35 per day was arrived at, as stated in the letters of the officers representing the government, which were examined and criticized by the company before the signing of the contract. The correspondence shows that the sum was arrived at by figuring the average difference in time of delivery between the price bid for slow delivery of the carriages and the price under the accepted bid, the Department saying "that this average difference should be the prescribed penalty."

Having this question before them and the amount stated arrived at in the manner known to both parties, we think it appears from the contract and the correspondence that it was the intention of the parties that this amount should be regarded as liquidated damages, and not technically as a penalty. This view is also strengthened when we recognize the great difficulty of proving damage in a case like this, regard being had to all the circumstances heretofore referred to. It would have been very unusual to allow the company to obtain the *contract for the construction of these car- [121] riages, and yet to place it under no liability to fulfil it as to time of delivery, specially agreed upon, other than to pay only those actual damages (not exceeding $35 per day) that might be proved were naturally and proximately caused by the failure to deliver. The provision under such circumstances would be of no real value. The circumstances were such that it would be almost necessarily impossible to show what damages (if any) might or naturally would result from a failure to fulfil the contract. The fact that not very long after the contract had been signed and the war with Spain was near its end, the importance of time as an element largely disappeared, and that practically no damage accrued to the government on account of the failure of the company to deliver, cannot affect the meaning of this clause as used in the contract, nor render its language substantially worthless for any purpose of security for the proper performance of the contract as to time of delivery.

The amount is not so extraordinarily disproportionate to the damage which might result from the failure to deliver the carriages as to show that the parties must have intended a penalty, and could not have meant liquidated damages. If the contract

were construed as contended for by the company, it would receive (as events have turned out) the highest price for the longest time in which to deliver, which could not have been contemplated by either party. This would result from the finding that no damages in fact flowed from the failure to deliver on time.

The eighth finding of the court of claims is, in effect, that the failure to deliver was caused in part by both parties; that the total number of days failure was 1096 days, of which 496 were caused by the defendant's officers, and it does not mean that the court regarded itself as bound by the decision of the Chief of Ordnance as to the number of days that the claimant or the government delayed the delivery. It found the number of days as stated, and that the transactions [122] were so involved that *whether the defendant should be charged with a greater proportion of the delays than set forth in the finding, the court could not decide on the evidence produced.

The judgment of the Court of Claims must be reversed, and the cause remanded, with directions to dismiss the petition.

Reversed.

NORTHERN PACIFIC RAILWAY COMPANY, John A. Miller and Anna Miller, His Wife, and Washington Grain & Milling Company, Plffs. in Err.,

v.

JACOB SLAGHT.

(See S. C. Reporter's ed. 122-134.)

Judgment—res judicata.

1. A decree rendered on demurrer, dismissing, on the merits, a suit to establish a trust in certain lands in favor of a railway company, which set up, as a basis of its alleged title in fee simple, the railroad land grant act of July 2, 1864 (13 Stat. at L. 365, chap. 217), prevents the successor in interest of such railway company from asserting, in an action of ejectment involving the same property, brought by the defendant in the former suit, that such company had acquired title under the act of March 3, 1875 (18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568), or under the state statute of limitations.

NOTE.—On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

On the consequences of nonsuit or dismissal of complaint—see note to Homer v. Brown, 14 L. ed. U. S. 970.

Limitation of actions—when statute begins to run.

2. A state statute of limitations for the recovery of real property does not begin to run in favor of a railway company as against a settler under the homestead laws of the United States until patent has issued.

[No. 152.]

Argued and submitted January 11, 1907. Decided March 11, 1907.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court in and for the County of Whitman, in that state, in favor of plaintiff in an action of ejectment. Affirmed.

See same case below, 39 Wash. 576, 81 Pac. 1062.

The facts are stated in the opinion.

Mr. Charles W. Bunn argued the cause, and, with Mr. James B. Kerr, filed a brief for plaintiffs in error:

It is entirely clear that one occupying public land may protect his possessory right before patent. It is clear, upon the decisions of this court, that he would be protected by injunction or by any other proper remedy against a railway claiming under the act of 1875.

Washington & I. R. Co. v. Osborn, 160 U. S. 103, 40 L. ed. 356, 16 Sup. Ct. Rep. 219; Spokane Falls & N. R. Co. v. Ziegler, 167 U. S. 65, 42 L. ed. 79, 17 Sup. Ct. Rep. 728.

Other courts have held that he will be protected by any appropriate action.

Brown v. Hartshorn, 12 Okla. 121, 69 Pac. 1049; Woodruff v. Wallace, 3 Okla. 355, 41 Pac. 357, and cases cited; French v. Cromwell, 13 Or. 418, 11 Pac. 62; Burlington, K. & S. W. R. Co. v. Johnson, 38 Kan. 142, 16 Pac. 125; Wendel v. Spokane County, 27 Wash. 121, 91 Am. St. Rep. 825, 67 Pac. 576; see also Pierce v. Frace, 2 Wash. 81, 26 Pac. 192, 807.

If the right of the defendant in error is only to recover damages, then the ruling of the state court, that the statute of limitation could not run until patent, is clearly erroneous. Regardless of whether this action is one for damages or one to recover possession, the ruling is erroneous if the title vested in the railway company subject to the possessory claim.

The decision in Wiggins Ferry Co. v. Ohio & M. R. Co. 142 U. S. 396, 410, 35 L. ed. 1055, 1060, 12 Sup. Ct. Rep. 188, seems to settle that the former litigation terminating in Powers v. Slaght, 160 U. S. 173, 45 L. ed. 479, 21 Sup. Ct. Rep. 319, is not *res judicata*. See also Gilman v. Rives, 10 Pet. 298, 9 L. ed. 432; Freeman, Judgm. 4th ed. § 267; Van Fleet, Former Adjudication, § 306 and following.

ese authorities settle that where the ment in the former action is upon de- er to a complaint, the estoppel extends to the very point raised in the plead- and does not bar another action based other facts.

r. U. L. Ettinger submitted the cause defendant in error. Messrs. Thomas l and W. E. McCroskey were on the f:

he judgment in a former action in which title to this land was determined is *judicata* of this case.

4 Am. & Eng. Enc. Law, 2d ed. p. 781; v Orleans v. Citizens' Bank, 167 U. S. , 42 L. ed. 210, 17 Sup. Ct. Rep. 905; lleup v. Tacoma, 13 Wash. 141, 52 Am. Rep. 25, 42 Pac. 541; Isensee v. Austin, Wash. 352, 46 Pac. 394.

judgment on a demurrer to the merits s much an adjudication as if rendered r trial of facts.

lley v. Nott, 111 U. S. 472, 28 L. ed. 4 Sup. Ct. Rep. 495; Gould v. Evans- & C. R. Co. 91 U. S. 526, 23 L. ed. 416; Fleet, Former Adjudication, § 306; 24 & Eng. Enc. Law, 2d ed. p. 798.

Mr. Justice McKenna delivered the opin- of the court:

This is an action of ejectment brought by endant in error against plaintiffs in error the superior court in and for the county Whitman, state of Washington, for land ate in the town of Palouse.

The trial court adjudged defendant in er- the owner in fee simple of the land d for, and that the plaintiffs in error e in the possession and occupation of portions thereof described in their an- rs against the will and consent of the ntiff (defendant in error), and were oc- ying and in possession thereof without t, except that the Northern Pacific way Company, as a public carrier, had ight to hold the possession of a strip and 25 feet wide, "being 12½ feet on side of the center line between the of its main track over and across said and also a tract 100 feet square." tract was described. Defendant in er- was adjudged entitled to recover "all rest of the land described in the amend- omplaint." And that a writ issue to put in possession thereof, but not until y days from the date of the judgment, if an appeal should be taken and pro- ngs stayed, then not until ninety days the time the remittitur from the su- e *court affirming the judgment should ed; and if, in the meantime, the railway any should commence proceeding in the r court to condemn the land claimed by d described in its answer, for railroad purposes, then said writ should not be issued as to such land as it might seek to condemn, unless the company should afterwards dismiss such proceedings or fail to prosecute the same to final judgment and pay the award that might be made therein. The supreme court affirmed the judgment. 39 Wash. 576, 81 Pac. 1062.

The facts, as far as necessary to be stated, are that after proceedings in the land office, to which the railway company was a party, a homestead patent was issued to defendant in error April 20, 1897, to lots 10, 11, 14, and 15 of section 1, township 16 N., range 45 E., Willamette meridian. Defendant in error established his residence upon the land in 1883.

In 1886 and the first half of 1887 the Spokane & Palouse Railway Company constructed and completed, at great expense, a railroad over lots 10 and 11, conforming to the survey previously made and staked out, and from and after its completion it was operated daily and continuously in the carrying of freight, passengers, and mail. The right of way claimed was 100 feet wide on either side of the main line of railroad. It would be possible for plaintiff in error, who is the successor of the Spokane company, to carry freight, passengers, and mail over a right of way not exceeding 25 feet in width, and a space of 100 feet square would permit of the erection of a depot at the town of Palouse. But great inconvenience would result to the citizens of that town and vicinity and the railway company. For the convenient, prompt, and expeditious handling of freight and the erection of elevators for storing grain and wheat a right of way of 200 feet is necessary. At the time the railroad was surveyed and constructed defendant in error resided upon said lands and knew of its construction and the expenditure of large sums of money therefor. About the *time of the survey he [127] published a notice in the Palouse News, a newspaper published in the vicinity of the land, forbidding all persons from trespassing thereon. This is the only objection he made. In the month of August, 1887, the Northern Pacific Railroad Company, claiming to be the owner of lots 10 and 11, conveyed the same to William S. Powers, and he, on the 14th of September of the same year, conveyed to the Spokane & Palouse Railway Company a right of way 200 feet wide over lots 10 and 11, being the same then claimed by that company and now claimed by plaintiff in error, the Northern Pacific Railroad Company. On the 12th of May, 1897, the Spokane & Palouse Railway Company, Powers, and others, as successors in interest of Powers under the above deed of conveyance from the

Northern Pacific Railroad Company, brought a suit against the defendant in error which will hereafter be referred to and described. The complaint was amended. The date of its filing as amended does not appear. It was sworn to February 19, 1898. A demurrer to the amended complaint was sustained and, the plaintiffs declining to plead further, a judgment was entered June 24, 1898, dismissing the suit. The judgment was affirmed successively by the supreme court of the state and by this court. No suit of any kind was commenced by defendant in error to enjoin the construction of, or the maintenance of, said railroad over said right of way, except the suit at bar, which was brought shortly after the decision of this court above mentioned. The summons was served on the Northern Pacific Railway Company on the 9th of October, 1901, and the complaint was filed on the 4th of June, 1902.

The Spokane & Palouse Railway Company conveyed the right of way in controversy and all of its property on the 21st of February, 1899, to the Northern Pacific Railway Company, which has ever since maintained and operated said road from Spokane, Washington, to Lewiston, Idaho, and intervening points.

[128] *The Northern Pacific Railway Company (we shall follow counsel's example and treat the Northern Pacific Railway Company as the sole plaintiff in error, the individuals named being its lessees) assigns as error in its brief the ruling of the supreme court of the state, that the company "had no right of way under the act of Congress of March 3, 1875" (18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568), and the ruling, "that the statute of limitations of Washington could not, because the laws of the United States forbade, commence to run until patent issued." The limitation of the statute is ten years.

The defendant in error opposes as a bar to these defenses the judgment in his favor in the suit brought by the Spokane & Palouse Railway Company and William S. Powers and others, which judgment was affirmed by this court. 180 U. S. 173, 45 L. ed. 479, 21 Sup. Ct. Rep. 319. Plaintiff in error is the successor in interest of the Spokane & Palouse Railway Company, and is estopped by the judgment if that company would be.

The object of the suit in which the judgment was rendered, as appears from the findings of fact of the trial court, was to have Slaght, defendant in error, "declared a trustee, and as holding the land in trust" for the plaintiffs in the suit, and to require a conveyance from him to them, and to enjoin him from bringing any action to oust them. The amended complaint, which is made part of the findings, averred that the patent to Slaght was "issued under a misconstruction and misinterpretation of the law," and that, at the date of the issuance of said patent, the land was not, nor was it at the time he applied to enter the same, public land, subject to settlement or entry under the land laws of the United States, other than the act of Congress approved July 2, 1864 [13 Stat. at L. 365, chap. 217], granting land to the Northern Pacific Railroad Company. The facts and circumstances from which these conclusions were deduced and justified were set forth with great particularity. It was averred that the Spokane & Palouse Railway Company and other plaintiffs asserted and claimed title to certain portions of the land under and by virtue of certain instruments *duly made and delivered by Powers and his [129] grantees. And it was also averred that the questions involved were of common and general interest to many persons whom it was impracticable to make parties, and that such persons and the plaintiffs were the owners in fee simple and had an indefeasible title, and were in possession of lots 10, 11, 14, and 15 of section 1, township 16 N., range 45 E., Willamette meridian, and that Slaght claimed an interest or estate therein adverse to the plaintiffs, which claim was without any right whatever and that he had no estate, right, title, or interest whatever in the land or any part thereof. And it was averred that he threatened to commence suits in ejectment, and, without suit, forcibly to dispossess and eject plaintiffs from said premises or a portion thereof unless enjoined. An injunction was prayed restraining him from selling the land and doing the acts described; that he be required to set forth the nature of his claim, and that his claim be determined; that he be adjudged to have no title or interest whatever to the land or any part thereof, and be enjoined from ever asserting any; "that the title of plaintiffs be decreed good, valid, indefeasible fee simple, and free from all claims of said defendant;" that the patent be declared to have issued under a misconstruction of law, that he be held to be a trustee for the plaintiff, William L. Powers, and his grantees, both direct and through mesne conveyance, and that Slaght be required to convey the land to Powers and his grantees. Slaght demurred to the complaint and the demurrer was sustained. The plaintiffs electing to stand on the demurrer, judgment was entered dismissing the suit. This judgment was affirmed by the supreme court of the state and by this court, as we have seen.

The complaint in the suit did not show

land or interest Powers deeded to the ane & Palouse Railway Company, but it ars from the findings that the Northern fic Railroad Company conveyed lots 10 11 to Powers in August, 1887, and in ember, 1887, Powers conveyed to the ane & Palouse Railway Company the t of *land then used as its right of way, that it is the same tract which was pied by the plaintiff in error as its of way. The basis of the title al- l in the suit was the grant to the hern Pacific Railroad Company by act ongress of July 2, 1864. Rights under act of Congress of March 3, 1875, or r the statute of limitations of the e, were not set up. The Spokane & use Railway Company, however, al- d that it and the other plaintiffs in the had a title in fee simple, and prayed, he most comprehensive and detailed way, have it quieted against the claims of defendant in error, which, it was al- d, were threatened to be asserted by s and by force without suit. The ques- t now to be decided is, Is the decree in suit *res judicata?* Against this effect the decree the railway company urges t it was rendered on demurrer and "the oppel extends only to the very point ed in the pleading, and does not bar ther action based upon other facts." effect of the decree, it is insisted, was y to decide against the title specially forth in the pleading. And further, "in s action [that at bar] the right as- ted is a perpetual easement or way by tue of the act of 1875 through the lands olved in the former suit. Not only was s right not pleaded in the former com- int, but under it the title now asserted ld not have been proved." To sustain se conclusions the following authorities cited: Wiggins Ferry Co. v. Ohio & R. Co. 142 U. S. 396, 410, 35 L. ed. 1055, 0, 12 Sup. Ct. Rep. 188; Gilman v. Rives, Pet. 298, 9 L. ed. 432; Freeman, Judgm. ed. 267; Van Fleet, Former Adjudica- n, § 306 and following.

'he citations are not apposite to the pres- controversy. It is well established that udgment on demurrer is as conclusive as rendered upon proof. Gould v. Evans- e & C. R. Co. 91 U. S. 526, 23 L. ed. ; Bissell v. Spring Valley Twp. 124 U. 225, 31 L. ed. 411, 8 Sup. Ct. Rep. 495; eman, Judgm. § 267. The question as such judgment when pleaded in bar of ther action will be necessarily its legal ntity with such action. The general rule the extent of the bar is not only *what pleaded or litigated, but what could e been pleaded or litigated. There is ifference between the effect of a judgment as a bar against the prosecution of a second action for the same claim or demand, and its effect as an estoppel in another action between the same parties upon another claim or demand (Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Bissell v. Spring Valley Twp. supra; New Orleans v. Citizens' Bank, 167 U. S. 396, 42 L. ed. 210, 17 Sup. Ct. Rep. 905; Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252; Deposit Bank v. Frankfort, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154); and a distinction between personal actions and real actions is useful to observe. Herman, Estoppel, § 92. It is there said: "Although there may be several different claims for the same thing, there can be only one right of property in it; therefore, when a cause of action has resulted in favor of the defendant, when the plaintiff claims the property of a certain thing there can be no other action maintained against the same party for the same property, for that would be to renew the question already decided; for the single question in litigation was whether the property belonged to the plaintiff or not; and it is of no importance that the plaintiff failed to set up all his rights upon which his cause of action could have been maintained; it is sufficient that it might have been litigated."

In United States v. California & O. Land Co. 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266, this principle was applied. In that case a decree rendered upon a bill in equity brought under an act of Congress to have patents for land declared void, as forfeited, and to establish the title of the United States to the land, was held to be a bar to a subsequent bill brought against the same defendants to recover the same land, on the ground that it was excepted from the original grant as an Indian reservation. And, speaking of the two suits, we said, by Mr. Justice Holmes: "The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. *Formerly it sought [132] to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means; that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee." And further: "But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim (Fetter v. Beale, 1 Salk. 11; Trask v. Hartford & N.

H. R. Co. 2 Allen, 331; Freeman, Judgm. 4th ed. §§ 238, 241); and, *a fortiori*, he cannot divide the grounds of recovery."

This doctrine has illustrations in suits to quiet title. It was decided in Parrish v. Ferris (Doe ex dem. Parrish v. Ferris) 2 Black, 606, 17 L. ed. 317, that the judgment in an action to quiet title is conclusive of the title, whether adverse to the plaintiff in the action or to the defendant. In other words, determines the merits of the plaintiff's title as well as that of the defendant. In Indiana, B. & W. R. Co. v. Allen, 113 Ind. 581, 15 N. E. 446, it was held that the railway company could not assert against a judgment decreeing title in the plaintiff in such an action the right to construct and maintain a railway over it. And in Davis v. Lennen [125 Ind. 185, 24 N. E. 885], it was decided that every possible interest of a defendant is cut off. And necessarily every possible interest of the plaintiff is cut off if the judgment is in favor of the defendant. Parrish v. Ferris, supra.

The Spokane & Palouse Railway Company alleged a title in fee simple, and the truth of the allegation could be determined as well by demurrer as by proof, and the same legal consequences followed from it. Clearwater v. Meredith (Ferguson v. Meredith) 1 Wall. 25, 17 L. ed. 604; Goodrich v. Chicago, 5 Wall. 566, 18 L. ed. 511; Aurora v. West, 7 Wall. 82, 19 L. ed. 42; Black, Judgm. § 707; Freeman, Judgm. 267, and cases hereinbefore cited. The record shows that the demurrer was not upon merely formal or technical defects, but went to the merits. It was directed to the second amended complaint of the plaintiffs. They elected to stand on that complaint, [133] and declined to plead *further. They asserted its sufficiency by an appeal to the supreme court of the state and again to this court, and met defeat in both, as we have seen. Whether the Spokane & Palouse Railway Company could have pleaded, in addition to the right it alleged under the deed from Powers, the rights that plaintiffs in error contend it acquired under the act of Congress of 1875, or the statute of limitations of the state, we need not determine. See Story, Eq. Pl. §§ 97, 120, et. seq.; Smith v. Swormstedt, 16 How. 288, 14 L. ed. 942. It elected between those rights and rights under the Powers deed, and we think its grantee is now bound by that election. The interest that the Spokane & Palouse Railway Company derived from Powers was of the right of way, which is now claimed by plaintiff in error. In other words, plaintiff in error, as successor of the Spokane & Palouse Railway Company, again asserts title to the very property that was the subject of the other suit, the source of title, only, being different. If this may be done, how often may it be repeated? If defeated upon the new title, may plaintiff in error assert still another one, either in its predecessor, or in itself, and repeat as often as it may vary its claim? The principle of *res judicata* and the cases enforcing and illustrating that principle declare otherwise.

In the discussion thus far we have assumed, as contended by plaintiff in error, that the statute of limitations could commence to run before the patent issued, and we have also assumed that rights under it were complete in the Spokane & Palouse Railway Company at the time of its suit against Slaght. Lest the latter assumption be questioned it may be well to determine whether the other assumption be true. The supreme court decided against it on the authority of Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534, and Redfield v. Parks, 132 U. S. 239, 33 L. ed. 327, 10 Sup. Ct. Rep. 83; that is, decided that the statute did not commence to run until the patent issued to Slaght, and that, therefore, this action was not barred. The ruling, we think, was right. The act of Congress of 1875 and the statute of limitations are "independent defenses, and, being so, the latter comes within the rule announced. Of course, if the act of Congress of 1875 was a grant of the right of way in prasenti, "conveying a good title when the road was completed," as contended, it needs no aid from the statute of limitations, and would be an effectual defense if it were not barred by the judgment which we have considered.

Judgment affirmed.

NORTHERN PACIFIC RAILWAY COMPANY et al.
v.
MARGARET SLAGHT.

(See S. C. Reporter's ed. 124.)

This case is governed by the decision in Northern P. R. Co. v. Slaght, ante, 728.

[No. 153.]

Argued and submitted January 11, 1907. Decided March 11, 1907.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court in and for the County of

, in that state, in favor of plain-
action of ejectment. Affirmed.
arles W. Bunn argued the cause
tiffs in error.
nsel for defendant in error.

stice McKenna delivered the opin-
e court:
ase was submitted with No. 152,
ions being identical. On the au-
f that case the judgment is af-

stice Brewer took no part in the
of these cases.

MAS R. MARTIN, Plff. in Err.,
v.
ICT OF COLUMBIA. (No. 190.)

CE A. BRANDENBURG, Plff. in Err.,
v.
ICT OF COLUMBIA. (No. 191.)

S. C. Reporter's ed. 135–141.)

provements — assessments — bene-

apportionment of the cost of widen-
lley in the city of Washington
property lying within the square
which such alley runs must be
benefits, where the jury of award,
directed by the act of July 22,
Stat. at L. 255, chap. 230), as
by the act of August 24, 1894 (28
. 501, chap. 328), to apportion an
qual to the damages ascertained
ised, is to apportion such amount
g as each lot or part of lot in such
ay be benefited."

[Nos. 190, 191.]

anuary 29, 1907. Decided March 11, 1907.

OR to the Court of Appeals of the
t of Columbia to review judgments
judgments of the Supreme Court
District, quashing writs of cer-
test the validity of assessments
idening of an alley in the city of
on. Reversed.
e case below, No. 190, 26 App. D.
o. 191, 26 App. D. C. 140.
ts are stated in the opinion.
win C. Brandenburg argued the
l, with Mr. Clarence A. Branden-
l a brief for plaintiffs in error.

On assessments for benefits and
in cases of public improvements—
o Bauman v. Ross, 42 L. ed. U. S.

Mr. George E. Sullivan also argued the cause, and, with Messrs. Edwin C. Brandenburg and Clarence A. Brandenburg, filed a brief for plaintiff in error in No. 191.

Mr. Francis H. Stephens argued the cause, and, with Mr. Edward H. Thomas, filed a brief for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

These are writs of certiorari to test the validity of assessments for the widening of an alley in Washington under the *act of [138] Congress of July 22, 1892, chap. 230 (27 Stat. at L. 255), as amended by the act of August 24, 1894, chap. 328 (28 Stat. at L. 501). The writs were quashed by the supreme court of the District and the judgments affirmed by the court of appeals. 26 App. D. C. 140, 146. The principal case is that of Brandenburg, the owner of land taken for the widening. That of Martin raises questions as to the rights of a mortgagee of the same land. The main issue is upon the constitutionality of the act. The statute authorizes the commissioners of the District to condemn, open, widen, etc., alleys upon the presentation to them of a plat of the same accompanied by a petition of the owners of more than one half of the real estate in the square in which such alley is sought to be opened, etc., or in certain other cases. After prescribed preliminaries the commissioners are to apply to the marshal of the District to impanel a jury of twelve disinterested citizens, and the marshal is to impanel them, first giving ten days' notice to each proprietor of land in the square. The jury is to appraise the damages to real estate and also is to "apportion an amount equal to the amount of said damages so ascertained and appraised as aforesaid," including fixed pay for the marshal and jury, "according as each lot or part of lot of land in such square may be benefited by the opening, widening, extending, or straightening such alley," with certain deductions. The amendment authorizes the commissioners to open minor streets, to run through a square, etc., whenever, in the judgment of said commissioners, the public interests require it.

The law is not a legislative adjudication concerning a particular place and a particular plan, like the one before the court in Wight v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616. It is a general prospective law. The charges in all cases are to be apportioned within the limited taxing district of a square, and therefore it well may happen, it is argued, that they exceed the benefit conferred, in some case of which Congress never thought and upon

which it could not have passed. The present is said to be a flagrant instance of that sort. If this be true, perhaps the objection [139]*to the act would not be disposed of by the decision in Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466. That case dealt with the same objection, to be sure, in point of form, but a very different one in point of substance. The assessment in question there was an assessment for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good-sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweigh a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the 14th Amendment, a system of delusive exactness and merely logical form.

But when the chance of the cost exceeding the benefit grows large, and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent. Constitutional rights like others are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit 5 feet would require compensation and a taking by eminent domain. So it well might be that a form of assessment that would be valid for paving would not be valid for the more serious expenses involved in the taking of land. Such a distinction was relied on in French v. Barber Asphalt Paving Co. 181 U. S. 324, 344, 45 L. ed. 879, 889, 21 Sup. Ct. Rep. 625, to reconcile the decision in that case with Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

And yet it is evident that the act of Congress under consideration is very like earlier acts that have been sustained. That passed upon in Wight v. Davidson, it is true, dealt with a special tract, and so required the hypothesis of a legislative determination as to the amount of benefit conferred. But the real ground of the decision is shown by the citation (181 U. S. 378, 379, 45 L. ed. 904, 21 Sup. Ct. Rep. 616) of Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966, when the [140]*same principle was sustained in a general law. 167 U. S. 589, 590, 42 L. ed. 288, 17 Sup. Ct. Rep. 966. It is true again that in Bauman v. Ross the land benefited was to be ascertained by the jury instead of being limited by the statute to a square; but it was none the less possible that the sum charged might exceed the gain. As only half the cost was charged in that case it may be that, on the practical distinction to which we have adverted in connection with Louisville & N. R. Co. v. Barber Asphalt Paving Co. the danger of such an excess was so little that it might be neglected, but the decision was not put on that ground.

In view of the decisions to which we have referred it would be unfortunate if the present act should be declared unconstitutional after it has stood so long. We think that without a violent construction of the statute it may be read in such a way as not to raise the difficult question with which we have been concerned. It is true that the jury is to apportion an amount equal to the amount of the damage ascertained, but it is to apportion it "according as each lot or part of lot of land in such square may be benefited by the opening, etc." Very likely it was thought that in general, having regard to the shortness of the alleys, the benefits would be greater than the cost. But the words quoted permit, if they do not require, the interpretation that in any event the apportionment is to be limited to the benefit, and if it is so limited all serious doubt as to the validity of the statute disappears.

It is clear, however, from the petitions and the returns that the jury did not administer the statute in the way in which we have determined that it should be read. About one fifth of each lot was taken, and was valued at $92 and $75 respectively. That would give a value of $368 and $300, at the most, to the remaining portions, before the improvement was made. These lots were assessed $650 less said $92, or $558, and $550 less said $75, or $475. It is most improbable that the widening of an alley could have nearly trebled the value of each lot. We think it apparent, as was assumed by the court of appeals, "that the jury understood their duty to be to divide the whole cost among the landowners, whether the benefit was equal to their share of the cost or not. It must be admitted that the language of the statute more or less lent itself to that understanding. There is nothing in the record sufficient to show that the jury took a different view, or that they limited the assessment to the benefit actually conferred on these lots. For this reason the assessment must be quashed, and it will not be [illegible]

onsider the special objections of ragee.
nts reversed.

stice Harlan, Mr. Justice White, Justice McKenna concur in the

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O. WETMORE, Administrator of ate of Charles H. Wetmore, Deto the use of JOHN F. McKAY, Err.,

v.

JAMES L. KARRICK.

S. C. Reporter's ed. 141–160.)

onal law—due process of law—rendering new judgment after the

court which, acting under the erelief that no action had been a cause within a year, renders a of dismissal, cannot, consistently process of law, set aside such judgr the term, or the rule day which, local practice, is equivalent to the term, without motion or proo vacate the judgment, and with, and proceed to render a personal against the defendant.

judgments—action on—want of ion.

nt of jurisdiction to set aside a after the term, and render, with, a new and different judgment, is as a defense to an action on such in a foreign jurisdiction, whatly the local practice may afford a inst whom judgment is rendered nce and without his knowledge.

[No. 144.]

nuary 9, 1907. Decided March 11, 1907.

R to the Court of Appeals of the ict of Columbia to review a judgch affirmed a judgment of the Court of that District, overruling r to a plea in an action on a lgment. Affirmed.

e case below, 26 App. D. C. 124; appeal, 25 App. D. C. 415.

s are stated in the opinion.

iam L. Ford argued the cause and f for plaintiff in error:

gment of dismissal of June 12, ng been entered improvidently, mistake or oversight as to an record, the Massachusetts court did not thereby lose jurisdiction, and had the power to vacate the dismissal, and restore the case to the docket after the term.

The Palmyra, 12 Wheat. 1, 6 L. ed. 531; Alviso v. United States, 6 Wall. 457, 18 L. ed. 721; Phillips v. Negley, 117 U. S. 665, 29 L. ed. 1013, 6 Sup. Ct. Rep. 901; Manning v. German Ins. Co. 46 C. C. A. 144, 107 Fed. 52; Capen v. Stoughton, 16 Gray, 364; Murray v. Derrick, 101 Ga. 113, 28 S. E. 616; Wood v. Payea, 138 Mass. 62.

The judgment of dismissal of June 12, 1899, was founded upon a mere clerical mistake of the clerk, or, at the most, upon a clerical mistake of the judge, and a judgment so entered can be vacated at any time.

The Palmyra; Alviso v. United States; Capen v. Stoughton; Manning v. German Ins. Co. and Phillips v. Negley,—supra; Sheepshanks v. Boyer, Baldw. 462, Fed. Cas. No. 12,741; Sherburne v. King, 2 Cranch, C. C. 205, Fed. Cas. No. 12,759; McCormick v. Magruder, 2 Cranch, C. C. 228, Fed. Cas. No. 8,723; Black, Judgm. § 328; Chase v. Whitten, 62 Minn. 498, 65 N. W. 84; Morrison v. Stewart, 21 Ill. App. 113.

The judgment of dismissal of June 12, 1899, being irregular and entered contrary to the practice of the Massachusetts court, said court had the power to set aside said dismissal and reinstate the cause, notwithstanding the expiration of the term.

Dick v. McLaurin, 63 N. C. 185; Union Bank v. Crittenden, 2 Cranch, C. C. 238, Fed. Cas. No. 14,354; Stocker v. Cooper Circuit Court, 25 Mo. 401; Hunt v. Yeatman, 3 Ohio, 16; Nave v. Todd, 83 Mo. 601.

The defendant in error was not entitled to notice of the vacation of the dismissal and the reinstatement of the original suit to the docket of the superior court of Suffolk county, in the state of Massachusetts, the said suit having been inadvertently dismissed through mistake, and reinstated on the docket by said court for reasons apparent of record, no new thing having been brought before the court; and even if notice was required, the absence of it affords no ground for assailing the judgment sued on herein in a collateral proceeding such as the present one.

Odell v. Reynolds, 17 C. C. A. 317, 37 U. S. App. 447, 70 Fed. 656; Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co. 126 Fed. 552; Re Wight (Wight v. Nicholson) 134 U. S. 136, 33 L. ed. 865, 10 Sup. Ct. Rep. 487; Rhoads v. Com. 15 Pa. 276; Black, Judgm. § 134; Freeman, Judgm. § 142; Emery v. Whitwell, 6 Mich. 474; Nave v. Todd, supra; Emery v. Berry, 28 N. H. 473, 61 Am. Dec. 622; Balch v. Shaw, 7 Cush. 282; Walden v. Craig, 14 Pet. 147, 10 L. ed. 393; Mann v. Schroer, 50 Mo. 306; 17 Am. & Eng. Enc. Law, 2d ed. p. 823.

On notice and hearing required to due process of law—see notes to Sumption, 2 L.R.A. 657; Chauvin , 3 L.R.A. 194; and Ulman v. 11 L.R.A. 225.

It will be presumed, in the absence of a contrary showing, that courts of general jurisdiction have the power they assume to exercise, and that the mode of procedure adopted by them is authorized by the laws under which they act.

Westervelt v. Jones, 5 Kan. App. 35, 47 Pac. 322.

There was no fraud practised upon the defendant in error. The delay in entering the judgment certainly did not amount to fraud, nor did his want of knowledge of the entry of judgment.

Bellamy v. Woodson, 4 Ga. 175, 48 Am. Dec. 221; Miller v. Clements, 54 Tex. 351.

Messrs. W. W. Millan and J. J. Darlington argued the cause, and, with Messrs. Millan and Smith, filed a brief for defendant in error:

A court, after having once entered a final judgment for the defendant, though through an error of fact, thus discharging him *sine die*, has no jurisdiction, at a remote subsequent term, without notice to him, to annul the judgment in his favor, and to render another upon a money demand against him in its stead.

Hettrick v. Wilson, 12 Ohio St. 137, 80 Am. Dec. 337; Morgan v. Campbell, 54 Ill. App. 242; Swift v. Allen, 55 Ill. 303; Bryant v. Vix, 83 Ill. 11; Huntington County v. Brown, 14 Ind. 191; Jenkins v. Corwin, 55 Ind. 21; Perkins v. Hayward, 132 Ind. 100, 31 N. E. 670; Durre v. Brown, 7 Ind. App. 132, 34 N. E. 577; Elsner v. Shrigley, 80 Iowa, 30, 45 N. W. 393; Montgomery v. Merrill, 36 Mich. 97; Stringer v. Echols, 46 Ala. 61; Harper v. Sugg, 111 N. C. 327, 16 S. E. 173; Keeney v. Lyon, 21 Iowa, 280; 14 Enc. Pl. & Pr. p. 27; Hook v. Mercantile Trust Co. 32 C. C. A. 238, 60 U. S. App. 647, 89 Fed. 410; Hume v. Bowie, 148 U. S. 245, 255, 37 L. ed. 438, 440, 13 Sup. Ct. Rep. 582; Central Trust Co. v. Grant Locomotive Works, 135 U. S. 224, 34 L. ed. 104, 10 Sup. Ct. Rep. 736; American Burial Case Co. v. Shaughnessy, 59 Miss. 400; Jameson v. Hilton, 85 Mo. App. 298; Ewing v. Perry, 35 Tex. 778; Hickman v. Ft. Scott. 141 U. S. 418, 35 L. ed. 776, 12 Sup. Ct. Rep. 9; Re Wight (Wight v. Nicholson) 134 U. S. 143, 33 L. ed. 869, 10 Sup. Ct. Rep. 487; 1 Bishop, Crim. Proc. § 1160; Grames v. Hawley, 50 Fed. 319; Elder v. Richmond Gold & S. Min. Co. 7 C. C. A. 354, 19 U. S. App. 118, 58 Fed. 536; Arrowood v. Greenwood, 50 N. C. (5 Jones, L.) 414; Arnold v. Kendrick, 50 Ga. 293; Villars v. Parry, 1 Ld. Raym. 182; Hubbard v. Welch, 11 Ark. 151; Cameron v. M'Roberts, 3 Wheat. 591, 4 L. ed. 467; Gibson v. Wilson, 18 Ala. 63; Cleveland Leader Printing Co. v. Green, 52 Ohio St. 493, 49 Am. St. Rep. 725, 40 N. E. 201; Cairo & St. L. R. Co. v. Holbrook, 72 Ill. 419; Hickman v. Ft. Scott, 141 U. S. 415, 418, 419, 35 L. ed. 775, 776, 12 Sup. Ct. Rep. 9; Bank of United States v. Moss, 6 How. 31, 38, 39, 12 L. ed. 331, 334, 335.

Where the correction consists merely in making the entry of the judgment conform to what the court did or intended to do, as shown by the record, it may well be in many instances that notice is unnecessary.

Odell v. Reynolds, 17 C. C. A. 317, 37 U. S. App. 447, 70 Fed. 656; Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co. 126 Fed. 552; Emery v. Whitwell, 6 Mich. 474; Emery v. Berry, 28 N. H. 473, 61 Am. Dec. 622; Balch v. Shaw, 7 Cush. 282; Mann v. Schroer, 50 Mo. 306; Nave v. Todd, 83 Mo. 601; Walden v. Craig, 14 Pet. 147, 154, 155, 10 L. ed. 393, 397, 398.

Even where the correction is of the character stated, the jurisdiction to make it exists subject to the qualification that the rights of the parties, or of third persons, are not unjustly affected; it is to be exercised with great caution and with strict regard to the rights of others (Stickney v. Davis, 17 Pick. 169), with due regard to the rights of parties and third persons (Moore v. Hinnant, 90 N. C. 163). Where these are concerned, there must be notice to the parties in interest.

Cairo & St. L. R. Co. v. Holbrook, supra; Coughran v. Gutcheus, 18 Ill. 390; Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co. supra; Black, Judgm. § 164; Capen v. Stoughton, 16 Gray, 364; Manning v. German Ins. Co. 46 C. C. A. 144, 107 Fed. 88; Parker v. Johnson, 22 Mo. App. 516; Blake v. McMurtry, 25 Neb. 290, 41 N. W. 173; Homan v. Hellman, 35 Neb. 414, 53 N. W. 369; Hawkeye Ins. Co. v. Duffie, 67 Iowa, 175, 25 N. W. 117; Warren v. Farquaharson, 4 Baxt. 484; Swift v. Allen, supra.

After the term, "the court can make no order changing, modifying, or correcting the judgment, except upon notice, again bringing the parties before it, or upon their voluntary appearance."

Perkins v. Hayward; Bryant v. Vix; Huntington County v. Brown; Jenkins v. Corwin; Durre v. Brown; Elsner v. Shrigley; Montgomery v. Merrill; Stringer v. Echols; Harper v. Sugg; and Keeney v. Lyon,—supra.

Mr. Justice Day delivered the opinion of the court:

This is a writ of error to the court of appeals of the District of Columbia to review a judgment of that court affirming a judgment of the supreme court of the District of Columbia in favor of the defendant in error, overruling a demurrer to the defendant's second plea.

The action was brought on the law side in

court of the District of Co-
ecember 1, 1903, to recover judg-
it Karrick, defendant in error,
ment rendered in the superior
e county of Suffolk, common-
Massachusetts, on November 20,
of the record in the Massa-
rt is made part of the record
me court of the District of Co-

d shows that suit was brought
contracts between the defend-
and one Charles H. Wetmore,
d, plaintiff's intestate. The de-
personally served with process,
nd pleaded to the declaration.
ad to a jury, and resulted in a
inst the defendant. Upon his
verdict was set aside. There-
aintiff filed an amendment to his
and another trial to a jury was
February 21, 1894, by another
ial and general, a sum of $9,-
found in favor of the plaintiff.
new trial was made by the de-
l overruled March 3, 1894, and
led. On June 8, 1897, more than
after the proceedings just re-
ction was dismissed under the
er of the court *upon the calling
et. Two days thereafter, June
order of dismissal was stricken
case restored to the docket.
23, 1897, attorney for the de-
ered an order withdrawing his
On June 13, 1898, an attorney,
does not appear elsewhere in
withdrew his appearance. The
shows:
the case was continued to the
, 1898, when said exceptions,
presented to the court, were
s not conformable to the truth,
properly and correctly stating
so as to fairly present the ques-
raised by the defendant's ex-

ows:
the case was continued from
sitting into the April sitting,
on the 12th day of June, 1899,
of the docket under the general
urt, said action was dismissed."
the entry:
, at this present October sitting,
it, on the 18th day of said
00, said dismissal is stricken off
e brought forward, the same hav-
dismissed improvidently, action
taken within one year, but not

nber 17, 1900, there was a motion
for judgment on the verdict of
the jury, and on November 20, 1900, judgment was entered accordingly against the defendant for the sum of $12,881.46 and costs.

Two pleas were filed to the declaration in the supreme court of the District of Columbia; first, the general issue *nul tiel record;* second, a special plea, wherein the defendant set out that on June 12, 1899, the cause against him in the Massachusetts court was dismissed; that under the rules of court that dismissal became final on the first Monday of July, 1899; that the cause remained so dismissed for more than five terms or sittings of the court, and until October 18, 1900; that, in *the meantime, on April 29, [148] 1899, defendant filed his petition in bankruptcy in the district court of the United States for the district of Colorado, enumerating in his schedule the debt due to said Wetmore, and was, by the said district court, on June 23, 1899, discharged from all debts provable against him in bankruptcy, including the debt sued on; that subsequently to the discharge, as aforesaid, he made inquiry of the clerk of the court in Massachusetts as to the suit, and was informed that said suit was no longer pending; that relying upon this statement he took no steps to suggest in that court his discharge in bankruptcy; that the action of the court in Massachusetts, restoring the case to the docket, was without summons, citation, or notice of any kind to him, or to anyone for him, and without his knowledge; that the court had no jurisdiction to render the judgment sued upon.

Issue was joined upon the first plea, and to the second plea a demurrer was filed, which was sustained by the supreme court of the District of Columbia. From the order sustaining the demurrer special appeal was taken on January 6, 1905, to the court of appeals for the District of Columbia, and on April 17, 1905, the judgment below was reversed and the cause remanded. 25 App. D. C. 415.

On May 16, 1905, the supreme court of the District of Columbia entered an order overruling plaintiff's demurrer to defendant's second plea and, the plaintiff electing to stand on his demurrer, judgment was entered for the defendant, and the plaintiff appealed to the court of appeals of the District of Columbia.

On October 10, 1905, the case was submitted; and, on the 12th day of the same month, judgment below was affirmed without further opinion.

Before taking up the case in detail it must be regarded as settled by previous decisions of this court that, where an action is brought to recover upon a judgment, the jurisdiction of the court rendering the

judgment is open to inquiry. And the constitutional requirement as to full [149]faith and credit in *each state to the public acts, records, and judicial proceedings of every other state does not require them to be enforced if they are rendered without jurisdiction, or otherwise wanting in due process of law. This principle was so lately asserted by a decision in this court as to render unnecessary more than a reference to the consideration of the subject in Old Wayne Mut. Life Asso. v. McDonough, decided on January 7, 1907, of the present term. 204 U. S. 8, ante, 345, 27 Sup. Ct. Rep. 236.

It is also an elementary doctrine of this court that a judgment rendered *in personam* against a defendant without jurisdiction of his person is not only erroneous but void. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565. And the same case holds that such judgment is not required to be enforced in another state, either by the due faith and credit clause of the Constitution, or the act of Congress (Rev. Stat. § 905, U. S. Comp. Stat. 1901, p. 677) passed in aid thereof.

It is apparent from the statement of facts preceding this discussion that the precise question to be determined is whether a court which has once rendered a judgment in favor of a defendant, dismissing the cause and discharging him from further attendance, may, at any time after the term, and at a subsequent term, no matter how remote from the time of rendering judgment, without motion or proceeding to vacate the judgment, and without notice, set aside the judgment so rendered and render a new judgment against the defendant for the recovery of a sum of money against him.

The general principle is that judgments cannot be disturbed after the term at which they are rendered, and can only be corrected, if at all, by writ of error, or appeal, or relieved against in equity in certain cases. There are, it is true, certain exceptions to the rule, within which, it is the contention of the plaintiff in error, the present action is brought.

No contention is made in the brief or oral argument of counsel for plaintiff in error that the question for decision in this case is changed or modified because of the [150]fact that terms *of court are abolished by statute in Massachusetts. The statutes of that commonwealth (Rev. Laws, vol. 2, 1382, § 24) provide for "sittings" of the superior court at Boston, in the county of Suffolk, for civil business, on the first Tuesdays of January, April, July, and October. The exemplified copy of the record in this case shows that the case was dismissed under the general order of the court at the April sitting, 1899, on the 12th day of June, 1899. At the October sitting, 1900, to wit, on October 18, 1900, the dismissal was stricken off for the reason stated, and on November 20, 1900, the new judgment was rendered.

In Dalton-Ingersoll Co. v. Fiske, 175 Mass. 15, 55 N. E. 468, the supreme judicial court recited the previous cases, holding that terms no longer exist in the superior court, and said (p. 22, N. E. p. 471): "When we had terms the practice was to enter judgment, either on some day in the term, upon motion, or, of course, on the last day. Howe, Pr. 267. Since terms have been abolished the practice is regulated by statutes and the rules of the courts." In the second plea it is averred, and admitted by the demurrer, that under the rules of court the dismissal became final on the first Monday of July, 1899; that is, the first Monday of the following month.

We think this rule day equivalent to the end of a term. It is the time at which, by the rules of court adopted under statutory power, the judgment became final, unless set aside for mistake within the principles to be hereinafter discussed.

Pierce v. Lamper, 141 Mass. 20, 6 N. E. 223, was a case where a suit had been dismissed upon the call of the docket under the same rule under which the case against Karrick, defendant in error, was dismissed for want of action within the year, which order should have been followed by an entry of judgment of dismissal, in place of which the clerk simply made a docket entry "dismissed on call." The court held, since it was the duty of the clerk to have entered the dismissal, it was to be deemed in law as actually entered and a final disposition of the case; that at a subsequent term the court had *no power to vacate it, except by [151] writ of review filed within one year under the statute.

The doctrine that a judgment is final at the term unless set aside within the exceptions for mistake seems fully recognized by other decisions in Massachusetts. Radclyffe v. Barton, 154 Mass. 159, 28 N. E. 14, where previous cases are cited in the opinion.

At common law a writ of error coram *vobis* brought before the court certain mistakes of fact not put in issue or passed upon,—such as the death of a party, coverture, infancy, error in process, or mistake of the clerk. This writ is no longer in use, but its objects are attained by motion. Pickett v. Legerwood, 7 Pet. 145, 147, 8 L. ed. 638, 639.

As in the common-law writ of coram *vobis*, so in the proceeding by motion, after a party has been dismissed from the action by judgment he is brought again into the

urt by notice of the new proceeding. rris v. Douglass, 20 Wend. 626.

A few of the cases from this court may noticed which support the general oposition that, at the end of the term at hich judgment was rendered, the court ses jurisdiction of the cause. The principle was briefly stated by Mr. Chief Justice Vaite, speaking for the court, in Brooks v. urlington & S. W. R. Co. 102 U. S. 107, 26 . ed. 91:

"At the end of the term the parties are ischarged from further attendance on all auses decided, and we have no power to ring them back. After that, we can do no more than correct any clerical errors that may be found in the record of what we have done."

The question underwent a full discussion, Mr. Justice Miller delivering the opinion of the court, in Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797. On page 415, L. ed. p. 799, he said:

"But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct *them; and, if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court. Brooks v. Burlington & S. W. R. Co. supra; St. Louis Public Schools v. Walker, 9 Wall. 603, 19 L. ed. 850; Brown v. Aspden, 14 How. 25, 14 L. ed. 311; Cameron v. M'Roberts, 3 Wheat. 591, 4 L. ed. 467; Sibbald v. United States, 12 Pet. 488, 9 L. ed. 1167; United States v. The Glamorgan, 2 Curt. C. C. 236, Fed. Cas. No. 15,214; Bradford v. Patterson, 1 A. K. Marsh. 464; Ballard v. Davis, 3 J. J. Marsh. 56."

In discussing the exceptions to this rule or the correction of judgment by writ of error *coram vobis*, or motion, now substituted for the old practice, the only one which has application here is error in the process through the default of the clerk.

We are unable to find in the present record any clerical mistake. The entry of action during the year upon the bill of exceptions appears to have been duly entered upon the minutes of the court; the clerk made no mistake about it. The court erroneously rendered a judgment, believing that no action had been taken, but this was not through mistake or oversight of the clerk within the meaning of the rule. The judgment intended to be entered by the court was, in fact, entered,—through misapprehension, it is true; but nothing was left out which the court intended to make a matter of record.

In Hickman v. Ft. Scott, 141 U. S. 415-418, 35 L. ed. 775, 776, 12 Sup. Ct. Rep. 9, 10, there was a petition to correct by new findings the special findings of fact upon which the court had rendered a judgment at a former term, which findings, it was averred, had been omitted, some unavoidably and others accidentally; but the application was overruled and error was prosecuted to this court, which, *speaking through [153] Mr. Justice Harlan, said: "The judgment was the one the court intended to enter, and the facts found were those only which the court intended to find. There is here no clerical mistake. Nothing was omitted from the record of the original action which the court intended to make a matter of record. The case, therefore, does not come within the rule that a court, after the expiration of the term, may, by an order *nunc pro tunc*, amend the record by inserting what had been omitted by the act of the clerk or of the court. Re Wight (Wight v. Nicholson) 134 U. S. 136, 144, 33 L. ed. 865, 10 Sup. Ct. Rep. 487; Fowler v. Equitable Trust Co. 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. Rep. 1; Galloway v. McKeithen, 27 N. C. (5 Ired. L.) 12, 52 Am. Dec. 153; Hyde v. Curling, 10 Mo. 359."

This case from 10 Missouri was quoted with approbation also in the case of Re Wight (Wight v. Nicholson) 134 U. S. 136, 145, 33 L. ed. 865, 869, 10 Sup. Ct. Rep. 487, 490, as follows: "A court has power to order entries of proceedings had by the court at a previous term to be made *nunc pro tunc;* but, where the court has omitted to make an order which it might or ought to have made, it cannot, at a subsequent term, be made *nunc pro tunc*."

In the case Re Wight this court approved an order of the circuit court of the United States putting in the record at a subsequent term an order which was made at a previous term of the court, remanding the case to the district court. "A clerical error, as its designation imports, is an error of a clerk or a subordinate officer in transcribing or entering an official proceeding ordered by another." Marsh v. Nichols, S. & Co. 128 U. S. 605, 615, 32 L. ed. 538, 542, 9 Sup. Ct. Rep. 168, 171.

Of another alleged exception to the general rule of finality of judgments, counsel

for plaintiff in error says, after conceding the general rule that jurisdiction is lost after the lapse of the term at which judgment is rendered:

"But a well-known exception to this general rule is that a judgment of dismissal based upon a mistake or inadvertence, such as appear in this record, can be set aside after the term, and that is the proposition with which this court is concerned in this case. The reason is that jurisdiction is not [154] lost by a *dismissal by a mistake. This is one of the exceptions to the general rule that has been recognized in the decisions of this court for nearly a century."

To support this contention the case of The Palmyra, 12 Wheat. 1, 6 L. ed. 531, is relied upon. In that case, which was one in admiralty, the court found there was no final decree in the court below, and, therefore, it was not appealable. The next term of the court a corrected transcript was adduced, showing there had been a final decree which the clerk, through mistake, had failed to include in the record, and the court permitted the filing of a new transcript. Mr. Justice Story, delivering the opinion of the court, said:

"The difference between a new appeal and a reinstatement of the old appeal after a dismissal, from a misprision of the clerk, is not admitted by this court justly to involve any difference of right as to the stipulators. Every court must be presumed to exercise those powers belonging to it which are necessary for the promotion of public justice; and we do not doubt that this court possesses the power to reinstate any cause dismissed by mistake. The reinstatement of the cause was founded, in the opinion of this court, upon the plain principles of justice, and is according to the known practice of other judicial tribunals in like cases."

It is to be observed, while the learned justice, speaking for the court in that case, affirmed the "power of this court to reinstate any cause dismissed by mistake," the case had been dismissed at the first hearing, as Mr. Justice Story distinctly says, from a "misprision of the clerk,"—a recognized exception to the general doctrine of conclusiveness of the judgment after the term, and there is no indication that the correction made in that case was made without notice to the party interested. The adverse party was present and resisted the order, so there was opportunity to be heard.

The Palmyra Case has been cited a number of times since in the course of opinions not involving the precise proposition, to the effect that the court "may reinstate a [155] cause at a subsequent *term, dismissed by mistake." Sibbald v. United States, 12 Pet. 492, 9 L. ed. 1169.

It was cited to the proposition that court might correct misprision of clerk Bank of United States v. Moss, 6 How. 31 12 L. ed. 334.

In 21 How. 85, 16 L. ed. 32, Rice v. Minnesota & N. W. R. Co., an opinion delivered by Mr. Chief Justice Taney, it was held that at common law, where a case upon error proceedings had been dismissed for want of jurisdiction, it could not be reinstated at a subsequent term upon a showing that the final judgment below, for want of which the case was dismissed, had been accidentally omitted from the record as a production of the correct record showed.

In that case The Palmyra Case was relied upon in support of the motion, but the court declined to follow it in a common-law case, and limited its application to the jurisdiction of an appellate court in admiralty cases, which, the Chief Justice said, was much wider than in a case at common law.

In the case of Alviso v. United States, 6 Wall. 458, 18 L. ed. 721, a case dismissed for want of citation at a former term, omitted to be returned from neglect of the clerk, was reinstated upon the authority of The Palmyra; but in that case Mr. Justice Nelson, speaking for the court, distinctly stated that the omission in The Palmyra Case was the error of the clerk in making out the transcript, and there is no reference to the general authority of the court to reinstate a case dismissed by mistake, regardless of the character of the omission or error.

The Palmyra, like every other case, must be read in the light of the point decided in the case, and in considering the language of Mr. Justice Story, who spoke of the general power of the court to reinstate a case dismissed by mistake, it is evident that he had in mind, for he says so, that the first dismissal was for a clerical mistake, which is a well-recognized ground for correcting judgments at subsequent terms, upon notice and proper showing.

The plaintiff in error also cites Phillips v. Negley, 117 U. S. 665, 29 L. ed. 1012, 6 Sup. Ct. Rep. 901. *That case contains an em- [156] phatic statement of the doctrine that a judgment at law cannot be reversed or annulled after the close of the term at which it was entered by the court rendering the judgment, for errors of fact or law, with the exceptions which we have heretofore noted. In that case Negley had been sued in the supreme court of the District of Columbia upon a certain order. Negley answered, denying his liability, and asserting that he signed the order only as agent; denied also that plaintiff was the holder of the order, or notice of nonpayment. After issue joined on the pleas, on April 3, 1879, Negley sued

pearing, a jury was called, and verdict und for the plaintiff, upon which judgent was rendered.

On September 4, 1882, Negley filed his otion to vacate the judgment and set aside e verdict rendered against him *ex parte*, cause of irregularity, fraud, and deceit, d the negligence of his attorney. Affiavits were filed in support of this motion, etting forth a denial of Negley's personal ability on the order; that he was served rith process when temporarily in Washingon, being then and since a resident of Pittsurg; that he employed counsel and filed is defense, but received no further notice rom the fall of 1874 until July 26, 1882, hen he was sued on the judgment in llegheny county, Pennsylvania; that plainiff took no notice of the plea filed in the riginal case until May 3, 1877; that in the neantime, without defendant's knowledge, is counsel had removed from Washington, eaving him without counsel, as plaintiff nd his counsel well knew, and on April 3, 879, without notice, and while Negley was gnorant of the proceeding, called for a ury and procured the verdict and judgment gainst him.

Other testimony was taken, and after earing on December 2, 1882, the supreme ourt of the District set aside the verdict ecause of "irregularity, surprise, fraud, nd deceit," and granted a new trial. In his court the judgment of the supreme ourt was reversed for error in entertaing and granting *the motion to set aside he judgment, and the cause was remanded, rithout prejudice to Negley's right to file bill in equity. After citing and quoting rom the Bronson Case (104 U. S. 410, 26 . ed. 797), Mr. Justice Matthews, who deivered the opinion of the court, said:

"Although the opinion [Bronson Case] lso shows that upon the facts of that case he action of the circuit court in vacating its udgment after the term could not be justied upon any rule authorizing such relief, hether by motion or by bill in equity, evertheless the decision of the case rests pon the emphatic denial of the power of e court to set aside a judgment upon otion made after the term and grant a ew trial, except in the limited class of ses enumerated as reached by the previous ractice under writs of error *coram vobis*, for the purpose of correcting the record cording to the fact where mistakes have curred from the misprision of the clerk. e content ourselves with repeating the ctrine of this recent decision, without repitulating previous cases in this court, in ich the point has been noticed, for the rpose of showing their harmony. It has en the uniform doctrine of this court. 'No principle is better settled,' it was said in Sibbald v. United States, 12 Pet. 488, 492, 9 L. ed. 1167, 1169, 'or of more universal application, than that no court can reverse its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes (Cameron v. M'Roberts, 3 Wheat. 591, 4 L. ed. 467; Bank of Commonwealth v. Wistar, 3 Pet. 431, 7 L. ed. 731), or to reinstate a cause dismissed by mistake (The Palmyra, supra); from which it follows that no change or modification can be made, which may substantially vary or affect it in any material thing. Bills of review, in cases in equity, and writs of error *coram vobis* at law, are exceptions which cannot affect the present motion.'"

The case just cited is relied upon because of its reference to The Palmyra. But the point to which that case is cited was not involved. As we have seen, it had already been limited in Rice v. Minnesota & N. W. R. Co. 21 How. 85, 16 L. ed. 32, to appeals in admiralty. *Further, that case, as we have [158] seen, was one of clerical mistake in making up the record.

We therefore find nothing in the previous decisions of this court justifying the contention of the plaintiff in error as to the right to correct the judgment of the previous term, in view of the character of the error sought to be corrected, and more especially in the attempt, under the circumstances shown in this record, to set aside a judgment of a former term, and render a new and different judgment without notice to the party who had been dismissed by a former judgment.

As we have seen, the question here involved pertains to a case where no notice is given and a new and different judgment is entered at a subsequent term. It is urged when the necessary facts appear in the record such correction can be made without notice, because, it is said, there is nothing to litigate. But aside from the fact that this proposition ignores the rule that jurisdiction once lost can only be regained by some proper notice, the case at bar is an illustration that such action may impair the substantial right of a party to be heard against the rendition of a new judgment against him. Had notice been given, the defendant could have availed himself of his right to plead his discharge in bankruptcy by proper proceedings for that purpose. Loveland, Bankr. 783. It may be that he did not lose all right to avail himself of the discharge in some other manner, but he had the right to show that, in view of his discharge, the judgment in question ought not to be rendered against him.

In Capen v. Stoughton, 16 Gray, 364,

cited by plaintiff in error, a sheriff's jury in condemnation proceedings by mistake signed a verdict in favor of the municipal corporation instead of the property owners. The court held this a mistake of a merely formal and clerical kind; and "when no action has been taken on an order or judgment, and the rights of parties to the proceeding or those of third persons cannot be affected unjustly by the correction of an error, the court has power to order an action to be [159] brought forward and a judgment *to be vacated in order that an entry may be made in conformity with the truth."

There is no suggestion that such action can be "brought forward" without notice to the adverse party, or a correction made where, as in the present case, the party has lost a valuable right in reliance upon a judgment of dismissal.

And if it be held that the mistake in this case, though not of the clerk, was of a clerical character, and within the rule permitting the correction of such mistakes by the court, a point unnecessary to decide in this case, such a correction cannot be made after term without notice, certainly where the changed condition of the parties in view of a new right acquired would render it prejudicial to render a new judgment.

The plaintiff in error also relies upon the proposition that the Massachusetts statute (Revised Laws of Massachusetts, chap. 193, § 22) provides that if a judgment is rendered in the absence of the petitioner, and without his knowledge, a writ of review may be granted upon petition filed within one year after the petitioner first had notice of the judgment; otherwise, within one year after the judgment was rendered. But we cannot agree that this remedy supplied the want of jurisdiction in the Massachusetts court to render, after the term and without notice, a new and different judgment against the defendant in error. Whatever his remedy may be in the state courts, want of jurisdiction may be pleaded wherever the judgment is set up against him in another forum.

We find nothing in any decision of this court which sanctions any different procedure, and the cases in the state courts which hold that notice is necessary after the term before a judgment can be set aside are numerous. Some of them will be found in the note in the margin.†

[160] *To sanction a proceeding rendering a new judgment without notice at a subsequent term, and hold that it is a judgment rendered with jurisdiction, and binding when set up elsewhere, would be to violate the fundamental principles of due process of law as we understand them, and do violence to that requirement of every system of enlightened jurisprudence which judges after it hears, and condemns only after a party has had an opportunity to present his defense. By the amendment and new judgment the proceedings are given an effect against the defendant in error which they did not have when he was discharged from them by the judgment of dismissal. By the judgment of dismissal the court lost jurisdiction of the cause and of the person of the defendant. A new judgment in *personam* could not be rendered against the defendant until, by voluntary appearance or due service of process, the court had again acquired jurisdiction over him. As a matter of common right, before such action could be taken he should have an opportunity to be heard and present objections to the rendition of a new judgment, if such existed.

We find no error in the judgment of the Court of Appeals overruling the demurrer to the second plea, and the same is affirmed.

Mr. Justice Brewer took no part in this case.

UNITED STATES, Appt., [161]
v.
DONN C. MITCHELL.

(See S. C. Reporter's ed. 161-176.)

Claims—extra pay of Army officer—deductions.

1. Sums improvidently paid to an Army officer by the auditor for the War Department cannot be deducted from the extra pay sued for in the court of claims, where the United States filed no set-off or counterclaim.

Army—extra pay—exercising higher command.

2. Special orders purporting to appoint and to confirm the appointment to the command of a cavalry troop, in the absence of its captain, of the senior subaltern present, on whom such command would regularly devolve, "unless otherwise specially directed," under the Army Regulations of 1895, ¶ 204, can give such officer no right to the increased pay provided for by the act of April 26, 1898 (30 Stat. at L. 365, chap. 191, U. S. Comp. Stat. 1901, p. 895), § 7, when an officer is exercising, "under assignment in

†Murphy v. Farr, 11 N. J. L. 186; Martin v. Bank of State, 20 Ark. 636; De Witt v. Monroe, 20 Tex. 289; Berthold v. Fox, 21 Minn. 51; Cobb v. Wood, 8 N. C. (1 Hawks) 95; Hill v. Hoover, 5 Wis. 386, 68 Am. Dec. 70; Perkins v. Hayward, 132 Ind. 95, 103, 31 N. E. 670; Bryant v. Vix, 83 Ill. 11, 18; Keeney v. Lyon, 21 Iowa, 277; West v. Weed, 25 Conn. 337; Fischesser v. Thompson, 45 Ga. 459, 467.

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[No. 180.]

uary 25, 1907. Decided March
18, 1907.

rom the Court of Claims to re-
dgment giving one month's extra
ptain of cavalry, mounted, to a
nant while in command, in the
he captain and first lieutenant.
d remanded with directions to
nt for claimant for one month's
a second lieutenant of cavalry,

case below, 41 Ct. Cl. 36.

by Mr. Chief Justice Fuller:
of claims filed the following
act and conclusions of law:

imant, Donn C. Mitchell, was
he Volunteer Army, during the
, as second lieutenant of Troop
o Volunteer Cavalry, on the 3d
, 1898. He served in the grade
utenant until promoted to first
ctober 20, 1898. He was mus-
s first lieutenant October 23,
entire service was within the
United States.
on duty as second lieutenant of
io Volunteer Cavalry, at Hunts-
ma, during the Spanish war,
eived the following order:
rs 1st Ohio Volunteer Cavalry,
ler, Huntsville, Ala., August 24,

ers, }
}
ieut. William D. Forsyth, 1st
eer Cavalry, having been ordered
rd of examination for appoint-
cond lieutenant in the Regular
reby relieved of the command of
He will turn over the property,
records of the troop to his suc-

eut. Donn C. Mitchell, 1st Ohio
Cavalry, is hereby appointed to
d of Troop E. He will receipt
Forsyth for the property and
ining to the troop.
of Lieut. Col. Day.
ed) A. C. Rogers,
d Regtl. Adj. 1st Ohio Vol.

r was approved by the command-
in the field in the following or-

"Headquarters Fourth Army Corps,
Camp Wheeler, Huntsville, Ala., September 2, 1898.
Special Orders, }
No. 97. }

. . . . . .

"2. It appearing from evidence that the following-named officers of the First Ohio Volunteer Cavalry have exercised the functions of commanders above that pertaining to the grades held by them from and after the dates set opposite their respective names, the assignment thereto contemplated by General Order No. 86, current series, Adjutant General's Office, is confirmed, namely:

. . . . . .

*"2d Lieut. Donn C. Mitchel, as captain, [163] from August 24th, 1898.

. . . . . .

"By command of Major-General Coppinger:

(Signed) Clarence K. Edwards,
Assistant Adjutant-General."

Under these orders claimant exercised command of Troop E from August 26, 1898, to October 23, 1898, when he was mustered out with his regiment.

So much of G. O. No. 86, A. G. O. of 1898, as relates to the matter of pay for exercising a higher command, is as follows:

"General Orders, }
No. 86. }

"Headquarters of the Army,
Adjutant General's Office,
Washington, July 2, 1898.

"1. In § 7 of the act 'For the Better Organization of the Line of the Army of the United States,' approved April 26, 1898 [30 Stat. at L. 365, chap. 191, U. S. Comp. Stat. 1901, p. 895], it is provided 'That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised.'

"The Attorney General has held that this clause 'was intended to apply to all instances where the troops of the United States are assembled in separate bodies, such as regiments, brigades, divisions, or corps, for the purpose of carrying on and bringing to a conclusion the war with Spain,' but that 'all service in the Army at the present time is not to be considered as operating against an enemy.' Troops and their officers on the western frontiers, performing the same service as garrisons which is requisite in time of peace, and in no wise considered a part of the Army assembled to

carry on the war with Spain, would not be within the meaning of the act.

"To entitle an officer to the pay of a [164]grade above that *actually held by him the assignment in orders under the clause cited must be by the written order of the commanding general in the field or the Secretary of War, and no pay or allowances of a higher grade than that actually held by an officer will be paid under this provision except when a certified copy, in duplicate, of such order, with statement of service, is filed with the paymaster. . . ."

General Orders No. 86 was amended by General Orders No. 155, dated September 27, 1898, by striking out the above portion of the order, and, on the same date, Circular No. 18, promulgating this order, was amended by striking out the portion above quoted and inserting in lieu thereof the following language, to wit:

"To entitle an officer to the pay of a grade above that actually held by him under § 7 of the act of Congress approved April 26, 1898, he must be assigned in orders issued by competent authority to a command appropriate to such higher grade of troops operating against the enemy." Circ. No. 39, A. G. O., Sept. 27, 1898.

At the time that he assumed, and during the time that he exercised, command of troop E, he was the senior officer present with the troop.

The Treasury Department, from the decision of the Comptroller of March 31, 1899 (5 Comp. Dec. 641), to the decision of the court in Humphreys v. United States, 38 Ct. Cl. 689, on May 25, 1903 (pp. 15–16), recognized this sort of orders, so subsequently confirmed, as sufficient authority for the higher pay. Under similar orders, subsequently affirmed, all officers were paid either by the Pay Department or by the Treasury Department in claims presented after the war.

3. From August 26, 1898, to October 19, 1898, claimant was originally paid the rate due a second lieutenant of cavalry, and from October 20 to October 23, 1898, he originally received the pay of a first lieutenant of cavalry. He subsequently filed a claim for additional pay for command of the troop and was paid by the auditor for the War [165]Department, *October 30, 1899, the pay of a captain for the entire period from August 26, 1898, to October 23, 1898.

4. On the 14th day of September, 1898, a furlough of thirty days for said regiment was authorized under General Orders No. 130, A. G. O., 1898, and amendatory circulars. The above-named claimant did not receive such furlough. From the beginning of the furlough to September 26, 1898, the said claimant was sick in Mount Carmel Hospital, Columbus, Ohio. From September 26, 1898, to the end of the furlough period he was detained for duty and actually performed duty. During the whole furlough period he was at all times subject to the orders of his superior officers until final muster out. Claimant was first taken sick at Huntsville, Alabama, before the furlough, but accompanied his regiment to the home station at Columbus, Ohio, where he was placed in the hospital by officers of said regiment, the surgeon being absent. While at the hospital claimant performed some military service by directing a clerk employed by him for that purpose.

5. If claimant is entitled to retain the pay already received by him, the amount due him as extra pay at the rate due a captain, mounted, is $166.66.

If entitled to extra pay at the rate due a second lieutenant, mounted, the amount due is $125.

If entitled to extra pay, and not entitled to retain the pay of a captain as stated in finding 3, there should be deducted from the extra pay allowed the sum of $79.44.

The court rendered judgment for the claimant in the sum of $166.66. 41 Ct. Cl. 36.

Assistant Attorney General Van Orsdel argued the cause, and, with Mr. George H. Anderson, filed a brief for appellant.

Mr. George A. King argued the cause, and, with Messrs. William B. King and Clark McKercher, filed a brief for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court:

It is conceded by the government that claimant is entitled to extra pay, so that the question is to what amount. Was he entitled to receive one month's extra pay of a captain of cavalry, mounted ($166.66), or one month's extra pay of a second lieutenant of cavalry, mounted ($125)?

We lay out of view the suggestion that if claimant were entitled to the extra pay of a second lieutenant of cavalry only, then that a certain sum or sums ought to be deducted as having been previously improvidently paid by the auditor for the War Department. The United States filed no set-off or counterclaim, and we think we cannot overhaul the allowance by the auditor for the War Department in the circumstances. Such payment, if made in error, did not determine the question before us within United States v. Hite, 204 U. S. 362, ante, 514, 27 Sup. Ct. Rep. 386.

The claim is made under § 1 of the act

April 26, 1898 (30 Stat. at L. 364, 365, ıp. 191, U. S. Comp. Stat. 1901, p. 895), ıding as follows: "That in time of war ery officer serving with troops operating ainst an enemy who shall exercise, under signment in orders issued by competent thority, a command above that pertaining his grade, shall be entitled to receive the y and allowances of the grade appropri- e to the command so exercised."

The main question is whether claimant ercised, "under assignment in orders is- ed by competent authority, a command ove that pertaining to his grade?" When assumed command of his company, Au- st 26, 1898, he was the senior officer pres- t, the captain and the first lieutenant ing absent. Section 253 of the Army Reg- ations of 1895, then in force, provided: n the absence of its captain, the command a company devolves upon the subaltern xt in rank who is serving with it, unless herwise specially directed."

*This embodied the rule of succession by niority prevailing in the ordinary course military affairs, while, at the same time, recognized that there might be excep- ons, in respect of which special direction is required, and § 7 of the act of April , 1898, applied to such cases.

The exceptions spring from necessity, and here it is apparent that that does not ex- t, orders relied on as the basis for in- eased pay under § 7 are ineffectual for at purpose.

In Humphreys v. United States, 38 Ct. Cl. 9, the court of claims held that what the w contemplated was "necessary, and not atuitous, assignments, and only such as ould be for the good of the service for the gorous prosecution of the war." Chief stice Nott, speaking for the court, said: t seems to the court incontrovertible that e words 'under assignment in orders is- ed by competent authority' constitute the ntrolling limitation of the statute; and limitation implies that the benefits of statute extend only to cases where such order is necessary to impose the burden the higher command upon an officer." concur in that view, and, tested by it, cial Orders No. 44, dated August 24, 1898, reby the lieutenant colonel of the First o Volunteer Cavalry announced that st Lieutenant Forsyth was relieved of command of troop E, and, as incident reto, that Second Lieutenant Mitchell appointed to the command, cannot be sidered as an "assignment in orders is- l by competent authority," within § 7. t section was not enacted to give in- sed pay for the discharge of the ordi- duties of the service, but to give compensation for the greater risk and responsibility of active military command, and no assignment in orders when unnecessary to that end can make a case within the statute. Truitt v. United States, 38 Ct. Cl. 398, 406; Parker v. United States, 1 Pet. 293, 297, 7 L. ed. 150, 151. Here the additional duties discharged by Lieutenant Mitchell were "the ordinary incidental duties of military official life which go with each officer's commission." 38 Ct. Cl. 692.

*The attempted confirmation by Special[170] Orders No. 97 must fail of effect under § 7 for like reasons.

Other questions argued at the bar need not be discussed.

Judgment reversed and cause remanded, with a direction to enter judgment in favor of claimant for $125.

ROBERT J. TRACY, Plff. in Err.,
v.
ALBERT A. GINZBERG, Individually and as Trustee in Bankruptcy of H. C. Long & Company.

(See S. C. Reporter's ed. 170–178.)

Constitutional law—due process of law.

1. The police board of Boston, by issuing a liquor license, on a vacancy created by bankruptcy, to the nominee of the trustee in bankruptcy of the original licensees, does not deprive a co-licensee, to whom the original license had been assigned as security, of property without due process of law, where his so-called property right depends wholly upon the practice of the board to reissue licenses to the old holders until refused for cause, since such right, being of the board's creation, is subject to any limitations which the board may impose.

Constitutional law—due process of law.

2. The decision of a state court involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its ef-

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NOTE.—As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On discretion in the granting of liquor licenses—see note to Sherlock v. Stuart, 21 L.R.A. 580.

On liquor licenses as assets—see note to Deggender v. Seattle Brewing & Malting Co. 4 L.R.A.(N.S.) 626.

fect is to deny his claim of ownership in such property.

[No. 204.]

Argued February 26, 1907. Decided March 18, 1907.

IN ERROR to the Supreme Judicial Court of the State of Massachusetts to review a judgment which affirmed a decree of the trial justice of that court, dismissing a bill to recover from a trustee in bankruptcy moneys received from the sale of an unexpired liquor license to one desiring a renewal. Affirmed.

See same case below, 189 Mass. 260, 75 N. E. 637.

The facts are stated in the opinion.

Mr. Harry J. Jaquith argued the cause, and, with Mr. Thomas J. Barry, filed a brief for plaintiff in error:

The difference between a governmental franchise and a governmental license is one of degree, and not of species, and the same principles of law control dealings in governmental privileges, whether franchise or license, when the fee exacted for the license is more than the nominal sum required to cover the cost of registration.

3 Kent, Com. 458; Gibbons v. Ogden, 9 Wheat. 1, 213, 6 L. ed. 23.

A license for a stated period and for a valuable consideration cannot be revoked except for breach of conditions.

Davis v. Townsend, 10 Barb. 343; Cook v. Stearns, 11 Mass. 537; Com. v. Moylan, 119 Mass. 109.

It is a franchise.

State ex rel. Chicago, M. & St. P. R. Co. v. McFetridge, 56 Wis. 259, 14 N. W. 185; Wiggins Ferry Co. v. East St. Louis, 102 Ill. 576; Hancock v. Singer Mfg. Co. 62 N. J. L. 335, 42 L.R.A. 852, 41 Atl. 846; Logan v. Pyne, 43 Iowa, 524, 22 Am. Rep. 261; Com. v. Standard Oil Co. 101 Pa. 145; State v. Schlier, 3 Heisk. 286.

The power to mortgage is coextensive with the power to alienate, and is an incident that cannot be divorced from ownership.

Com. v. Smith, 10 Allen, 448, 87 Am. Dec. 672.

The only limitation upon this power is that the holder of a franchise or license for the benefit of the public cannot do anything to disqualify him from performing his public duties.

Evans v. Boston Heating Co. 157 Mass. 37, 31 N. E. 698.

A license is property.

Re Fixen, 50 L.R.A. 605, 42 C. C. A. 354, 102 Fed. 296; Re Emrich, 101 Fed. 231; Re Gallagher, 16 Blatchf. 410, Fed. Cas. No. 5,192; Fisher v. Cushman, 51 L.R.A. 292, 43 C. C. A. 381, 103 Fed. 865; Re Becker, 88 Fed. 407; Re Brodbine, 93 Fed. 643; Re Hurlbutt, 68 C. C. A. 216, 135 Fed. 504; Hyde v. Woods, 94 U. S. 523, 525, 24 L. ed. 264, 265; Sparhawk v. Yerkes, 142 U. S. 1, 12, 35 L. ed. 915, 917, 12 Sup. Ct. Rep. 194; Re Ketchum, 1 Fed. 840; Re Warder, 19 Fed. 275; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 218, 219, 41 L. ed. 965, 976, 977, 17 Sup. Ct. Rep. 604.

The several millions of capital invested in licenses in Boston is within the protection of the law.

Tehan v. Municipal Ct. Justices, 191 Mass. 92, 77 N. E. 313.

A trustee in bankruptcy is bound by all the agreements of the bankrupt as fully as the bankrupt except as to frauds and preferences and executory contracts; and, in taking over property or property rights, he takes them subject to such liens, encumbrances, or assignments as existed prior to the bankruptcy, provided they are not obnoxious as frauds or preferences.

Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673; Ex parte Newhall, 2 Story, 360, Fed. Cas. No. 10,159; Fletcher v. Morey, 2 Story, 555, Fed. Cas. No. 4,864; Winsor v. Kendall, 3 Story, 507, Fed. Cas. No. 17,886; Winsor v. McClellan, 2 Story, 492, Fed. Cas. No. 17,887; Ex parte Dalby, 1 Low. Dec. 431, Fed. Cas. No. 3,540; Potter v. Coggshall, Fed. Cas. No. 11,322; Coggshall v. Potter, Holmes, 75, Fed. Cas. No. 2,955; Williamson v. Colcord, 1 Hask. 620, Fed. Cas. No. 17,752; Thompson v. Fairbanks, 196 U. S. 516, 526, 49 L. ed. 577, 586, 25 Sup. Ct. Rep. 306.

A license is property protected by the Federal Constitution.

Ward v. Maryland, 12 Wall. 418, 430, 20 L. ed. 449, 452; United States v. Cutting, 3 Wall. 441, 443, 18 L. ed. 241, 242; Gaulling v. Chicago, 177 U. S. 183, 186, 188, 44 L. ed. 725, 728, 729, 20 Sup. Ct. Rep. 633; Re Fixen, 50 L.R.A. 605, 42 C. C. A. 354, 102 Fed. 296; Scranton v. Wheeler, 179 U. S. 141, 155, 45 L. ed. 126, 134, 21 Sup. Ct. Rep. 48; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 241, 41 L. ed. 979, 983, 988, 17 Sup. Ct. Rep. 581; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 91, 100, 44 L. ed. 84, 89, 20 Sup. Ct. Rep. 33; Rock Island County v. United States, 4 Wall. 435, 446, 18 L. ed. 419, 422; United States v. Cornell S. B. Co. 69 C. C. A. 69, 137 Fed. 455.

Mr. Alfred W. [illegible] argued the cause, [illegible] 205 U. S.

d, with Messrs. William B. Sullivan and urie & Ginsberg, filed a brief for defend-t in error:

The strict conditions imposed by stat-e and the manifest reasons for such su-rvision show that a license to engage in e liquor traffic (a business which is uni-rsally regarded as hazardous to the pub-: morals and welfare) is a purely personal ivilege, granted or withheld by the state the exercise of the police power.

The supreme judicial court of Massachu-tts has declared such a license to be a ersonal trust."

Com. v. Hadley, 11 Met. 71.

It has universally been held that such censes are not assignable in the absence of ecific statutory authority.

Strahn v. Hamilton, 38 Ind. 57; Alger v. Teston, 14 Johns. 231; Gilday v. Warren, Conn. 237, 37 Atl. 494; Blumenthal's Pe-tion, 125 Pa. 412, 18 Atl. 395.

Any attempted assignments or agreements assign licenses are absolutely void.

17 Am. & Eng. Enc. Law, 2d ed. pp. 232, 33; Com. v. Hadley, supra; Tracy v. Ginz-erg, 189 Mass. 260, 75 N. E. 637.

That a state has the exclusive power to egulate or prohibit the sale of intoxicating quors within her borders in the exercise f the police power is so well established as o make the citation of authorities well igh superfluous.

Boston Beer Co. v. Massachusetts, 97 U. 25, 24 L. ed. 989; Crowley v. Christensen, 37 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 3; Giozza v. Tiernan, 148 U. S. 657, 37 L. d. 599, 13 Sup. Ct. Rep. 721; Gray v. Con-ecticut, 159 U. S. 74, 40 L. ed. 80, 15 Sup. t. Rep. 985.

The point of law involved in this case—hat an assignment of a license is invalid nd confers no rights upon the assignee—s an important feature of the general power o control or regulate the business. Hence he question is peculiarly one of local law, hich each state should have the right nally to decide for itself. This court will ot assume the right to review the judg-ents of the court of last resort of a state here the subject involved concerns purely matter of local or general law.

Sayward v. Denny, 158 U. S. 180, 39 L. ed. 41, 15 Sup. Ct. Rep. 777; Henderson Bridge o. v. Henderson, 173 U. S. 592–608, 43 L. d. 823–829, 19 Sup. Ct. Rep. 553; Telluride ower Transmission Co. v. Rio Grande West-n R. Co. 175 U. S. 639–647, 44 L. ed. 305–8, 20 Sup. Ct. Rep. 245; Telluride Power ransmission Co. v. Rio Grande Western R. . 187 U. S. 569–584, 47 L. ed. 307–313, 23 p. Ct. Rep. 178; Pennsylvania R. Co. v. ghes, 191 U. S. 477–486, 48 L. ed. 268–1, 24 Sup. Ct. Rep. 132.

This court will not review facts on a writ of error to a state court.

Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 639–647, 44 L. ed. 305–308, 20 Sup. Ct. Rep. 245; Turner v. New York, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; Crary v. Devlin, 154 U. S. 619, and 23 L. ed. 510, 14 Sup. Ct. Rep. 1199.

Moot questions this court has repeatedly declined to consider.

Missouri, K. & T. R. Co. v. Ferris, 179 U. S. 602, 45 L. ed. 337, 21 Sup. Ct. Rep. 231; Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; St. Joseph & G. I. R. Co. v. Steele, 167 U. S. 659–662, 42 L. ed. 315, 316, 17 Sup. Ct. Rep. 925; Kimball v. Kimball, 174 U. S. 158–161, 43 L. ed. 932, 933, 19 Sup. Ct. Rep. 639.

A party who has invoked the jurisdiction of a state court to have determined the rights which he claims should not be allowed to complain that his constitutional guaranties were denied him because the litigation was unsuccessful for him.

Remington Paper Co. v. Watson, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456; Central Land Co. v. Laidley, 159 U. S. 103–112, 40 L. ed. 91–94, 16 Sup. Ct. Rep. 80; Head v. Amoskeag Mfg. Co. 113 U. S. 9–26, 28 L. ed. 889–895, 5 Sup. Ct. Rep. 441.

The mere assertion of a Federal question is not sufficient to confer jurisdiction on this court.

Millingar v. Hartupee, 6 Wall. 258, 18 L. ed. 829; Wilson v. North Carolina, 169 U. S. 586–595, 42 L. ed. 865–871, 18 Sup. Ct. Rep. 435; Hamblin v. Western Land Co. supra.

It must appear from the record by clear and necessary intendment that the Federal question was directly involved so that the state court could not have given judgment without deciding it.

Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 311, 47 L. ed. 190, 192, 23 Sup. Ct. Rep. 123; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336–344, 46 L. ed. 936–941, 22 Sup. Ct. Rep. 691; St. Joseph & G. I. R. Co. v. Steele, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; Iowa v. Rood, 187 U. S. 87–92, 47 L. ed. 86–89, 23 Sup. Ct. Rep. 49.

A liquor license, if property, is so only in the narrowest and most restricted sense.

Fisher v. Cushman, 51 L.R.A. 292, 43 C. C. A. 381, 103 Fed. 860; Re Lyman, 160 N. Y. 96, 54 N. E. 577; Tracy v. Ginzberg, 189 Mass. 260, 75 N. E. 637; State, Lantz, Prosecutor, v. Hightstown, 46 N. J. L. 102; Voight v. Board of Excise, 59 N. J. L. 358, 37 L.R.A. 292, 36 Atl. 686; Metropolitan Bd. of Excise v. Barrie, 34 N. Y. 657; Sprayberry v. Atlanta, 87 Ga. 120, 13 S. E. 197.

There is no analogy between a liquor license and a stock exchange seat, or a market license, for example. The latter are a species of property which can be transferred. Sparhawk v. Yerkes, 142 U. S. 1, 35 L. ed. 915, 12 Sup. Ct. Rep. 104; Hyde v. Woods, 94 U. S. 523, 24 L. ed. 264; Nashua Sav. Bank v. Abbott, 181 Mass. 531, 92 Am. St. Rep. 430, 63 N. E. 1058; Re Gallagher, 16 Blatchf. 410, Fed. Cas. No. 5,192.

It would seem to be quite immaterial whether it be decided that a liquor license is property of a purely personal, nontransferable nature or is not property at all. In either view the plaintiff in error has no case as a matter of law.

Tracy v. Ginzberg, supra; Com. v. Hadley, 11 Met. 66; State v. Bayne, 100 Wis. 35, 75 N. W. 403; Heath v. State, 105 Ind. 342, 4 N. E. 901; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; Bartemeyer v. Iowa, 18 Wall. 129, 21 L. ed. 929; Calder v. Kurby, 5 Gray, 597; La Croix v. Fairfield County, 50 Conn. 321, 47 Am. Dec. 648; Metropolitan Bd. of Excise v. Barrie and Sprayberry v. Atlanta, supra; Stone v. Mississippi, 101 U. S. 814-820, 25 L. ed. 1079, 1080; Schwuchow v. Chicago, 68 Ill. 444.

Money realized from the nomination for a license is assets of a bankrupt estate.

Re Fisher, 98 Fed. 89; Fisher v. Cushman, 51 L.R.A. 292, 43 C. C. A. 381, 103 Fed. 860; Re McArdle, 126 Fed. 442.

Mr. Justice Harlan delivered the opinion of the court:

This suit was instituted in the supreme judicial court of Massachusets by the plaintiff in error, a citizen of New York, against the defendant in error, a citizen of Massachusetts, individually and as trustee to H. C. Long & Company, composed of H. C. Long and Frank A. Sanderson.

The case made by the bill of complaint is as follows: On the 23d of December, 1902, the plaintiff sold to Long and Sanderson the personal property used in carrying on hotel business at a certain place in Boston, and assigned to them the lease of the realty occupied by the hotel. As partial payment therefor he took back a mortgage on the personal property for the sum of $7,500, running to the James Everard's Breweries, a corporation of New York. The [171] mortgage covered not only *a part of the purchase price, but also $3,000 in cash, which the plaintiff paid for the liquor license, which, on or about the above date, he procured to be assigned to Long and Sanderson and to himself, as joint owners, and also the sum of $1,400 in cash, which the plaintiff paid to the city of Boston as a fee for the liquor license issued by the board of police of that city to Long and Sanderson and to the plaintiff. That license expired by limitation on May 1st, 1903.

In consideration of the advance, by plaintiff's procurement, of the above sums of $3,000 and $1,400, Long and Sanderson, on the above date, by writing, assigned their right, title, and interest in said license to the plaintiff, covenanting and agreeing that all future applications for renewals of the license should be in the names of Long and Sanderson and the plaintiff, and that, upon such renewal being granted, they would assign, transfer, and set over any such license.

Long and Sanderson being without money for the purpose, the plaintiff paid $1,400 to the city as the renewal fee, and thereupon a new first and fourth-class license was issued by the board of police to Long and Sanderson and the plaintiff to sell intoxicating liquors in the said hotel building. This license was taken by the plaintiff into his possession, and he had it in his possession at the bringing of this suit.

On the payment of the license fee for 1903, 1904, Long and Sanderson, by an instrument of writing dated April 24th, 1903, assigned, transferred, and set over to the plaintiff their interest in that license, and further agreed to assign and set over to him their interest in any renewal of the license so long as they should be indebted to James Everard's Breweries. The plaintiff alleged that that assignment was for present and valuable consideration, and that by reason thereof he became the sole owner of the license.

Long and Sanderson were adjudged bankrupts on the 23d of July, 1903, being at the time indebted, and are still indebted, to James Everard's Breweries in a sum exceeding $7,000.

*The number of first and fourth-class licenses in Boston is limited by law, and are substantially all issued each year, so that a new license cannot be issued until an old license is canceled. Old licenses are of great value to persons who desire to engage in the liquor business in Boston. They sell from $3,000 to $5,000 to persons who present them for cancelation together with an application for a new license to themselves.

Because of the large surrender value of old licenses and of the long-continued custom of reissuing licenses to old holders until refused for cause, such licenses have been recognized by the courts of Massachusetts as property rights, and the powers of the board of police in dealing with them have been

mited to the exercise of the sound discretion within the limits established by the laws of the commonwealth.

The defendant, Ginzberg, having full knowledge of the above facts, procured the board of police, on or about the 1st of April, 1904, to cancel the plaintiff's license. This was done without notice to plaintiff or hearing on any charge of the violation of the terms of the license. With the assistance of the police board, prior to the cancelation of the license, Ginzberg sold the license for $3,000, which he refused to pay over to the plaintiff. He also collected from the city the sum of $200 as a rebate upon the plaintiff's license, and refused to account for any sum to the plaintiff whatever. In the matter complained of Ginzberg acted beyond his powers as trustee of the bankrupt estate, and, without warrant of law, disposed of [to one O'Hearn] a valuable privilege belonging to the plaintiff, and has procured the destruction and cancelation of the plaintiff's valuable rights.

The relief prayed was that the title of the plaintiff to the first and fourth-class liquor license issued to Long and Sanderson and himself be established; that Ginzberg be ordered to account for the sums received by him as the proceeds of the plaintiff's license, and be required to pay the same over to plaintiff; that the plaintiff's losses and damages by reason of the acts of defendant be established, and that he be ordered *to pay the same; that execution issue against Ginzberg, individually, for such sums as may be found due to the plaintiff by reason of his wrongful interference with plaintiff's property; that if, upon hearing, it should appear that defendant acted within his duties as trustee of the bankrupt estate, that the decree run against him as such trustee, but without execution thereon; and that the plaintiff have such other and further relief as may be just.

Such is the case made by the bill. After answer and replication the evidence was taken by a special commissioner, to be reported to the full court. In its finding of facts the court said: "In the case at bar, the police commissioners were satisfied that the name of Tracy was inserted in the two licenses to secure to his principal the debt or part of the debt, due from the defendants Long and Sanderson; that he was not a partner in the liquor business, and for that reason the police commissioners gave a preference to O'Hearn, who was nominated by the trustee in bankruptcy, with[out] the consent, or against the objections, of Tracy, in deciding to whom a license should be issued on the vacancy caused by Long and Sanderson going out of business. The trustee received $3,000 for the nomination by him, and I find that it is, in fact, the value of such a nomination. It follows that the $3,000 received by the defendant was received for something which he had, and not for anything which the plaintiff had, and the defendant is entitled to have the bill dismissed with costs." By the final decree the bill was dismissed and the case carried before the full court, which affirmed the decree of the trial court.

The supreme judicial court of Massachusetts affirmed the judgment, holding that to sell intoxicating liquor was a personal privilege, valuable as property, in a certain sense, for the personal use of the holder, but not assignable or transferable by him in any way; and that "the value of the release is recognized as depending wholly upon the practice of the police commissioners, and because there is no legal right to assign *the privileges of such a license, and the [174] police commissioners refuse to be bound by assignments, or to recognize at all assignments for security, the court has decided that a holder of an assignment for security has no rights under the assignment." Further: "In the present case the release or assignment of the licenses by the bankrupts to one who wished to obtain licenses for the next year, induced [him] . . . to pay the trustee in bankruptcy $3,000. The money so received was not for any property owned by the plaintiff. It was for a position before the police commissioner, from which the payer had reasonable ground to expect their favorable action. The plaintiff could not control this position, or do anything that would induce the payment by O'Hearn of the money which the defendant received. Upon the facts shown, the board of police commissioners did not consider the insertion of the plaintiff's name in the original license as affecting their right to issue new licenses. It is plain that they were right as regards the licenses for the ensuing year. Whether they were right or not in regard to the plaintiff's relation to the old license is immaterial, for it is plain that the money received by the defendant was not paid on account of the plaintiff's interest, but on account of what the defendant did in enabling O'Hearn to obtain the new licenses." 189 Mass. 260, 75 N. E. 637.

The plaintiff insists that the action of the police commissioners deprived him of property without due process of law. The answer to this contention is that the expectation called a right or property was of the board's creation, and therefore subject to the limitations which the board imposed.

The plaintiff also insists that by the judgment of the supreme judicial court of Mas-

sachusetts he has been deprived of his property without the due process of law guaranteed by the 14th Amendment of the Constitution of the United States. This proposition is without merit. Within the meaning of that Amendment, the court, by its judgment, did not deprive the plaintiff of property without due process of law. He sought a decree adjudging that he was entitled to the money received by Ginzberg from O'Hearn. The court, proceeding entirely upon principles of general and local law, and giving all parties interested in the [178] question an opportunity to be *heard, decided that plaintiff had no right to that money. The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. If we were of opinion, upon this record, that the money received by Ginzberg from O'Hearn really belonged to Tracy,—upon which question we express no opinion,—still it could not be affirmed that the latter had, within the meaning of the Constitution, and by reason of the judgment below, been deprived of his property without due process of law. Under the opposite view every judgment of a state court involving merely the ownership of property could be brought here for review,—a result not to be thought of. The 14th Amendment did not impair the authority of the states, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before them, controverted questions as to the ownership of property, which did not involve any right secured by the Federal Constitution, or by any valid act of Congress, or by any treaty. Within the meaning of that Amendment, a deprivation of property without due process of law occurs when it results from the arbitrary exercise of power, inconsistent with "those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Bank of Columbia v. Okely, 4 Wheat. 235, 244, 4 L. ed. 559, 561. It cannot be said that the state court in this case, by its final judgment, departed from those usages or modes of proceeding.

The judgment is affirmed.

*HENRY W. URQUHART, as Sheriff of Lewis County, Washington, Appt.,
v.
THOMAS BROWN.

(See S. C. Reporter's ed. 179-183.)

Habeas corpus—Federal interference with state administration of criminal law.

Relief by habeas corpus should not be accorded by a Federal court to a person held in custody by the state authorities under an order of commitment entered by a state court after a jury had returned a verdict of "not guilty, by reason of insanity," although the prisoner may be so held in violation of the Federal Constitution, since he should be left to his remedy by writ of error from the Federal Supreme Court to review the final action of the highest court of the state.

[No. 226.]

Argued March 7, 1907. Decided March 18, 1907.

APPEAL from the Circuit Court of the United States for the Western District of Washington to review an order discharging, on habeas corpus, a person held in the custody of the state authorities under an order of commitment entered by a state court after the jury had returned a verdict of not guilty, by reason of insanity. Reversed, with directions to deny the writ, with leave to apply for a writ of error to review the judgment of the Supreme Court of the State of Washington, affirming the order of the trial court.

See same case below, 139 Fed. 846.

The facts are stated in the opinion.

Mr. E. C. Macdonald argued the cause, and, with Messrs. John D. Atkinson, A. J. Falknor, and J. R. Buxton, filed a brief for appellant.

No counsel for appellee.

Mr. Justice Harlan delivered the opinion of the court:

This appellee, Brown, was charged in the superior court of Lewis county, Washington, with the crime of murder, and was acquitted. The verdict of the jury was: "We, the jury, find the defendant not guilty, by reason of insanity."

The verdict having been entered of record, an order was made which recited that the court, by reason of the verdict, the evidence, the proceedings in the trial, and the demeanor of the defendant, "finds that

NOTE.—On habeas corpus in the Federal courts—see notes to [illegible] Reinitz, [illegible] L.R.A. 236; State ex rel. [illegible] hran v. Winter, [illegible] L.R.A. 616; Re E[illegible], 25 C. C. A. [illegible] Tinsley v. Anderson, 4[illegible] L. ed. U. S. [illegible]

e discharge or going at large of said homas Brown would be and is considered y the court as manifestly dangerous to the eace and safety of the community;" also, hat he be committed to the county jail ntil the further order of the court.

In making this order the court acted on he authority of a statute of Washington, s follows: "When any person indicted or nformed against for an offense shall, on trial, be acquitted by reason of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause; and thereupon, if the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the *peace and safety of the community, the court may order him to be committed to prison, or may give him into the care of his friends, if they shall give bonds, with surety to the satisfaction of the court, conditioned that he shall be well and securely kept; otherwise he shall be discharged." Ballinger's Anno. Codes & Statutes, § 6959.

Subsequently, the accused, being in the custody of the sheriff under the above order, made an original application to the supreme court of Washington on the 13th day of June, 1905, for a writ of habeas corpus, alleging that he was unlawfully detained and imprisoned, in that the statute under which he was held was in violation of both he 14th Amendment of the Constitution of he United States and of the Constitution f the state.

The supreme court of Washington, by its final judgment, entered July 14th, 1905, eld that the statute was constitutional, and hat the order of the trial court was in trict conformity with its provisions. Re Brown, 39 Wash. 160, 1 L.R.A.(N.S.) 540, 09 Am. St. Rep. 868, 81 Pac. 552. That ourt accordingly denied his application to e discharged. The appellee then, on July 8th, 1905, made application to the circuit ourt of the United States for the western istrict of Washington for a writ of habeas orpus. In his answer to this application he sheriff, having the appellee in custody, eferred to the proceedings in the supreme ourt of the state, and alleged that the mental condition or capacity of the applicant was in no wise different or improved than t was on the 23d of December, 1904, at the ime he killed his father. That court granted the writ, and, the case being heard, the ourt, by its final order, entered January 0th, 1906, discharged the appellee from ustody. The circuit judge held that the tatute, although constitutional, was not roperly administered by the superior court rendering its judgment, and that the imprisonment of the petitioner with sanction of the judiciary of the state, without arraignment, and a fair opportunity to defend himself against charges lawfully preferred, and to produce evidence in his defense, was a deprivation *of his liberty by the [181] state, without due process of law, and violated the national Constitution; and for that reason the application for the writ of habeas corpus was granted. 139 Fed. 846.

The order of commitment under which the appellee was held was adjudged by the circuit court to be illegal and void, but the judgment was without prejudice to any lawful proceeding to have the prisoner restrained, if he should be adjudged to be a dangerous person by reason of insanity. From that judgment the present appeal was prosecuted.

It is the settled doctrine of this court that, although the circuit courts of the United States, and the several justices and judges thereof, have authority, under existing statutes, to discharge, upon habeas corpus, one held in custody by state authority in violation of the Constitution or of any treaty or law of the United States, the court, justice, or judge has a discretion as to the time and mode in which the power so conferred shall be exerted; and that, in view of the relations existing, under our system of government, between the judicial tribunals of the Union and of the several states, a Federal court or a Federal judge will not ordinarily interfere by habeas corpus with the regular course of procedure under state authority, but will leave the applicant for the writ of habeas corpus to exhaust the remedies afforded by the state for determining whether he is illegally restrained of his liberty. After the highest court of the state, competent under the state law *to dispose of the matter, has finally acted, the case can be brought to this [182] court for re-examination. The exceptional cases in which a Federal court or judge may sometimes appropriately interfere by habeas corpus in advance of final action by the authorities of the state are those of great urgency, that require to be promptly disposed of; such, for instance, as cases "involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations." The present case is not within any of the exceptions recognized in our former decisions. If the applicant felt that the decision, upon habeas corpus, in the supreme court of the state, was in violation of his rights under the Constitution or laws of the United States, he could have brought the ease by writ of error directly from

that court to this court.† In Reid v. Jones, 187 U. S. 153, 47 L. ed. 116, 23 Sup. Ct. Rep. 89, it was said that one convicted for an alleged violation of the criminal statutes of a state, and who contended that he was held in violation of the Constitution of the United States, "must ordinarily first take his case to the highest court of the state, in which the judgment could be reviewed, and thence bring it, if unsuccessful there, to this court by writ of error; that only in certain exceptional cases, of which the present is not one, will a circuit court of the United States, or this court, upon appeal from a circuit court, intervene by writ of habeas corpus in advance of the final action by the highest court of the state." So, in the recent case of United States ex rel. Drury v. Lewis, 200 U. S. 1, 50 L. ed. 343, 26 Sup. Ct. Rep. 229, it was said that, in cases of the custody by state authorities of one charged with crime, the settled and proper procedure was for a circuit court of the United States not to interfere by habeas corpus, "unless in cases of peculiar urgency, and that, instead of [183] discharging, *they will leave the prisoner to be dealt with by the courts of the state; that, after a final determination of the case by the state court, the Federal courts will even then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court, and subject to its laws, may, by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state, and finally discharged therefrom."

Without now expressing any opinion as to the constitutionality of the statute in question, or as to the mode in which it was administered in the state court, for the reasons stated the judgment of the Circuit Court must be reversed, with directions to set aside the order discharging the appellee, and to enter an order denying the application for a writ of habeas corpus, leaving the appellee in the custody of the state, with liberty to apply for a writ of error to review the above judgment of the Supreme Court of Washington.

It is so ordered.

†Ex parte Royall, 117 U. S. 241, 251, 29 L. ed. 868, 871, 6 Sup. Ct. Rep. 734; Ex part Fonda, 117 U. S. 516, 29 L. ed. 994, 6 Sup. Ct. Rep. 848; New York v. Eno, 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30; Re Wood (Wood v. Brush) 140 U. S. 278, 35 L. ed. 505, 11 Sup. Ct. Rep. 738; Re Frederich, 149 U. S. 70, 37 L. ed. 653, 13 Sup. Ct. Rep. 793; Pepke v. Cronan, 155 U. S. 100, 39 L. ed. 84, 15 Sup. Ct. Rep. 34; Re Chapman, 156 U. S. 211, 39 L. ed. 401, 15 Sup. Ct. Rep. 331; Whitten v. Tomlinson, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; Baker v. Grice, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; Tinsley v. Anderson, 171 U. S. 101, 104, 43 L. ed. 91, 96, 18 Sup. Ct. Rep. 805; Markuson v. Boucher, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76; Minnesota v. Brundage, 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455; Riggins v. United States, 199 U. S. 547, 50 L. ed. 303, 26 Sup. Ct. Rep. 147; Re Lincoln, 202 U. S. 178, 50 L. ed. 984, 26 Sup. Ct. Rep. 602.

THOMAS TINDLE and Willis K. Jackson, Plffs. in Err.,
v.
CLARENCE T. BIRKETT.

(See S. C. Reporter's ed. 183-186.)

Bankruptcy—provable debts—discharge.

1. Claims for damages arising out of false and fraudulent representations inducing sales of merchandise might have been proved under the bankrupt act of July 1, 1898 (30 Stat. at L. 550, 562, chap. 541, U. S. Comp. Stat. 1901, pp. 3428, 3447), § 63a, as debts "founded upon an open account or upon a contract, expressed or implied," if the sellers had chosen to waive the tort and take their places with the other creditors of the bankrupt estate, and are therefore barred by a discharge in bankruptcy.

Bankruptcy—provable debts—discharge.

2. The words "while acting as an officer or in any fiduciary capacity," as used in the bankrupt act of July 1, 1898, § 17, subd. 4, making an exception from the operation of a discharge in bankruptcy in favor of debts created by the bankrupt's "fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity," extend to "fraud, embezzlement, misappropriation," as well as to "defalcation."

[No. 217.]

Argued February 28, 1907. Decided March 25, 1907.

IN ERROR to the Supreme Court of the State of New York to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which reversed a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a trial term of that court held in and for the county of Erie, in favor of plaintiffs in an

NOTE.—On the effect of a discharge in bankruptcy on liability for torts—see the note to Winfree v. Jones, 1 L.R.A.(N.S.) 202.

ion to recover damages arising out of se and fraudulent representations in- cing the sale of merchandise, in which defendant pleaded a discharge in bank- ptcy as a defense. Affirmed.

See same case below in Court of Appeals, N. Y. 267, 76 N. E. 25.

The facts are stated in the opinion.

Mr. Frank Gibbons argued the cause and d a brief for plaintiffs in error:

Crawford v. Burke, 195 U. S. 176, 49 L. 147, 25 Sup. Ct. Rep. 9, in logical effect an authority for the proposition that a im for damages for fraud and deceit is t released, because not provable, unless has its origin in a valid contract.

The claim in the Crawford Case was in way "created by fraud," because the bt was created by a valid contract be- re any fraud was committed. The debt s of the kind which was held not to be udulent within the meaning of the act 1867.

Hennequin v. Clews, 111 U. S. 676, 28 L. 565, 4 Sup. Ct. Rep. 576.

The qualifying clause, "while acting as officer or in any fiduciary capacity," nd in § 17, sub. 4, of the act, relates to word "defalcation" only, and not to any the preceding words, "fraud, embezzle- nt, misappropriation."

The sentence standing alone would clear- mean that the restrictive clause limits word "defalcation" only, and that any bt created by fraud is within the list of eptions.

Quackenbos's Course of Composition and etoric, § 137, p. 110; Lockwood's Lessons English; Hill's Principles of Rhetoric, pp. , 263.

Under the bankruptcy act of 1867 debts ated by fraud, or arising out of fiduciary ations and in tort generally, were not chargeable. In the highest courts of ny of the states, as well as in many of United States circuit courts, it was held t if, prior to the bankruptcy, a judgment s obtained for the fraud, then the fraud d tort became merged into the judgment, ontract of record, and was released as a tract indebtedness.

Wilcott v. Hodge, 15 Gray, 547, 77 Am. 381; Ellis v. Ham, 28 Me. 385; Crouch Gridley, 6 Hill, 250; Kellogg v. Schuyler, Denio, 73; Blake v. Bigelow, 5 Ga. 437; nstock v. Grout, 17 Vt. 512; Re Comstock, Vt. 642; Manning v. Keyes, 9 R. I. 224, Am. Rep. 249; Re Wiggers, 2 Biss. 71, l. Cas. No. 17,623; Re Book, 3 McLean, Fed. Cas. No. 1,637; Hays v. Ford, 55 . 52.

Congress, when it came to pass the act 1898, did so with full knowledge of the judicial construction which the act of 1867 has received.

McDonald v. Hovey, 110 U. S. 628, 28 L. ed. 272, 4 Sup. Ct. Rep. 142; Beebe v. Griffing, 14 N. Y. 243; Bellegarde v. Union Bag & Paper Co. 90 App. Div. 577, 86 N. Y. Supp. 72.

Under the act of 1867, it was held that if the creditor could get his claim into judgment between the time of the filing of the petition and the date of the discharge, then the judgment could not be discharged; arguing, upon the same theory, that the debt which existed when the petition was filed was not discharged, because it was merged into the judgment subsequently obtained,—a new and different debt,—and that the judgment was not discharged, neither was it provable against the estate, because it did not exist when the petition was filed.

Bradford v. Rice, 102 Mass. 472, 3 Am. Rep. 483; Holbrook v. Foss, 27 Me. 441; Pike v. McDonald, 32 Me. 418, 54 Am. Dec. 597.

Congress intended to correct this situation and had full knowledge and understanding of this subject.

No counsel appeared for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

This was an action brought in 1899 to recover damages claimed to have been sustained in consequence of specified false and fraudulent representations made by the firm of which the defendant was survivor, by reason whereof plaintiffs alleged *they [185] were deceived into selling goods to defendant's firm, which they otherwise would not have done. The complaint contained three counts, setting up separate items of damages, namely, $349.30, $230.83, and $321.73 for goods sold, and judgment was demanded for the aggregate, with interest on each item.

One of the defenses was that plaintiffs' claims were barred by a discharge in bankruptcy of defendant's firm, to which plaintiffs replied that they were not such as could be discharged in bankruptcy proceedings.

The New York court of appeals held that, according to the rulings of this court in Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9, the alleged indebtedness to plaintiffs was covered by the discharge, and directed plaintiffs' complaint to be dismissed. 183 N. Y. 267, 76 N. E. 25.

This writ of error was then prosecuted, and plaintiffs' counsel contends that their debts were not provable debts, and therefore not discharged, and that Crawford v.

Burke might well be modified in view of certain suggestions deemed to be novel.

Sections 17 and 63a of the bankruptcy act of 1898 read as follows:

"Sec. 17. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; . . . or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

"Sec. 63. Debts which may be proved:—

"(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not . . . ; (4) founded upon an open account, or upon a contract expressed or implied; and (5) founded *upon provable debts [186] reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge." [30 Stat. at L. 550, 562, chap. 541, U. S. Comp. Stat. 1901, pp. 3428, 3447.]

Counsel admit that the claims in question were all liquidated. By their nature and amount as well as by the form of the complaint they stand upon the contracts originally made. Whiteside v. Brawley, 152 Mass. 133, 134, 24 N. E. 1088.

Crawford v. Burke was an action in trover instituted in the circuit court of Cook county, Illinois, by Burke against Crawford and Valentine, plaintiffs in error, to recover damages for the wilful and fraudulent conversion of the interests of the plaintiff in certain shares of stock. There were ten counts in the declaration, five charging fraudulent conversion of that stock, and five, the obtaining of money from plaintiff in the way of margins by means of false and fraudulent representations. Defendants pleaded their discharge in bankruptcy, but were found guilty on all the counts, and judgment was entered against them, which was affirmed by the appellate court and by the supreme court of Illinois. This court held that plaintiff's claim was "provable under the bankruptcy act," that is, was "susceptible of being proved," and that it might have been proved under § 63a as "founded upon an open account or upon a contract express or implied," if plaintiff had chosen to waive the tort and take his place with the other creditors of the estate. And that the words, in the fourth subdivision of § 17, "while acting as an officer, or in any fiduciary capacity," extended to "fraud, embezzlement, misappropriation" as well as "defalcation."

That case completely determines this, as the New York Court of Appeals correctly held.

Judgment affirmed.

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*DAVIDSON STEAMSHIP COMPANY, [14] Plff. in Err.,

v.

UNITED STATES OF AMERICA.

(See S. C. Reporter's ed. 187-195.)

Collision—with government breakwater—negligence.

1. A captain engaged in navigating the waters of Lake Superior cannot, as a matter of law, be said to be free from negligence in colliding with an uncompleted extension of a government breakwater in an important harbor in that lake, where he had the means of ascertaining the conditions, which, if known, would have prevented the collision.

Appeal—review of facts.

2. The determination of the jury, approved by the trial court and by the circuit court of appeals, respecting the negligence of the captain of a steamer in running into and injuring an uncompleted extension of a government breakwater in a harbor, and respecting the contributory negligence of the government, cannot be disturbed by the Federal Supreme Court if there is any evidence upon which it can be rested.

[No. 220.]

Argued March 1, 1907. Decided March 18, 1907.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Minnesota in favor of the United States in an action to recover for injuries to a government breakwater, alleged to have been occasioned by the negligence of the captain of a steamer. Affirmed.

See same case below, 73 C. C. A. 488, 142 Fed. 315.

The facts are stated in the opinion.

Messrs. Charles E. Kremer and Herman A. Kelley argued the cause and filed a brief for plaintiff in error:

A misleading light is as bad as no light at all.

The Excelsior, 39 Fed. 393; Connolly v. Brandywine Granite Co. No. 6, 168 Fed. 95; The Scotia (Sears v. The Scotia) 14 Wall.

NOTE.—On the liability for injuries caused by attempted exercise of rights of navigation—see note to Crookston Waterworks, Power & Light Co. v. Sprague, 64 L.R.A. 977.

0, 20 L. ed. 822; The Conoho, 24 Fed. 758; oster v. Merchants' & M. Transp. Co. 134 ed. 964; The Frank Moffat, 2 Flipp. 291, ed. Cas. No. 5,060; Casement v. Brown, 148 S. 615, 37 L. ed. 582, 13 Sup. Ct. Rep. 672.

The government should have used a red ght to mark the end of the new construction.

Harrison v. Hughes, 110 Fed. 545; United tates v. Charles G. Dunn Co. 124 Fed. 705.

Assistant to the Attorney General Purdy rgued the cause and filed a brief for dendant in error:

Can it be said that Captain McAvoy took hose precautions against accident which a areful and prudent mariner would have aken under similar circumstances?

Nitro-glycerine Case (Parrott v. Wells) 15 Wall. 524, 536, 21 L. ed. 206, 211; Baltimore t P. R. Co. v. Jones, 95 U. S. 439, 441, 24 L. ed. 506, 507; Grand Trunk R. Co. v. Ives, 44 U. S. 408, 417, 36 L. ed. 485, 489, 12 Sup. Ct. Rep. 679; Culbertson v. The Southern Belle, 18 How. 584, 587, 15 L. ed. 493, 495.

When Captain McAvoy presumed to act in he capacity of a harbor pilot in entering he port of Two Harbors the law imposed pon him the duty of being acquainted and amiliar with all the dangers that were permanently erected or in process of construction at the mouth of such harbor.

Atlee v. Northwestern Union Packet Co. Wall. 389, 396, 22 L. ed. 619, 621.

The master, John McAvoy, was acting as e pilot of his vessel on the night in question, and, for aught that appears from this cord, always had acted as the pilot of the enandoah. It will be presumed, in the sence of any proof to the contrary, that was duly licensed by the government to t in such dual capacity; to wit, as a master and as a first-class pilot.

Butler v. Boston & S. S. S. Co. 130 U. S. 7, 554, 32 L. ed. 1017, 1023, 9 Sup. Ct. Rep. 2; Re Meyer, 74 Fed. 891.

Where contributory negligence is alleged the defendant such question is to be dermined by the jury, unless no recovery uld be had upon any view of the case.

New York C. & H. R. R. Co. v. Fraloff, 0 U. S. 24, 31, 25 L. ed. 531, 535; Kane v. orthern C. R. Co. 128 U. S. 91, 94, 35 L. 339, 341, 9 Sup. Ct. Rep. 16; Dunlap v. ortheastern R. Co. 130 U. S. 649, 652, 32 ed. 1058, 1059, 9 Sup. Ct. Rep. 647; Richond & D. R. Co. v. Powers, 149 U. S. 43, 47, 37 L. ed. 642-644, 13 Sup. Ct. Rep. 8; Alaska S. S. Co. v. Collins, 62 C. C. A. 9, 127 Fed. 940; Chicago G. W. R. Co. v. ice, 38 C. C. A. 239, 97 Fed. 428.

*Mr. Justice Brewer delivered the opinion the court:

On April 1, 1902, the United States commenced this action in the circuit court of the United States for the district of Minnesota to recover for injuries charged to have been done through the negligence of the Davidson Steamship Company to a government breakwater at Two Harbors, Lake Superior. The defendant answered, denying the negligence, and alleging that the result was due to the negligence of the government, the plaintiff. No question was made as to the amount of the injury. Trial was had before a jury, which returned a verdict for the government. Judgment thereon was entered by the circuit court. This judgment was affirmed by the circuit court of appeals for the eighth circuit (73 C. C. A. 425), and from that court brought here on writ of error.

In a general way, the facts are that on the night of July 24, 1901, the steamer Shenandoah, the property of the steamship company, ran into the government breakwater at Two Harbors, Minnesota. Agate bay, Lake Superior, is the harbor of the village of Two Harbors, and is an open bay, across the mouth of which there are breakwaters extending from either shore, running in an easterly and westerly direction, and leaving an open space as an entrance to the iron ore and other docks in the bay. The breakwater extending from the easterly side had been constructed for a number of years, extending into the bay for a distance of about 750 feet, and its outer end indicated in the nighttime by a fixed, large red light, 15 or 20 feet high. In 1899 the government projected an extension of this breakwater of about 300 feet in length, and at an angle of 45 degrees from the original breakwater. At the time of the injury this extension, composed of wooden cribs filled with stone, had been carried to its full length, but not built up to its intended height, and, in fact, rising only a few inches above the surface of the water. On the extreme outward end of the new extension was a mast or pole about 12 feet *high, and on it was hung an ordinary [190] white light or lantern. The original fixed red light on the old breakwater had been moved back some 30 feet, in order that the new work could be properly joined to the old.

On the evening named the Shenandoah loaded a cargo of iron ore at Superior, Wisconsin, and proceeded to Two Harbors, to take in tow a barge that was being loaded there. When the vessel left Superior the night was dark and stormy and the sky covered with clouds, with a heavy wind blowing from the northeast, making a high sea. Arriving off Two Harbors at about 11 o'clock, the steamer headed for the entrance, intending to enter port, as she had formerly done,

close to the easterly breakwater. When she had approached within about 200 feet the surf was seen breaking over the extension of the breakwater. Her engines were promptly stopped and reversed, but, notwithstanding this, she struck this extension about 125 feet from the fixed red light, and did considerable damage to it, but without injury to herself. The port of Two Harbors is on the north side of Lake Superior, about 27 miles from Duluth, and one of the most important iron ore loading points on the Great Lakes.

Now, whether the injury was the result of negligence, and which party was guilty of negligence, are questions of fact properly determinable by a jury. These questions are the only ones discussed by counsel for the steamship company, and therefore to them alone we direct our attention. It is true in the assignment of errors some other matters are named, but they are not called to our attention in brief or argument, and an examination of them shows that very properly counsel for the steamship company considered them not sufficiently important to justify any discussion.

It is well, before noticing the testimony, to consider the extent to which our inquiry may properly go. The settled rule is that where negligence is a mere question of fact, and nothing appears which is negligence [191] *per se*, the determination *of the question is peculiarly the province of a jury, and its conclusions will not be disturbed unless it is entirely clear that they were erroneous. Courts do not approach the question as an original one, and consider whether, in their judgment, the testimony does or does not prove negligence, but accept the determination of the jury, if there is any evidence upon which it can be rested. This is the general rule in respect to all mere questions of fact. Authorities in this court, as well as in others, are abundant and clear on this point. It is sufficient to refer to one or two.

Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745, was an action to recover damages in behalf of a boy, six years of age, for injuries sustained upon a turntable belonging to the railroad company. This turntable was in an open space, about 80 rods from the company's depot, in a village of from 100 to 150 persons. The railroad ground was not inclosed or visibly separated from the adjoining property, and was about three quarters of a mile distant from the house of the child's parents. The boy, with two older boys, went to the turntable and commenced playing on it. It was not attended or guarded by any servant of the company. It was not fastened or locked, and revolved easily on its axis. While so playing he was injured. T found the company guilty of neglige affirming the judgment this proposit stated (664, L. ed. 749):

"It is this class of cases and th to it that the law commits to the of a jury. Twelve men of the av the community, comprising men o tion and men of little education, learning and men whose learning only in what they have themselv and heard,—the merchant, the m the farmer, the laborer,—these sit t consult, apply their separate exper the affairs of life to the facts pro draw a unanimous conclusion. This judgment thus given it is the gre of the law to obtain. It is assum twelve men know more of the com fairs of life than does one man. th *can draw wiser and safer conclusio admitted facts thus occurring tha single judge."

In New York C. & H. R. R. Co. v. 100 U. S. 24, 31, 25 L. ed. 531, 534, o tion was as to the value of prop which the company was responsibl taining a judgment against it, we s

"If the jury acted upon a gross of facts, or were governed by s proper influence or bias, the remed for rested with the court below, w general power to set aside the verd that court, finding that the ver abundantly sustained by the evid that there was no ground to sup the jury had not performed their partially and justly, refused to d verdict, and overruled a motio trial. Whether its action in tha was erroneous or not, our power by the Constitution to the deter the questions of law arising u ord. Our authority does not re-examination of facts whic tried by the jury under inst rectly defining the legal righ Parsons v. Bedford, 3 Pet. 44 Barreda v. Silsbee, 21 How. 93; Mercantile Mut. Ins. Co. Wall. 249, 21 L. ed. 833."

In Dunlap v. Northeaste U. S. 649, 652, 32 L. ed. 10 Ct. Rep. 647, 648, this was

"The circuit court erred b the question of contributo the jury, as the conclusi low, as matter of law, could be had upon any be properly taken of the tended to establish. Ka R. Co. 128 U. S. 91, 32 Ct. Rep. 16; Jones v. 1

G. R. Co. 128 U. S. 443, 32 L. ed. 478, 9 ıp. Ct. Rep. 118."

In Richmond & D. R. Co. v. Powers, 149 S. 43, 45, 37 L. ed. 642, 643, 13 Sup. . Rep. 748, 749, the jury having found the ilroad company guilty of negligence, we stained the verdict and judgment, saying: "It is well settled that where there is ıcertainty as to the existence of either ıgligence or contributory negligence, the ıestion is not one of law, but of fact, and ɔ be settled by a *jury; and this, whether ıe uncertainty arises from a conflict in he testimony, or because the facts, being ndisputed, fair-minded men will honestly ıraw different conclusions from them. Sioux City & P. R. Co. v. Stout, supra; Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569."

From these authorities, and many more of a kindred nature could be cited, it is obvious that the question for us to consider is whether there was testimony from which the jury might rightfully find the defendant guilty of negligence. It appears that the captain of the steamship had been for many years on the lakes, and that he was acting as pilot of the ship at the time of the collision. The harbor was one of great importance, although he had not been in it for over a year. He knew that harbor improvements on the Great Lakes were being made by the government, that information of the condition of those improvements was given from time to time by circulars from the Departments, and still made no efforts to ascertain the then condition of the harbor, the only chart he had being an old one. In addition to the fact that he knew where information could be obtained, might have assumed that he would be likely to be sent to any one of the many important harbors, and ought to have prepared himself therefor, there was testimony that official circulars and notices were mailed him at his postoffice address, although he states that he failed to receive them, and rested upon the knowledge which he had gained his visit of more than a year theretofore, and upon what he should find as he entered the harbor. Now there is an obligation on all persons to take the care which, under ordinary circumstances of the case, a reasonable and prudent man would take, and the omission of that care constitutes negligence. It was said by Mr. Justice McLean, delivering the opinion in Culbertson v. The Southern Belle, 18 How. 584, 587, 15 L. ed. 493, 495:

"When a steamer is about to enter a harbor great caution is required. There being no usage as to an open way, the *vigilance[194] is thrown upon the entering vessel. Ordinary care, under such circumstances, will not excuse a steamer for a wrong done."

In Atlee v. Northwestern Union Packet Co. 21 Wall. 389, 396, 22 L. ed. 619, 621, Mr. Justice Miller, commenting on the duty of a pilot of a river steamer, makes these observations:

"But the pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. In the long course of a thousand miles in one of these rivers, he must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees, and its openings between trees, are all landmarks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is, in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as sand bars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of sand bars newly made, of logs, or snags, or other objects newly presented, against which his vessel might be injured. In the active life and changes made by the hand of man or the action of the elements in the path of his vessel, a year's absence from the scene impairs his capacity, his skilled knowledge, very seriously in the course of a long voyage."

It would not be strange if the jury found that a captain engaged in the navigation of the waters of Lake Superior was guilty of negligence in not keeping himself informed of changes going on from time to time in the different harbors which he was likely to be called upon to visit. His very want of knowledge, when he had the means of ascertaining the facts, could properly be regarded as negligence. Clearly, it could not be held as matter of law not to be so.

It is true he was apparently misled by the lights on the *breakwater, and we do[195] not mean to intimate that there was no evidence from which the jury would have been warranted in finding that the government was guilty of negligence in the way in which it left those lights. But no omission or negligence on the part of the government avoids the fact that there was testimony from which the jury was justified in finding the captain guilty of negligence, and for that negligence the steamship company was responsible. The jury might have thought that if he had kept himself properly in-

formed in reference to the condition of that as of other important harbors he would not have been misled by the condition of the lights. At any rate, the verdict of the jury was against the contention of contributory negligence on the part of the government, and the jury was the tribunal to determine this, as well as the question of negligence. We could not set aside the verdict of the jury, approved as it was by the trial court and the court of appeals, without ourselves exercising the function of triers of fact, when, under the law, such questions are committed to the determination of a jury.

The judgment is affirmed.

EDWARD H. LOVE, Plff. in Err.,
v.
ANNIE FLAHIVE and Andrew J. Lansing.

(See S. C. Reporter's ed. 195-202.)

Public lands—control of Land Department.

1. Findings of the Secretary of the Interior to the effect that a designated party to a controversy in the Land Department had the right to enter the land as a homestead does not prevent such Department, if patent has not issued, from instituting further inquiry, and, upon such inquiry, finally awarding the land to the party held to have a better right.

Public lands—homestead—sale before patent as abandonment.

2. A sale of a homestead claim before patent has issued, although void, may be treated by the Land Department as a relinquishment or abandonment by the seller of his homestead application and entry.

[No. 236.]

Submitted March 8, 1907. Decided March 25, 1907.

IN ERROR to the Supreme Court of the State of Montana to review a judgment which affirmed a judgment of the District Court of Missoula County, in that state, sustaining a demurrer to the complaint in a suit to have the holder of the legal title to real property adjudged to hold it in trust. Affirmed.

See same case below, 33 Mont. 348, 83 Pac. 882.

Statement by Mr. Justice Brewer:

[196*] *On December 3, 1900, Edward H. Love commenced this suit in the district court of Missoula county, Montana, to have Annie Flahive, the holder of the legal title to a specified tract in that county, adjudged to hold it in trust for him. A demurrer to the complaint was sustained by the district court, and, no amendment being asked, judgment was entered for the defendants. This judgment was affirmed by the supreme court of the state (33 Mont. 348, 83 Pac. 882), from which court the case was brought here on writ of error.

The facts, as stated in the complaint and attached exhibits, are that plaintiff, with the purpose of entering the land as a homestead, and being qualified therefor, in May, 1888, settled upon, occupied, and fenced the entire tract, with the exception of the north 20 acres thereof. In addition to a controversy in the Land Department with the Northern Pacific Railroad Company, which claimed the land under its grant, but whose claim was finally rejected, he had a contest in the Land Department with Michael Flahive, who was also seeking to enter the land, which, after several hearings before the local land officers, with appeals to and decisions by the Commissioner of the General Land Office and the Secretary of the Interior, resulted in a final decision against him and an award of the land to the defendant Annie Flahive, the widow of Michael Flahive, who had died pending the proceedings. In pursuance of that award a patent was issued to her in December, 1898.

Mr. Thomas C. Bach submitted the cause for plaintiff in error. Mr. Charles Edward Pew was on the brief:

The Land Department had no authority to make any findings with reference to the alleged sale.

Noble v. Union River Logging R. Co. 147 U. S. 176, 37 L. ed. 127, 13 Sup. Ct. Rep. 271.

The authority to pass upon equities claimed to exist between parties is vested in the courts, and no attempted usurpation of that authority by a special tribunal can in any degree affect the jurisdiction of the courts in such controversies.

Garland v. Wynn, 20 How. 6, 15 L. ed. [illegible]; Monroe Cattle Co. v. Becker, 147 U. S. 47, 57, 37 L. ed. 72, 77, 13 Sup. Ct. Rep. 217; Turner v. Sawyer, 150 U. S. 587, 37 L. ed. 1191, 14 Sup. Ct. Rep. 192.

The local officers could not take any testimony bearing upon the questions of fact which had already been repeatedly affirmed and had become final.

McDonald v. Hartman, 19 Land Dec. [illegible].

No conclusion made at the subsequent hearing could in any manner affect the rights of Love, since the facts which were vital had all been finally decided in his favor.

McDonald v. Har[illegible], supra.

Where particular contracts are prohibited by statute, and, if attempted, are, in pro-

e terms, declared "utterly null and void," :b contracts will not be enforced.

Gibbs v. Consolidated Gas Co. 130 U. S. 3, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; Miller Ammon, 145 U. S. 421, 36 L. ed. 759, 12 p. Ct. Rep. 884; Quinby v. Conlan, 104 S. 420, 26 L. ed. 800; Hartman v. Butter-ld Lumber Co. 199 U. S. 337, 50 L. ed. 219, Sup. Ct. Rep. 63.

A void sale is ineffectual for any purpose.

Dung v. Parker, 52 N. Y. 494.

Being null and void when attempted, it ll forever remain so.

Anderson v. Carkins, 135 U. S. 483, 34 L. . 272, 10 Sup. Ct. Rep. 905.

Even a sale by Love (or attempted sale) his own land would not have been evi-nce of an intention to abandon, to say thing of it being a complete abandon-ent.

McLeran v. Benton, 43 Cal. 476; Richard-n v. McNulty, 24 Cal. 339; Morse v. Gran- County, 19 Mont. 452, 48 Pac. 745.

Even supposing the alleged sale was evi-nce of an intention to abandon, the rec-l shows that Love never did actually ve the premises. The intent and act st concur or there is no abandonment.

Smith v. Cushing, 41 Cal. 97; Stephens Mansfield, 11 Cal. 366; Judson v. Malloy, Cal. 310; Utt v. Frey, 106 Cal. 392, 39 . 807; Hickman v. Link, 116 Mo. 123, 22 W. 472.

Where two parties claim the same tract land upon the public domain, the with-wal of one of them instantly inures to benefit of the other, to the exclusion of rd parties.

Stone v. Cowles, 13 Land Dec. 192; Mc-wan v. McCann, 15 Land Dec. 542; Moss Dowman, 176 U. S. 416, 417, 44 L. ed. , 528, 20 Sup. Ct. Rep. 429.

The only way Flahive could acquire a ht to the land was by settlement and provement. He could not acquire any hts by purchase which would be good as inst the actual settlement and improve-nt of Love.

Gonzales v. French, 164 U. S. 344, 41 L. ed. , 17 Sup. Ct. Rep. 102; Quinby v. Conlan, U. S. 425, 26 L. ed. 802.

nd the land being in the possession of e and under improvement by him, Fla-e could not initiate a settlement.

Cosmer v. Wallace, 97 U. S. 579, 24 L. ed. 2.

Messrs. S. M. Stockslager and George C. rd submitted the cause for defendants rror. Messrs. Elmer E. Hershey and dy & Woody were on the brief:

o entitle a party to relief in equity nst a patent of the government, he must a better right to the land than the ntee. It is not sufficient to show that the patentee ought not to have received the patent. It must appear that, by the law properly administered, the title should have been awarded to the claimant.

Sparks v. Pierce, 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102; Bohall v. Dilla, 114 U. S. 47, 29 L. ed. 61, 5 Sup. Ct. Rep. 782; Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249.

The Land Department is a tribunal appointed by Congress to decide certain questions relating to the public lands; and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition, is conclusive everywhere else.

Lee v. Johnson, supra; Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; Warren v. Van Brunt, 19 Wall. 646, 22 L. ed. 219; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; Moore v. Robbins, 96 U. S. 530, 24 L. ed. 848; Marquez v. Frisbie, 101 U. S. 473, 25 L. ed. 800; Vance v. Burbank, 101 U. S. 514, 25 L. ed. 929; Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; Baldwin v. Stark, 107 U. S. 463, 27 L. ed. 526, 2 Sup. Ct. Rep. 473; United States v. Minor, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; Potter v. Hall, 189 U. S. 292, 47 L. ed. 817, 23 Sup. Ct. Rep. 545.

The ruling of the Department that the sale by Love of the claim, or even of the improvements on the land, was an abandonment of all right under his settlement, is in harmony with previous decisions of the Department.

Weber v. Sahppell, 9 Copps, L. O. 131; Houston v. Coyle, 2 Land Dec. 58; Dashney v. Pagganer, 27 Land Dec. 319.

The Secretary has jurisdiction at any time prior to the issuing of patent to cancel any entry. He also has jurisdiction to order a hearing for the purpose of obtaining the facts to enable him to determine, in a contest case, whether either claimant, and, if either, which one, has the better right; and in doing so he may overrule any and all other decisions theretofore made.

Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 42 L. ed. 591, 18 Sup. Ct. Rep. 208; Beley v. Naphtaly, 169 U. S. 353, 42 L. ed. 775, 18 Sup. Ct. Rep. 354; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; Brown v. Hitchcock, 173 U. S. 473, 43 L. ed. 772, 19 Sup. Ct. Rep. 485; Hawley v. Diller, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986; Harkrader v. Goldstein, 31 Land Dec. 87.

Mr. Justice Brewer delivered the opinion of the court:

Plaintiff rests his case on the contention

that in the conclusions of the Secretary of the Interior there was error in matter of law, inasmuch as it is well settled that in the absence of fraud or imposition the findings of the Land Department on matters of fact are conclusive upon the courts. Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 354, 375, 39 L. ed. 183, 190, 15 Sup. Ct. Rep. 103; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018; Gonzales v. French, 164 U. S. 338, 41 L. ed. 458, 17 Sup. Ct. Rep. 102; Johnson v. Drew, 171 U. S. 93, 99, 43 L. ed. 88, 90, 18 Sup. Ct. Rep. 800.

He also invokes the authority of Noble v. Union River Logging R. Co. 147 U. S. 176, 37 L. ed. 127, 13 Sup. Ct. Rep. 271, to the effect that when, by the action of the Department, a right of property has become vested in an applicant, it can be taken [199] away only by a *proceeding directly for that purpose, and contends that his right to the land was determined by certain findings of the Commissioner of the General Land Office on July 26, 1892, affirmed by the Secretary of the Interior on January 12, 1894. It is doubtless true that when once a patent has issued the jurisdiction of the Land Department over the land ceases, and any right of the government or third parties must be asserted by proceedings in the courts. United States v. Stone, 2 Wall. 525, 535, 17 L. ed. 765, 767; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 593, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208, and cases cited. It may also be conceded that a right of property may become vested by a decision of the Land Department, of which the applicant cannot be deprived except upon proceedings directly therefor, and of which he has notice. Cornelius v. Kessel, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; Orchard v. Alexander, 157 U. S. 372, 383, 39 L. ed. 737, 741, 15 Sup. Ct. Rep. 635; Parsons v. Venzke, 164 U. S. 89, 41 L. ed. 360, 17 Sup. Ct. Rep. 27; Michigan Land & Lumber Co. v. Rust, supra. Without undertaking to indicate the limits to which this can be carried, it is enough to say that the proceedings in this case, both in the local land offices and by appeals and reviews in the General Land Office, were within the settled rules of procedure established by the Department in respect to such matters. Generally speaking, the Land Department has jurisdiction until the legal title has passed, and the several steps in this controversy were before the issue of the patent, while the jurisdiction of the Land Department continued, and with both parties present and participating. The question of title was in process of administration, and until the patent issued nothing was settled so as to stop further inquiry. Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; Michigan Land & Lumber Co. v. Rust, supra. So, although it be conceded that the findings of the Secretary of the Interior, in 1894, were to the effect that the plaintiff had a right to enter the land, that decision was not final, and it was within the jurisdiction of the Land Department to institute further inquiry, and upon it to finally award the land to the party held to have the better right.

*This brings us to the pivotal fact. It appears from the complaint and exhibits that during the time that these proceedings were pending in the Land Department, Love made a sale to James Rundall of the tract in controversy, or some other tract, or some logs, and that Rundall thereafter made a sale of the same property to Flahive. What was the thing sold is not positively shown by the testimony. In the final decision of the case the Secretary of the Interior, after giving a synopsis of the testimony, which he says is largely incomplete and irrelevant and not entirely satisfactory upon the question, says:

"The witnesses Vanderpool and Lynch testify that Love had a place for sale which included the tract in controversy; Rundall, that he purchased the tract in controversy from Love. The latter denies any sale of the land, but states that he sold some logs for W. H. Finley. It is evident from Love's statement of the transaction that, considering the sale to be only of logs, he was aware that the land upon which the logs were situated would be claimed by the purchaser of the logs, not by virtue of the sale of the logs, but because it appears that he sold the logs for the reason that the claim of W. H. Finley, upon which the logs were situated, was about to be taken by Rundall.

. . . . . .

"It appears that a clear preponderance of the testimony shows that the logs were situated upon the land in controversy; and from Love's evidence it is shown that he, at the time of this sale, laid no claim to the land upon which this unfinished cabin was erected.

. . . . . .

"It thus appears that from a preponderance of the testimony it is shown that this tract of land was not claimed by Love at the date of the sale of this land or of these logs; for it is evident that in either case Love asserted no title. It matters not, under the peculiar circumstances of this case, whether Love sold his own land or the land of W. H. Finley, or simply *logs; as in the first instance it would work an estoppel of

the assertion of claim now, in the second it would be conclusive evidence that the land was not claimed by him, and in the third it would be equally evidence of the same fact, as, from his own testimony, it appears that he laid no claim to the land upon which the logs were situated.

"This decision is not to be understood as holding that Love, in selling the Finley claim to Rundall, conveyed to the latter any title, or that Rundall, in selling to Flahive, did so; but it appearing that this sale was made, it is conclusive evidence that Love asserted, at that time, no title in himself, or, if he had prior to such time asserted title, that by such sale he relinquished all claim in and to the tract in controversy; and that he is in equity and good faith estopped from asserting title against the vendee of the purchaser from him.

"The decision appealed from is therefore affirmed and the application of Love to enter the tract in controversy is held subject to the rights of Annie Flahive, the widow of Michael Flahive."

Of course, whether there was a sale, and what was the thing sold, were matters of fact to be determined by the testimony, and the findings of the Land Department in that respect are conclusive in the courts. It is objected by the plaintiff that a sale of a homestead prior to the issue of patent is void under the statutes of the United States. Anderson v. Carkins, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905. This is undoubtedly the law, and the ruling of the Secretary was not in conflict with it; but the fact that one seeking to enter a tract of land as a homestead cannot make a valid sale thereof is not at all inconsistent with his right to relinquish his application for the land, and so the Secretary of the Interior ruled. While public policy may prevent enforcing a contract of sale, it does not destroy its significance as a declaration that the vendor no longer claims any rights. He cannot sell and at the same time deny that he has made a sale. The government may fairly treat it as a relinquishment—an abandonment—of his application and entry. No man entering land as a homestead is bound to perfect his title by occupation. He may abandon it at any time, or he may in any other satisfactory way relinquish the rights acquired by his entry. Having done that, he is no longer interested in the title to the land. That is a matter to be settled between the government and other applicants. In this case, Love having relinquished his claim, it does not lie in his mouth to challenge the action of the government in patenting the land to Mrs. Flahive.

We see no error in the record, and the judgment of the Supreme Court of Montana is affirmed.

Mr. Justice White took no part in the decision of this case.

ALBERT K. HISCOCK, Trustee in Bankruptcy of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens, and Edmund A. Mertens, Individually and as Composing the Copartnership Firm of "J. M. Mertens & Co.," Bankrupts, Petitioner,

v.

JACOB M. MERTENS.

(See S. C. Reporter's ed. 202-214.)

Bankruptcy — assets — life insurance—cash surrender value.

1. The words "cash surrender value," as used in the proviso to § 70 of the bankrupt act of July 1, 1898 (30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3451), which permits a bankrupt to redeem a policy of insurance on his life from the claims of creditors by paying or securing to the trustees the cash surrender value, embrace policies which, by their terms, or by the practice or concession of the company issuing them, have such value.

Bankruptcy—assets—life insurance — cash surrender value.

2. The investment feature of so-called tontine policies of life insurance does not exclude them from the proviso to § 70 of the bankrupt act of July 1, 1898, which permits the bankrupt to redeem a policy of insurance on his life from the claims of creditors by paying or securing to the trustee its cash surrender value.

Bankruptcy—assets—life insurance — cash surrender value.

3. Life insurance policies which had not lapsed either when the petition to have the insured declared a bankrupt was filed, or when the bankruptcy was adjudged, have a cash surrender value within the meaning of the proviso to § 70 of the bankrupt act of July 1, 1898, which permits a bankrupt to redeem a policy of insurance on his life from the claims of the creditors by paying or securing to the trustee the cash surrender value within thirty days after such value has been ascertained and stated to the trustee by the company issuing the policy, although it may be the practice of the company not to accept a surrender until the policy has lapsed.

[No. 209.]

Argued February 27, 1907. Decided March 25, 1907.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which reversed an adjudication of the District

Court for the Northern District of New York that certain policies of insurance on the life of a bankrupt had no cash surrender value and passed to the trustee in bankruptcy. Affirmed.

See same case below, 142 Fed. 445.

The facts are stated in the opinion.

Mr. Will B. Crowley argued the cause and filed a brief for petitioner:

The term "cash surrender value" in the bankruptcy act refers to a value in cash provided by the terms of the policy itself, and which can be demanded as a contract right by the insured; it does not mean a sum which the company will voluntarily pay, although not obligated to do so.

Re Welling, 51 C. C. A. 151, 113 Fed. 189; Re Slingluff, 106 Fed. 154; Pulsifer v. Hussey, 97 Me. 434, 9 Am. Bankr. Rep. 657, 54 Atl. 1076.

These policies did pass to the trustee. The claim of the bankrupt that policies which have no cash surrender value do not pass to the trustee is not well taken.

Re Welling and Re Slingluff, supra; Re Holden, 51 C. C. A. 97, 113 Fed. 141; Re Scheld, 52 L.R.A. 188, 44 C. C. A. 233, 104 Fed. 872.

Whenever the bankrupt claims that a part of his property does not pass to the trustee by virtue of the bankruptcy proceedings, the burden of showing that claim to be well founded is upon the bankrupt, because it is the theory of the bankruptcy act to grant immunity from debt to the bankrupt upon his surrendering all his property. Manifestly, any exception under which the bankrupt, while still claiming the discharge of his debts, seeks to retain his property, must be very clear, explicit, and convincing; and the burden is upon him to show such exception. In case of any doubt, the benefit thereof should be given to the trustee.

Re Turnbull, 106 Fed. 667.

To sustain the contention of the petitioner would be to hold that nothing could be obtained by a bankrupt's creditors from the bankrupt's life insurance contracts, no matter how valuable the same might be. On the other hand, it is well settled that policies of insurance are assignable and are valid in the hands of the assignee.

St. John v. American Mut. L. Ins. Co. 13 N. Y. 31, 64 Am. Dec. 529; Valton v. National Fund Life Assur. Co. 20 N. Y. 32; Dannhauser v. Wallenstein, 169 N. Y. 199, 62 N. E. 160; Steinback v. Diepenbrock, 158 N. Y. 24, 44 L.R.A. 417, 70 Am. St. Rep. 424, 52 N. E. 662.

Mr. Dorr Raymond Cobb argued the cause and filed a brief for respondent:

The policies in question had a cash surrender value within the meaning of § 70a of the national bankruptcy act, and, upon the payment of that cash surrender value to the trustee, the bankrupt may continue to "hold, own, and carry" said policies, as permitted by that section of the act.

Re McKinney, 15 Fed. 535; Holden v. Stratton, 198 U. S. 202, 214, 49 L. ed. 1018, 1022, 25 Sup. Ct. Rep. 656; Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924; Re Newland, 6 Ben. 342, Fed. Cas. No. 10,170; Re Boardman, 103 Fed. 783; Re Lange, 1 Am. Bankr. Rep. 189, 91 Fed. 361; Re Steele, 98 Fed. 78; Steele v. Buel, 44 C. C. A. 237, 104 Fed. 968; Re Coleman, 69 C. C. A. 496, 136 Fed. 818.

The argument for a narrower construction overlooks the policy of the law.

Holden v. Stratton, supra; Warnock v. Davis, 104 U. S. 775, 779, 26 L. ed. 924, 926; Mutual L. Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; Crotty v. Union Mut. L. Ins. Co. 144 U. S. 621, 36 L. ed. 566, 12 Sup. Ct. Rep. 749.

Insurance policies having no cash surrender value do not pass to the trustee as assets.

Re Lange, 91 Fed. 361; Re Herrich, 1 Am. Bankr. Rep. 713; Re Buelow, 98 Fed. 86; Re Josephson, 121 Fed. 142; Morris v. Dodd, 110 Ga. 606, 50 L.R.A. 33, 78 Am. St. Rep. 129, 36 S. E. 83.

Under the bankruptcy act of 1867, which contained no provision reserving any right in insurance policies to the bankrupt, only the cash surrender value of the policies passed to the trustee.

Re McKinney and Re Newland, supra.

The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name.

Warnock v. Davis, Mutual L. Ins. Co. v. Armstrong, and Crotty v. Union Mut. L. Ins. Co., — supra; Re McKinney, 15 Fed. 539.

*Mr. Justice McKenna delivered the opinion of the court:

The question in this case is whether the cash surrender value of a policy of insurance under § 70-2-5 of the bankruptcy act must be provided for in the policy, or whether it be sufficient if the policy have such value by the concession or practice of the company. Section 70 provides that "the trustee of the estate of a bankrupt, upon his appointment and qualification, . . . shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property . . . (3) powers which he might have exercised for his own benefit, but not those which he might have exer-

ised for some other person . . . (5) property which, prior to the filing of the petition, he could, by any means, have transferred, or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings; otherwise the policy shall pass to the trustee as assets." [30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3451.]

The respondent and his sons, individually and as composing the copartnership of J. H. Mertens & Company, were declared bankrupts, and petitioner was elected the trustee of their estate October 14, 1903.

At the time the petition in bankruptcy was filed Mertens held four life insurance policies issued by the Equitable Life Assurance Society of the United States. One of the policies, payable to his wife if she should survive him, has been dropped from his controversy. The other three policies were payable *to Mertens at his death, his executors, administrators, or assignees. They were subject to certain claims arising from their having been assigned as security for certain loans. With these we are not concerned.

A dispute arose as to the ownership of the policies, and the trustee filed a petition in the district court for the determination of the ownership of them, and that Mertens be required to make an assignment of them to the trustee. Mertens answered, alleging that the policies had, by law and the regular practice of the Equitable Life Assurance Society, a cash surrender value which he had sought to pay to the trustee, and was ready and willing to pay; that it was the uniform practice of the society to pay, upon the surrender of such policies and on policies issued on any of the blank forms known by the policies, the cash value thereof "determined in accordance with a fixed and definite method of computation, and stated on demand by any policy holder or person in interest;" that the society, pursuant to law and in accordance with its practice, had stated to him and declared the cash surrender value of each of the policies and its readiness and willingness to pay such value upon the surrender of the policies. The values were stated.

The matter was referred to a special master to take the proofs and report the same, with findings of fact and conclusions of law. Proofs were taken and a report made in accordance with the order of the court. The master, in his report, describing the policies, said:

"None of these express any agreement or provision whereby, upon default, the company shall pay a 'cash surrender value' to any person. By their terms the assured is excluded from any participation in dividends until the completion of the tontine period, at which time all surplus and profits derived from such policies are to be divided among the persistent policies of that class then in force. At the expiration of the tontine period the persistent policy holder is given certain options, among them to withdraw in cash the policy's entire *share of the assets, that is, the ac- [207] cumulated reserve, the amount of which is stated in each policy, and, in addition, the accumulated surplus apportioned to the policy. Each of these policies also provides that, upon default in payment of a premium and the surrender of the policy within six months thereafter, the assured shall be entitled to a new paid-up policy, based upon the reserve accumulated under the old policy, but 'without participation in profits.' Both funds secured by the agreement, namely, the insurance proper and the endowment fund representing the accumulated profits, are payable to the assured or to his executors, administrators, or assigns. No other person is mentioned in either of the policies as having any beneficial interest therein."

It appeared from the testimony that, as a matter of fact, policies of the character of those in controversy had, under the practice of the company, cash surrender values, if offered for surrender within six months from the date of the nonpayment of any premium. Explaining this, a witness said: "To make clear the replies of previous questions I will state that the Equitable Life Assurance Society would decline to purchase for cash a policy during the period for which premiums had been paid, entitling the policy holder to protection for the face value, for the reason that, in the event of the death of the holder of that policy before the expiration of the period for which premiums had been paid, the question would be raised as to the liability of the company, so that the payment of an amount of cash for the surrender of a policy is only made by the company after that policy has lapsed by reason of the nonpayment upon its due date." And it was testified that the cash surrender values of policies was determined by a fixed and definite method of compu-

tation, uniform in all cases, and had, without exception, been paid to persons insured by the company. It further appeared that the surrender values of the policies in controversy were as follows: Policy No. 274,445, $5,905.65; policy No. 417,678, $2,272.56; policy No. 417,171, $6,574.00.

[208] *It was further testified that the surrender value of each policy was equivalent to the amount of a paid-up policy, which the company was willing to give. Or, as expressed by a witness, "it is equivalent to the percentage reserved under that policy (referring to policy No. 274,445), which the company is willing to pay in consideration of the surrender."

The district court held that the policies had no cash surrender value within the meaning of § 70 of the bankrupt act. The court said:

"In the policies in question not only is there a failure to provide for a cash surrender value, but the provisions are inconsistent with the existence of such a value. This, however, is not at war with the fact that the assurance association may be willing to pay money for the surrender of such policies. There is no pretense that this custom of the insurer formed a part of the contract between the parties, or that the insured could enforce the payment of a surrender value, or the payment of anything, on surrendering the policy. In short, the insurer might be willing to pay a surrender value and might not. Such payment would be optional with it."

And again:

"The association might be willing to pay one day, entirely unwilling the next. . . . Is this the 'cash surrender value' spoken of in the bankruptcy law? This court thinks not. It would seem that had Congress intended that every bankrupt holding a policy of insurance of the nature of these should retain the same as his own on paying to the trustee in bankruptcy the value thereof that the insurer might fix by its custom or otherwise, it would have used language appropriate to that end, and not an expression implying a value the insured has a legal right to demand, and the insurer may be compelled to pay,—a value generally understood to be provided for in the policy itself." [131 Fed. 974, 975.]

The court cited, to sustain its views, Re Welling, 51 C. C. A. 151, 113 Fed. 189, and Re Slingluff, 106 Fed. 154.

An order was entered requiring Mertens [209] to assign the policies *to the trustees. It was reversed by the circuit court of appeals. The latter court, however, said that it "should be inclined to concur with these views [expressed in Re Welling] and to sustain the conclusion of the district judge in the cause at bar, that 'no policy is understood to have a cash surrender value unless provided for in the policy so as to be enforceable by the insured,' were it not for a subsequent expression of opinion by the Supreme Court. This is found in Holden v. Stratton, 198 U. S. 214, 49 L. ed. 1022, 25 Sup. Ct. Rep. 660, as follows:

"'There has been some contrariety of opinion expressed by the lower Federal courts as to the exact meaning of the words "cash surrender value" as employed in the proviso, some courts holding that it means a surrender value expressly stipulated by the contract of insurance to be paid, and other courts holding that the words embrace policies, even though a stipulation in respect to surrender value is not contained therein, where the policy possesses a cash value which would be recognized and paid by the insurer on the surrender of the policy. It is to be observed that this latter construction harmonizes with the practice under the bankrupt act of 1867 (Re Newland, 6 Ben. 342, Fed. Cas. No. 10,170; Re McKinney, 15 Fed. 535) and tends to elucidate and carry out the purpose contemplated by the proviso as we have construed it. However, whatever influence that construction may have, as the question is not necessarily here involved we do not expressly decide it.'" [142 Fed. 447.]

The court observed that the extract from Holden v. Stratton was *obiter* to the questions decided in the case, but considered it such an explicit declaration of views that the court expressed hesitation to disregard it.

We are hence confronted with the problem whether the *obiter* of Holden v. Stratton shall be pronounced to be the proper construction of § 70 of the bankrupt act. We may remark at the commencement that that *obiter* was not inconsiderately uttered, nor can it be said that it was inconsequent to the considerations there involved. It was there necessary to determine between conflicting decisions of two *circuit courts of appeals upon the effect of state statutes of exemption from liability for debts, and a careful consideration of § 6 of the bankrupt act, which provided for exemptions, and § 70, which defined the property which passed to the trustee, was necessary to be made and their proper effect and relation determined. As elements in that consideration the meaning and scope of § 70 were involved and the purpose of Congress in its enactment. Section 6 provides for exemptions "prescribed by the state laws." Section 70 vests the title of all the property of the bankrupt in the trustee, "except in so far as it is to property which is exempt"

Then, after a designation of the property the title to which is transferred, follows the proviso in regard to insurance policies. It was argued that the proviso would be meaningless unless considered as wholly disconnected from the clause as to exempt property, and this court replied:

"As § 70a deals only with property which, not being exempt, passes to the trustee, the mission of the proviso was in the interest of the perpetuation of policies of life insurance, to provide a rule by which, where such policies passed to the trustee because they were not exempt, if they had a surrender value their future operations could be preserved by vesting the bankrupt with the privilege of paying such surrender value, whereby the policy would be withdrawn out of the category of an asset of the estate. That is to say, the purpose of the proviso was to confer a benefit upon the insured bankrupt by limiting the character of the interest in a nonexempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate. When the purpose of the proviso is thus ascertained it becomes apparent that to maintain the construction which the argument seeks to affix to the proviso would cause it to produce a result diametrically opposed to its spirit and to the purpose it was intended to subserve." 198 U. S. 213, 49 L. ed. 1022, 25 Sup. Ct. Rep. 659.

And, contemplating the proviso as having such purpose, *the court used the language quoted by the circuit court of appeals, and expressed the view that, as between the two constructions that had been made of the terms, "cash surrender value," whether they meant a stipulation in the contract or the recognition by the company, the latter harmonized with the practice under the bankrupt act of 1867 [14 Stat. at L. 517, chap. 176], and tended to elucidate and carry out the purpose contemplated by the proviso as the decision construed it. And the precedent practice is necessarily a strong factor and would be so even if it had a less solid foundation in reason. It is nowhere better expressed than in Re McKinney, supra. It is there pointed out that the foundation of the surrender value of a policy is the excess of the fixed annual premiums in the earlier years of the policy over the annual risk during the later years of the policy. "This excess," it was said, "in the premium paid over the annual cost of insurance, with accumulations of interest constitutes the surrender value."

And further:

"Though this excess of premiums paid is legally the sole property of the company, still in practical effect, though not in law, it is moneys of the assured, deposited with the company in advance, to make up the deficiency in later premiums to cover the annual cost of insurance instead of being retained by the assured, and paid by him to the company in the shape of greatly increased premiums when the risk is greatest. It is the 'net reserve' required by law to be kept by the company for the benefit of the assured and to be maintained to the credit of the policy. So long as the policy remains in force the company has not practically any beneficial interest in it, except as its custodian, with the obligation to maintain it unimpaired and suitably invested for the benefit of the assured. This is the practical, though not the legal, relation of the company to this fund.

"Upon the surrender of the policy before the death of the assured, the company, to be relieved from all responsibility for the increased risk, which is represented by this accumulating *reserve, could well afford to [212] surrender a considerable part of it to the assured, or his representative. A return of a part in some form or other is now usually made."

In Re Newland, supra, it was said that the present value of a policy is its cash surrender value, and but for that "it could not be said to have any appreciable value. Parker v. Anglesey, 20 Week. Rep. 162, 25 L. T. N. S. 482."

There is no expression in either of the cases that the cash surrender value depended upon contract as distinct from the usage of companies. And § 70 expresses no distinction. At the time of its enactment there were policies which stated a surrender value and a practice which conceded such value if not stated. If a distinction had been intended to be made it would have been expressed. Able courts, it is true, have decided otherwise, but we are unable to adopt their view. It was an actual benefit for which the statute provided, and not the manner in which it should be evidenced. And we do not think it rested upon chance concession. It rested upon the interest of the companies and a practice to which no exception has been shown. And that a provision enacted for the benefit of debtors should recognize an interest so substantial and which had such assurance was perfectly natural. What possible difference could it make whether the surrender value was stipulated in a policy or universally recognized by the companies? In either case the purpose of the statute would be subserved, which was to secure to the trustee the sum of such value and to enable the bankrupt to "continue to hold, own, and carry such policy free from the claims of the creditors

participating in the distribution of the estate under the bankruptcy proceedings."

Counsel for petitioner argues that the policies are mere investments, and intimates the injustice of keeping them from the trustee, and illustrates the comment by contrasting what the company would have paid as the surrender value of policy No. 274,445, [213] if default had been made in payment *of premiums, and what the company would pay six months thereafter. The contrast is between $5,905.65 and $11,318.40. But this is the result of the age of the policy, and cannot be a test of other policies or of the construction of the law. And a precisely like effect would result if the policy expressed a surrender value, in which case it is conceded, it would come under the law. The same comment is applicable to other arguments of petitioner which tend to confound the distinction between surrender value and other value. Section 70 deals with the former, and makes it the conditions of the relative rights of the bankrupt and the trustee of his estate. Pursuing the argument farther, it is said that "the right to participate in the profits was a part and parcel of the policy and of the privileges enjoyed thereunder;" and it is further observed that the difference between the value of the policy which was used for illustration, "if lapsed on September 8, 1903, given as $5,905.65, and its value on March 8, 1904, $11,318.40, is chiefly made up of the value of this right to participate in profits." And counsel for petitioner is disposed to think the contention absurd that the bankruptcy law contemplated that such a valuable right "could be absolutely wiped out and taken from the trustee in such a case as this by allowing the bankrupt to take up the policy by paying what the bankrupt here claims to be the surrender value." Such result would not appear to be absurd if the policy were only two years old instead of nineteen years. Manifestly a policy cannot be declared in or out of the law according to its age, nor can anything be deduced from the investment features of tontine policies. Such policies were decided to be covered by the law in Holden v. Stratton. Whether the law should have included them is not our concern. Whatever may be said against it, it has seemed best to the legislature to encourage the extra endeavor and sacrifice which such policies may represent.

It is further contended that respondent has not made out that the policies have a cash surrender value, because it appears [214] *from the evidence that the company would not accept their surrender until they had lapsed, and that they had not lapsed either when the petition was filed or the bankruptcy adjudged. But this is tantamount to saying that no policy can ever have surrender value. According to the testimony, policies which have a stipulation for such value are subject to the same condition. And there is nothing in the record to show that the practice and policies of other companies are not the same as those of the Equitable Life Assurance Society. Section 70 is broad enough to accommodate such condition. It permits the redemption of a policy by the bankrupt from the claim of creditors by paying or securing to the trustee the cash surrender value of the policy "within thirty days" after such value "has been ascertained and stated to the trustee by the company issuing the same."

Judgment affirmed.

WILLIAM MOORE and J. S. McFerren, Partners, Doing Business under the Firm Name of Moore & McFerren, Appts.,

v.

R. J. McGUIRE, E. H. Woods, E. S. Wood, et al.

(See S. C. Reporter's ed. 214-225.)

Evidence—sufficiency—boundary between states—islands.

Evidence which goes no further than to raise a doubt as to whether the main channel of the Mississippi river has at different times varied from one side of Island No. 76 to the other will not support a finding that this channel ran to the west of the island when Mississippi was admitted to the Union, and was therefore a part of that state, where such finding is opposed by testimony from memory and tradition, by the presumption from the establishment of the channel on the east side for a time reaching back nearly or quite to the admission of Arkansas, and by consensus of action on the part of the two states concerned and the United States.

[No. 222.]

Argued and submitted March 1 and 4, 1897. Decided March 25, 1897.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas to review a decree dismissing, for want of jurisdiction, a bill to quiet and remove a cloud upon the title to Island No. 76 in the Mississippi river. Reversed.

See same case below, 142 Fed. 797.

The facts are stated in the opinion.

NOTE.—On rivers and lakes as state boundaries—see note to Buck v. Elizabeth, 15 L.R.A. 187.

Messrs. U. M. Rose and D. E. Myers argued the cause, and, with Messrs. W. E. Hemingway, G. B. Rose, Lem Banks, and J. W. Apperson, filed a brief for appellants.

Mr. J. M. Moore submitted the cause for appellees. Messrs. Alexander Y. Scott, Charles Scott, and E. H. Woods were on the brief.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill to quiet and remove a cloud upon the title to land alleged to be in Arkansas. The circuit court found that *the land was in Mississippi and dismissed the case for want of jurisdiction. 142 Fed. 787. The judge made the usual certificate, and an appeal was taken to this court.

The land in controversy is Island No. 76, formerly called Chapeau island, in the Mississippi river, and whether it is part of Arkansas or of Mississippi depends, as both parties agree, on what was the western boundary of Mississippi, as established by the act of Congress admitting that state to the Union. Act of March 1, 1817, chap. 23 (3 Stat. at L. 348). In that act the state is bounded by a line "beginning on the river Mississippi" and running around the state "to the Mississippi river, thence up the same to the beginning." The plaintiffs contend that these words should be construed to bound the state on the eastern bank of the river, while the defendants maintain that they refer to the middle of the main channel, as it then was. The chief difference is upon the question of fact whether the main channel was to the east or west of the island in 1817; but as the construction of the statute also is in dispute, there is jurisdiction, and Joy v. St. Louis, 201 U. S. 332, 50 L. ed. 776, 26 Sup. Ct. Rep. 478, cited by the appellees, does not apply.

We shall assume for the purposes of decision that the boundary is the middle of the main channel as it was in 1817, and address ourselves at once to the chief issue. Some facts are clear. Arkansas was admitted to the Union by act of Congress of June 15, 1836, chap. 100 (5 Stat. at L. 50). This act purported, in terms, to bound the new state by the middle of the main channel; that is, of course, as it then was, so that if at that time the channel was on the Mississippi side, the act of the government imported an understanding that the boundary of Mississippi went no farther. In 1847, 1848, and 1849 there were purchases of a great part of the island at the United States land office in Helena, Arkansas, and certificates and patents were issued by the United States government. The titles thus created are not attacked, but are said to have been lost by the Mississippi tax sale hereafter mentioned. The small remnant was conveyed by the United States to Arkansas *ten years later by a patent under [220] the swamp land act. Arkansas regularly taxed the island as far back as its books are preserved, and presumably before. The above-mentioned greater part was forfeited for taxes to the state. Then the state instituted a statutory proceeding to decide whether the forfeiture was valid, and, if not, to collect the taxes by a new sale. A new sale was ordered in due time, made, and the deed approved by the court. The plaintiffs are purchasers from the grantor under this sale and also from grantees of the residue patented under the swamp land act to the state.

Thus it is apparent that Arkansas has exercised dominion over the island from 1847 down to recent times. The state of Mississippi, on the other hand, only recently, and since the channel has changed, as we shall state, has attempted to tax it. In 1891 it purported to sell the land for taxes, but the next year the money paid was refunded to the purchaser, on the certificate of the governor and attorney general of the state that the land was "within the limits, and the property, of the state of Arkansas." Later, in 1899, the state changed its mind and sold the land for taxes again, the defendants getting their title from this sale, but the possession of Arkansas and the plaintiffs under it has remained. In view of these conditions there may be a doubt whether courts should go beyond them in a private controversy, rather than leave it to the state of Mississippi, if dissatisfied, to bring a suit in its own name. See Jones v. United States, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80; Foster v. Neilson, 2 Pet. 253, 7 L. ed. 415; Filhiol v. Torney, 194 U. S. 356, 48 L. ed. 1014, 24 Sup. Ct. Rep. 698; Bedel v. Loomis, 11 N. H. 9; State v. Dunwell, 3 R. I. 127; State v. Wagner, 61 Me. 178, 184. But, however this may be the facts stated give us a starting point and raise a presumption which is fortified by some further matters also beyond dispute.

The court below finds that "ever since 1839, and probably two or three years before that time, up to the year 1881, the main channel was east of the island in controversy, and, since 1881 up to the present time, west of the island;" the change *being [221] due, it seems, to the washing away of the old Napoleon island, 10 miles or so above. There is no serious attempt to cast doubt upon this finding and we deem it correct. In connection with the finding it should be noticed that a Mississippi statute of 1839,

repeated in the Code of 1857, p. 64, gives as one boundary of Bolivar county, "thence down the main channel of the said Mississippi," thus seemingly adopting the channel as it then was, on the Mississippi side, as the true boundary, and furnishing evidence from which we should not lightly depart. In 1849 the island was surveyed and platted as part of Arkansas, and the survey was certified by William Pelham, the surveyor of public lands in Arkansas. The field notes state that the main channel is on the Mississippi side, and that the inhabitants of the island vote and pay taxes in Arkansas. They add that the channel or chute on the other side is wide, but in low water very shallow, and that on December 27, 1845, the surveyor got his skiff through with difficulty. This is the most exact and authentic of the surveys produced on either side.

The presumption raised by the facts thus far recited is confirmed by the evidence of an old steamboat captain, whose personal experience went back to 1839. He testified that he learned under his father and brother, and that they instructed him that the channel was on the east side in 1812. He further stated that one of the first wood yards established on the Mississippi river for selling wood to steamers was just above No. 76 on the Mississippi side. Another witness, who lived in the neighborhood in 1839 and after, testified that the channel was considered to be on the east side, that the boats passed directly in front of her house, and that they could not pass up the chute on the other side, except in very high water. Having in mind the finding that we have quoted, we mention the last testimony only for the indication that it gives of a more or less permanent condition existing at the time when the witness's memory began.

As against this consensus of action on [222] the part of the two *states concerned and the United States, this presumption from the establishment of the channel for a time running back nearly or quite to the admission of Arkansas, and this testimony from memory and tradition, the chief reliance of the defendants is upon certain maps and the statement in a letter to which we shall refer. The first and most important of the maps is one of a "Reconnoissance of the Mississippi and Ohio Rivers," made during the months of October, November, and December, 1821, by two captains and a lieutenant of engineers under the direction of the board of engineers. This exhibits Chapeau island with a dry sand bar on the Mississippi side, and indicates by dots that the channel is to the west. If the distances are accurate the sand bar at the top approaches pretty near to Mississippi; but in view of the small scale of the map and the absence of measurements there is no sufficient warrant for assuming that the distances are accurate. As to the indication of the channel, it would not be surprising, considering the short time during which the reconnoitre extended, if it had been determined by nothing more than the visible width. But in any event it hardly would do more than confirm a conjecture suggested by other sources which we shall mention, that in some years the western passage was as good as or better than the more permanent one to the east.

The next map is one certified January 2, 1829, of a survey in February, 1827, showing the Arkansas shore sectionized and the island sketched in, with distances indicated at some points, but not sectionized. This map cannot be said to help either side except by speculation of an uncertain sort. The next map, however, is more definite. It is a map of township 21, range 8 west, Mississippi, said to be projected from field notes of Benjamin Griffin, also produced, made in January and February, 1830. Here the island is divided up as part of the township, although not sectionized under the United States statutes, and there are other slight indications that the draftsman regarded the island as belonging to Mississippi. This map is more or less counteracted by another map of the same township signed by Benjamin Griffin, which does not sectionize the island, and indicates, if it indicates anything about it, that the channel is on the east side. The field notes in two places speak of "where the west boundary comes to the river," and they give the width of the east channel at the top as 2,[illegible] feet. The defendants contend that the first mentioned of these two maps is the completed work, but that hardly can be said to be proved.

In addition to these maps there is some correspondence, etc, from which it appears that the island was selected by Mississippi under the swamp land act, and that after the selection had been approved by the Secretary of the Interior, but before any patent had issued, the island was sold by the state in 1854 to one Ford. In 1859 Ford wrote to the governor of Mississippi complaining that Arkansas claimed jurisdiction and that the island had been disposed of as public domain within the limits of that state, asking the governor to claim a patent from Washington, and inclosing a letter to the writer, Ford, from one Downing, who is said to have been surveyor general of Mississippi at an earlier date. This letter is much relied upon. It purports to answer

n inquiry as to the island, refers to the urvey of 1830 or 1831, and says that at that ime, and for some years after, the island hute, as it was called, was quite narrow, not over 100 yards wide about opposite the middle of the island, and that at that time the writer never heard of a steamboat going up or down on the east side. The main river then passed on the west side. The writer adds that he thinks it was in 1835 that he spent some time in examining the land in T. 21, R. 8 W., and that the island chute was quite narrow then.

Presumably this letter was written with knowledge of Ford's object, and it hardly can be said to stand on the footing of disinterested tradition. Whether it was admissible or not we need not consider. It was forwarded to the Department of the Interior by the governor with Ford's claim. The Commissioner answered the letter, expressing an opinion favorable to Mississippi from inspection of the plats and Downing's statement, and inclosing a similar opinion of a former Commissioner in 1855, also from inspection of the plats. Both letters, however, called for evidence of the condition in 1817, and the later one specifically asked for an affidavit from Downing and another disinterested witness. It was assumed that the land, or most of it, was disposed of, and that the question would be of reimbursement. The affidavits asked for seem not to have been furnished, and nothing more appears to have been done until June 27, 1896. At that date another letter from the Acting Commissioner speaks of the land as having been mostly disposed of before the swamp land act, and therefore not granted by it, and suggests the submission of a list containing the 51 acres not so disposed of for approval to Mississippi, giving the governor sixty days for action. Nothing further was done.

This evidence appears to us insufficient to meet the established facts to which we have referred. It must be admitted to raise a doubt whether the channel has not varied from time to time before the great changes about 1881. This doubt is enhanced by other sources of information not put in evidence, but partialy referred to by the plaintiffs at the argument. A map n Samuel Cummings's Western Navigator, Philadelphia, 1822, vol. 1, indicates the hannel on the Arkansas side, and this is onfirmed by the text. Vol. 2, p. 44. In he Navigator, Zadok Cramer, published for number of years at Pittsburg for the information of pilots, in 1806 the channel said to be good on both sides. In 1808 nd 1811 it is said that the left (east) side the best in low water. In 1814, 1817, nd 1818, on the other hand, the best channel is said to be on the right side at all stages. We refer to all the years that we have seen. In view of this statement for the very year when Mississippi was admitted, it is impossible not to hesitate, but in Cummings's Western Pilot for 1833 we read "channel either side: the right is nearest, and the left *is probably rather deepest;"[225] and this seems to us to have been true for the whole time. Upon the whole evidence we are compelled to decide that the plaintiffs have made out their case.

Decree reversed.

Mr. Justice Harlan agrees with the circuit court as to both the facts and the law, and therefore dissents.

Mr. Justice Peckham took no part in the decision.

EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY and Federal Mining & Smelting Company, Appts.,

v.

KENNEDY J. HANLEY.

(See S. C. Reporter's ed. 225–236.)

Appeal—direct review of decree of circuit court—when jurisdiction is in issue.

1. A case cannot be brought up to the Supreme Court of the United States by direct appeal from a Federal circuit court, under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 5, as one in which the jurisdiction of the court is in issue, where the jurisdiction challenged is not that of the court rendering the decree from which the appeal is taken, but is that of the court which rendered a former decree, which is set up in the bill as the basis of the title in suit.

Appeal—direct review of decree of circuit court—case involving construction or application of Federal Constitution.

2. A case in which the contention is made that the decree which is the basis of suit is void as violating the right, under the Federal Constitution, to a jury trial and to due process of law, does not involve the construction or application of such Constitution, within the meaning of the act of March 3, 1891, § 5, authorizing direct appeals from the circuit or district courts to the Federal Supreme Court, where the real issue as to such prior decree was whether it was *res judicata* between the parties, or, as is contended by the appellants, was rendered without jurisdiction.

[No. 206.]

NOTE.—On direct review of circuit and district court judgments in Federal Supreme Court—see note to Gwin v. United States, 46 L. ed. U. S. 741.

Argued February 1, 1907. Decided March 25, 1907.

APPEAL from the Circuit Court of the United States for the District of Idaho to review a decree sustaining the validity of a prior decree set up in the bill as the basis of title in suit. Dismissed for want of jurisdiction.

Statement by Mr. Justice Day:

The defendant in error, complainant below, brought suit in the circuit court of the United States for the district of Idaho against the Empire State-Idaho Mining & Developing Company and the Federal Mining & Smelting Company, appellants herein. The [226]bill, filed July 27, 1904, alleged diversity *of citizenship as the ground of jurisdiction, and averred that the Empire State-Idaho Mining & Developing Company, the Federal Mining & Smelting Company, and complainant are the owners and possessors, as tenants in common, of the Skookum mine and mining claim and the ores therein contained, situated in Yreka mining district, Shoshone county, Idaho. The complainant was alleged to be the owner of an undivided one-eighth interest in the fee thereof, and the Empire State-Idaho Mining & Developing Company the owner of the undivided seven eighths of said mine and claim.

There are other allegations, not necessary to be here set out, and then, in the eighth paragraph of the bill, it is alleged:

"8. That prior to May 17, 1902, the defendant Empire State-Idaho Mining & Developing Company extracted from said mine, through said tunnels, large quantities of ore, and sold the same, and received all of the proceeds thereof, and paid no part of the same to complainant; that complainant brought suit on March 19, 1899, in the United States circuit court, district of Idaho (a court having jurisdiction of the parties and subject-matter), against said defendant and Charles Sweeny and F. Lewis Clark, to recover his share of the proceeds, and to quiet his title to said mine and ore bodies; and in said suit recovered a decree against said defendant Empire State-Idaho Mining & Developing Company, duly given and made in said United States circuit court at Moscow, Idaho, on or about November 17, 1902, for the sum of one hundred seventy-five thousand dollars ($175,000), and which decree quieted the title of this complainant to said one-eighth interest in said claim and ore bodies, a certified and attested copy of which decree was, on the —day of November, 1902, recorded in Shoshone county, Idaho, and the amount decreed to complainant therein remains unpaid and unsatisfied, excepting the sum of $5,523.42; that, as the result of an appeal from said decree by complainant, the same was, on the 10th day of May, 1904, so modified as to make the amount thereof $255,061.40, with interest thereon from February 15 until *paid, at 7 per cent per annum, and [227] the said amount and every part thereof is now unpaid."

The bill avers the extraction of a large amount of ore in which the complainant alleges he is entitled to an interest, and that the defendants the Empire State-Idaho Mining & Developing Company and the Federal Mining & Smelting Company deny the title of the complainant to the mining and ore bodies. It further avers that the defendants are appropriating the ores mined to their own use, and, after other allegations not necessary to be set out, prays for an injunction restraining the defendants from extracting ore from the Skookum mine pending the suit, and for an accounting for the ores extracted from the mines and claim since May 17, 1902.

By the amended answer the defendants, among other defenses, set up that the ores which they are extracting belong to a vein or lode not having its apex within the Skookum mining claim, but belonging to a vein having its apex within the lode mining claim lying to the north of the Skookum claim and a part of the San Carlos claim, owned by the defendants, and deny that the defendants are mining any ores in which the complainant has any right, and avers that the claim thereto is without merit; and, coming to answer the eighth paragraph of the bill, setting up the decree upon which the plaintiff relied for his title, the defendants set up paragraphs 6 and 7:

"6. Answering paragraph eighth of the bill, these defendants admit that an action was brought against the parties named in said paragraph as alleged therein, but deny that said action was brought to quiet title to said ore bodies, or that the decree therein did in fact quiet title to said ore bodies or to an undivided one-eighth interest therein in the complainant, and allege further concerning said decree in said action that the court, in the said action, had no jurisdiction to determine title to the said Skookum mine or to the ore bodies lying within or beneath the said mining claim, for the reason that the bill of complaint in the said action does *not purport to be an action to quiet title to the said mine or ore bodies, nor does the same make a case for the quieting of title thereto, nor is it such as to authorize the decree rendered in said action, purporting to quiet the title to said mine and ore bodies, and for the further reason alleged by defendants to be a fact, that no opportunity was given to the defendants

therein to litigate the title to said ore bodies before the decree in said action purporting to quiet title was rendered, and for the further reason that, at the time of the commencement of said action, the defendant herein, Empire State-Idaho Mining & Developing Company, was, as shown by the complaint herein, in exclusive possession of such ore bodies, and the complainant was out of possession thereof, and an action of law alone would lie in the Federal court to determine title to such ore bodies, and that the defendant therein, being the defendant Empire State-Idaho Mining & Developing Company, had a right, under the laws and Constitution of the United States, to a trial by jury of the question of title to said ore bodies, and defendants allege that so much of the decree in said action as undertook or purported to quiet title to such ore bodies was and is absolutely void as to the Empire State-Idaho Mining & Developing Company, because the same constituted and was in fact an attempt to deprive it of its property without due process of law within the meaning of article 5 of the amendments to the Constitution of the United States, and because the same constituted an adjudication of its property rights without its consent by the court without 7 of the amendments to the Constitution of the United States.

"7. The defendants attach hereto, marked Exhibit A, and pray that the same may be taken as a part of this answer, copies of the complaint, answer, and replication in the action referred to in the eighth paragraph in the bill, and allege that the same constituted the sole pleadings in the said action, and, together with the evidence, constituted the sole basis for the final decree rendered therein, a copy of which is at-
[229] tached *hereto and marked Exhibit B, and made a part hereof; that after the replication in said cause was filed testimony was taken before an examiner, on the part of the complainant, in support of the allegations contained in the bill, to wit, the allegations that the defendants Clark and Sweeney had acquired the one-eighth interest in the Skookum mine from the complainant by fraud, covin, and deceit, and testimony was introduced by the defendants contradicting the testimony of the complainant, and tending to support the affirmative allegations of the answer, and no testimony was offered or taken, either for complainant or defendants, concerning the said one-eighth interest except the evidence for and against fraud, covin, and deceit, as before alleged. Thereupon the said cause was submitted to the court for decision, and the said circuit court entered a decree in favor of the defendants therein. Thereupon complainant in that suit appealed to the United States court of appeals for the ninth circuit from the said decree, and the said court, after a hearing upon the pleadings and the evidence before it, found that the allegations of the bill relating to the fraud in procuring title to the one-eighth interest claimed by the said Hanley were sustained by the evidence, and the decree was reversed and the cause sent back to the circuit court for the further proceedings in accordance with the opinion. Thereupon an order was made by the circuit court directing an accounting, and evidence was introduced by complainant to show the amount and value of ores extracted from the Skookum mine prior to May, 1902, by the defendants in said suit. That defendants in the said action thereupon offered to prove that the said ore so extracted from underneath the Skookum mine prior to that time was part of the vein having its apex in the said San Carlos claim, above referred to, owned by defendants, and that the said San Carlos claim was so located that its extralateral rights included the ore bodies from which the said ores were extracted. The said offer to prove the said fact was thereupon denied by the said court, acting under *the order of the United States circuit [230] court of appeals for the ninth circuit, in a certain mandamus proceeding brought in said court to test the question; that defendants in the said action thereafter, and at all times, contended and insisted that they had a right to show in the accounting that the ores taken from under the Skookum claim were a part of the vein apexing in the San Carlos claim, of which the defendants were the owners, and that the court was without jurisdiction to render a decree in the said action quieting title to the Skookum mine, or to the ore bodies referred to in the bill of complaint, but its contentions and objections were overruled and the decree averred by the complainant was rendered notwithstanding such protests and objections; and defendants aver that the said decree purporting to quiet title in said ore bodies was rendered without evidence being taken upon the said contention of the defendants, and without any evidence whatever being heard which threw any light upon the contention; and said decree was thereafter, upon appeal to the United States circuit court of appeals for the ninth circuit, affirmed, the court in said cause holding as ground for its action that the bill of complaint made a cause for quieting title to the one-eighth interest in the Skookum mine and to the ore bodies in the limits thereof, and that the defendants in said

cause, having failed to plead title to the ore bodies in themselves by virtue of the facts hereinbefore set up, were estopped to litigate the said facts."

The complainant below filed exceptions to this amended answer, in which he averred that, in the former decree, the title to the ore bodies in question was quieted, and that the issues made in that case were within the jurisdiction and power of the court to determine, and that the question of the right and title to one eighth of the Skookum mine and mining claim and ores therein contained had been determined in the former suit in favor of the complainant, and the said question had become *res judicata* in a court having jurisdiction of the parties and the subject-matter.

[231] *Upon hearing the exceptions to the amended answer, they were sustained and the answer held insufficient. Thereupon the defendants, averring that the court was in error and that the said amended answer constituted a defense, declined to plead further, and elected to stand upon the amended answer. The complainant thereupon moved the court for a final decree for one eighth of the amounts stated in paragraph 9 of the answer to have been mined as therein stated. A final decree was rendered accordingly, and thereupon a direct appeal was taken to this court.

Mr. George Turner argued the cause, and, with Mr. F. T. Post, filed a brief for appellants.

Mr. Myron A. Folsom argued the cause and filed a brief for appellee.

Mr. Justice Day delivered the opinion of the court:

In the brief and argument of the learned counsel for the appellants it is said: "The sole question in the case is whether, on the facts set up and pleaded in the answer, there was jurisdiction in the United States circuit court in the former suit to render the judgment quieting in the complainant, Hanley, title to one eighth of *all* the ore bodies found within the boundaries of the Skookum mining claim. The lower court thought the answer failed to show want of jurisdiction, and sustained complainant's exceptions."

A preliminary question for examination in this court, although not made in argument by counsel, is whether this court has jurisdiction of this case by direct appeal from the judgment rendered in the circuit court of Idaho. It is apparent from the statement preceding this opinion that the extent and effect of the adjudication in the first case wherein the complainant alleges title was decreed to him, was the real controversy between the parties. The complainant contended *that the court in the [232] former case had adjudicated title to all of the ore bodies found within the boundaries of the "Skookum claim." The defendants contended that the ore bodies in controversy belonged to another mine, the San Carlos, the property of the defendants, by reason of the fact that they are of a vein which has its apex in the San Carlos mining claim, and not in the Skookum; and that the decree in the former suit was without jurisdiction in so far as it undertook to quiet title for such ore bodies, because the pleadings in that suit made no case for such decree.

If this case can come here by direct appeal it must be because it is within § 5 of the court of appeals act 1891, providing for direct appeals in certain cases from the circuit court to this court. 26 Stat. at L. 827, chap. 517, § 5. U. S. Comp. Stat. 1901, p. 488. It cannot be brought directly here as a case in which the jurisdiction of the court is in issue; for the jurisdiction challenged is not that of the court rendering the decree from which this appeal is taken, but is that of the court rendering the former decree, which is set up in the complaint as the basis of the title sued upon. Re Lennon, 150 U. S. 399, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123.

If the case is properly here, it must be because it is one which involves the construction or application of the Constitution of the United States. It has been repeatedly held that it is only when the Constitution of the United States is directly and necessarily drawn in question that such an appeal can be taken, and the case must be one in which the construction or application of the Constitution of the United States is involved as controlling. We think this case is not of that character. It is evident that the real issue as to the former judgment was whether it was *res judicata* between the parties, or, as contended by the appellants, rendered without jurisdiction. The court, in deciding against the appellants, decided that the court had jurisdiction, and that the former decree was conclusive. This decision does not necessarily and directly involve the construction or application of the Constitution of the United States.

*In World's Columbian Exposition v. [233] United States, 6 C. C. A. 71, 18 U. S. App. 159, 56 Fed. 657, Mr. Chief Justice Fuller, speaking for the court, said: "Cases in which the construction or application of the Constitution is involved, or the constitutionality of any law of the United States is drawn in question, are cases which

ent an issue upon such construction or lication or constitutionality, the deci- of which is controlling; otherwise ry case arising under the laws of the ted States might be said to involve the struction or application of the Constitu- n, or the validity of such laws."

le Lennon, supra, was a proceeding in eas corpus to discharge a party held up- an order for imprisonment for failing pay a fine imposed for contempt. The itioner alleged that the circuit court had jurisdiction of the case in which the or- of injunction had been issued, for vio- ion of which the petitioner was alleged be guilty of contempt; and that it had jurisdiction either of the subject-matter of the person of the petitioner. The ap- cation being denied and direct appeal ng taken to this court, it was held that would not lie under § 5, act of March 1891, because the jurisdiction of the cir- it court of the petition for habeas corpus s not in issue, nor was the construction application of the Constitution involved. the latter phase of the case Mr. Chief stice Fuller, speaking for the court, said: "Nor can the attempt be successfully ade to bring the case within the class of ses in which the construction or applica- n of the Constitution is involved in the ase of the statute, on the contention that e petitioner was deprived of his liberty thout due process of law. The petition es not proceed on any such theory, but tirely on the ground of want of jurisdic- on in the prior case over the subject- atter and over the person of peti- oner, in respect of inquiry into which e jurisdiction of the circuit court was ught. If, in the opinion of that court, the straining order had been absolutely void, the petitioner were not bound *by it, he ould have been discharged, not because he ould otherwise be deprived of due proc- s, but because of the invalidity of the pro- edings for want of jurisdiction. The opin- n of the circuit court was that jurisdiction the prior suit and proceedings existed, d the discharge was refused; but an ap- al from that judgment directly to this urt would not, therefore, lie on the ground at the application of the Constitution was volved as a consequence of an alleged er- neous determination of the questions ac- ally put in issue by the petitioner."

In Carey v. Houston & T. C. R. Co. 150 S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. , in which a bill in equity had been filed order to impeach and set aside a decree foreclosure on the ground of fraud and ant of jurisdiction in the foreclosure suit, was held that no case for appeal direct- to this court was made as one that in- volved the construction or application of the Constitution of the United States. In that case Mr. Chief Justice Fuller, delivering the opinion of the court, said:

"It is argued that the record shows that complainants had been deprived of their property without due process of law, by means of the decree attacked, but because the bill alleged irregularities, errors, and *jurisdictional* defects in the foreclosure proceedings and fraud in respect thereof and in the subsequent transactions, which might have enabled the railroad company, upon a direct appeal, to have avoided the decree of sale, or which, if sustained on this bill, might have justified the circuit court in setting aside that decree, it does not follow that the construction or application of the Constitution of the United States was involved in the case in the sense of the statute. In passing upon the validity of that decree the circuit court decided no question of the construction or the application of the Constitution, and, as we have said, no such question was raised for its consideration. Our conclusion is that the motion to dismiss the appeal must be sustained."

The cases cited were followed and the principles deducible *therefrom applied in [235] Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489. In that case it was contended, in a replication to an answer setting up certain former judgments rendered against the complainant as a bar to the suit brought by it to recover possession of the real property sold under the judgments, that they were awarded without due process of law, in violation of the 14th Amendment. And this was upon the theory that the service of process in the state courts upon the corporation's agent in the suits where the judgments were rendered was unauthorized by the laws of the state or the general principles of law. It was held that the case was not one directly involving the construction or application of the Federal Constitution within the meaning of § 5 of the act of March 3, 1891, and the writ of error was dismissed.

We think the principles involved in these cases decisive against jurisdiction in this court of this appeal. It is true that it is averred in the sixth paragraph of the amended answer above set forth that, in the action to determine title to the ore bodies, the mining company had the right, under the laws and Constitution of the United States, to a trial by jury, of which it was deprived; and that so much of the decree as undertook to quiet title to the ore bodies was rendered without jurisdiction, because the same constituted and was in fact an attempt to deprive the defendant

of its property without due process of law, in violation of the Federal Constitution. But these averments of conclusions as to constitutional rights do not change the real character of the controversy and make it a case in which the controlling rule of decision involves the construction or application of the Constitution of the United States.

The thing relied upon in this case was the controlling effect as *res judicata* of a decree rendered between the parties in another suit. And the real issue was as to the jurisdiction of the court to render the decree. The determination of that question did not involve the construction or application of [236]*the Constitution of the United States. The circuit court held that the court rendering the first decree had jurisdiction to determine the ownership of the ore bodies underneath the surface of the Skookum claim. The court thus really decided a question of *res judicata* between the parties upon general principles of law. And it does not convert the decision into one involving the construction and application of the Constitution of the United States to aver, argumentatively, that to give such effect to a former adjudication under the circumstances amounts to depriving a party of due process of law.

We are of opinion, therefore, that the case does not come within the 5th section of the circuit court of appeals act as one directly appealable to this court.

The appeal is dismissed for want of jurisdiction in this court.

ROCHESTER RAILWAY COMPANY, Plff. in Err.,
v.
CITY OF ROCHESTER.

(See S. C. Reporter's ed. 236-256.)

Corporations—consolidation of street railways—effect on contract exemption from paving obligations.

1. A contract exemption of a street railway company from paving obligations is not a "privilege" within the meaning of N. Y. Laws 1867, chap. 254, as amended by Laws 1879, chap. 503, empowering a railway company, being the lessee of the property of another railway company, to acquire the whole of the latter's capital stock, in which case its "estate, property, rights, privileges, and franchises" shall vest in and be held and enjoyed by the purchasing corporation "fully and entirely, and without change or diminution."

Corporations—conditions of incorporation—effect on exemptions enjoyed by predecessor in title.

2. A street railway company incorporated under N. Y. Laws 1884, chap. 22, which imposed upon it the duty of paving a portion of the street, cannot claim the benefit of a contract exemption from paving obligations enjoyed by a predecessor in title.

Corporations—dissolution—sale of capital stock.

3. A street railway company whose capital stock has been wholly acquired by a lessee corporation, pursuant to N. Y. Laws 1867, chap. 254, which, as amended by Laws 1879, chap. 503, provides that in such case the estate, property, rights, privileges, and franchises of the selling corporation shall vest in the purchasing corporation, to be thereafter controlled by the latter in its own name, cannot be regarded as still having a corporate existence which will enable the purchasing corporation to claim and enjoy, on behalf of the selling corporation, a contract exemption from paving obligations which the latter corporation enjoyed.

[No. 156.]

Argued January 14, 15, 1907. Decided March 25, 1907.

IN ERROR to the Supreme Court of the State of New York to review a judgment entered pursuant to the mandate of the Court of Appeals of that State, which reversed a judgment of the Appellate Division, Fourth Department of the Supreme Court, which had affirmed a judgment of the Trial Term of that court, held in and for the county of Monroe, dismissing the complaint in an action by a municipal corporation to recover from a street railway company a portion of the expense of paving a city street. Affirmed.

See same case below in Appellate Division, 98 App. Div. 521, 91 N. Y. Supp. 67; in Court of Appeals, 182 N. Y. 99, 70 L. R. A. 773, 74 N. E. 953.

Statement by Mr. Justice Moody:

The defendant in error brought an action against the plaintiff in error, a street surface railroad corporation, hereinafter called the Rochester Railroad, to recover $[illegible] 274.02, the expense of making new pavements of two streets within the space between the tracks, the rails of the tracks, and 2 feet in width outside the tracks of the railroad. The action was brought under § 98 of chapter 30 of the General Laws of New York, which was enacted in 1890, and is as f[illegible]:

Every street sur[illegible] railroad corporation

NOTE.—On the effect of consolidation of corporations—see notes to Louisville, N. A. & C. R. Co. v. Boney, 3 L.R.A. 435; Shields v. Ohio, 24 L. ed. U. S. 357; and Cantillon v. Dubuque & N. W. R. Co. 5 L.R.A. 726.

long as it shall continue to use any of s tracks in any street, avenue, or public ace, in any city or village, shall have and eep in permanent repair that portion of ich street, avenue, or public place between s tracks, the rails of its tracks, and 2 feet width outside of its tracks, under the pervision of the proper local authorities, d whenever required by them to do so, d in such manner as they may prescribe. case of the neglect of any such corporaon to make pavements or repairs after the piration of thirty days' notice to do so e local authorities may make the same the expense of such corporation.

The Rochester Railroad was incorporated February 25, 1890, under a law of New ork enacted May 6, 1884. New York ws 1884, chap. 252. That law authored the *formation of street surface railroad rporations and provided that they should ave all the powers and privileges granted, d be subject to all the liabilities imposed, this act." Among the liabilities was at imposed by § 9 of the act, which is as llows:

"Every such corporation incorporated nder, or constructing, extending, or operting a railroad constructed or extended nder, the provisions of this act, within the corporated cities and villages of this state, hall also, whenever and as required, and nder the supervision of the proper local uthorities, have and keep in permanent reair the portion of every street and avenue etween its tracks, the rails of its tracks, nd a space of 2 feet in width outside and djoining the outside rails of its track or racks, so long as it shall continue to use ich tracks, so constructed, under the prosions of this act. In case of the neglect such corporations to make such paveent or repairs the local authorities may ake the same at the expense of such orporation after the expiration of thirty ays' notice to do so."

Section 18 of the act provides that "all cts and parts of acts, whether general or pecial, inconsistent with this act, are ereby repealed, but nothing in this act hall . . . interfere with or repeal or validate any rights heretofore acquired nder the laws of this state by any horse ailroad company, or affect or repeal any ight of any existing street surface railroad ompany to construct, extend, operate, and aintain its road in accordance with the erms and provisions of its charter and the cts amendatory thereof."

The Rochester Railroad Company was inorporated for the purpose of acquiring the roperty of the Rochester City & Brighton ailroad Company, hereinafter called the righton Railroad. The Brighton Railroad was incorporated March 5, 1868, under a general law of the state of New York. Laws of 1850, chap. 140. That law contained no provision respecting the repairs of streets, and, differences having arisen between the Brighton Railroad and the city, as to the extent of the *burden of such re- [239] pairs properly to be borne by the railroad, they joined in an application to the legislature for the enactment of a law which should regulate that and other subjects. Such a law was enacted February 27, 1869, and its 5th section was as follows:

"Said company shall put, keep, and maintain the surface of the streets inside the rails of its tracks in good and thorough repair, under the direction of the committee on streets and bridges of the common council of said city of Rochester; but, whenever any of said streets are, by ordinance or otherwise, permanently improved, said company shall not be required to make any part or portion of such improvement, or bear any part of the expense thereof, but it shall make its rails in such street or streets conform to the grade thereof." [Laws of 1869, chap. 34.]

On the 25th day of February, 1890, the Brighton Railroad duly executed and delivered a lease of its property, franchises, rights, and privileges, for the unexpired term of its charter, to the Rochester Railroad, which accepted the lease and took possession of the property. Subsequently, in the same year, the Rochester Railroad acquired the entire capital stock of the Brighton Railroad. The acquisition of stock was in pursuance of the authority contained in chapter 254 of the Laws of New York of 1867, which, as amended by chapter 503 of the Laws of 1879, is as follows:

"Any railroad corporation created by the laws of this state, or its successors, being the lessee of the road of any other railroad corporation, may take a surrender or transfer of the capital stock of the stockholders, or any of them, in the corporation whose road is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the corporation taking such surrender or transfer shall thereafter, on a resolution electing so to do, to be entered *on their minutes, become *ex officio* the [240] directors of the corporation whose road is so held under lease, and shall manage and conduct the affairs thereof, as provided by law; and whenever the whole of the said capital stock shall have been so surrendered

or transferred, and a certificate thereof filed in the office of the secretary of state, under the common seal of the corporation to whom such surrender or transfer shall have been made, the estate, property, rights, privileges, and franchises of the said corporation whose stock shall have been so surrendered or transferred shall thereupon vest in and be held and enjoyed by the said corporation to whom such surrender or transfer shall have been made, as fully and entirely, and without change or diminution, as the same were before held and enjoyed, and be managed and controlled by the board of directors of the said corporation to whom such surrender or transfer of the said stock shall have been made, and in the corporate name of such corporation. The rights of any stockholder not so surrendering or transferring his stock shall not be in any way affected hereby, nor shall existing liabilities or the rights of creditors of the corporation, where stock shall have been so surrendered or transferred, be in any way affected or impaired by this act."

Subsequently the Rochester Railroad duly obtained permission to convert the road into an electric trolley road, expended large sums of money in doing so, and, in the acquisition of the stock of the Brighton Railroad and the conversion of its road into an electric road, relied upon the provisions of the act of 1869 as a contract exempting it, with respect to the streets covered by the tracks of the Brighton Railroad, from other street repairs than those therein described. The city acquiesced in this view until October, 1898, when, upon the suit of an owner of adjoining property, the court of appeals held that, under § 9 of the act of 1884, and § 98 of chapter 39 of the General Laws, which were regarded as substantially the same, the Rochester Railroad was bound to bear the expense of [241] a new pavement on *the location acquired from the Brighton Railroad. Conway v. Rochester, 157 N. Y. 33, 51 N. E. 395. Subsequently, the city repaved two streets which were within the location acquired and operated by the Brighton Railroad, prior to the passage of the act of 1884, and, in obedience to the decision in the Conway Case, assessed against the Rochester Railroad its share of the expense of pavement, and brought this action to recover the amount of the assessment. It was set up in defense of the action that, by the act of 1869, the state of New York had entered into an inviolable contract with the Brighton Railroad, exempting it from the expense of pavement, that the contract had passed with the property of the Brighton Railroad to the Rochester Railroad, and that the assessment was in violation of the Constitution of the United States. The contentions of the Rochester Railroad were denied by the court of appeals of New York (182 N. Y. 116, 70 L.R.A. 773, 74 N. E. 853), which held, first, that the statute mentioned did not constitute a contract between the state and the railroad company, and, second, that if it did, the exemption granted by the statute was personal to the Brighton Railroad, and did not pass to the Rochester Railroad. The case was remanded to the supreme court and a judgment entered pursuant to the remittitur from the court of appeals, and by writ of error that judgment is brought here for review.

Mr. Charles J. Bissell argued the cause, and, with Messrs. William C. Trull and Joseph S. Clark, filed a brief for plaintiff in error:

The merging company, the plaintiff in error, took everything which the lessor had, by the same title and to the same extent as any stockholder purchasing the entire stock would take it, only the merging company took title to all the property, privileges, etc., as well as to the stock. That everything was to pass to the merging company was clearly the legislative intent. Each corporation continued in life, the lessor corporation, although it had parted with all its property, as well as the lessee corporation, which acquired it.

Re New York Elev. Co. 43 N. Y. S. R. 651, 17 N. Y. Supp. 778, Affirmed in 133 N. Y. 690, 31 N. E. 627.

This distinction must necessarily be borne in mind in examining the several cases referred to and relied on by the majority of the court below in arriving at the conclusion that the contract, if one existed, was personal to the R. C. & B. road, and did not pass by the merger.

The several cases which it is desired to digest and bring to the attention of the court are of three different kinds: First, where it was claimed that the exemption from taxation passed to another company under a foreclosure sale.

Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; Chesapeake & O. R. Co. v. Virginia, 94 U. S. 718, 24 L. ed. 310; Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; Wilson v. Gaines, 103 U. S. 417, 26 L. ed. 401.

Second, where there was a consolidation of two corporations, one holding an exemption from taxation, into a new corporation, taking its life under existing law, and it was claimed that the exemption passed to the new corporation.

Shields v. Ohio, 95 U. S. 319, 24 L. ed. 265 U. S.

57; St. Louis, I. M. & S. R. Co. v. Berry, 113 . S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 29; Maine C. R. Co. v. Maine, 96 U. S. 499, 4 L. ed. 836; Atlantic & G. R. Co. v. eorgia, 98 U. S. 359, 25 L. ed. 185; Norlk & W. R. Co. v. Pendleton, 156 U. S. 667, 9 L. ed. 574, 15 Sup. Ct. Rep. 413; Keokuk W. R. Co. v. Missouri, 152 U. S. 301, 38 . ed. 450, 14 Sup. Ct. Rep. 592; Phœnix . & M. Ins. Co. v. Tennessee, 161 U. S. 174, 0 L. ed. 660, 16 Sup. Ct. Rep. 471; Picard . East Tennessee, V. & G. R. Co. 130 U. S. 37, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640; Vilmington & W. R. Co. v. Alsbrook, 146 . S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72.

Third, where, as in the case at bar, there as a merger of one corporation holding an xemption from taxation into another existng corporation, authorized to merge it, and he claim was made that the exemption from axation contained in the charter or franhises of the company merged passed to the erging company.

Yazoo & M. Valley R. Co. v. Adams, 180 . S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; outhwestern R. Co. v. Georgia, 92 U. S. 76, 23 L. ed. 762; Tomlinson v. Branch, 15 Vall. 460, 21 L. ed. 189; Central R. & Bkg. o. v. Georgia, 92 U. S. 665, 23 L. ed. 757; ennessee v. Whitworth, 117 U. S. 139, 29 . ed. 833, 6 Sup. Ct. Rep. 649; Humphrey . Pegues, 16 Wall. 244, 21 L. ed. 326.

Messrs. **William W. Webb and Benjamin . Cunningham** argued the cause and filed brief for defendant in error:

Powers of corporations are such, and such nly, as are conferred upon them by acts of he legislature of the state in which they re organized; and a railroad corporation, nless authorized by the legislature, canot lease its road and franchises to another, or can a railroad corporation, without like uthority, accept a lease of the road and ranchises of another railroad corporation.

Oregon R. & Nav. Co. v. Oregonian R. Co. 30 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 09.

A corporation cannot purchase the stock f another corporation without legislative ermission.

De La Vergne Refrigerating Mach. Co. v. erman Sav. Inst. 175 U. S. 40, 44 L. ed. 65, 0 Sup. Ct. Rep. 20.

The Rochester City & Brighton Railroad ompany practically passed out of existnce. Its stock was surrendered and it beame a company without any stock. Its estte, property, rights, privileges, and franhises vested in the Rochester Railway Comany, and its affairs were managed and conolled by the directors of the latter corration. As was said by this court in a milar case, nothing was left of the Rochesr City & Brighton Railroad Company but the memory of its existence,—a mere shadow of a name.

Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

The act under which the lease was made and the stock acquired by the plaintiff in error is conceded to be constitutional and valid, and the only question at issue is the effect which should be given to that act; and certainly the construction of that statute is one for the state courts, and their decision thereon must be final.

Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; Weber v. Rogan, 188 U. S. 10, 47 L. ed. 363, 23 Sup. Ct. Rep. 263; Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 170, 26 Sup. Ct. Rep. 23; Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 182, 50 L. ed. 143, 26 Sup. Ct. Rep. 41.

A special statutory exemption or privilege, such as an immunity from taxation or the right to fix and determine rates of fares, does not accompany the property in its transfer to a purchaser, in the absence of express direction to that effect in the statute.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484.

The same rule is applicable when one corporation is owned and operated by another, pursuant to statutory authority.

People's Gaslight & Coke Co. v. Chicago, 194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. Rep. 520.

The question as to whether such a statute operates to transfer the immunity to the purchasing or leasing corporation involves the construction of a state statute, and raised no Federal question.

Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310.

This court will agree with a state court in its construction of a state statute whenever the question decided is balanced with doubt.

Mead v. Portland, 200 U. S. 148, 50 L. ed. 413, 26 Sup. Ct. Rep. 171; Tampa Waterworks Co. v. Tampa, supra.

Where one statute grants to a company all the rights, privileges, and immunities of a former company, and a later statute grants to a corporation the rights and privileges of a former corporation, omitting the word "immunities," this omission must be considered as showing the legislative intent that the later statute should not operate to pass any special exemption or immunity, such as an immunity from taxation.

Phœnix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471.

A grant to a corporation of the franchises, rights, and privileges of a former corporation does not operate to transfer an immunity from taxation.

Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; Phœnix F. & M. Ins. Co. v. Tennessee, supra; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; Pickard v. East Tennessee, V. & G. R. Co. 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640; Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813.

A corporation is bound by the provisions of the act under which it is incorporated, and when it has taken advantage of the provisions of a statute granting it corporate capacity, it assumes all liabilities arising therefrom.

Grand Rapids & I. R. Co. v. Osborn, supra.

[245] *Mr. Justice Moody, after making the foregoing statement, delivered the opinion of the court:

By the judgment of the highest court of the state of New York, the city of Rochester was allowed to recover from the Rochester Railroad, a street surface railroad corporation, the cost of laying new pavements on the parts of two streets which lay between the tracks, the rails of the tracks and 2 feet outside of the tracks of the railroad. This recovery was had under a statute of New York which required such railroads to keep that part of the street over which their tracks ran in permanent repair. The requirement of permanent repair includes the duty of laying new pavements. Conway v. Rochester, 157 N. Y. 33, 51 N. E. 395.

The Rochester Railroad, not denying its liability in ordinary cases to bear the expense of paving, asserts that, with respect to the two streets in question, it was exempted from that burden by contract with the state of New York, made with its predecessor in title, the Brighton Railroad, and transferred to it with the title to the property of that railroad. The contract relied upon is found in a law enacted in 1869, for the benefit of the Brighton Railroad, which relieved that road from the burden of pavement of any part of the streets in which its tracks were situated. The Rochester Railroad claims that the law of New York, so far as that law imposes upon it the cost of the pavement of the streets in question, was in violation of that provision of the Constitution of the United States which forbids a state to pass any law impairing the obligation of contracts.

The Brighton Railroad was incorporated in 1862, under the general law of 1850, which contained no provision with respect to the railroad's share of street repairs. Until the enactment of the law of 1884, under which the Rochester Railroad was subsequently incorporated, there was no general law regulating the apportionment between street railroads and municipalities of the expense of such repairs, and the *question [246] was determined in individual cases either by agreement or a special law. Differences having arisen between the Brighton Railroad and the city of Rochester as to the share of the expense of street repair which ought to be borne by the railroad, they joined in a request for legislation which would settle this and other disagreements. In response to that request the law of 1889 was enacted. The 5th section of the law, after providing that the railroad should put and keep the surface and street inside of the rails of its tracks in repair, enacts that: "Whenever any of said streets are, by ordinance or otherwise, permanently improved, said company shall not be required to make any part or portion of such improvement, or bear any part of the expense thereof."

This law, obviously, as held by the court of appeals, exempted the railroad from the expense of new pavements, which is the expense sought to be recovered in this action. This was the effect conceded to the statute by the city for the whole time during which the railroad property was owned and operated by the Brighton Railroad, and even after it parted with the property, and until the decision in Conway v. Rochester, supra, in 1898. Whether this statute was a contract between the state of New York and the Brighton Railroad, inviolable by the Federal Constitution, and if so, whether its benefits have been waived or it has been lawfully modified or repealed by virtue of the powers reserved by the Constitution or laws of New York, are questions which have been much argued at the bar. We do not deem it necessary in this case to decide those questions, and therefore put out of view many facts found in the record which were deemed by both parties to be relevant to them. We assume, for the purpose of our decision, that there was a contract exempting the Brighton Railroad from the expense of street pavements, and that the contract could not constitutionally be impaired by the state of New York, and that its benefits have not been waived.

It becomes, therefore, necessary to inquire whether the *contract has been transferred with the property of the Brighton Railroad to the Rochester Railroad, the plaintiff in error.

The Rochester Railroad was incorporated for the purpose of acquiring the property of the Brighton Railroad, which was accomplished by a lease of the property, franchises, rights, and privileges of the Brighton Railroad, followed by the purchase of its capital stock. Th[illegible] was done under the authority of a [illegible] which provided that

l corporation, being the lessee of erty of another railroad corpo- ight acquire the whole of the ock of the latter, and in such a estate, property, rights, privileges, hises should vest in and be held yed by" the purchasing corpo- t is contended that the effect of fer under this law is to vest in ster Railroad the exemption from se of street pavement which the Railroad enjoyed through the with the state of New York. This presents the question to be de-

art has frequently had occasion to ether an immunity from the exer- vernmental power which has been y contract to one has, by legis- hority, been vested in or trans- another, and in the decisions neral principles, which control in nination of the case at bar, have blished. Although the obligations contract are protected by the onstitution from impairment by the contract itself is not property, such, can be transferred by the another, because, being personal ith whom it was made, it is in- f assignment. The person with contract is made by the state inue to enjoy its benefits un- as long as he chooses, but there end, and he cannot, by any form ance, transmit the contract or its a successor. Morgan v. Louisi- . S. 217, 23 L. ed. 860; Wilson v. 3 U. S. 417, 26 L. ed. 401; Louis- R. Co. v. Palmes, 109 U. S. 244, 922, 3 Sup. Ct. Rep. 193; Picard ennessee, V. & G. R. Co. 130 U. S. ed. 1051, 9 Sup. Ct. Rep. 640; St. S. F. R. Co. v. Gill, 156 U. S. 649. 67, 15 Sup. Ct. Rep. 484; Norfolk o. v. Pendleton, 156 U. S. 667, 39 , 15 Sup. Ct. Rep. 413. But the virtue of the same power which e original contract of exemption, r by the same law or by subse- s, authorize or direct the trans- exemption to a successor in title. se the exemption is taken, not by the inherent right of the original ssign it, but by the action of the uthorizing or directing its trans- determining whether a contract ion from a governmental power d, so in determining whether its o another was authorized or very doubt is resolved in favor of ance of the governmental power, and unmistakable evidence of the art with it is required.

Keeping these fundamental principles steadily in mind, we proceed to inquire whether the state of New York has authorized or directed the transfer from the Brighton Railroad to the Rochester Railroad of the contract of exemption. A legislative authorization of the transfer of "the property and franchises" (Morgan v. Louisiana and Picard v. East Tennessee, V. & G. R. Co. ubi supra); of "the property" (Wilson v. Gaines and Louisville & N. R. Co. v. Palmes, ubi supra); of "the charter and works" (Memphis & L. R. R. Co. v. Railroad Comrs. [Memphis & L. R .R. Co. v. Berry], 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299); or of "the rights of franchise and property" (Norfolk & W. R. Co. v. Pendleton, ubi supra),—is not sufficient to include an exemption from the taxing or other power of the state, and it cannot be contended that the word "estate" has any larger meaning. It is, however, argued that the word "privileges" is sufficiently broad to embrace within its meaning such an exemption, and that, when it is added to the other words, the legislative intent to transfer the exemption is clearly manifested, and that the words of the law under consideration, "the estate, property, rights, privileges, and franchises," indicate the purpose to vest in the purchasing corporation every asset of the selling corporation which is of conceivable value. There is authority *sustaining this position, which [249] cannot be set aside without examination.

In the case of Humphrey v. Pegues, 16 Wall. 244, 21 L. ed. 326, it appeared that the charter of the Northeastern Railroad Company, granted by the state of South Carolina, originally contained no exemption from taxation, but that, by amendment to the charter, some years later, the real estate and stock of the company were exempted from all taxation during the continuance of its charter. Subsequently the legislature granted the charter of the Cheraw & Darlington Railroad Company, and provided that "all the powers, rights, and privileges granted by the charter of the Northeastern Railroad Company are hereby granted to the Cheraw & Darlington Railroad Company." The state of South Carolina attempted to tax the stock and property of the Cheraw & Darlington Railroad Company, and the validity of that taxation was the question in the case. The court held that the powers, rights, and privileges granted to the Cheraw & Darlington Railroad Company were those contained in the amendment of the charter, as well as those contained in the original charter, and said, by Mr. Justice Hunt: "All the 'privileges,' as well as powers and rights, of the prior company, were granted to the latter. A

more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage, of a special exemption from a burden falling upon others." Upon this reasoning it was held that the stock and real estate of the Cheraw & Darlington Railroad Company were exempt from taxation. See Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252.

In Chesapeake & O. R. Co. v. Virginia, 94 U. S. 718, 24 L. ed. 310, it was said that an act conferring upon a railroad corporation "the benefits of the charter" of another corporation which had an immunity from taxation, and "the rights, privileges, fran-
[250] chises, *and property" of another corporation, which, when formed, would have the "rights, privileges, and franchises and property" of the corporation holding the immunity, was sufficient to transfer the immunity from taxation. But this expression of opinion was unnecessary to the decision of the case, which merely decided that where a railroad corporation acquired the property of another railroad corporation, to which was attached an immunity from taxation, that immunity did not extend beyond the property thus acquired. In Southwestern R. Co. v. Georgia, 92 U. S. 676, note, 23 L. ed. 762, where a statute allowed the Muscogee Railroad to unite with the Southwestern Railroad into one company, under the charter of the latter, and it was provided that "all the rights, privileges, and property [of the Muscogee Railroad Company] shall be part and parcel of the Southwestern Railroad," it was held that the immunity from taxation enjoyed by the Muscogee Railroad passed with its property to the Southwestern Railroad.

In Tennessee v. Whitworth, 117 U. S. 139, 29 L. ed. 833, 6 Sup. Ct. Rep. 649, it was held that a statute conferring upon a railroad corporation "all the rights, powers, and privileges" of another railroad corporation, and "all the powers and privileges" of a third railroad corporation, included the immunities from taxation enjoyed respectively by the latter corporations, the ground of the decision being that an exemption from taxation is, in the common acceptation of the term, a privilege.

If the authority of these four cases, supported by some *dicta* which need not be cited, remained unimpaired, it would justify the opinion that a legislative transfer of the "privileges" of a corporation includes an exemption from the taxing or other governmental power granted by a contract with the state. But other and later cases have essentially modified the rule which may be deduced from them.

In the case of the Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813, it was held that the foreclosure of a mortgage on railroad property under the provisions of a statute which authorized the purchaser under a foreclosure sale to become a corporation, and provided that it should "succeed to all such franchises, rights, and privileges" as were possessed by the mortgagor company, did not vest in the purchasing corporation an immunity from taxation.

In Picard v. East Tennessee, V. & G. R. Co. 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640, Mr. Justice Field, in delivering the opinion of the court, said: "The later, and, we think, the better, opinion, is that unless other provisions remove all doubt of the intention of the legislature to include the immunity in the term 'privileges,' it will not be so construed. It can have its full force by confining it to other grants to the corporation."

In Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72, Mr. Chief Justice Fuller, in delivering the opinion of the court, said, on page 287, L. ed. page 979, Sup. Ct. Rep. page 77: "We do not deny that exemption from taxation may be construed as included in the word 'privileges,' if there are other provisions removing all doubt of the intention of the legislature in that respect."

In Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592, Mr. Justice Brown, in delivering the opinion of the court, said: "Whether, under the name 'franchises and privileges,' an immunity from taxation would pass to the new company, may admit of some doubt, in view of the decisions of this court, which, upon this point, are not easy to be reconciled."

These conflicting views were before the court in Phœnix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471. The plaintiff in error in that case claimed to have an immunity from taxation by virtue of a provision in its charter granting it "all the rights and privileges" of the De Soto Insurance Company, which had an immunity from taxation by virtue of a provision in its charter granting it "all the rights, privileges, and immunities" of the Bluff City Insurance Company, whose charter contained an expressed immunity from taxation. Mr. Justice Peckham, in delivering the opinion of the court, stated the question for decision in these words: "Is immunity from taxation granted to plaintiff in [illegible] or under language

which grants 'all the rights and privileges' "of a company which has such immunity?" Much significance was given to the fact that the word "immunity," which clearly includes an exemption, was used in the charter of the De Soto company, and not used in the charter of the plaintiff in error, granted seven years later. But the decision was not rested on this circumstance, although the omission was thought to cast a grave doubt upon the plaintiff's claim. The opinion reviews all the cases, cites the foregoing quotations from the opinions of Mr. Justice Brown, Mr. Justice Field, and of the Chief Justice, and, after saying: "There must be other language than the mere word 'privilege,' or other provisions in the statute removing all doubt as to the intention of the legislature before the exemption will be admitted," concludes that: "If this were an original question we should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the present time the weight of authority, as well as the better opinion, is in favor of the same conclusion which we should otherwise reach."

In Gulf & S. I. R. Co. v. Hewes, 183 U. S. 6, 46 L. ed. 86, 22 Sup. Ct. Rep. 26, Mr. Justice Brown, in delivering the opinion of the court, said, citing this case as authority: "The better opinion is that a subrogation to the 'rights and privileges' of a former corporation does not include an immunity from taxation."

We think it is now the rule, notwithstanding earlier decisions and *dicta* to the contrary, that a statute authorizing or directing the grant or transfer of the "privileges" of a corporation which enjoys immunity from taxation or regulation should not be interpreted as including that immunity. We, therefore, conclude that the words "the estate, property, rights, privileges, and franchises" did not embrace within their meaning the immunity from the burden of paving enjoyed by the Brighton Railroad Company. Nor is there anything in this, or any other statute, which tends to show that the legislature used the words with any larger meaning than they would have standing alone. The meaning is not *enlarged, as faintly suggested, by the expression in the statute that they are to be held by the successor "fully and entirely, and without change and diminution,"—words of unnecessary emphasis, without which all included in "estate, property, rights, privileges, and franchises" would pass, and with which nothing more would pass. On the contrary, it appears, as clearly as it did in the Phœnix Fire Insurance Company Case, that the legislature intended to use the words "rights, franchises, and privileges" in the restricted sense. The law under which this transfer was made was enacted in 1867 and amended in 1879. In 1869 an act was passed authorizing the merger and consolidation of railroad corporations (chap. 917, Laws of 1869), which provided that, upon the consolidation, "all and singular the rights, privileges, *exemptions*, and franchises should be transferred to the new corporation." In 1876 an act was passed (chap. 446, Laws of 1876) which authorized the purchasers of the rights, privileges, and franchises of railroad corporations (except street railroad corporations) under a foreclosure sale to become a corporation, and thereupon have "all the franchises, rights, powers, privileges, and *immunities*" of the corporation whose property was sold. The omission in the statute under consideration of the words "exemptions" or "immunities," either of which would be apt to transfer the immunity claimed, is significant, in view of the fact that each of these words was employed by the legislature about the same time in other statutes dealing with the transfer of corporate property, and raises a doubt of the intention of the legislature, which, in cases of the interpretation of a statute claimed to devest the state of a governmental power, is equivalent to a denial.

The conclusion that the exemption of the Brighton Railroad did not accompany the transfer of its property to the Rochester Railroad is reached by another and entirely independent course of reasoning, based upon a consideration of the law under which the Rochester Railroad was incorporated. That was the general incorporation law of 1884. Every corporation *incorporated under it was [254] made "subject to all the liabilities imposed by the act" (§ 1), and directed to keep the street surface about and between its tracks "in permanent repair" (§ 9), which, as held by the state court, includes the duty of laying such pavement as is in controversy here. We follow the construction by that court of § 9 so far as it holds that that section applies to all tracks, whether constructed under this law or any other law, owned and operated by a corporation incorporated under it. Whether the section applies, or constitutionally can apply, to a corporation not deriving its powers from the act of 1884, in respect of tracks not constructed under its provisions, it is not necessary for us to consider. There may have been a saving of the rights of such

corporations under § 18. That question would be presented if the Brighton Railroad, instead of a successor in title, were claiming an exemption. Here a corporation deriving its right to exist under the act of 1884 is asserting an exemption from a duty imposed upon it by the law which created it. The authorities are numerous and conclusive that no corporation can receive, by transfer from another, an exemption from taxation or governmental regulation which is inconsistent with its own charter or with the Constitution or laws of the state then applicable; and this is true, even though, under legislative authority, the exemption is transferred by words which clearly include it. Trask v. Maguire, 18 Wall. 391, 21 L. ed. 938; Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Maine C. R. Co. v. Maine, 96 U. S. 499, 24 L. ed. 836; Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; Memphis & L. R. R. Co. v. Railroad Comrs. (Memphis & L. R. R. Co. v. Berry) 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299; St. Louis, I. M. & S. R. Co. v. Berry, 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; Norfolk & W. R. Co. v. Pendleton, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. Rep. 413; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310; San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. Rep. 261.

The principle governing these decisions, so plain that it needs no reasoning to sup-
[255] port it, is that those who seek and *obtain the benefit of a charter of incorporation must take the benefit under the conditions and with the burdens prescribed by the laws then in force, whether written in the Constitution, in general laws, or in the charter itself. The Rochester Railroad, therefore, having accepted its charter under a law which imposed upon it the duty of laying pavements, is bound to perform that duty, even in respect of tracks which, while owned by a predecessor in title, would have been exempt.

The foregoing considerations would be conclusive of the case were it not that the plaintiff in error takes another position, which, if tenable, would avoid the result reached by either course of reasoning. It is insisted that this is not a case of transfer of an exemption: that the rules governing transfer are not applicable here; that the Brighton Railroad has not ceased to exist as a corporation; that it has been merely joined by merger with the Rochester Railroad, which controls it by stock holdings, and operates it by virtue of its franchises; and that, therefore, the Rochester Railroad may claim and enjoy the exemption of the Brighton Railroad in its behalf in respect of its property. In support of this view counsel cite Tomlinson v. Branch, 15 Wall. 460, 21 L. ed. 189; Central R. & Bkg. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757; Tennessee v. Whitworth, ubi supra. These cases hold that where corporations are united in such manner that one continues to exist as a corporation, owning and operating its property, by virtue of its own charter, the corporation thus continuing to exist still holds its immunities and exemptions in respect of the property to which they apply. But the cases have no application here. It may well be that a proceeding for condemnation of property, begun by the Brighton Railroad, would not abate by reason of its consolidation with the Rochester Railroad, as held in [Re New York Elev. R. Co.] 43 N. Y. S. R. 651, 17 N. Y. Supp. 778, Affirmed in 133 N. Y. 690, 31 N. E. 627. An examination, however, of the statute under which the union of the two corporations was made, and the transactions by which the union was accomplished, shows that the Brighton *Railroad has ceased to exist as a corporation. The Rochester Railroad first took a lease of the Brighton Railroad, apparently for the purpose of bringing itself within the provisions of the act of 1884. Then all the stock of the latter corporation was acquired by exchange of shares of stock of the former corporation. Then a certificate of the transfer of stock was filed with the secretary of state. Thereupon, by operation of the law, the "estate, property, rights, privileges, and franchises" of the Brighton Railroad vested in the Rochester Railroad, to be thereafter controlled by the Rochester Railroad in its own corporate name. The law does not expressly dissolve the selling corporation, but it leaves it without stock, officers, property, or franchises. A corporation without shareholders, without officers to manage its business, without property with which to do business, and without the right lawfully to do business, is dissolved by the operation of the law which brings this condition into existence. Maine C. R. Co. v. Maine; Keokuk & W. R. Co. v. Missouri; and Yazoo & M. Valley R. Co. v. Adams,—ubi supra.

The judgment of the Supreme Court of New York is, therefore, affirmed.

Mr. Justice White concurs in the result.

WARD J. PEARCY, Plff. in Err.,
v.
NEVADA N. STRANAHAN.

e S. C. Reporter's ed. 257–274.)

–what is foreign country—Isle of

The Isle of Pines must be regarded east *de facto* under the jurisdiction Republic of Cuba, and hence, as a country" within the meaning of the tariff act of July 24, 1897 (30 Stat. 51, chap. 11, U. S. Comp. Stat. 1901, , since the United States has never ossession of such island as included erritory ceded by Spain to the United in the treaty of peace, but, instead, its legislative and executive depart- has recognized the Cuban govern- s rightfully exercising sovereignty e Isle of Pines as a *de facto* govern- ntil the *de jure* status shall be deter-

[No. 1.]

ted March 4, 1907. Decided April 8, 1907.

RROR to the Circuit Court of the ited States for the Southern District York to review a judgment sustain- emurrer to, and dismissing, the com- n an action to recover the value of nported from the Isle of Pines which n seized for the nonpayment of du- ffirmed.

acts are stated in the opinion.

ames C. Lenney submitted the cause ntiff in error:

aphically the two islands are dis- separate, being, at their nearest f approach, about 40 miles apart. ll say that the maritime jurisdiction sland of Cuba extends thus far?

luction to International Law, 6th , p. 69; Hautefeuille, Droit de Neu- le 1, chap. 3, § 1, p. 89.

reaty should be most liberally con- Its interpretation is to be sought notives and policy of the parties and words and in their acts.

d States v. Percheman, 7 Pet. 57–65, 607–610.

ney General Bonaparte, Solicitor Hoyt, and Mr. Otis J. Carlton sub- he cause for defendant in error:

er the Isle of Pines be included he boundaries of the United States itical question, which cannot be de- this court, being nonjudicial in its

v. Neilson, 2 Pet. 253, 7 L. ed. 415; v. Lee, 12 Pet. 511, 9 L. ed. 1176; States v. Arredondo, 6 Pet. 691, 8 7; Jones v. United States, 137 U. S. L. ed. 691, 11 Sup. Ct. Rep. 80.

The courts of the United States are scrupulous to exercise no power not clearly judicial in its nature.

Hayburn's Case, 2 Dall. 409, 1 L. ed. 436; United States v. Ferreira, 13 How. 40, 14 L. ed. 42; United States v. Todd, 13 How. 52, note, 14 L. ed. 47, note; Gordon v. United States, 117 U. S. 697, Appx.

If it be considered that the title to the Isle of Pines has been determined by the political departments to be in the United States, the fact that the question of ownership, by mutual agreement between the United States and the Republic of Cuba, is to be settled by arbitration, the adjudication to take the form of a treaty, excludes this court from its jurisdiction to decide the question of title in this case.

United States v. Ferreira, supra; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 280, 15 L. ed. 376; Bates & G. Co. v. Payne, 194 U. S. 109, 48 L. ed. 895, 24 Sup. Ct. Rep. 595; United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644.

This court will put itself in the position of the government when the treaty was proposed and ratified, and will avail itself of all the light which the President had when he made the treaty, and which the Senate had when it was ratified.

Platt v. Union P. R. Co. 99 U. S. 48, 64, 25 L. ed. 424, 429; Smith v. Townsend, 148 U. S. 490, 494, 37 L. ed. 533, 534, 13 Sup. Ct. Rep. 634; United States v. Laws, 163 U. S. 258, 41 L. ed. 151, 16 Sup. Ct. Rep. 998; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511.

This court will follow that interpretation which the political departments have put upon treaties.

Foster v. Neilson, 2 Pet. 253, 307, 309, 7 L. ed. 415, 433, 434; Cherokee Nation v. Georgia, 5 Pet. 1, 46, 8 L. ed. 25, 41; United States v. Arredondo, 6 Pet. 691, 711, 8 L. ed. 547, 555; Garcia v. Lee, 12 Pet. 511, 9 L. ed. 1176.

The Isle of Pines, by a well-settled principle of international law, is a part of Cuba.

Hall, International Law, 1895 ed. pp. 129, 130.

Cuba is, in fact, in possession and exercising the powers of government, and that situation brings this case, even upon the supposition that the Isle of Pines was ceded to the United States, within the principle of the following cases:

De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743; Keene v. M'Donough, 8 Pet. 308, 8 L. ed. 955; Pollard v. Kibbe, 14 Pet. 353, 10 L. ed. 490; Hallett v. Doe, 7 Ala. 882; The Fama, 5 C. Rob. 107;

United States v. Rice, 4 Wheat. 246, 4 L. ed. 562.

Mr. Chief Justice Fuller delivered the opinion of the court:

Plaintiff brought his action in the circuit court of the United States for the southern district of New York against the then collector of the port of New York to recover the value of certain cigars seized by him, which had been brought to that port from the Isle of Pines, where they had been produced and manufactured. This seizure was made under the Dingley act, so called (act July 24, 1897, 30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1626), and the regulations of the Secretary of the Treasury thereunder. The Dingley act provided for the imposition of duties "on articles imported from foreign countries," and in plaintiff's complaint it was asserted that the Isle of Pines was "in possession of and part of the United States," and hence domestic territory. The government demurred, the demur-
[263] rer was sustained, the *complaint dismissed, and the case brought here on a writ of error.

Whether the Isle of Pines was a part of the United States is a conclusion of law not admitted by the demurrer. It was certainly not such before the treaty of peace with Spain [30 Stat. at L. 1754], and, if it became so, it was by virtue of that treaty. The court takes judicial cognizance whether or not a given territory is within the boundaries of the United States, and is bound to take the fact as it really exists, however it may be averred to be. Jones v. United States, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80; Lincoln v. United States, 197 U. S. 417, 49 L. ed. 816, 25 Sup. Ct. Rep. 455; Taylor v. Barclay, 2 Sim. 213.

August 12, 1898, a protocol of agreement for a basis for the establishment of peace was entered into between the United States and Spain, which provided:

"Article 1. Spain will relinquish all claim of sovereignty over and title to Cuba.

"Article 2. Spain will cede to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also an island in the Ladrones, to be selected by the United States." 30 Stat. at L. 1742.

This was followed by the treaty of peace, ratified April 11, 1899, containing the following articles:

"Article 1. Spain relinquishes all claim of sovereignty over and title to Cuba.

"And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may, under international law, result from the fact of its occupation, for the protection of life and property.

"Article 2. Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones." 30 Stat. at L. 1754, 1755.

In Neely v. Henkel, 180 U. S. 109, 45 L. ed. 448, 21 Sup. Ct. Rep. 302 (Jan. 14, 1901), the question was whether Cuba was a foreign country or foreign territory within the act of Congress of June 6, 1900 (31 Stat. at L. 656, chap. 793, U. S. Comp. Stat. 1901, p. 3591), *providing for the extradition from [264] the United States of persons committing crimes within any foreign country or foreign territory or any part thereof, occupied or under the control of the United States. And it was held that Cuba was within this description. Mr. Justice Harlan, delivering the opinion of the court, said:

"The facts above detailed make it clear that, within the meaning of the act of June 6, 1900, Cuba is foreign territory. It cannot be regarded, in any constitutional, legal, or international sense, a part of the territory of the United States.

"While by the act of April 25, 1898 [30 Stat. at L. 364, chap. 189], declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several states to such extent as was necessary, to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States, but only for the purpose of compelling the relinquishment by Spain of its authority and government in that island, and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the government, by the joint resolution of April 20, 1898 [30 Stat. at L. 738, U. S. Comp. Stat. 1901, p. 2769], expressly disclaimed any purpose to exercise sovereignty, jurisdiction, or control over Cuba 'except for the pacification thereof,' and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view, and, so far as the court is informed by the public history of the relations of this country with that island, nothing has been done inconsistent with the declared object of the war with Spain.

"Cuba is none the less foreign territory, within the [illegible] of the act of Congress, because it is [illegible] military governor appointed by and representing the President in the work of [illegible] the inhabitants of

that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference *by other nations. The occupancy of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

"It is true that, as between Spain and the United States,—indeed, as between the United States and all foreign nations,—Cuba, upon the cessation of hostilities with Spain, and after the treaty of Paris, was to be treated as if it were conquered territory. But, as between the United States and Cuba, that island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action."

If, then, the Isle of Pines was not embraced in article 2 of the treaty, but was included within the term "Cuba" in article 1, and therefore sovereignty and title were merely relinquished, it was "foreign country" within the Dingley act.

This inquiry involves the interpretation which the political departments have put upon the treaty. For, in the language of Mr. Justice Gray, in Jones v. United States, "who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens, and subjects of that government."

By the joint resolution of April 20, 1898 (30 Stat. at L. 738, U. S. Comp. Stat. 1901, p. 2790), entitled "Joint Resolution for the Recognition of the Independence of the People of Cuba, Demanding That the Government of Spain Relinquish Its Authority and Government in the Island of Cuba, and to Withdraw Its Land and Naval Forces from Cuba and Cuban Waters, and Directing the President of the United States to Use the Land and Naval Forces of the United States to Carry These Resolutions into Effect," the United States disclaimed any disposition or intention to exercise sovereignty or control over Cuba, except in the pacification thereof, and *asserted its determination, when that was accomplished, to leave the control of the island to its people. What was the signification of the word "Cuba" at that time?

The record of the official acts of the Spanish government from 1774 to 1898 demonstrates that the Isle of Pines was included in the political division known as "Cuba." The first official census of Cuba, in 1774; the "Statistical Plan of the Ever Faithful Isle of Cuba for the Year 1827;" the establishment by the governor general, in 1828, of a colony on the island; the census of 1841; the budgets of receipts and expenses; the census for 1861, 1877, 1887, and so on, all show that the Isle of Pines was, governmentally speaking, included in the specific designation "Cuba" at the time the treaty was made and ratified, and the documents establish that it formed a municipal district of the province of Habana.

In short, all the world knew that it was an integral part of Cuba, and in view of the language of the joint resolution of April 20, 1898, it seems clear that the Isle of Pines was not supposed to be one of the "other islands" ceded by article 2. Those were islands not constituting an integral part of Cuba, such as Vieques, Culebra, and Mona islands, adjacent to Porto Rico.

Has the treaty been otherwise interpreted by the political departments of this government? The documents to which we have had access, with the assistance of the presentation of the facts condensed therefrom in the brief for the United States, enable us to sufficiently indicate the situation in that regard, and we think it proper to do this, notwithstanding the determination of the case turns at last on a short point requiring no elaboration.

The Spanish evacuated Havana January 1, 1899, and the government of Cuba was transferred to a military governor as the representative of the President of the United States. The President ordered, August 17, 1899, a census to be taken as a first step toward assisting "the people of Cuba" to establish "an effective system of self-government." In accomplishing *this the island [267] was divided into 1,607 enumeration districts. Three enumerators took the census of the Isle of Pines, which was described as a municipal district of the judicial district of Bejucal, in the province of Havana. The report on the census, as published by the War Department in 1900, stated: "The government of Cuba has jurisdiction not only over the island of that name, but also over the Isle of Pines, lying directly to the south of it, and more than a thousand islets and reefs scattered along its northern and southern coasts. . . . The Isle of Pines, with an area of 840 square miles, is a municipal district of the province of Habana. . . . The total population of Cuba, including the Isle of Pines and the neighboring keys, was, on October 16, 1899, 1,572,797."

The population tables give the population

of the Isle of Pines as a municipal district of Havana province, and so of the statistics as to rural population; sex, nativity, and color; age and sex; birthplace; conjugal condition; school attendance; foreign whites; number and size of families; dwellings of families,—these and like items are given as to the Isle of Pines as under the province of Habana.

In August, 1899, the military governor of Cuba appointed a mayor and first assistant mayor of the Isle of Pines.

On June 16, 1900, an election was held throughout the island, at which the people of Cuba in all their municipalities elected their municipal officers, participated in by the inhabitants of the Isle of Pines, as is stated in the report of the Committee on Foreign Relations, Senate Document No. 205, Fifty-ninth Congress, though this was denied in a minority report.

A constitutional convention was called and the inhabitants of the Isle of Pines participated in the election of delegates thereto. September 15, 1900.

The convention concluded its work by October 1, 1901, and December 31, 1901, an election was held to choose governors of provinces, provincial councilors, members of the house of representatives, and presidential [268] and senatorial electors, under *an order of General Wood of October 14, 1901, No. 218, approved by the War Department, which divided the province of Habana into four circuits, the third being composed of several ayuntamientos, of which the Isle of Pines was one.

February 24, 1902, the electors met, chose senators, and elected Señor Palma, President, and Señor Romero, Vice President.

The government was transferred to Cuba, May 20, 1902, and in making the transfer, and declaring the occupation of Cuba by the United States and the military government of the island to be ended, the military governor wrote to "The President and Congress of Cuba," among other things: "It is understood by the United States that the present government of the Isle of Pines will continue as a *de facto* government, pending the settlement of the title to said island by treaty, pursuant to the Cuban Constitution and the act of Congress of the United States approved March 2, 1902 [1]." [31 Stat. at L. 897, chap. 803.] On the same day President Palma replied:

"It is understood that the Isle of Pines is to continue *de facto* under the jurisdiction of the government of the Republic of Cuba, subject to such treaty as may be entered into between the government of the United States and that of the Cuban Republic, as provided for in the Cuban Constitution and in the act passed by the Congress of the United States, and approved on the 2d of March, 1901." 31 Stat. at L. 897, chap. 803.

At that date the Isle of Pines was actually being governed by the Cubans through municipal officers elected by its inhabitants, and a governor of the province of Habana, councilors, etc., in whose choice they had participated. And see Neely v. Henkel, 180 U. S. 109, 117, 118, 45 L. ed. 448, 454, 455, 21 Sup. Ct. Rep. 302.

February 16, 1903, the Senate of the United States, by resolution, requested the President "to inform the Senate as to the present status of the Isle of Pines, and what government is exercising authority and control in said island."

In reply the President submitted a report from the Secretary of War, which stated:

*"The nature of the *de facto* government [269] under which the Isle of Pines was thus left pending the determination of the title thereof by treaty is shown in the following indorsement upon a copy of the said resolution by the late military governor of Cuba:

[Here follows the indorsement, dated February 20, 1903, of which the following is a part:]

" 'At the date of transfer of the Island of Cuba to its duly elected officials the Isle of Pines constituted a municipality included within the municipalities of the province of Habana and located in the judicial district of Bejucal. The government of the island is vested in its municipal officers, subject to the general control of the civil governor of the province of Habana, who is vested, under the Constitution of Cuba, with certain authority in the control of municipal affairs. Under the military government of Cuba the Isle of Pines was governed by municipal officials, subject to the general authority of the civil governor, who received his authority from the governor general. The Isle of Pines, as it had existed under the military government, was transferred as a *de facto* government to the Cuban Republic, pending the final settlement of the status of the island by treaty between the United States and Cuba. The action taken by the military government was in accordance with telegraphic orders from the honorable the Secretary of War. The government of the island to-day is in the hands of its municipal officers, duly elected by the people under the general control of the civil governor of the province of Habana and the Republic of Cuba. As I understand it, the government of the Isle of Pines is vested in the Republic of Cuba, pending such final action as may be taken by the United States and Cuba looking to the ultimate disposition of the island. No special action was taken to pro-

ect the interests of the citizens of the United States who have purchased property and ave settled in the Isle of Pines, for the reason that no such action was necessary. All Americans in the island are living under exactly the same conditions as other foreigners, *and if they comply with the laws in orce it is safe to say that they will not ave any difficulty or need special protection. At the time these people purchased roperty they understood distinctly that the uestion of ownership of the Isle of Pines as one pending settlement, and in locating here they took the risks incident to the situation.'"

We are justified in assuming that the sle of Pines was always treated by the resident's representatives in Cuba as an integral part of Cuba. This was indeed to be xpected in view of the fact that it was ich at the time of the execution of the reaty and its ratification, and that the reaty did not provide otherwise in terms, say nothing of general principles of international law applicable to such coasts nd shores as those of Florida, the Bahamas, nd Cuba. Hall, 4th ed. 129, 130; Louisiana v. Mississippi, 202 U. S. 153, 50 L. ed. 13, 932, 26 Sup. Ct. Rep. 408, 571; The nna, 5 C. Rob. 273.

In August, 1902, the Treasury Department ecided that duties should be assessed on oods coming from the Isle of Pines at the ame rates as on similar merchandise imorted from other places.

On July 2, 1903, a treaty with Cuba as signed, relinquishing any claim by the Inited States to the Isle of Pines under the reaty of peace, but this failed of ratification, and on March 2, 1904, another treaty as signed, which relinquished all claim of itle under that treaty.

November 27, 1905, the Secretary of State rote an American resident of the Isle of Pines:

"The treaty now pending before the Senate, if approved by that body, will relinquish ll claim of the United States to the Isle of Pines. In my judgment the United States as no substantial claim to the Isle of Pines. he treaty merely accords to Cuba what is ers in accordance with international law nd justice.

"At the time of the treaty of peace which nded the war between the United States nd Spain, the Isle of Pines was, and had een for several centuries, a part of Cuba. have no *doubt whatever that it continues be a part of Cuba, and that it has not nd never has been territory of the United tates. This is the view with which President Roosevelt authorized the pending treaty, and Mr. Hay signed it, and I expect to urge its confirmation."

There are some letters of an Assistant Secretary of War, or written by his direction, and other matters, referred to, which we do not regard as seriously affecting the conclusion that the Executive has consistently acted on the determination that the United States had no substantial claim to the Isle of Pines under the treaty.

The only significant legislative action is found in the proviso of the act of March 2, 1901, the Army appropriation act (31 Stat. at L. 895, chap. 803, U. S. Comp. Stat. 1901, p. 2799), commonly called the Platt amendment (897), which reads:

"Provided, further, that in fulfilment of the declaration contained in the joint resolution approved April twentieth, eighteen hundred and ninety-eight, entitled 'For the Recognition of the Independence of the People of Cuba, Demanding that the Government of Spain Relinquish Its Authority and Government in the Island of Cuba, and to Withdraw Its Land and Naval Forces from Cuba and Cuban Waters, and Directing the President of the United States to Use the Land and Naval Forces of the United States to Carry These Resolutions into Effect,' the President is hereby authorized to 'leave the government and control of the island of Cuba to its people' so soon as a government shall have been established in said island under a constitution which, either as a part thereof or in an ordinance appended thereto, shall define the future relations of the United States with Cuba, substantially as follows:"

Then follow eight clauses, of which the sixth is:

"6. That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty."

It appears that certain American citizens, asserting interests in the Isle of Pines, had contended that it belonged to the *United [272] States under the treaty, and the sixth clause of the Platt amendment, while not asserting an absolute claim of title on our part, gave opportunity for an examination of the question of ownership and its settlement through a treaty with Cuba. The Republic of Cuba has been governing the isle since May 20, 1902,—the present situation need not be discussed,—and has made various improvements in administration at the suggestion of our government, but Congress has taken no action to the contrary of Cuba's title as superior to ours.

It may be conceded that the action of both the political departments has not been sufficiently definite to furnish a conclusive in-

terpretation of the treaty of peace as an original question, and as yet no agreement has been reached under the Platt amendment. The Isle of Pines continues, at least *de facto*, under the jurisdiction of the government of the Republic of Cuba, and that settles the question before us, because, as the United States have never taken possession of the Isle of Pines as having been ceded by the treaty of peace, and as it has been and is being governed by the Republic of Cuba, it has remained "foreign country" within the meaning of the Dingley act, according to the ruling in De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743, and cases cited; United States v. Rice, 4 Wheat. 246, 4 L. ed. 562. There has been no change of nationality for revenue purposes, but, on the contrary, the Cuban government has been recognized as rightfully exercising sovereignty over the Isle of Pines as a *de facto* government until otherwise provided. It must be treated as foreign, for this government has never taken, nor aimed to take, that possession in fact and in law which is essential to render it domestic.

Judgment affirmed.

Mr. Justice McKenna concurred in the judgment.

Mr. Justice White and Mr. Justice Holmes concurred specially.

Mr. Justice Moody took no part.

[273] *Mr. Justice White, concurring:

My reasons for agreeing to the conclusion announced by the court are separately stated to prevent all implication of an expression of opinion on my part as to a subject which, in my judgment, the case does not require, and which, as it is given me to see it, may not be made without a plain violation of my duty.

The question which the case raises, by way of a suit to recover duties paid on goods brought from the Isle of Pines, is whether that island, by the treaty with Spain, became a part of the United States, or was simply left or made a part of the island of Cuba, over which the sovereignty of Spain was relinquished.

I accept the doctrine which the opinion of the court announces, following Jones v. United States, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80, that "who is the sovereign *de jure* or *de facto* of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens, and subjects of that government." That the legislative and executive departments have conclusively settled the present status of the Isle of Pines as *de facto* a part of Cuba, and have left open for future determination the *de jure* claim, if any, of the United States to the island, as the court now declares, is to me beyond possible contention. Thus, by the amendment to the act of 1891, which was enacted to determine the *de facto* position of the island and to furnish a rule for the guidance of the executive authority in dealing in the future with the island, it was expressly provided "that the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty." So, also, when the island of Cuba was turned over to the Cuban government by the military authority of the United States, that government was expressly notified by such authority, under the direction of the President, that "whilst the *de facto* position of the Isle of Pines as a part of Cuba was not disturbed, it must be understood that its *de jure* relation was reserved for future determination by treaty between Cuba and the United States. And this notification and relation was in terms accepted by the President of the Republic of Cuba. If the opinion now announced stopped with these conclusive expressions I should, of course, have nothing to say. But it does not do so. Although declaring that the *de facto* position of the Isle of Pines as resulting from legislative and executive action is binding upon courts, and although referring to the conclusive settlement of that *de facto* status, and the reservation by the legislative and executive departments of the determination of the *de jure* status for future action, the opinion asserts that it is open and proper for the court to express an opinion upon the *de jure* status, that is, to decide upon the effect of the treaty. In doing so it is declared that all the world knew that the Isle of Pines was an integral part of Cuba, this being but a prelude to an expression of opinion as to the rightful construction of the treaty. To my mind any and all expression of opinion concerning the effect of the treaty and the *de jure* relation of the Isle of Pines is wholly unnecessary, and cannot be indulged in without disregarding the very principle upon which the decision is placed; that is, the conclusive effect of executive and legislative action. In other words, to me it seems that the opinion whilst recognizing the force of the executive and legislative action, necessarily disregards it. This follows because the views which are expressed on the subject of the meaning of the treaty amount sub[illegible] to declaring that the

on of the executive and legislative nts of the government on the sub- been wrong, and that any future by those departments to proceed hypothesis that the *de jure* status and is unsettled will be a violation aty as now unnecessarily interpret-

stice Holmes concurs.

B. SWING, as Trustee for the Cred- f the Union Mutual Fire Insurance ny of Cincinnati, Ohio (Formerly a ation), Plff. in Err.,
v.
STON LUMBER COMPANY.

S. C. Reporter's ed. 275-279.)

state court—Federal question— ised.
decision of the Michigan supreme t a foreign mutual insurance com- ch had not been authorized to do in the state as provided by the tutes could not maintain a suit assessments due on a policy is- one of its agents in another state it of an insurance broker in Mich- was unable to place the whole line n authorized companies cannot be in the Supreme Court of the tates, where the only showing of l question raised before judgment y a request for a finding as matter at the state statutes do not, and , under the Federal Constitution, the insured from going or sending e state and there procuring insur- its property located in the state insurance company not authorized iness therein, which is entirely in- for the purpose.

[No. 145.]

anuary 10, 1907. Decided April 8, 1907.

OR to the Supreme Court of the of Michigan to review a judgment irmed a judgment of the Circuit Court of Schoolcraft County, in that state, in favor of defendant in a suit to collect assessments due on a policy of insurance issued by a foreign insurance company not entitled to do business in the state. Dismissed for want of jurisdiction.

See same case below, 140 Mich. 344, 103 N. W. 816.

The facts are stated in the opinion.

Mr. Patterson A. Reece argued the cause, and, with Mr. Virgil I. Hixson, filed a brief for plaintiff in error.

Mr. Edward C. Chapin argued the cause and filed a brief for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

This action was brought in the circuit court of Schoolcraft county, Michigan, by Swing, trustee of the Union Mutual Fire Insurance Company, a corporation of Ohio, against the Weston Lumber Company, a corporation of Michigan, to collect its share as a policy holder of an assessment made by the order of the supreme court of Ohio in liquidating the liabilities of the insurance company.

The assessment against defendant was in respect of a policy for $5,000 and a renewal thereof on defendant's lumber and other property at Manistique, Michigan. The insurance company was never licensed to do business in Michigan, and the *defense was [276] pleaded that it was a foreign corporation, not authorized to transact business in that state, and that the policies were issued in direct violation of the laws of Michigan, the company not having complied with those relating to foreign insurance companies doing business in the state; and that the contracts of insurance were at variance with and contrary to the settled policy of the state.

The case was tried by the court without a jury. At the conclusion of the trial plaintiff made requests for certain findings as matters of law, including this:

"11. That the statutes of this state do not and could not, under the Constitution of the United States, prohibit this defendant from going or sending outside of this state and

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-On the general subject of writs of n United States Supreme Court to ts—see notes to Martin v. Hunter, . S. 97; Hamblin v. Western Land ed. U. S. 267; Re Buchanan, 39 S. 884; and Kipley v. Illinois, 42 S. 998.

t adjudications of state courts can it up for review in the Supreme the United States by writ of error courts—see note to Apex Transp. rbade, 62 L.R.A. 513.

v and when questions must be 5. raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

there procuring insurance on property belonging to the defendant and located in this state, from an insurance company not authorized to do business in this state;" which the court refused.

Findings of fact and conclusions of law were made and filed. It was found, among other things, that—

"In the latter part of the summer of 1889 defendant desired to increase the amount of insurance carried upon lumber accumulated in its yards, and made application to a local agency conducted by a banking institution of the town for a considerable addition to the line of its insurance already held in that agency. Not being able to write, in one risk, in its own companies, the amount of additional insurance desired, the local agency, through W. C. Marsh, an employee of the bank, who attended to its insurance business, placed twelve different policies with outside agencies. Part of this line of insurance was sent to George R. Lewis & Company, an agency of Minneapolis, Minnesota, through which concern the $5,000 insurance involved in this case was placed with the said Union Mutual Fire Insurance Company of Cincinnati, Ohio."

It was admitted that the insurance company had never complied with any of the requirements imposed by the statutes of Michigan on insurance companies of other states seeking to transact business in Michigan.

[277] *Sections 5157 and 10467 of the Complied Laws of Michigan of 1897 are as follows:

(5157.) "That it shall be unlawful for any person or persons, as agent, solicitor, surveyor, broker, or in any other capacity, to transact or to aid in any manner, directly or indirectly, in transacting or soliciting within this state any insurance business for any person, persons, firm, or copartnership who are nonresidents of this state, or for any fire or inland navigation insurance company or association, not incorporated by the laws [or] of this state, or to act for or in behalf of any person or persons, firm or corporation, as agent or broker, or in any other capacity, to procure, or assist to procure, a fire or inland marine policy or policies of insurance on property situated in this state, for any nonresident person, persons, firm, or copartnership, or in any company or association without this state, whether incorporated or not, without procuring or receiving from the commissioner of insurance the certificate of authority provided for in § 23 of an act entitled 'An Act Relative to the Organization of Fire and Marine Insurance Companies Transacting Business within This State,' approved April third, eighteen hundred and sixty-nine, as amended. Such certificate of authority shall state the name or names of the person, persons, firm, or copartnership, or the location of the company or association, as the case may be, and that the party named in the certificate has complied with the laws of this state, regulating fire, marine, and inland navigation insurance, and the name of the duly appointed attorney in this state on whom process may be served." Act of 1881, § 1.

(10467.) "But when, by the laws of this state, any act is forbidden to be done by any corporation, or by any association of individuals, without express authority by law, and such act shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of, such act."

*Judgment was entered in favor of defendant, and affirmed, on error, by the supreme court of Michigan. 140 Mich. 344, 103 N. W. 816. [278]

The supreme court held that a foreign mutual insurance company which had not been authorized to do business in Michigan as provided by its statutes could not maintain a suit to collect assessments due on a policy issued by one of its agents in another state on request of an insurance broker of Michigan who was unable to place the whole line in his own authorized companies. Samans v. Temple Co. 105 Mich. 400, 28 L.R.A. 430, 55 Am. St. Rep. 457, 63 N. W. 408, citing many cases, was referred to and quoted from. It appeared therefrom that it had been for years the policy of the state to limit the business of insurance to such corporations, domestic and foreign, as should be authorized to do business, after compliance with certain regulations and conditions prescribed by law, and that the statutes were intended to be prohibitory in their character.

The power of the state to prohibit foreign insurance companies from doing business within its limits, or, in allowing them to do so, to impose such conditions as it pleases, is undoubted. Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619; Chattanooga Nat. Bldg. & L. Asso. v. Denson, 189 U. S. 468, 47 L. ed. 870, 23 Sup. Ct. Rep. 630.

What was held here on the facts was that the contract was brought about and completed in Michigan by a representative of the foreign corporation. So far as defendant was concerned its application for insurance was made and the business was done with the home office at Manistique, with which it was in the habit of doing business.

t a case of defendant "going or tside of this state and there pro- urance on property belonging to ant and located in this state from ce company not authorized to do this state," as supposed in plain- ith request for finding. That re- e only pretense in the record of a estion being raised prior to the below, and was entirely inade- that purpose. *Naturaly enough, e circuit court nor the supreme red to any Federal question what-

t of error cannot be maintained. & L. R. Co. v. McGuire, 196 U. , 49 L. ed. 413, 417, 25 Sup. Ct. Allen v. Alleghany Co. 196 U. S. ed. 551, 25 Sup. Ct. Rep. 311. error dismissed.

D RESERVOIR & IRRIGATION COMPANY, Appt.,
v.
LA WATER COMPANY.

. C. Reporter's ed. 279-285.)

-res judicata—jurisdiction.
jurisdiction of a territorial court sale of property by a receiver ap- an earlier action without for- ding the receivership to the suit he decree of sale was made can- aterally attacked by a party to after unsuccessfully prosecuting both the territorial supreme he Supreme Court of the United which the jurisdictional question esented.

226. October Term, 1905.]

rehearing filed January 7, 1907. Decided April 8, 1907.

from the Supreme Court of the y of Arizona to review a decree ed a decree of the District Court a County, in that Territory, in fendant in a suit to quiet title. rehearing denied.
case below (Ariz.) 76 Pac. 990.
are stated in the opinion.
ugh T. Taggart and William C. r appellant on petition for re-

. Ainsworth for appellee.

Mr. Justice Brewer delivered the opinion of the court:

During the October term, 1905, and on May 14, 1906 (202 U. S. 270, 50 L. ed. 1023, 26 Sup. Ct. Rep. 615), the decree of the supreme court of the territory of Arizona in this case was affirmed. On May 26 (the last day *of the term) an order was entered [280] which in effect continued the jurisdiction of this court to the present term, giving opportunity to appellant to present a petition for rehearing during the vacation. That petition was presented, and, in the early part of this term, after full consideration, was denied. Subsequently, lest in the confused state of the record it might be supposed by either of the parties that the facts had been misapprehended, we, on January 7, 1907, entered an order withdrawing the memorandum denying the petition for rehearing, and granting leave to counsel on both sides to file such additional briefs as they desired. In pursuance of this leave briefs on both sides have been filed, and we have again examined the record.

This consists of the pleadings, the decree in favor of the defendant, a bill of exceptions divided into two parts,—one being a statement of exceptions, and the other a narrative of the "circumstances and evidence,"—the decree and opinion of the supreme court, and a statement of facts prepared for the review by this court. The opinion was filed March 26, 1904, and the statement of facts allowed February 21, 1905, nearly a year after the decision. In addition there appears a motion made in the supreme court by the appellee to strike from the files the abstract of record for several reasons, one of which was that it did not contain the findings of fact and the conclusions of law of the district court. This is followed by the suggestion of a diminution of the record in what purports to be these findings and conclusions. It does not appear that any action was taken by the supreme court upon this motion, or any leave given to amend the record by the addition of the findings and conclusions.

We copy in full the statement of facts prepared and allowed by the supreme court:

"Statement of facts in this case in the nature of a special verdict made by the supreme court of the territory of Arizona, and also rulings of the court below on the admission and rejection of evidence as excepted to on the foregoing transcript* of the rec- [281] ord in the above-entitled cause, to be used

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a conclusiveness of judgments see notes to Sharon v. Terry, 1 Bollong v. Schuyler Nat. Bank. ; Wiese v. San Francisco Music- . 7 L.R.A. 577; Morrill v. Mor- .A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

by appellant herein in its appeal to the Supreme Court of the United States.

"That the above-entitled cause was tried in the court below upon the complaint, which was the statement of a cause of action to quiet title to the property described in said complaint against the defendants therein mentioned; the amended answer of the Gila Water Company, one of the said defendants, denying the plaintiff in said complaint being the owner of the property therein described, said defendant further alleging peaceable and adverse possession of the property described in plaintiff's complaint under the title and color of title for more than three years preceding the date of the commencement of the above action, and also alleging peaceable and adverse possession of said property for more than five years before the commencement of the suit, using and enjoying the same, paying taxes thereon, claiming under deeds duly recorded; the cross complaint of said defendant, Gila Water Company, claiming to be the owner in fee simple of all the property described in plaintiff's complaint in said cause, and the answer of appellant herein to said Gila Water Company's cross complaint;

"That all of the other defendants mentioned in said complaint answered and disclaimed any right, title, and interest in and to the property described in said complaint;

"That this supreme court adopts and makes a part of this statement of facts the bill of exceptions in this case, part I., exceptions, part II., circumstances and evidence, as certified and signed on the 24th day of November, 1902, by Hon. Edward Kent, the presiding judge who tried this cause below, the same as if it were set forth at length herein;

"That no order was made in the court below consolidating the case known as No. 1728 in the trial court and the case known as No. 1996 in the same court, said cases being those the record of which is referred to in the above-mentioned bill of exceptions;

[282] *"That the receiver appointed in said case No. 1728 made the sale and executed the deed under which the Gila Water Company, appellee, claims title to the property in dispute; that no order was in terms made extending the receivership in said case No. 1728 to said case No. 1996, the latter case being the one in which said receiver made said sale, and, by the judgment rendered therein, assumed to convey the title to said property; that the only orders made in said case No. 1996 relating to said receivership are those dated May 29, 1894, November 23, 1898, July 21, 1894, November 20, 1894, and January 10, 1895, referred to in said bill of exceptions.

"That from the foregoing record and facts, the court finds that plaintiff and appellant herein, Gila Bend Reservoir & Irrigation Company, a corporation, has not and did not have, at the commencement of this action, any cause of action in respect to, nor did it have and has not now any right, title, or interest in and to the property or any part thereof mentioned and described in the complaint herein; that the defendant appellee, Gila Water Company, a corporation, was, at the time of the commencement of this action and is now, the owner in fee simple and in possession of all the property mentioned and described in plaintiff's complaint herein."

Appellant invokes the doctrine laid down in Herrick v. Boquillas Land & Cattle Co. 200 U. S. 96, 98, 50 L. ed. 388, 389, 26 Sup. Ct. Rep. 192; Harrison v. Perea, 168 U. S. 311, 323, 42 L. ed. 478, 482, 18 Sup. Ct. Sup. 129, and cases cited in the opinion, to the effect that our jurisdiction on an appeal from the supreme court of a territory, "apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of facts support the judgment." Of course, if there are no findings or statement of facts and no exceptions in respect to the introduction or rejection of testimony, the decree will be affirmed, if responsive to the allegations of the pleadings.

The statement of facts prepared by the supreme court, standing by itself, is incomplete, but it is helped by a reference to the bill of exceptions in the trial court, which is adopted *and made part of the statement. True, much of the matter in this bill is a mere recital of testimony, but we find in it copies of certain orders and decrees. Putting all together, we are enabled to see clearly the scope of the inquiry. It appears that prior to this litigation two suits were brought in the trial court, one numbered 1728 and the other 1996. The appellant was defendant in the latter. In the first an order was made December 6, 1893, appointing James McMillan receiver of the property now in question. The complaint in suit No. 1996, alleging that the court had already appointed a receiver in the prior case, prayed the appointment of a receiver or an enlargement of the powers of the one then acting, and that he take possession of the property and sell the same to pay the debts. No order appears of record in terms either consolidating the two cases or extending the receivership in case No. 1728 to case No. 1996. A decree was entered in suit No. 1996, of date No[illegible]r 20, 1894, which, after finding the am[illegible] to due certain creditors, adjudged and d[illegible]ed "that James McMillan, the receiver heretofore appointed by this court, and now [illegible] possession of all

premises, under the orders of this court, proceed to advertise and sell said property and distribute the proceeds as directed in the decree." On January 3, 1895, a report, bearing a double heading, to wit, the titles and headings of both suits Nos. 1728 and 1996, and purporting to be of a sale of the property by James McMillan, receiver, under the order and decree in suit No. 1996, was filed in the court, and on January 10, 1895, an order bearing the same double heading of the two suits was entered, confirming that sale. Subsequently a deed of the property to the purchaser was executed, purporting to be from the receiver duly appointed in the two equity suits, with titles and numbers as above.

The decree in suit No. 1996 was appealed to the territorial and United States Supreme Courts, and affirmed by each of them. The briefs of appellant in the territorial supreme court show that the question of the [4]jurisdiction of a court, in *a particular case, over property in its actual possession, was not presented. In the brief of appellant filed in this case this statement appears:

"So confident were counsel of the lack of equity in the bill and of reversal by the appellate courts that the fundamental question of jurisdiction, now urged, was overlooked.

"Indeed, the attention of counsel was so centered upon that point and the question of change of venue that in the brief in this court it was even stated that the receiver had been appointed upon motion of the plaintiffs in suit No. 1996, and that the decree therein of November 20, 1894, provided for the appointment of a receiver."

It is now contended that, inasmuch as the question is one of jurisdiction, neither the omission to call attention to the matter in the prior litigation nor the misrecital of fact operates to render the decree in that case *res judicata* upon the question, but leaves the matter open for present inquiry. Counsel are mistaken. In that litigation the present appellant was the defendant. The property was in the possession of the court, even if held under a prior receivership. The decree directed its sale. It was sold. The sale was confirmed, the deed made, and the property delivered to the purchaser. The appellant at least cannot now question the jurisdiction of the court in that suit, or the title which it conveyed to the purchaser at the sale. A failure to make a defense by a party who is in court is, generally speaking, equivalent to making a defense and having it overruled.

Further, in the opinion heretofore filed, after referring to the declaration of the supreme court of the territory that the trial "court, by its action, ratified the acts of the receiver in the second suit, and thereby, in effect, extended his power and authority as such receiver to such second suit," we said (p. 274, L. ed. p. 1025, Sup. Ct. Rep. p. 616):

"The objection made by the appellant to it is, as we have indicated, that suit No. 1996 was a proceeding *in rem*, and that the court did not acquire jurisdiction of the property *for the reason that it was in the [285] custody of the court in suit No. 1728, and that the court in the latter case did not extend the receivership to the No. 1996, nor consolidate the suits, and, therefore, had no power to order the sale of the property by the receiver in No. 1728.

"This is tantamount to saying that the absence of formal orders by the court must prevail over its essential action. It is clear from the record that the district court considered the cases pending before it at the same time, considered No. 1996 as the complement of No. 1728, regarded the cases in fact as consolidated, and empowered the receiver appointed in 1728 to sell the property and distribute the proceeds as directed by the decree in 1996."

Nothing further need be added to show that the case was rightly decided. The petition for a rehearing is denied.

Mr. Justice Moody took no part in the decision of this case.

C. G. BALLENTYNE and Honolulu Rapid Transit & Land Company, Appts.,

v.

WILLIAM O. SMITH, Trustee; The Pacific Heights Electric Railway Company, Limited, and C. S. Desky.

(See S. C. Reporter's ed. 285-291.)

Mortgage—foreclosure sale—setting aside for inadequacy of price.

A foreclosure sale of mortgaged property may be set aside before confirmation upon the single ground of inadequacy of price if such price is grossly disproportionate to the value of the property.

[No. 216.]

Argued March 21, 1907. Decided April 8, 1907.

APPEAL from the Supreme Court of the Territory of Hawaii to review a judgment which affirmed an order of the Third Judge of the First Circuit, in that terri-

NOTE.—As to setting aside judicial sales —see notes to Schroeder v. Young, 40 L. ed. U. S. 721, and Hopkins v. Ensign, 9 L.R.A. 731.

tory, refusing, because of the inadequacy of the price, to confirm a foreclosure sale of mortgaged property. Affirmed.

See same case below, 17 Haw. 96.

Statement by Mr. Justice Brewer:

This is an appeal from a judgment of the [286]supreme court of *the territory of Hawaii (17 Haw. 96), affirming an order of the third judge of the first circuit court in the territory of Hawaii, which refused to confirm a sale of property made by a commissioner under order of court in a foreclosure suit brought by William O. Smith, as trustee, against the Pacific Heights Electric Railway Company, Limited, a Hawaiian corporation, and directed that the property be again offered for sale. The suit was brought to foreclose a trust deed of $50,000 executed by the railway company to Smith, as trustee, on April 1, 1902, and purporting to convey an electric railway 2½ miles in length and running up to Pacific Heights, with its equipment of every kind, and also all land and other property conveyed to it by deed from one Charles S. Desky, dated January 25, 1902.

The sale was made on February 4, 1905, for the sum of $1,100. It was in bulk of the entire property covered by the mortgage, except a cable and condenser, which were of comparatively little value, and which, for reasons not at all affecting the merits of this controversy, were not sold with the balance of the property. The commissioner who made the sale reported that the amount realized was disproportionate to the value of the property sold, and recommended that it should not be confirmed, but that such further order should be made as to the court should seem meet in the premises. On the hearing of a motion to confirm the sale, and objections thereto, the trial court found that the evidence was overwhelming that the actual value of the property was at least seven times the amount at which the property was struck off, that being the highest and best bid therefor.

Mr. David L. Withington argued the cause, and, with Mr. William R. Castle, filed a brief for appellants:

Mere inadequacy of price is not sufficient to set the sale aside.

Smith v. The City of Columbia, 11 Haw. 709; Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839, 6 Sup. Ct. Rep. 686; Schroeder v. Young, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512; Freeman, Executions, § 304i; Den ex dem. Flommerfelt v. Zellers, 7 N. J. L. 156; Lennon v. Heindel, 56 N. J. Eq. 8, 37 Atl. 149; Morrisse v. Inglis, 46 N. J. Eq. 306, 19 Atl. 16; Mercereau v. Prest, 3 N. J. Eq. 460; Bank of New Brunswick v. Hassert, 1 N. J. Eq. 1; Simmons v. Vandergrift, 1 N. J. Eq. 55; Quigley v. Breckenridge, 180 Ill. 627, 54 N. E. 580; Barling v. Peters, 134 Ill. 606, 25 N. E. 765; Pickering v. Driggers, 59 Ill. 65; Gibbons v. Bressler, 61 Ill. 110; McMullen v. Gable, 67 Ill. 67; Noyes v. True, 23 Ill. 503; Ackerman v. Hendricks, 117 Iowa, 106, 90 N. W. 522; Herndon v. College of the Bible, 29 Ky. L. Rep. 30, 45 S. W. 67; Parker v. Hannibal & St. J. R. Co. 44 Mo. 415; Meir v. Zelle, 31 Mo. 331; Chouteau v. Nuckolls, 29 Mo. 442; Media Title & T. Co. v. Kelly, 185 Pa. 131, 64 Am. St. Rep. 618, 39 Atl. 832; Mead v. Conroe, 113 Pa. 220, 8 Atl. 374; Cooper v. Wilson, 96 Pa. 409; Cooper v. Galbraith, 3 Wash. C. C. 546, Fed. Cas. No. 3,193; Cowles v. Phœnix Mut. L. Ins. Co. 63 Kan. 883, 65 Pac. 217; Booher v. Louisville, 25 Ky. L. Rep. 497, 76 S. W. 18; Connick v. Hill, 127 Cal. 162, 59 Pac. 832; Anglo-Californian Bank v. Cerf, 142 Cal. 303, 75 Pac. 902; Summerville v. March, 100 Am. St. Rep. 145, note, 142 Cal. 554, 76 Pac. 389; Koch v. West, 118 Iowa, 468, 96 Am. St. Rep. 394, 92 N. W. 663.

There are cases in which the conscience of the chancellor has not been shocked by similar or even greater disparity than is the case at bar.

Kerr v. Haverstick, 94 Ind. 178; Sowle v. Harvey, 20 Ind. 217, 83 Am. Dec. 315; Benton v. Shreeve, 4 Ind. 69; Fullerton v. Seiper (N. J. Eq.) 34 Atl. 680; Weber v. Weitling, 18 N. J. Eq. 441; Smith v. Duncan, 16 N. J. Eq. 240; Rogers & B. Hardware Co. v. Cleveland Bldg. Co. 132 Mo. 442, 31 L.R.A. 335, 53 Am. St. Rep. 494, 34 S. W. 57; McDonnell v. De Soto Sav. & Bldg. Asso. 175 Mo. 250, 97 Am. St. Rep. 592, 75 S. W. 438; Kearney v. Boeckeler, 143 Mo. 60, 44 S. W. 721; Weaver v. Nugent, 72 Tex. 272, 13 Am. St. Rep. 792, 10 S. W. 458; Smith v. Perkins, 81 Tex. 182, 26 Am. St. Rep. 794, 16 S. W. 805; Jones v. Pratt, 77 Tex. 210, 13 S. W. 887; Allen v. Pierson, 60 Tex. 604; Mason v. Jackson (Tenn. Ch. App.) 57 S. W. 217; Palmer v. Roper, 119 Ga. 10, 45 S. E. 790; Watt v. McGalliard, 67 Ill. 519; Garrett v. Moss, 29 Ill. 549; Comstock v. Purple, 49 Ill. 159; Griffith v. Milwaukee Harvester Co. 92 Iowa, 634, 54 Am. St. Rep. 573, 61 N. W. 203; Sheppard v. Messenger, 107 Iowa, 717, 77 N. W. 515; Wood v. Young, 38 Iowa, 166; Wallace v. Berger, 25 Iowa, 456; Peterson v. Little, 74 Iowa, 223, 37 N. W. 189; Stroup v. Raymond, 183 Pa. 279, 63 Am. St. Rep. 758, 38 Atl. 626; Carden v. Lane, 49 Ark. 216, 3 Am. St. Rep. 228, 2 S. W. 709; Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co. 84 Fed. 752; Magann v. Segal, 24 C. C. A. 323, 92 Fed. 252.

he rule has been applied directly to the firmation of judicial sales.

azet v. Landry, 21 Nev. 291, 30 Pac. 1; Comstock v. Purple, supra; Duncan Sanders, 50 Ill. 475; Thomson v. Ritchie, Md. 247, 30 Atl. 708; Nix v. Draughon, Ark. 240, 19 S. W. 669; Robb v. Hannah, Ky. L. Rep. 361, 14 S. W. 360; Passmore Moore, 15 Ky. L. Rep. 107, 22 S. W. 325; ns & D. Co. v. Shackelford, 17 Ky. L. p. 908, 32 S. W. 1088; Ison v. Kinnaird, Ky. L. Rep. 569, 17 S. W. 633; Terry v. inford, 19 Ky. L. Rep. 712, 41 S. W. 553; ens v. Owens, 21 Ky. L. Rep. 625, 52 S. 822; Stroup v. Raymond, 183 Pa. 279, 63 n. St. Rep. 758, 36 Atl. 626; Hollister v. nderlin, 165 Pa. 248, 44 Am. St. Rep. 657, Atl. 1002; Cake v. Cake, 156 Pa. 47, 26 l. 781; Felton v. Felton, 175 Pa. 44, 34 l. 312; First Nat. Bank v. Black Hills air Asso. 2 S. D. 145, 48 N. W. 852; Glen-n v. Mittenight, 86 Ala. 455, 5 So. 772; ttell v. Zuntz, 2 Ala. 256, 36 Am. Dec. 415; nway v. John, 14 Colo. 30, 23 Pac. 170; eans v. Rosevear, 42 Kan. 377, 22 Pac. 9; McGeorge v. Sease, 32 Kan. 387, 4 Pac. 6; Bethlehem Iron Co. v. Philadelphia & S. R. Co. 49 N. J. Eq. 356, 23 Atl. 1077; Williamson v. Dale, 3 Johns. Ch. 290; Os-ood v. Franklin, 2 Johns. Ch. 12, 7 Am. ec. 513; Pewabic Min. Co. v. Mason, 145 S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 7; Magann v. Segal, supra; Fidelity Trust Safety Vault Co. v. Mobile Street R. Co. Fed. 26; Fidelity Ins. & S. D. Co. v. Roa-oke Street R. Co. 98 Fed. 475.

Even gross inadequacy is not of itself ufficient.

Cavender v. Smith, 1 Iowa, 306.

It must be coupled with other circum-tances sufficient to give rise to the pre-umption of fraud or unfairness.

Palmour v. Roper, 119 Ga. 10, 45 S. E. 90; Smith v. Huntoon, 134 Ill. 24, 23 Am. t. Rep. 646, 24 N. E. 971; Dobbins v. Wil-on, 107 Ill. 17.

The inadequacy must amount to evidence f fraud.

Quigley v. Breckenridge, 180 Ill. 627, 54 N. E. 580; Barling v. Peters, 134 Ill. 606, 5 N. E. 765; Duncan v. Sanders, 50 Ill. 75.

It is a mere fact admissible as evidence o establish fraud.

Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 75; Central P. R. Co. v. Creed, 70 Cal. 97, 11 Pac. 772.

It cannot affect the purchaser's right here he has no notice of a fraud or irregu-arity, even when it is held that the court as a large discretion in these cases.

Williams v. Johnson, 112 N. C. 424, 21 R.A. 848, 34 Am. St. Rep. 513, 17 S. E. 96.

The discretion to set aside a judicial sale is a legal discretion, and not an arbitrary one, and is to be exercised under the rules of law; and the exercise of this discretion under an erroneous rule of law is clear error.

Re Farmers' Loan & T. Co. 129 U. S. 206, 32 L. ed. 656, 9 Sup. Ct. Rep. 265; Blossom v. Milwaukee & C. R. Co. 1 Wall. 655, 17 L. ed. 673; Ayres v. Baumgarten, 15 Ill. 444; Quigley v. Breckenridge, supra; Morrisse v. Inglis, 46 N. J. Eq. 306, 19 Atl. 16; Bethlehem Iron Co. v. Philadelphia & S. S. R. Co. supra; American Ins. Co. v. Oakley, 9 Paige, 259, 38 Am. Dec. 561; Pewabic Min. Co. v. Mason, supra; Moore v. Triplett, 96 Va. 603, 70 Am. St. Rep. 882, 32 S. E. 50.

The purchaser in this case is in no way responsible for the inadequate price. There has been no surprise or mistake caused by him, and many of the cases hold that something more must appear than the opportunity to get a higher price.

American Ins. Co. v. Oakley, supra; Woodhull v. Osborne, 2 Edw. Ch. 614; Barling v. Peters and Quigley v. Breckenridge, supra; Johnson v. Dorsey, 7 Gill, 269; Hayes v. Stiger, 29 N. J. Eq. 196; Young v. Teague, Bail. Eq. 13.

Mr. Francis M. Hatch argued the cause, and, with Messrs. William O. Smith, A. Lewis, Jr., and L. J. Warren, filed a brief for appellees:

Even conceding that the rule in question is applicable as well to judicial as to execution sales, it is not in the conjunctive, as claimed by the appellants, in the sense that the inadequacy must be so gross as to shock the conscience and either be presumptive evidence of fraud or be accompanied by circumstances showing accident, mistake, etc., but it is in the alternative, "or"—that is, that inadequacy if so great as to shock the conscience or sense of fairness, is of itself sufficient to warrant the rejection of the bid, and the making of a resale, where the sale is judicial.

Graffam v. Burgess, 117 U. S. 180, 191, 29 L. ed. 839, 842, 6 Sup. Ct. Rep. 686; Rorer, Judicial Sales, § 28; 17 Am. & Eng. Enc. Law, 2d ed. pp. 1000–1002; Magann v. Segal, 34 C. C. A. 323, 92 Fed. 259; Pewabic Min. Co. v. Mason, 145 U. S. 367, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; Fidelity Ins. & S. D. Co. v. Roanoke Street R. Co. 98 Fed. 476; Marlatt v. Warwick, 18 N. J. Eq. 111; Garrett v. Moss, 20 Ill. 549; Page v. Kress, 80 Mich. 85, 20 Am. St. Rep. 504, 44 N. W. 1052.

Cases discussing the points of refusal to set aside a sale or to confirm a sale for inadequacy of price may very properly be

classed under at least three distinct heads, namely:

Class 1: Legal, or nonjudicial, sales, concerning which the term "legal" or "law" sales should be used instead of "judicial" sales, this being a correct statement of the rule itself.

Freeman, Void Judicial Sales, § 1; Rorer, Judicial Sales, §§ 1–30, 2d ed. §§ 1086, 1098; 17 Am. & Eng. Enc. Law, 2d ed. pp. 953, 956, 989, 990; 2 Jones, Mortg. § 1751.

Class 2: Sales under code practice and sales not purely judicial, where the rule may or may not apply, according to the status of the sale under statutes bearing upon their conduct or effect.

2 Jones, Mortg. §§ 1639, 1915; Parrat v. Neligh, 7 Neb. 456; Bachle v. Webb, 11 Neb. 423, 9 N. W. 473; Watt v. McGalliard, 67 Ill. 519; Dickerman v. Burgess, 20 Ill. 266; Dutcher v. Leake, 44 Ill. 398; Ayres v. Baumgarten, 15 Ill. 444; Sigerson v. Sigerson, 71 Iowa, 476, 32 N. W. 462; Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co. 84 Fed. 752; Central P. R. Co. v. Creed, 70 Cal. 497, 11 Pac. 772; Connick v. Hill, 127 Cal. 162, 59 Pac. 832; Summerville v. March, 142 Cal. 554, 100 Am. St. Rep. 145, 76 Pac. 388; Anglo-California Bank v. Cerf, 142 Cal. 307, 75 Pac. 902; Benton v. Shreeve, 4 Ind. 71; Morrisse v. Inglis, 46 N. J. Eq. 308, 19 Atl. 16; Smith v. The City of Columbia, 11 Haw. 709; Schroeder v. Young, 161 U. S. 334, 338, 40 L. ed. 721, 723, 16 Sup. Ct. Rep. 512; Twining v. Neil, 38 N. J. Eq. 470; Files v. Brown, 59 C. C. A. 403, 124 Fed. 133.

Class 3: Judicial sales, to which the rule should have no application.

Johnson v. Avery, 60 Minn. 265, 51 Am. St. Rep. 529, 62 N. W. 283; Loyd v. Loyd, 61 Iowa, 243, 16 N. W. 117; Central Trust Co. v. Gate City Electric Street R. Co. 96 Iowa, 651, 65 N. W. 982; Wood v. Parker, 63 N. C. 379; Phillips v. Benson, 82 Ala. 500, 2 So. 93; Tice v. Zinsser, 76 N. Y. 549; Hale v. Clauson, 60 N. Y. 341; Jones, Mortg. §§ 1637, 1638; Rorer, Judicial Sales, §§ 8, 16, 17, 529, 545; Wiltsie, Mortg. Foreclosures, §§ 469, 529; State ex rel. Kunz v. Campbell, 5 S. D. 645, 60 N. W. 32.

A marked distinction should be preserved between cases where the application for a resale is made before and where after confirmation by the court.

Rorer, Judicial Sales, § 545; Wiltsie, Mortg. Foreclosures, § 469; 2 Jones, Mortg. §§ 1637, 1641; State ex rel. Kunz v. Campbell, 5 S. D. 636, 60 N. W. 32; Adams v. Haskell, 10 Wis. 123; Wood v. Parker, supra; Schroeder v. Young, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512; Pewabic Min. Co. v. Mason, 145 U. S. 367, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; Files v. Brown, 59 C. C. A. 403, 124 Fed. 138; Magan v. Segal, 34 C. C. A. 323, 92 Fed. 255.

Whether or not a judicial sale should be confirmed rests in the sound judicial discretion of the court, and its ruling should not be disturbed unless it clearly appears that such discretion has been plainly abused. And although a sale may have been regularly and fairly made, yet if, in the belief of the court, the price offered is clearly and grossly inadequate, and a confirmation would be opposed to the best interests of all the parties before it and under its care for whose benefit the sale is to be made, it is not only in the discretion of the court to refuse confirmation and order a resale, but it is its duty to do so. It is not necessary that the inadequacy be traced to its cause; it is sufficient only that its result is unfair and against the interests of those in whose interest it is made.

Nugent v. Nugent, 54 Mich. 557, 20 N. W. 584; State v. Campbell; Phillips v. Benson; and Wood v. Parker,—supra; Jennings v. Dunphy, 174 Ill. 86, 50 N. E. 1045.

Mr. Justice Brewer delivered the opinion of the court:

The question presented is whether a court of equity may, prior to any order of confirmation, set aside a foreclosure sale of mortgaged property upon the single ground of inadequacy in price; and further, whether, if it has that power, the inadequacy here shown is so gross as to justify such action. It does not appear that there was any fraudulent conduct on the part of the purchaser or any combination to restrict bidding. The sale was duly advertised. It was, so far as disclosed, open and public, and the bid reported was the highest. Nothing in time or place or lack of attendance of buyers is shown. Many of the considerations, therefore, which have influenced courts of equity to set aside judicial sales are not to be found in the present case. Indeed, the only substantial objection is that the amount of the bid is largely below the value of the property. Something may be said on each side of the question; on the one, that a court of equity owes a duty to the creditors seeking its assistance in subjecting property to the payment of debts, to see that the property brings something like its true value in order that, to the extent of that value, the debts secured upon the property may be paid; that it owes them something more than to merely take care that the forms of law are complied with, and that the purchaser is guilty of no fraudulent act; on the other, that it is the right of one bid[illegible]g in good faith at an open and [illegible] to have the property for which he bids [illegible]t off to him if he is the highest and [illegible]der; that if he is

from wrong he should not be deprived of benefit of his bid simply because others not bid, or because parties interested e done nothing to secure the attendance those who would likely give for the prop- y something nearer its value; that if the editors make no effort, and are willing to e the chances of a general attendance, y have no right to complain on the und that the property did not bring what hould have brought.

In England the old rule was that in chan- y sales, until confirmation of the master's ort, the bidding would be opened upon a re offer to advance the price 10 per cent; this rule has been rejected, and now both England and this country a sale will not set aside for mere inadequacy of price un- s that inadequacy be so gross as to shock conscience, or unless there be additional cumstances against its fairness. But if re be great inadequacy, slight circum- nces of unfairness in the conduct of the rty benefited by the sale will be sufficient justify setting it aside. Graffam v. Bur- s, 117 U. S. 180, 191, 192, 29 L. ed. 839, 2, 843, 6 Sup. Ct. Rep. 686. It is difficult formulate any rule more definite than s, and each case must stand upon its own uliar facts.

It was said by Mr. Chief Justice Waite, in yhew v. West Virginia Oil & Oil Land Co. Fed. 205, 215, "that in chancery a bidder a sale by a master, under a decree of urt, is not considered a purchaser until report of sale is confirmed." See o Magann v. Segal, 34 C. C. A. 323, 92 d. 252, 255; Jennings v. Dunphy, 174 86, 50 N. E. 1045; Vanbussum v. Ma- ey, 2 Met. (Ky.) 550, 552; Sumner v. ssoms, 94 N. C. 371; Branch v. Griffin, N. C. 173, 5 S. E. 393, 398. The power a court of equity in reference to a resale s affirmed by this court in Pewabic Min. v. Mason, 145 U. S. 349, 36 L. ed. 732, Sup. Ct. Rep. 887, in which case we said 356, L. ed. p. 734, Sup. Ct. Rep. p. 3):

"The question in this case is whether the ster's sale shall stand. It may be stated erally that there is a measure of discre- n in a court of equity, both as to the nner and the conditions of such a sale, as ll as to ordering or refusing a resale. The ncellor will always make such provi- ns for notice and other conditions as will his judgment best protect the rights of all erested, and make the sale most profit- le to all; and after a sale has once been de, he will, *certainly before confirmation, that no wrong has been accomplished in and by the manner in which it was conducted."

See also Schroeder v. Young, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512.

Now, in the case before us, the commissioner who made the sale reported against its confirmation. It was not confirmed, but set aside by the trial court, which found that the evidence was overwhelming that the actual value of the property was at least seven times the amount of the bid. While the testimony is not preserved, it is stated by the supreme court of the territory that it was claimed that only four years before the sale the property cost $78,000, exclusive of the right of way. It was, in fact, bonded less than three years before for $50,000. Speaking in general terms, it consisted of an electric railway 2½ miles in length, two freight cars, two passenger cars, and other appliances for running the railway. All this was sold for $1,100. The action of the trial court in setting aside the sale was approved by the supreme court of the territory.

Under the circumstances, we think the order of the supreme court should be sustained. While we are disinclined to any action which will impair confidence in the stability of judicial sales, yet, with the concurrence of judicial opinion adverse to this sale, considering the amount of property sold, the meager sum bid by the purchaser, the express finding that the overwhelming testimony was to the effect that the property was worth at least seven times more than the sum bid, and also recognizing that the courts which have passed upon this question are much more familiar with the condition of things in Hawaii, and therefore more competent to appreciate the significance of the transactions attending the sale, we have come to the conclusion that it would not be right to reverse the ruling below and confirm the sale.

The judgment of the Supreme Court of the Territory of Hawaii is affirmed.

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*THOMAS M. FIELDS, Plff. in Err., [292]
v.
UNITED STATES.

(See S. C. Reporter's ed. 292-297.)

Certiorari—to court of appeals of District of Columbia.

1. Certiorari to review a judgment of

NOTE.—On certiorari in United States courts—see note to Clark v. Hackett, 17 L. ed. U. S. 69.

On appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to United States ex rel. Taylor v. Taft, ante, 269.

the court of appeals of the District of Columbia in a criminal case will not be granted by the Federal Supreme Court, where such case, however important it may be to the petitioner, does not involve a question of gravity and general importance, there being no conflict between the decisions of state and Federal courts, or between those of Federal courts of different circuits, and nothing affecting international relations.

Error to court of appeals of District of Columbia—criminal case.

2. A judgment convicting a chancery receiver of embezzling money which had come into his possession in his official capacity is not reviewable on writ of error from the Federal Supreme Court to the court of appeals of the District of Columbia, on the theory that the forfeiture by defendant, under D. C. Code, § 841, defining the offense, of all right or claim to any commissions, was determined by the judgment, and that therefore the jurisdictional amount prescribed by § 233 of such Code was involved, since the forfeiture of commissions does not follow the judgment, but follows the wrongful conversion or appropriation of the moneys.

[No. 395.]

Argued March 12, 13, 1907. Decided April 8, 1907.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed, with a modification of the sentence, a judgment of the Supreme Court of that District convicting the defendant of embezzlement. Dismissed for want of jurisdiction. Also

A PETITION for a writ of certiorari to review the same judgment. Denied.

See same case below, 27 App. D. C. 433.

Statement by Mr. Justice Brewer:

Thomas M. Fields was indicted in the supreme court of the District of Columbia at the January term, 1905, for embezzlement. Of eight counts in the indictment seven were disposed of by demurrer or by verdict in favor of the defendant. The trial begun on May 8, and ending May 15, 1905, resulted in a verdict of guilty under the third count. Motions in arrest of judgment and for a new trial having been overruled, he was sentenced to imprisonment and labor in the penitentiary for five years. The court of appeals of the District modified the judgment of the supreme court by striking out the order for "labor," and, as so modified, affirmed it. 27 App. D. C. 433. The case was brought to this court on writ of error. A motion to dismiss and a petition for certiorari were presented by the respective parties, the consideration of both of which was postponed to the hearing on the merits. The indictment was found under § 841 of the District Code, which is as follows:

"Any executor, administrator, guardian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office or employment, who shall fraudulently convert or appropriate the same to his own use, shall forfeit all right or claim to any commissions, costs, and charges thereon, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both." [31 Stat. at L. 1326, chap. 854.]

The statute under which the writ of error was sued out is § 233 of the District Code, which reads:

"Sec. 233. Any final judgment or decree of the court of appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the supreme court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States." [31 Stat. at L. 1227, chap. 854.]

Messrs. Frank J. Hogan and John C. Gittings argued the cause, and, with Mr. Henry E. Davis, filed a brief for plaintiff in error:

In the following criminal cases this court has granted writs of certiorari under this act to the court of appeals of the District of Columbia, and reversed its judgments: Winston v. United States, 172 U. S. 303, 43 L. ed. 456, 19 Sup. Ct. Rep. 212; Winston v. United States, 171 U. S. 690, 19 Sup. Ct. Rep. 887 (in which the only question was the construction of the act of Congress giving juries the right to render qualified verdicts in capital cases); United States v. Cadarr, 197 U. S. 475, 49 L. ed. 842, 25 Sup. Ct. Rep. 487 (in which the only question was the construction of D. C. Code, § 929 [31 Stat. at L. 1342], concerning abandonment

f prosecution of criminal cases for failure f the grand jury to indict or ignore within ine months).

The practice of filing a petition for the rit of certiorari, if there be any doubt as to he jurisdiction of this court, where the case s here on error or appeal, was followed and pproved in Security Trust Co. v. Dent. 187 U. S. 237, 239, 47 L. ed. 158, 159, 23 Sup. Ct. Rep. 61; Burton v. United States, 196 U. S. 283, 295, 49 L. ed. 482, 486, 25 Sup. Ct. Rep. 243; Whitney v. Dick, 202 U. S. 132, 134, 50 L. ed. 963, 964, 26 Sup. Ct. Rep. 584.

The writ of certiorari will be granted (1) in order to secure uniformity of decision, or (2) where questions of importance are involved.

Forsyth v. Hammond, 166 U. S. 506, 512, 514, 515, 41 L. ed. 1095, 1097–1099, 17 Sup. Ct. Rep. 665; American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 383, 37 L. ed. 486, 491, 13 Sup. Ct. Rep. 758; Lau Ow Bew v. United States, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; Hubbard v. Soby, 146 U. S. 56, 60, 36 L. ed. 886, 887, 13 Sup. Ct. Rep. 13; United States v. Rider, 163 U. S. 132, 139, 41 L. ed. 101, 104, 16 Sup. Ct. Rep. 983; Re Woods, 143 U. S. 202, 206, 36 L. ed. 125, 126, 12 Sup. Ct. Rep. 417; Columbus Watch Co. v. Robbins, 148 U. S. 266, 269, 270, 37 L. ed. 445–447, 13 Sup. Ct. Rep. 594.

The writ of certiorari is also granted in contempt cases, in the absence of any other adequate remedy, because such judgments are not reviewable here on error or appeal.

Re Tampa Suburban R. Co. 168 U. S. 583, 587, 42 L. ed. 589, 590, 18 Sup. Ct. Rep. 177; Re Chetwood, 165 U. S. 443, 462, 41 L. ed. 781, 788, 17 Sup. Ct. Rep. 385; Re Debs, 158 U. S. 564, 573, 39 L. ed. 1092, 1095, 15 Sup. Ct. Rep. 900; Hayes v. Fischer, 102 U. S. 121, 26 L. ed. 95.

If this case has been improperly brought up by the writ of error to the court of appeals of the District of Columbia, this court should grant the writ of certiorari to said court, and in such case the copy of the record filed under the writ of error should be directed to be taken and deemed a sufficient return to the certiorari.

Security Trust Co. v. Dent and Whitney v. Dick, supra.

The practice of submitting the petition for certiorari on the hearing of the writ of error or appeal was followed and approved in Security Trust Co. v. Dent, supra, and Burton v. United States, 196 U. S. 284, 295, 49 L. ed. 483, 486, 25 Sup. Ct. Rep. 243.

The consideration that this judgment is conclusive (United States v. Three Copper Stills, 47 Fed. 495) of the petitioner's absolute forfeiture to the United States of "all right or claim to any commissions, costs, and charges," amounting to $10,070.82, also affords a powerful reason why the writ of certiorari should issue.

The court has jurisdiction on writ of error.

Shappirio v. Goldberg, 192 U. S. 232, 240, 48 L. ed. 419, 424, 24 Sup. Ct. Rep. 259; Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; Smith v. Adams, 130 U. S. 167, 32 L. ed. 895, 9 Sup. Ct. Rep. 566; Stinson v. Dousman, 20 How. 461, 15 L. ed. 966; McNeill v. Southern R. Co. 202 U. S. 543, 558, 50 L. ed. 1142, 1147, 26 Sup. Ct. Rep. 722; Scott v. Donald, 165 U. S. 107, 115, 41 L. ed. 648, 654, 17 Sup. Ct. Rep. 262; Troy v. Evans, 97 U. S. 1, 24 L. ed. 941; Callan v. Wilson, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; United States ex rel. Steinmetz v. Allen, 192 U. S. 543, 48 L. ed. 555, 24 Sup. Ct. Rep. 416.

The statute is self-invoking and self-executing, and operates *ex proprio vigore* to transfer absolutely from the plaintiff in error to the United States "all right or claim" of the former to these commissions, costs, and charges, *eo instanti* the basic act is committed.

United States v. Stowell, 133 U. S. 1, 16, 33 L. ed. 555, 559, 10 Sup. Ct. Rep. 244; The Mary Celeste, 2 Low. Dec. 354, Fed. Cas. No. 9,202; Pilcher v. Faircloth, 135 Ala. 313, 33 So. 545; United States v. Olsen, 57 Fed. 586; 13 Am. & Eng. Enc. Law, pp. 58–60.

If these commissions, etc., be, in one sense, an incident to the prosecution for embezzlement, still this court has jurisdiction.

Simms v. Simms, 175 U. S. 162, 44 L. ed. 115, 20 Sup. Ct. Rep. 58; De la Rama v. De la Rama, 201 U. S. 303, 50 L. ed. 765, 26 Sup. Ct. Rep. 485.

This prosecution and judgment (if valid) conclusively establish the forfeiture judicially, as against the plaintiff in error and in favor of the United Shates.

13 Am. & Eng. Enc. Law, p. 69; United States v. Three Copper Stills, 47 Fed. 499; Re Leszynsky, 16 Blatchf. 13, Fed. Cas. No. 8,279; United States v. Olsen, 57 Fed. 583; United States v. Schneider, 35 Fed. 108; Boyd v. United States, 116 U. S. 616, 634, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524; United States v. Zucker, 161 U. S. 475, 478, 40 L. ed. 777, 779, 16 Sup. Ct. Rep. 641; Stone v. United States, 167 U. S. 178, 184–188, 42 L. ed. 127, 130, 131, 17 Sup. Ct. Rep. 778; Forsyth v. Hammond, 166 U. S. 506, 518, 41 L. ed. 1095, 1100, 17 Sup. Ct. Rep. 665; Miller v. State, 149 Ind. 620, 40 L.R.A. 109, 49 N. E. 894; Vowells v. Com. 84 Ky. 55; Com. v. Pennock, 3 Serg. & R. 199; Shular v. State, 160 Ind. 310, 66 N. E. 746; 19 Enc. Pl. & Pr. p. 483; Paley, Summary Convictions, London, 1904, 276, 277; Burton v.

United States, 202 U. S. 344, 369, 50 L. ed. 1057, 1066, 26 Sup. Ct. Rep. 688.

Where the law prescribes a pecuniary forfeiture of "all right or claim," etc., rather than a specific, tangible property forfeiture, as one of the results of the omission or commission of a certain act also made a criminal offense, especially by the same law, the proper proceeding to establish such forfeiture is a criminal prosecution by and in the name of the United States, unless the statute provides a different and exclusive remedy.

Ransdell v. Patterson, 1 App. D. C. 495; United States v. Moore, 11 Fed. 251; United States v. Craft, 43 Fed. 375; United States v. Dougher, 6 McLean, 281, Fed. Cas. No. 14,627; United States v. Nash, 111 Fed. 529; United States v. Mattingly, Fed. Cas. No. 15,743; United States v. Hoskins, 5 Mackey, 480; United States v. Ebert, Fed. Cas. No. 15,019.

In so far as the statute and this proceeding and judgment are intended to operate a forfeiture of the vested rights or claims of the accused to the commissions, costs, and charges which had been adjusted and allowed him before the Code, amounting to about $10,000, the law is invalid because in plain violation of the Federal Constitution; in which aspect of the case the writ of error will lie to review this judgment, without regard to the sum or value of the matter in dispute, under D. C. Code, § 233 [31 Stat. at L. 1227].

New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 47, ante, 78, 27 Sup. Ct. Rep. 1.

Mr. James S. Easby-Smith argued the cause, and, with Solicitor General Hoyt, filed a brief for defendant in error.

Solicitor General Hoyt also filed a separate brief for defendant in error:

The court of appeals of the District of Columbia was created, as were the circuit courts of appeals, for the purpose of relieving this court of the oppressive burden of general litigation.

Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665; Re Woods, 143 U. S. 202, 36 L. ed. 125, 12 Sup. Ct. Rep. 417.

This court has uniformly held that its power in certiorari is one which should be sparingly exercised, and only when the circumstances of the case satisfy the court that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of the nation in its internal or external relations, demands such exercise.

Forsyth v. Hammond, supra; Re Lau Ow Bew, 141 U. S. 583, 587, 35 L. ed. 868, 870, 12 Sup. Ct. Rep. 43; Re Woods, supra; Lau Ow Bew v. United States, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 383, 37 L. ed. 486, 491, 13 Sup. Ct. Rep. 758.

This court has recently denied petitions for certiorari to the court of appeals of the District of Columbia.

McCaully v. United States, 198 U. S. 508, 49 L. ed. 1174, 25 Sup. Ct. Rep. 803; Raymond v. United States, 200 U. S. 612, 50 L. ed. 623, 26 Sup. Ct. Rep. 755; Knoll v. United States, 201 U. S. 643, 50 L. ed. 902, 26 Sup. Ct. Rep. 759.

This court has no jurisdiction to review, on writ of error, the judgment of the court of appeals of the District of Columbia, because it is a judgment in a criminal case.

Chapman v. United States, 164 U. S. 436, 41 L. ed. 504, 17 Sup. Ct. Rep. 76; Sinclair v. District of Columbia, 192 U. S. 16, 48 L. ed. 322, 24 Sup. Ct. Rep. 212.

The argument that forfeiture should be included in the judgment reduces the question to one of the construction and application of the statute, and not of its validity.

South Carolina v. Seymour (United States ex rel. South Carolina v. Seymour) 153 U. S. 353, 38 L. ed. 742, 14 Sup. Ct. Rep. 871; United States v. Lynch, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114; United States ex rel. Taylor v. Taft, 203 U. S. 461, ante, 269, 27 Sup. Ct. Rep. 148.

Mr. Justice Brewer delivered the opinion of the court:

The petition for certiorari must be first considered. A certiorari can be issued only when a writ of error cannot. 26 Stat. at L. 828, § 6, chap. 517, U. S. Comp. Stat. 1901, p. 550, last two paragraphs. There have been two or three instances in which, after a writ of error has been allowed, an application for a certiorari has been filed, the latter because of doubt whether the former would lie. It must not be supposed that because we have before us both a writ of error and an application for certiorari that the rules laid down by this court governing the latter applications are to be ignored, and the case held in this court by either the writ of error or the certiorari.

*In this case there is no sufficient ground for a certiorari. The application comes within none of the conditions therefor declared in the decisions of this court. However important the case may be to the applicant, the question involved is not one of general and general importance. There is no conflict between the [illegible] ns of state and Federal courts or betw[illegible] those of Federal courts of diffe[illegible] its. There is no

ng affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public.

Will a writ of error lie? Is the case one of which this court has jurisdiction? It is settled that a criminal case, as such, cannot be brought here on a writ of error from the court of appeals of the District. Chapman v. United States, 164 U. S. 436, 41 L. ed. 504, 17 Sup. Ct. Rep. 76, and cases cited in the opinion; Sinclair v. District of Columbia, 192 U. S. 16, 48 L. ed. 322, 24 Sup. Ct. Rep. 212.

The authority of these cases is not questioned, but it is contended that the forfeiture of all right or claim to any commissions, etc., was determined by the judgment in the case at bar, and that, therefore, it comes within the pecuniary provisions of § 233. Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570, is cited as authority. In that case we sustained our jurisdiction over a judgment of the supreme court of the District, dismissing a petition for a writ of prohibition to a court-martial convened to try an officer for an offense punishable by dismissal from the service and consequent deprivation of salary, which, during the term of his office, would exceed the sum of $5,000. But that case is very different from this. There the direct result of an adverse judgment of the court-martial was the deprivation of an office with a salary of over $5,000. That sum, therefore, was involved in the trial sought to be restrained. But no such result follows in this case. The act of the defendant in fraudulently converting or appropriating the moneys in his possession operates to forfeit all right or claim to any commissions, etc., and this, irrespective of the question whether he is or is not convicted of any crime in respect thereto. It is true such fraudulent conversion or appropriation is declared *to be embezzlement, and the defendant was prosecuted and convicted of that offense, but the forfeiture of commissions does not follow the judgment, but follows the wrongful conversion or appropriation of the moneys. The only direct pecuniary result of a conviction is a fine not exceeding $1,000, and that as a punishment for the offense. United States v. More, 3 Cranch, 159, 174, 2 L. ed. 397, 402. It adjudges no forfeiture of commissions. It may be that it furnishes evidence in respect to the forfeiture of commissions, but, if so, it is simply evidence. Nor does the criminal offense depend at all upon the amount of the appropriation. If the official fraudulently converts or appropriates $1,000 the crime is the same as though he fraudulently converts or appropriates $50,000. All that can be accomplished by the criminal prosecution is the statutory punishment for the offense, which cannot exceed a fine of $1,000, or imprisonment for ten years, or both. The conviction is conclusive as to the fact of a fraudulent conversion and appropriation, but not as to the amount thereof, any more than a conviction of larceny is a conclusive adjudication that the larceny was committed at a day named or of the precise amount or value of the property charged to have been stolen. Those are incidental and minor facts, which may or may not be proved exactly as stated. All that is necessary to sustain the judgment before us is that there was a fraudulent conversion or appropriation of some amount of money in the possession of the official. For these reasons the writ of error cannot be sustained.

The application for a certiorari is denied and the writ of error is dismissed.

Mr. Justice White concurred in the judgment.

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*MERCANTILE TRUST COMPANY, Plff. in Err., [298]
v.
MELVILLE D. HENSEY.

(See S. C. Reporter's ed. 298-309.)

Appeal—bill of exceptions—statement as to evidence.

1. A general statement in a bill of exceptions in an action on a bond to secure performance of a building contract, that the plaintiff gave evidence by several witnesses that the buildings were not completed according to the plans and specifications, in the particulars set forth in the assignment of breaches of such contract, and that the value, by reason of the omissions, structural defects, and defective materials, was from $2,000 to $3,000 less on each building than if they had been so completed, furnishes no basis for the assertion that there was no evidence of the amount of damage sustained from each of the breaches of the contract, but only of the total damage.

Appeal — questions reviewable — questions not raised below.

2. The objection that there was no evidence of the particular damage for which alone a recovery was permitted by the trial court, but only evidence as to the total damage, cannot be first raised in an appellate court.

NOTE.—As to the effect of decision of architect, engineer, or umpire in case of fraud or mistake—see case note to Edwards v. Hartshorn, 1 L.R.A.(N.S.) 1050.

As to performance of building contract—see note to Boettler v. Tendick, 5 L.R.A. 270.

Building contract—conclusiveness of architect's certificate.

3. The architect's certificate of completion according to the contract and its plans and specifications is not conclusive, so as to bind the owner or relieve the contractor from performance, where the contract, although providing that the contractor must obtain such certificate before he is entitled to payment, contains no provision that such certificate shall be final and conclusive between the parties, but instead provides that such certificate shall not lessen the responsibility of the contractor, nor exempt him from liability to replace defective work, contains the positive agreement of the contractor to perform the work called for in the specifications in the best and most workmanlike manner, and provides that final payment is to be made only when the buildings are completed in accordance with the agreement and the plans and specifications.

[No. 245.]

Submitted March 15, 1907. Decided April 8, 1907.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of plaintiff in an action on a bond to secure the performance of a building contract. Affirmed.

See same case below, 27 App. D. C. 210.

Statement by Mr. Justice Peckham:

The Mercantile Trust Company, by this writ of error, seeks to review a judgment of the court of appeals of the District of Columbia, affirming a judgment against it of the supreme court of the District for the sum of $8,468. The action was brought upon a bond for $50,000 executed January 24, 1900, by the company as surety for one Jones, for the performance by him of a written contract entered into on the same date between him and the defendant in error, who was the plaintiff below, relative to the completion by Jones for the defendant in error of certain houses already in process of construction in the city of Washington. The condition of the bond was, in substance, that if the principal, Jones, should duly and faithfully perform and fulfil all the conditions of the contract entered into between him and the defendant in error the bond was to be void, otherwise to remain in force.

The contract provided that Jones, for the consideration mentioned therein, would, within seven months from the date thereof, well and sufficiently erect and replace all [299] defective *work and finish the twenty-one brick dwelling houses mentioned "agreeably to the drawings and specifications made by Melville D. Hensey, architect, and which plans and specifications are signed by the said parties hereto and hereunto annexed, within the time aforesaid, in a good, workmanlike, and substantial manner, to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him to be testified by writing or certificate under the hand of Bates Warren, or the architect placed in charge by him, and also shall and will find and provide such good, proper, and sufficient material of all kinds whatsoever as shall be proper and sufficient for the completing and finishing all of said twenty-one houses and other works of the said buildings mentioned in the said specifications for the sum of $89,250, to be paid as set out in the schedule of payments hereto annexed, and signed by the parties hereto and made a part hereof." Hensey, "in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part as specified," agreed to pay the contractor the above-named sum "as the work progresses, in the manner and at the time set out in the schedule of payments hereto annexed and signed by the parties hereto and made a part of this agreement; provided that in each of the said cases a certificate shall be obtained from and signed by the architect in charge that the contractor is entitled to payment, said certificate, however, in no way lessening the total and final responsibility of the contractor; neither shall it exempt the contractor from liability to replace work if it be afterwards discovered to have been ill done or not according to the drawings and specifications, either in execution or materials; and, further, that the party of the second part shall furnish, if required, satisfactory evidence that no lien does or can exist upon the work." The last payment provided for in the contract was to be made "when the houses are fully completed in accordance with the said agreement and the plans and specifications prepared therefor."

*All the materials were to be new and of the best quality, and the contractor was to "execute and complete all the work as set forth in the specifications and drawings in the best and most workmanlike manner." It was agreed that "in all cases of doubt as to the meaning of the drawings reference is to be made to the architect in charge, whose decision will be final."

Although this contract was entered into in January, 1900, and under it the houses were to be completed in seven months, yet, for some reason, Bates Warren, the person named in the contract, did not appoint an

architect until April, 1901, when he appointed Mr. W. J. Palmer. The evidence given, on the part of the plaintiff tended to prove that the contractor, Jones, abandoned the work on the houses early in the fall of 1900, leaving them uncompleted, and the work was otherwise carried on during the following winter, but that there was no architect in charge until Mr. Palmer's appointment. From that time Mr. Palmer seems to have in some degree superintended the work, and on the 29th of July, 1901, reported in writing to Mr. Warren the completion of the houses in question. In his letter Mr. Palmer said: "The work has been done according to my interpretation of the plans and specifications, and where deviations have been made from the plans and specifications it has been where the same were inconsistent and ambiguous, and in all cases of inconsistency and ambiguity the work has been done according to the interpretation most beneficial to the houses."

This action was subsequently commenced for the purpose of recovering the damages which the plaintiff Hensey alleged he had sustained by reason of the failure of Jones to fulfil and carry out the contract. Issue being duly joined between the parties, the plaintiff gave evidence tending to prove that the houses were not completed within the contract time, nor according to the plans and specifications in the particulars stated, and that the value of the houses was between two and three thousand dollars less on each house than it would have been had they been completed according to the contract, *plans, and specifications. The defendant duly objected to such evidence and took exceptions to its admission.

A verdict was rendered in favor of the plaintiff in the sum of $8,468, after allowing the defendant's claim of set-off of $29,032.

Messrs. Hayden Johnson and John Ridout submitted the cause for plaintiff in error:

The architect's certificate was conclusive. Boettler v. Tendick, 5 L.R.A. 270, and note, 73 Tex. 494, 11 S. W. 497; Crane Elevator Co. v. Clark, 26 C. C. A. 100, 53 U. S. App. 257, 80 Fed. 705; Sheffield & B. Coal, Iron & R. Co. v. Gordon, 151 U. S. 285, 38 L. ed. 164, 14 Sup. Ct. Rep. 343; Martinsburg & P. R. Co. v. March, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035; Chicago, S. F. & C. R. Co. v. Price, 138 U. S. 188, 34 L. ed. 917, 11 Sup. Ct. Rep. 290; Sweeney v. United States, 109 U. S. 618, 27 L. ed. 1053, 3 Sup. Ct. Rep. 344, 10 Rose's notes, p. 672; Kihlberg v. United States, 97 U. S. 398, 24 L. ed. 1106.

Messrs. Arthur A. Birney and Henry F. Woodard submitted the cause for defendant in error:

A point not having been presented to the court of appeals will not be considered here. Old Jordan Min. & Mill. Co. v. Société Anonyme des Mines, 164 U. S. 261, 264, 41 L. ed. 427, 428, 17 Sup. Ct. Rep. 113.

It is competent for parties to agree that the certificate of an engineer, architect, or other person shall be final and conclusive, and that in such case, and in the absence of fraud or such gross mistake as necessarily to imply bad faith, or failure to exercise an honest judgment, the action of the architect would be final. That this attribute of finality attaches only where the parties have so agreed, either in terms or by necessary implication, is clear from the decisions.

Central Trust Co. v. Louisville, St. L. & T. R. Co. 70 Fed. 282; Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449; Bond v. Newark, 19 N. J. Eq. 376; Memphis, C. & L. R. Co. v. Wilcox, 48 Pa. 161; Adlard v. Muldoon, 45 Ill. 193; Fontano v. Robbins, 22 App. D. C. 253.

The certificate is so clearly wrong as to prove either fraud or such mistake by the architect as necessarily to imply bad faith, and for this reason is not binding.

Kihlberg v. United States, 97 U. S. 402, 24 L. ed. 1108; Glacius v. Black, supra.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

After even more than the usual number of pleas, additional pleas, replications, rejoinders, and demurrers, which are to be *found in the pleadings in this District, the [304] parties came to trial on the issues of fact, and the plaintiff recovered a verdict as stated. The judgment entered on the verdict was affirmed by the court of appeals. 27 App. D. C. 210.

The grounds submitted in this court for the reversal of the judgment are reduced to two, set forth in the brief for the plaintiff in error, as follows:

"First, that the testimony of all the plaintiff's witnesses who testified in respect of deficiencies in construction being as to the total damage sustained by the plaintiff as the result of structural defects, defective materials, and omissions, and the trial court having ruled that the jury should consider omissions alone, there was no basis upon which the jury could segregate damages caused by defective materials and damages caused by omissions, so as to reach a verdict in accordance with the court's ruling.

"Second, that under the building agreement, the architect's certificate of comple-

tion should have been held to be final and conclusive of such completion, there being no evidence of fraud or bad faith on his part."

In regard to this first ground of reversal the record is at first sight somewhat confused. The plaintiff in error asserts that there was no evidence given segregating the items upon which the sum total of the damage was arrived at; that the evidence given on the part of the plaintiff was that the houses were each worth between two and three thousand dollars less on account of the failure of plaintiff in error to fulfil the conditions of the contract, but that it is impossible to discover from that evidence what amount of the damage was due to omissions, what amount to structural defects, and what amount to defective material; and, as the court instructed the jury that in considering the question of structural defects they were not at liberty to consider anything but omissions, and were not entitled to consider substitutions of material or modifications of construction made with the approval of the architect under his interpretation of the [305] plans and specifications, there *was in reality no evidence before the jury upon which they could have estimated the damages under the instruction given them by the court; that all the witnesses testified simply as to the total diminution in value, as a result of the three items mentioned,—omissions, structural defects, and defective material, —while the court charged, agreeably to the twelfth request of the plaintiff in error, that they were at liberty only to consider damages resulting from omissions.

The twelfth prayer of the plaintiff in error, which its counsel asserts was granted by the court, is as follows:

"The jury are instructed that, in considering the question of structural defects, they are not at liberty to consider anything but omissions, if any they find, and are not entitled to consider substitutions of materials or modifications of construction made with the approval of the architect, under his interpretation of the plans and specifications."

There are several answers to the first ground urged by the plaintiff in error for a reversal of this judgment.

(1) It does not appear that there is any basis in the record for the assertion of the plaintiff in error that there was no evidence given showing the amount of damage sustained from each of the breaches of the contract, but only a statement of the sum total sustained by reason of all the breaches. The bill of exceptions does not purport to set forth all the evidence given upon the trial of the case. There is a general statement that the plaintiff gave evidence by several witnesses that the houses were not completed according to the plans and specifications in the contract, in the particulars set forth in the assignment of breaches, and that the value, by reason of the omissions, structural defects, and defective materials was from two to three thousand dollars less on each house than it would have been had they been completed according to the contract, plans, and specifications. This is not at all equivalent to saying that there is no evidence except as to the total damage. It is much more probable that on the trial such evidence was given, and that the statement in the bill is simply a summary of the total amount of damage, which the evidence showed in detail had been sustained from each particular breach. It does not mean that there was no evidence of the amount of the damage caused from each breach that was proved. It is very improbable that the case was tried in any such manner. The amount of damage on account of each breach that was proved would most naturally have also been proved as part of the case.

It is part of the duty of a plaintiff in error affirmatively to show that error was committed. It is not to be presumed, and will not be inferred from a doubtful statement in the record. We think in this case the record fails to show the absence of the evidence as argued by the plaintiff in error.

(2) If, however, we assume that there was no such evidence in detail and only a conclusion given as to the total amount of damage, and if we further assume that the twelfth request of the plaintiff in error was charged by the court, and the right of recovery was thereby limited as stated, it does not appear that the plaintiff in error made any point on the trial of the absence of the evidence of damage in detail, or that the court was asked to direct a verdict for the defendant on account of its absence. If there were no evidence of the amount of damage caused by each particular breach, but only of the total amount sustained, and the plaintiff in error desired to avail itself of that objection to a recovery for the particular damage permitted, counsel should have called the attention of the court to the point, and requested a direction of a verdict for the defendant on that ground. No such request was made, and nothing was said which would show that counsel for the plaintiff in error had any such objection in mind, and he cannot argue an objection here which was never t[illegible] in the trial court.

(3) In truth the court did not limit the recovery of da[illegible]s, as is set forth in the above-mentioned [illegible]h request to charge

but permitted a recovery for the total sum of the various items proved.

*The defendant in error insists that the twelfth request, instead of being charged, was in fact refused by the court. We think that in this assertion the defendant in error is perfectly right. Some little confusion at first appears on looking in the record, caused by a mistaken reference to the request which was charged, but a more careful perusal of all that appears regarding the charge of the court, and the requests and refusals to charge, bring us to the conclusion that there is not the slightest doubt that the court refused the twelfth request, instead of charging it. In such case there was no occasion for segregating the items of damage proved.

This leaves the argument of the plaintiff in error upon the first ground wholly without merit.

The other ground taken for a reversal in this case is that the architect's certificate of July 29, 1901, was conclusive between the parties and was a bar to the maintenance of his action.

Mr. Palmer, in his letter or certificate, reported the completion of the buildings according to his interpretation of the plans and specifications, and that where deviations had been made from them it was where the same were inconsistent and ambiguous, and in all cases of inconsistency and ambiguity the work had been done according to the interpretation most beneficial to the houses.

We do not think this certificate was conclusive, and it did not, therefore, bar the maintenance of this action. The language of the contract, upon which the claim is based, is set out in the foregoing statement, and while it provides that the work shall be completed agreeably to the drawings and specifications made by M. D. Hensey, architect, in a good, workmanlike, and substantial manner, to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate under the hand of Bates Warren, or the architect placed in charge by him, it omits any provision that the certificate shall be final and conclusive between the parties. In other words, *the contract provides that before the builder can claim payment at all he must obtain the certificate of the architect; but, after such certificate has been given, there is no provision which bars the plaintiff from showing a violation of the contract in material parts, by which he has sustained damage. A contract which provides for the work on a building to be performed in the best manner and the materials of the best quality, subject to the acceptance or rejection of an architect, all to be done in strict accordance with the plans and specifications, does not make the acceptance by the architect final and conclusive, and will not bind the owner, or relieve the contractor from the agreement to perform according to plans and specifications. Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449; Fontano v. Robbins, 22 App. D. C. 253.

There is also in the contract the provision already mentioned in the statement of facts in regard to payments as the work progressed, which showed that a certificate was to be obtained from and signed by the architect in charge before the contractor was entitled to payment, but it was provided that the certificate should "in no way lessen the total and final responsibility of the contractor; neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill, or not according to the drawings and specifications, either in execution or materials." There is the further positive agreement of the contractor to execute and complete all the work as set forth in the specifications in the best and most workmanlike manner, and also that final payment is to be made only when the houses are completed in accordance with the agreement and the plans and specifications prepared therefor.

The whole contract shows, in our opinion, that the certificate that the houses had been completed according to the contract and its plans and specifications was not to be conclusive of the question, and the plaintiff was not thereby precluded from showing that in fact the contractor had not complied with his contract, and the plaintiff had thereby sustained *damage. The cases cited in the [309] opinion of the court below (Fontano v. Robbins, supra; Bond v. Newark, 19 N. J. Eq. 376; Memphis, C. & L. R. Co. v. Wilcox, 48 Pa. 161; Adlard v. Muldoon, 45 Ill. 193) are in substance to this effect. To make such a certificate conclusive requires plain language in the contract. It is not to be implied. Central Trust Co. v. Louisville, St. L. & T. R. Co. 70 Fed. 282, 284. The cases of Sweeney v. United States, 109 U. S. 618, 27 L. ed. 1053, 3 Sup. Ct. Rep. 344; Martinsburg & P. R. Co. v. March, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035; Chicago, S. F. & C. R. Co. v. Price, 138 U. S. 185, 34 L. ed. 917, 11 Sup. Ct. Rep. 290; Sheffield & B. Coal, Iron & R. Co. v. Gordon, 151 U. S. 285, 38 L. ed. 164, 14 Sup. Ct. Rep. 343,—were all cases in which the contract itself provided that the certificate should be final and conclusive between the parties.

The only case in which the certificate of

the architect or his decision was by the contract made final was in case of doubt as to the meaning of drawings, in which case reference was to be made to the architect in charge, whose decision was to be final.

Both grounds urged by the plaintiff in error in this court for reversal of the judgment are untenable, and it must therefore be affirmed.

Mr. Justice Brewer took no part in the decision of this case.

ADDISON JOHNSON, Agent and Warden of the State Prison of the State of New York at Sing Sing, N. Y., Appt.,
v.
CHARLES C. BROWNE.

(See S. C. Reporter's ed. 309-322.)

Extradition—imprisonment under prior conviction of other offense.

1. The omission of the words "or be punished" from the provision of art. 3 of the extradition treaty of July 12, 1889 (26 Stat. at L. 1508), with Great Britain, that no person extradited "shall be triable or be tried" for any crime or offense committed prior to his extradition other than the offense for which he was surrendered until he shall have had an opportunity of returning to the country from which he was surrendered, does not justify the imprisonment, upon a former conviction for another and different offense, of a person extradited from Canada for an offense against the United States, until he has had an opportunity to return to Canada,—especially where extradition has been refused for the other offense,—since this omission is inadequate to overcome the positive provisions of U. S. Rev. Stat. §§ 5272, 5275, U. S. Comp. Stat. 1901, pp. 3595, 3596, and the otherwise manifest scope and object of the treaty, and the earlier Ashburton treaty of 1842, which are to limit imprisonment as well as the trial to the crime for which extradition has been demanded and granted.

Statutes—repeal by implication—effect of subsequent treaty.

2. A later treaty will not be regarded as repealing an earlier statute by implication unless the two are absolutely incompatible, and the statute cannot be enforced without antagonizing the treaty.

[No. 481.]

Argued March 4, 5, 1907. Decided April 8, 1907.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review an order discharging, on habeas corpus, a person extradited from Canada, for an offense against the United States, from imprisonment upon a former conviction for another and different offense. Affirmed.

Statement by Mr. Justice Peckham:

The respondent sued out a writ of habeas corpus from the circuit court of the United States for the southern district of New York, directed to the agent and warden of the state prison at Sing Sing, in the state of New York, where he was confined, and pursuant to the terms of the writ the respondent was brought before that court in New York city, and after a hearing the court ordered his discharge. The agent and warden has appealed to this court from that order.

The facts appearing on the hearing before the circuit court on the return to the writ were these:

The respondent was an examiner of silks in the appraisers' department in the port of New York, and in the spring of 1903, in the circuit court of the United States for the southern district of New York, a grand jury found two indictments against him, one being found against him jointly with two others for conspiring to defraud the United States in violation of § 5440 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3676), and the other was against him alone for knowingly attempting to enter certain Japanese silks upon payment of less than the amount of legal duty thereon, in violation of § 5444, Revised Statutes (U. S. Comp. Stat. 1901, p. 3677).

In January, 1904, he, in company with one of the others named in the indictment (the other having fled the jurisdiction), was tried in the circuit court of the United States for the southern district of New York upon the indictment charging them with conspiracy. He was convicted and sentenced to imprisonment in the state prison at Sing Sing, New York, for two years.

He appealed to the circuit court of appeals for the second circuit, where the conviction was affirmed, and thereafter an application was made on his behalf to this court for certiorari to review the judgment of conviction, which application was denied in January, 1906.

NOTE.—On the right to try a person for an offense other than the one for which he was surrendered—see notes to Ex parte McKnight, 14 L.R.A. 128; Com. v. Wright, 19 L.R.A. 206; Cook v. Hart, 36 L. ed. U. S. 934; and Whitten v. Tomlinson, 40 L. ed. U. S. 406.

On repeal of statutes by implication—see notes to State v. Massey, 4 L.R.A. 309; First Nat. Bank v. Weidenbeck, 38 C. C. A. 136; and United States v. 356 Caddies of Tobacco, 20 L. ed. U. S. 235.

After his trial and conviction, and pend-
g a review of the judgment, the respond-
t had been enlarged on bail, and after the
dgment was affirmed in the circuit court
appeals and a certiorari from this court
d been denied, he was, on the 19th of
nuary, 1906, duly called in the circuit
urt to submit himself to sentence, but did
t appear, and his default was entered.

A few days subsequently he was found
the Dominion of Canada. This govern-
ent then instituted extradition proceedings
Montreal to procure his rendition upon
e judgment of conviction of conspiracy
defraud the United States, and claimed
was an extraditable crime under the
urth subdivision of article 1 of the treaty
"extradition convention" of 1889, be-
een the United States and Great Britain.
6 Stat. at L. 1508.] That subdivision
ads as follows:

"4. Fraud by bailee, banker, agent, factor,
ustee, or director or member or officer of
y company made criminal by the laws of
th countries."

The respondent was held for extradition
the Canadian commissioner, but, on writ
habeas corpus, the court of King's bench
ld that the conspiracy to defraud the
nited States, as set forth in the indictment
pon which respondent was convicted, was
t such a fraud as was provided for in
e subdivision of the article of the treaty
bove referred to. Extradition was there-
ore refused.

Thereupon the United States secured the
earrest of the respondent on another com-
laint, charging him with the offenses for
hich he had been indicted under § 5444 of
he Revised Statutes, and for which he had
ot been tried in New York. The Canadian
ommissioner held the respondent upon that
omplaint, and ordered his extradition, and,
pon a writ of habeas corpus, the court of
King's bench affirmed that order; and the
espondent was then surrendered to the
roper agent of the United States, who at
nce took him to the state of New York, and,
aving arrived within the southern district
f that state, the marshal of that district,
roceeding under the warrant for imprison-
ent issued by the circuit court upon the
onviction of the respondent on the conspir-
cy indictment, took possession of him and
elivered him into the custody of the warden
f Sing Sing prison, there to be imprisoned
r two years according to the sentence im-
sed upon him under the conviction as stat-
d.

The respondent then obtained this writ
on a petition setting forth the above facts,
d claimed that his imprisonment was in
olation of the 3d and 7th articles of the
extradition treaty between the United States and Great Britain. 26 Stat. at L. 1508. The warden of the prison made return August 7, 1906, that he held the respondent by virtue of the final judgment of the circuit court of the United States for the southern district of New York, rendered on the 9th of March, 1904, as above set forth.

Mr. W. Wickham Smith argued the cause, and, with Solicitor General Hoyt, filed a brief for appellant:

The necessity and propriety of adhering to the plain language of treaties has been fully recognized by this court.

The Amiable Isabella, 6 Wheat. 1, 71, 5 L. ed. 191; Society for Propagation of the Gospel v. New Haven, 8 Wheat. 464, 490, 5 L. ed. 662, 668; Tucker v. Alexandroff, 183 U. S. 424, 436, 46 L. ed. 264, 270, 22 Sup. Ct. Rep. 195.

The intention of the parties to a treaty must be ascertained by an examination of the entire instrument.

United States v. Texas, 162 U. S. 1, 40 L. ed. 867, 16 Sup. Ct. Rep. 725.

The same principle has been repeatedly applied by this court to statutes.

Silver v. Ladd, 7 Wall. 219, 227, 19 L. ed. 138. 141; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 22, 43 L. ed. 341, 350, 19 Sup. Ct. Rep. 77; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 635, 42 L. ed. 878, 885, 18 Sup. Ct. Rep. 488.

Where the provisions of two acts are so unlike each other that the comparison exhibits only a contrast, instead of saying that their opposing regulations were designed to be similar, it would seem much more reasonable to say that the one act exhibits a legislative mind materially variant in the particulars where the difference exists, from what is exhibited by the other.

Pennington v. Coxe, 2 Cranch, 33, 59, 2 L. ed. 199, 207.

Mr. Terence J. McManus argued the cause, and, with Mr. W. M. K. Olcott, filed a brief for appellee:

Almost all of the important authorities on the law of nations have held that, without a treaty stipulation, one government is not under any obligation to surrender a fugitive from justice to another government for trial.

2 Foelix's Droit International Privé, § 608; Twiss, Nations in Time of Peace, 1884 ed. § 238; 1 Phillimore, International Law, 3d ed. 517; Creasy International Law, 202; Lewis, Foreign Jur. 37; Pom. International Law, Woolsey's 1886 ed. 236; Lawrence's Wheaton, International Law, 1863, 233; Mr. Rush, Sec. of State, to Mr. Hyde de Neuville, Apr. 9, 1817, M. S. notes to 2 For. Leg. 218; Mr. Webster, Sec. of State, to Mr. d'Argaiz,

June 21, 1842, 6 Webster's Works, 399–405; United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234.

When treaty stipulations have been entered into, the same writers and many others of equal authority hold that when a fugitive has been surrendered to the demanding government, he shall be tried only for the specific offense for which his surrender was granted; and that, in the event of his not being tried for that offense, or having been tried and acquitted thereon, he is entitled to a reasonable time to leave the country before being arrested upon any other charge of crime alleged to have been committed prior to his extradition.

1 Moore, Extradition, p. 255; Billot, Traité de l'Extradition, 308; Field's International Code, § 237; Wharton, Confl. § 846.

In the United States this doctrine has now acquired the dignity of well-settled law.

United States v. Rauscher, supra; Cosgrove v. Winney, 174 U. S. 64, 43 L. ed. 897, 19 Sup. Ct. Rep. 598; Ex parte Coy, 32 Fed. 911; People ex rel. Young v. Stout, 81 Hun, 336, 30 N. Y. Supp. 898; Re Reinitz, 4 L.R.A. 236, 39 Fed. 204.

The decision is also in line with the views which have obtained in the Department of State.

4 Moore's Inter. Law Dig. pp. 314–316.

The implied repeal of a Federal statute by a subsequent treaty provision is not to be favored.

Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568; Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; United States v. Lee Yen Tai, 185 U. S. 213, 222, 46 L. ed. 878, 883, 22 Sup. Ct. Rep. 629; Whitney v. Robertson, 124 U. S. 191–194, 31 L. ed. 387, 388, 8 Sup. Ct. Rep. 456; United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

It does not appear that any movement has been made or notice given by this government to try the respondent on the indictment for the crime for which he has been extradited, but his imprisonment in Sing Sing prison is upon a conviction of a crime for which the Canadian court had refused to extradite him, and is entirely different from the one for which he was extradited. In other words, he has been extradited for one offense and is now imprisoned for another, which the Canadian court held was not, within the treaty, an extraditable offense.

Whether the crime came within the provision of the treaty was a matter for the decision of the Dominion authorities, and such decision was final by the express terms of the treaty itself. Article 2, Convention of July 12, 1889, 26 Stat. at L. 1508; United States Treaties in Force April 28, 1904, pages 350, 351.

We can readily conceive that if the Dominion authorities, after the court of King's bench had decided that the crime of which respondent had been convicted, and for which extradition had been asked, was not extraditable, and the request for extradition had, therefore, been refused, had been informed on the subsequent proceeding for extradition on the other indictment that it was not the intention of this government to try respondent on that indictment, but that, having secured his extradition on that charge, it was the intention of this government to imprison him on the judgment of conviction, they would have said that such imprisonment would not be according to the terms of the treaty, and they would have refused to direct his extradition for the purpose stated.

Although the surrender has been made, it is still our duty to determine the legality of the succeeding imprisonment, which depends upon the treaty between this government and Great Britain, known as the Ashburton treaty of 1842 (8 Stat. at L. 572–576, art. 10), and the subsequent one, called a convention, concluded in 1889, and above referred to.

The treaty of 1842 had no express limitation of the right of the demanding country to try a person only for the crime for which he was extradited, and yet this court held that there was such a limitation, and that it was to be found in the "manifest scope and object of the treaty itself;" that there is "no reason to doubt that the fair purpose of the treaty is that the person shall be delivered up to be tried for that offense, and for no other." United States v. Rauscher, 119 U. S. 407, 422, 423, 30 L. ed. 425, 430, 7 Sup. Ct. Rep. 234.

Again, at the time of the decision of the Rauscher Case there were in existence §§ 5272 and 5275, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 3595, 3596), both of which are cited and commented upon in that case, and in the course of the opinion of Mr. Justice Miller, at page 423, L. ed. page 430, Sup. Ct. Rep. page 243, he said:

"The obvious meaning of these two statutes, which have reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this government to be tried for any other offense than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, he

shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought. This is undoubtedly a congressional construction of the purpose and meaning of extradition treaties, *such as the one we have under consideration, and, whether it is or not, it is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings.

"That right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition."

Mr. Justice Gray, page 433, L. ed. page 433, Sup. Ct. Rep. page 248, in his concurring opinion, places that concurrence upon the single ground that these sections clearly manifest the will of the political department of the government in the form of an express law that the person should be tried only for the crime charged in the warrant of extradition, and he should be allowed a reasonable time to depart out of the United States before he could be arrested or detained for any other offense. Both grounds were concurred in by a majority of the whole court.

If the question now before us had arisen under the treaty of 1842 and the sections of the Revised Statutes above mentioned, we think the proper construction of the treaty and the sections would have applied to the facts of this case and rendered the imprisonment of the respondent illegal. The manifest scope and object of the treaty itself, even without those sections of the Revised Statutes, would limit the imprisonment as well as the trial to the crime for which extradition had been demanded and granted.

It is true that the 10th article of the treaty contained no specific provision for delivering up a convicted criminal, but, if otherwise delivered, he could not have been punished upon a former conviction for another and different offense.

The claim is now made on the part of the government that "the manifest scope and object of the treaty" of 1842 are altered and enlarged by the treaty or convention of July 12, 1889. *The 2d, 3d, 6th, and 7th articles of that convention are set forth in the margin.†

It will be perceived that the second article provides that no person surrendered shall be triable or tried, *or be punished*, for any political crime or offense, while article three provides that no person surrendered shall be triable or be tried (leaving out the words "or be punished") for any crime or offense committed prior to the extradition, other than the offense for *which he was surrendered, until he shall have had an opportu- [320]

†Article II.

A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character.

No person surrendered by either of the high contracting parties to the other shall be triable or tried, or be punished for any political crime or offense, or for any act connected therewith, committed previously to his extradition.

If any question shall arise as to whether a case comes within the provisions of this article, the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time shall be final.

Article III.

No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.

Article VI.

The extradition of fugitives under the provisions of this convention and of the said 10th article shall be carried out in the United States and in Her Majesty's dominions, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering states.

Article VII.

The provisions of the said 10th article and of this convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers.

nity for returning to the country from which he was surrendered. Hence it is urged that, as punshment for another offense of which the person had been convicted is not in so many words expressly prohibited in and by article 3, a requisition may be obtained for one crime under that article, and, when possession of the person is thus obtained, he may be punished for another and totally different crime of which he had been convicted before extradition.

We do not concur in this view. Although if the words "or be punished" were contained in the 3d article the question in this case could not, of course, arise, yet we are satisfied that the whole treaty, taken in connection with that of 1842, fairly construed, does not permit of the imprisonment of an extradited person under the facts in this case.

The mere failure to use these words in the 3d article does not so far change and alter "the manifest scope and object" of the two treaties as to render this imprisonment legal. The general scope of the two treaties makes manifest an intention to prevent a state from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then, having obtained possession of his person, to use it for another and different purpose. Why the words were left out in the 3d article of the convention of 1889, when their insertion would have placed the subject entirely at rest, may perhaps be a matter of some possible surprise, yet their absence cannot so far alter the otherwise plain meaning of the two treaties as to give them a totally different construction.

In addition to the provisions of the treaty of 1889 we find still in existence the already-mentioned sections of the Revised Statutes, which prohibit a person's arrest or trial for any other offense than that with which he was charged in the extradition proceedings, until he shall have had a reasonable time to return unmolested from the country to which he was brought.

It is argued, however, that the sections in [321] question have *been repealed by implication by the treaty or convention of 1889, and that the respondent, therefore, cannot obtain any benefit from them. We see no fair or reasonable ground upon which to base the claim of repeal. Repeals by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty. United States v. Lee Yen Tai, 185 U. S. 213, 46 L. ed. 878, 22 Sup. Ct. Rep. 629. If both can exist the repeal by implication will not be adjudged. These sections are not incompatible with the treaty or in any way inconsistent therewith. We find nothing in the treaty which provides that a person shall be surrendered for one offense and then that he may be punished for another, such as is the case here. The most that can be asserted is that an inference to that effect perhaps might be drawn from the absence in article 3 of positive language preventing such punishment. But that slight and doubtful inference, resting on such an insufficient foundation, is inadequate to overcome the positive provisions of the statute and the otherwise general scope of both treaties, which are inconsistent with the existence of such right.

It is urged that the construction contended for by the respondent is exceedingly technical and tends to the escape of criminals on refined subtleties of statutory construction, and should not, therefore, be adopted. While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought, by doubtful construction of some of its provisions, to obtain the extradition of a person for one offense and then punish him for another and different offense. Especially should this be the case where the government surrendering the person has refused to make the surrender for the other offense, on the ground that such offense was not one covered by the treaty.

Our attention has been directed to various other treaties *between this government and [322] other nations, where provision is expressly made in regard to punishment. They frequently provide that no person shall be triable or tried "or be punished" for any other offense than that for which he was delivered up until he has had an opportunity of returning to the country from which he was surrendered. But because in some of the treaties the words "or be punished" are contained we are not required to hold that in the case before us the absence of those words permits such punishment, when that construction is, as we have said, contrary to the manifest meaning of the whole treaty, and also violates the statutes above cited. The order of the Circuit Court is affirmed.

Mr. Justice Moody did not sit in the case and took no part in its decision.

CLARENCE P. HUNT, Appt.,
v.
NEW YORK COTTON EXCHANGE.

(See S. C. Reporter's ed. 322-339.)

urts—jurisdictional amount.

1. The jurisdictional amount involved a suit brought by the New York Cotton change to enjoin the defendant from re-ving and using quotations of sales on ch exchange until he shall have acquired e right to receive them from the exchange, , with its consent and approval, from one the telegraph companies authorized to stribute them, is to be measured by the lue to the exchange of the right to con-ol the quotations, and not by the rate id by the defendant under his contract th the telegraph company furnishing him th such quotations.

idence — sufficiency — jurisdictional amount.

2. The effect of testimony in a suit by e New York Cotton Exchange to enjoin e defendant from receiving and using quo-ions of sales on such exchange, that the lue of the right to control these quota-ns is much greater than $2,000, is not paired by evidence that the value of quo-ions of sales varies with the volume of siness.

urts — enjoining proceedings in state ourt.

3. Enjoining, at the suit of the New rk Cotton Exchange, the receipt and use the defendant of quotations of sales on h exchange, is not forbidden to a Fed-l circuit court by U. S. Rev. Stat. § 720, S. Comp. Stat. 1901, p. 581, as enjoining ceedings in a state court, because an in-ction has been granted by a state court a pending suit between defendant and a egraph company, restraining the latter m refusing to furnish him with such quo-ions.

[No. 314.]

omitted March 4, 1907. Decided April 8, 1907.

PPEAL from the Circuit Court of the United States for the Western District Tennessee to review a decree enjoining de-dant from receiving and using quotations sales made upon the New York Cotton hange. Affirmed.

See same case below, on motion for preliminary injunction, 144 Fed. 511.

Statement by Mr. Justice McKenna:

This is a bill in equity brought by the New York Cotton Exchange, a New York corporation, against appellant, a citizen of Tennessee, in the circuit court of the United States for the western district of Tennessee, to enjoin him from receiving and using the quotations of sales made upon the exchange. The case is here on questions of jurisdiction, and only a synopsis of the principal facts alleged is necessary.

The exchange is a private corporation under the laws of New York, with 450 members, and owns in the city of New York a building for the use of its members, and conducts therein, on every business day, cotton sales for present and future delivery, the transfers aggregating many million bales of cotton annually. The purchases and sales for future delivery are permitted to be made and are made only during market hours and by open *viva voce* bidding, and the knowledge of the prices thus made has become a species of property of such value that telegraph companies pay large sums of money to the exchange for the privilege of receiving instantaneously the quotations, and distributing the same to customers and many persons in the United States who are engaged in the cotton commission business. Such persons are willing to pay and do pay the telegraph companies therefor, and the exchange realizes from the distribution of the quotations through the telegraph companies large sums of money annually. The quotations are such peculiar kind of property that their value depends upon the power of the exchange to confine the transmission and distribution thereof to such telegraph companies and their distributing agencies as will contract therefor with the exchange, and that, if any person or corporation is permitted to promptly acquire the quotations surreptitiously or *by theft, or without paying [324] the exchange therefor, such person or corporation can promptly give the same to numerous other persons, and the telegraph companies contracting with the exchange would thus be put at a disadvantage in competi-

OTE.—On the jurisdiction of Federal rts as affected by the amount in dis-e—see notes to Rich v. Bray, 2 L.R.A. ; Auer v. Lombard, 19 C. C. A. 75; and ment-Stribling Shoe Co. v. Roper, 36 C. A. 459.

s to conflict of jurisdiction between Fed- and state courts—see notes to Louis-e Trust Co. v. Cincinnati, 22 C. C. A. , and J. I. Case Plow Works v. Finks, C. C. A. 50.

n enjoining proceedings in Federal courts —see note to Copeland v. Bruning, 63 C. C. A. 437.

On pendency of action in state or Federal court as ground for abatement of action in other—see notes to Bunker Hill & S. Min. & Concentrating Co. v. Shoshone Min. Co. 47 C. C. A. 205, and Barnsdall v. Waltemeyer, 73 C. C. A. 521.

As to the exercise by courts of powers which bring them into collision—see notes to Carson v. Dunham, 3 L.R.A. 203, and Tefft v. Sternberg, 5 L.R.A. 221.

tion with such persons so obtaining the quotations without pay for them, and would thereby be deterred from continuing to pay the exchange the prices provided in the contracts with the telegraph companies. The manner of collecting and distributing the quotations is detailed, and yearly the cost to the exchange, it is alleged, is $4,500. Prior to 1893 the exchange permitted the telegraph companies to gather the quotations through their own employees upon the floor of the exchange building, and to distribute them without any effective restrictions upon the persons entitled thereto, with the result that many persons used the same in conducting so-called "bucket shops," by reason thereof the bucket-shop evil assumed such large proportions and became so serious as to materially affect the legitimate transactions upon the floor of the exchange, and its members were deprived of many customers. The exchange therefore found it necessary to terminate such right or license of the telegraph companies, and to that end made contracts with them. The contracts are attached to the bill. It is enough to say of them that under them the companies receive the quotations under the condition not to furnish them to any persons, firms, or corporations who, or which, may be directly or indirectly engaged in the promotion or maintenance of bucket shops or other places where such continuous quotations are used as a basis for bets or other illegal contracts based upon fluctuations of the prices of cotton dealt in on the exchange. Nor shall the companies directly or indirectly furnish the quotations to any person, firm, or corporation, whether members of the exchange or not, until such person, firm, or corporation shall have submitted an application in writing to the exchange in such form as it shall provide, and until it has approved of the application. The exchange has power to revoke its approval. In such event the com-
[325] panies shall cease *to furnish the quotations, and, if they have installed tickers or wires in the office or place of business of such person, firm, or corporation, they shall immediately remove the same. This, however, they are not required to do, "or to discontinue service furnished by any other means, which are under restraint by injunctions of the courts during the pendency of the injunction." In case of an application once approved and afterwards disapproved by the exchange and a suit be commenced against the companies on account of the discontinuance of the quotations, the exchange shall defend such suits at its expense and pay all fines, penalties, etc., to which the companies may be subject. In cases where an application has not been approved by the exchange, suits against the companies for refusal to furnish the quotations shall be defended at the expense of the companies, which shall use diligent efforts to secure the removal of injunctions. If the suit shall be brought against the exchange it shall defend at its own cost. For the purpose of protecting the companies against the use of quotations originating on the exchange by parties not entitled to them the companies may prosecute suits in their own name or that of the exchange to prevent or stop such competitive use.

The Western Union Telegraph Company has to pay the exchange for the quotations $13,584 per annum in equal instalments of $1,132 at the close of each month. The form of the application is attached to the contract.

It is alleged that all persons receiving the quotations have made applications in the form set out, except in a few instances, where persons who were receiving quotations from the companies prior to the execution of the contracts have, since the execution thereof, secured temporary injunctions (the exchange not being a party to the suits) to enjoin the companies from withholding or withdrawing the quotations, on the ground that such persons were not required to sign such applications or secure the approval of the exchange.

The defendant, Clarence P. Hunt (appellant), has not made application to either of the companies or the exchange, nor "has the exchange consented to his receipt of the quotations. On July 14, 1903, he was receiving from the Western Union Telegraph Company the quotations, and the company on said day notified him of the contract between it and the exchange, and that under said contract the company would be required to and would cease furnishing the quotations. Hunt declined to make an application, but in lieu thereof, on July 31, 1903, filed in the chancery court of Shelby county, Tennessee, a petition against the company to enjoin it from ceasing to furnish him said quotations. An *ex parte* injunction was issued. The company then filed its answer, and, the cause coming on for final hearing on bill and answer, decree was entered for it. The supreme court of the state reversed the decree without deciding the merits, for the reason that the chancery court should not have decided the cause on bill and answer, but should have awaited the taking of evidence. The cause is now pending and the injunction is still in force, and that by reason thereof only the company is furnishing Hunt the quotations. And it is alleged "that such authorized receipt and use of said quotations by said defendant is calculated to and in time will, if not entirely stopped, seriously

mpair the value to your orator of its quo-
ations, and that if even one person within
he jurisdiction of this court be allowed to
ecure such quotations without restrictions
s to the use thereof which your orator im-
oses as aforesaid, such person can furnish
hem to all the bucket shops and other per-
ons witnin the United States desiring them,
nd thus entirely defeat the efforts of your
rator to prevent their use in bucket shops
s a basis of their illegal bets, and mate-
ially impair the right of your orator to de-
ive a revenue from the distribution of said
uotations."

It is further alleged that there is no ade-
uate remedy at law, and that "the amount
nvolved and matters in dispute, exclusive
f interest and costs, is much more than the
um of $2,000." An injunction was prayed.
A preliminary injunction was issued. 144
ed. 511.

*The appellant filed a plea to the jurisdic-
ion, traversing the allegations of the bill
hich averred the jurisdictional amount.
A replication to the plea was filed. The
ourt sustained the jurisdiction. The appel-
ant then filed an answer, in which he al-
eged that the contracts with the telegraph
ompanies were illegal and void, and that the
xchange had no right to require the mak-
ng of applications to it, and no right to re-
uire the companies to refuse the quota-
ions to persons applying therefor, because
uch persons refused to make application to
he exchange. He admitted that he had not
ade an application to the exchange, but
ad been desirous and even anxious to pay
or the use of the quotations and conform to
ny reasonable rules or regulations, by
homsoever prescribed. He alleged that
hose stated in the bill were not reason-
ble, but unjust, oppressive, and illegal.
nd further, that he commenced business in
Memphis as a broker, dealing in cotton,
tocks, grain, and provisions, about the
onth of March, 1898, and made applica-
ion to the Western Union Telegraph Com-
any, under its designation of the Gold &
tock Telegraph Company, for its quota-
ions by "ticker." The application was ac-
epted, he agreeing to pay therefor the sum
f $25 per month. He has continued to re-
eive the quotations until the present time,
nd has built up and has now a considerable
usiness, at great expense and labor, and
he value and profits of the business depend
rgely upon the receipt and use of the quo-
ations "by and through the 'ticker,' under
nd in accordance with the contract." The
uotations are received through the "ticker"
utomatically,—a specimen of which is at-
ached to the answer,—and the letters and
gures are at once put upon a blackboard
in his office for reference and use, and are
used immediately for the transaction of busi-
ness. They indicate New York as the place
from which the quotations are sent, the time
of sending, the month the cotton has been
sold for. He has transacted no business ex-
cept as a broker, as stated, and is duly li-
censed under the laws of Tennessee. Every
transaction made by him is evidenced by a
report made to his customers *upon a form, [328]
a copy of which is attached to the answer.
The report evidences the consummation of
the contract, and has upon it the following:

"All orders for the purchase or sale of any
article are received and executed with the
distinct understanding that *actual delivery*
is contemplated where order is executed,
and that the party giving the order so un-
derstands and agrees."

Shortly after July 14, 1903, he was in-
formed that the exchange had required the
telegraph company to cancel its contract
with him, and to take the ticker out of his
office, and to cease to furnish to him the
quotations; thereupon he and other persons
similarly engaged in business of broker com-
menced in the chancery court of Shelby
county the suit mentioned in the bill. The
record and proceedings in the suit are re-
ferred to as part of the answer. The bill
in that suit prayed an injunction against
the telegraph company from removing the
ticker or refusing to furnish the quotations
as long as the company furnished them to
any other person. A preliminary injunction
was granted. The Western Union Telegraph
Company, the defendant in the suit, an-
swered, and based its defense substantially
upon its contract with the exchange. Hunt,
upon the authority of such contract, and up-
on information and belief, averred that the
answer was so filed by the company at the
request, and by the direction, and for the
benefit, of the exchange, "and with the view
and for the purpose of asserting and set-
ting up for him, and in his belief, the very
same matters and grounds and causes of ac-
tion as are set up and relied upon in this
suit." Upon the hearing the injunction was
discharged and the court dismissed. The de-
cree was reversed by the supreme court of
the state and the injunction continued in
force. The opinion of the supreme court is
made part of the answer. It appears there-
from that the court considered that a se-
rious question was presented by the defense
of the contracts between the telegraph com-
panies and the exchange. It was said upon
the defense two questions arose,—one of fact,
whether the contracts were made; *the other [329]
of law, whether, conceding the existence of
the contracts, did "they furnish a sufficient
answer to the demands of the complain-

ants." The court declined to pass upon either question, regarding the record imperfect. The court continued the injunction.

The suit is still pending in the chancery court, and, by reason of his contract with the company of May 1, 1899, and the injunction, Hunt has remained in the use and enjoyment of the ticker, "and is receiving, and the Western Union Telegraph Company has been and is furnishing him, the continuous quotations described in the bill and in this answer." And it is averred that that suit embraces the same questions of fact and law as this present suit and is between the same parties plaintiff and defendant, and the decree to be pronounced will adjudicate and dispose of the same matters of controversy. That suit is relied on as a bar to the present one, and it is insisted that the circuit court had no jurisdiction to grant or issue the injunction prayed for, as "it would require and compel the violation and breach of the injunction granted and in force in the chancery court of Shelby county, and the undoing of what has been done and is to be done in the course of the said suit." The other allegations of the answer are not material to the question now involved. A replication to the answer was filed. The case was submitted on the pleadings and exhibits, agreement of counsel as to certain paragraphs of the bill, evidence taken before the court, which consisted of the record of the suit in Shelby county, and testimony of witnesses. It was decreed that a permanent injunction issue restraining Hunt in accordance with the prayer of the bill. Extracts from the testimony will appear in the opinion of the court.

Messrs. Thomas B. Turley and William H. Carroll submitted the cause for appellant:

The question is not an analogous one to the cases that hold, for jurisdictional purposes, the amount involved is the value of the complainant's right to conduct its business without being subject to the burden of a nuisance, an illegal tax, or a threatened appropriation of property under an unconstitutional act, of the value of $2,000 exclusive of interest and costs.

Scott v. Donald, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262; Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311.

The mere allegation in the bill of complaint that the amount involved in matters in dispute, exclusive of interest and costs, is much more than the sum of $2,000, did not confer jurisdiction on the circuit court.

North American Transp. & Trading Co. v. Morrison, 178 U. S. 262–267, 44 L. ed. 1061–1064, 20 Sup. Ct. Rep. 869.

Manifestly the object sought to be accomplished by the bill in this case is stopping the receipt by the appellant of continuous cotton quotations which he is receiving, by virtue of the injunctive process in a suit instituted by him against the Western Union Telegraph Company, and now pending in the chancery court of Shelby county, Tennessee; and necessarily the amount in controversy is determinable by the value to the appellee of the accomplishment of that object.

McNeill v. Southern R. Co. 202 U. S. 543–558, 50 L. ed. 1142–1147, 26 Sup. Ct. Rep. 722; McDaniel v. Traylor, 196 U. S. 415–422, 49 L. ed. 533–537, 25 Sup. Ct. Rep. 369.

The appellant, under the peril of a contempt proceeding, is deprived of the benefit of the judgment of the state court, and the effect of the decree is to enjoin him from enforcing the decree of the state court. The decree operates upon him as effectively as though it, in terms, enjoined him from proceeding in the chancery court of the state, and is the exercise of a power over him as a litigant in the state court.

United States v. Parkhurst-Davis Mercantile Co. 176 U. S. 317, 44 L. ed. 485, 20 Sup. Ct. Rep. 423; Peck v. Jenness, 7 How. 612–625, 12 L. ed. 841–847; Watson v. Jones, 13 Wall. 679–719, 20 L. ed. 666–672; Haines v. Carpenter, 91 U. S. 254–257, 23 L. ed. 345, 346; Diggs v. Wolcott, 4 Cranch, 179, 2 L. ed. 587; Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644; Central Nat. Bank v. Stevens, 169 U. S. 463, 42 L. ed. 818, 18 Sup. Ct. Rep. 403.

Messrs. Henry S. Robbins, Henry W. Taft, and Henry Craft submitted the cause for appellee:

The burden is upon the defendant to prove the amount involved to be less than $2,000.

Sheppard v. Graves, 14 How. 505, 516, 14 L. ed. 518, 520; Adams v. Shirk, 55 C. C. A. 25, 117 Fed. 801; Pennsylvania Co. v. Bay, 138 Fed. 203; Wiemer v. Louisville Water Co. 130 Fed. 244; Butters v. Carney, 127 Fed. 622; Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; Gage v. Pumpelly, 108 U. S. 164, 27 L. ed. 688, 2 Sup. Ct. Rep. 390.

In suits which seek no money decree, but the protection of a property or contract right by injunction or like relief, the jurisdictional test is the value of the right sought to be protected or enforced.

Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311; Texas & P. R. Co. v. Kuteman, 4 C. C. A. 503, 13 U. S. App. 93, 54 Fed. 547; Whitman v. Hubbell, 30 Fed. 81; Board of Trade v. Cella Commission Co. 76 C. C. A. 28, 145 Fed. 28; McNeill v. Southern R. Co. 202 U. S. 558, 50 L. ed. 1147, 26 Sup. Ct. Rep. 722; Hutchinson v. Beckham, 55 C. C. A. 333, 118 Fed. 330;

utchers' & D. Stock-Yards Co. v. Louisville & N. R. Co. 14 C. C. A. 290, 31 U. S. pp. 252, 67 Fed. 35; Scott v. Donald, 165 . S. 107, 41 L. ed. 648, 17 Sup. Ct. ep. 262; Amelia Mill. Co. v. Tennessee al, Iron & R. Co. 123 Fed. 811; Humes Ft. Smith, 93 Fed. 857; Nashville, C. & St. R. Co. v. McConnell, 82 Fed. 65; Smith v. ivens, 56 Fed. 352; Lanning v. Osborne, Fed. 657.

A party is not to be denied a right to sort to a Federal court for the protection his property because the value of the ght asserted is not capable of being acrately measured in dollars and cents.

Northern P. R. Co. v. Cunningham, 103 ed. 708; Butters v. Carney, supra; Sparrow Strong, 3 Wall. 97, 103, 18 L. ed. 49, 50.

The only question here is whether the trial urt had jurisdiction.

McLish v. Roff, 141 U. S. 661, 668, 35 . ed. 893, 895, 12 Sup. Ct. Rep. 118; nited States v. Jahn, 155 U. S. 109, 114, L. ed. 87, 90, 15 Sup. Ct. Rep. 39.

The objection that the remedy is at law es not present a question of jurisdiction. Smith v. McKay, 161 U. S. 355, 40 L. ed. 31, 16 Sup. Ct. Rep. 490; Blythe v. Hinckly, 173 U. S. 501, 507, 43 L. ed. 783, 786, Sup. Ct. Rep. 497.

Nor does the objection that the court canot grant the relief sought because of prior ate court litigation pending, or constituting *res judicata*.

Blythe v. Hinckley, supra; Huntington v. aidley, 176 U. S. 668, 679, 44 L. ed. 630, 35, 20 Sup. Ct. Rep. 526; Louisville Trust o. v. Knott, 191 U. S. 225, 48 L. ed. 159, Sup. Ct. Rep. 119; Bache v. Hunt, 193 . S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 17.

The prior pendency of a suit (not inolving the court's possession of the *res*) one jurisdiction is no bar to a like suit, en between the same parties, in another risdiction; and within this rule a state urt and a Federal court (even within that ate) are courts of different jurisdictions. Gordon v. Gilfoil, 99 U. S. 168, 23 L. ed. 3; Stanton v. Embrey, 93 U. S. 548, 23 L. l. 983; Mutual L. Ins. Co. v. Brune, 96 U. 588, 24 L. ed. 737; Merritt v. American teel-Barge Co. 24 C. C. A. 530, 49 U. S. pp. 85, 79 Fed. 228; Shaw v. Lyman, 79 ed. 2; Defiance Water Co. v. Defiance, 100 d. 178; Marshall v. Otto, 59 Fed. 249; urst v. Everett, 21 Fed. 218.

The decree in the case at bar does not enin the state court nor appellant from proeding there.

Bank of Kentucky v. Stone, 88 Fed. 383.

True, a judgment now in the state court it would not be of benefit to appellant, r two reasons: First, because it would be, as respects appellee, *res inter alios acta;* and, second, because, in the regular course of proceeding, a final decree has been entered in one of two concurrent suits. But this latter is always the result to one party or the other in concurrent suits in two jurisdictions.

Woodbury v. Allegheny & K. R. Co. 72 Fed. 371.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

It will be observed that this case is like the Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637, and we therefore start with some propositions established. It is established that the quotations are property and are entitled to the protection of the law, and that the exchange "has the right to keep the work which it has done, or paid for doing, to itself." It is, however, contended by appellant that the controversy about them that this suit presents does not involve the value of $2,000, exclusive of interest and costs. This is the issue presented by the plea to the jurisdiction. Appellant contends that the value involved is measured by his contract with the telegraph company. The exchange contends that the matter in dispute is the value of the object sought to be accomplished by the bill. The circuit court expressed it to be "the value of the contract between the New York Cotton Exchange and the Western Union Telegraph Company."

On the issue presented by the plea the burden of proof was upon the appellant, and he was required to establish by a preponderance of the evidence that the amount involved was less than the jurisdictional amount. Sheppard v. Graves, 14 How. 505, 14 L. ed. 518; Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; Gage v. Pumpelly, 108 U. S. 164, 27 L. ed. 668, 2 Sup. Ct. Rep. 390; Adams v. Shirk, 55 C. C. A. 25, 117 Fed. 801. The only evidence offered by him was his contract with the telegraph company in connection with evidence of the manner of his receipt and use of the quotations. This testimony was to the effect that the quotations are communicated through a ticker, which is a machine with a tape attached to it, that registers the price of cotton, giving the hour. They come sometimes *not more than a quarter of a [334] minute or a half of a minute apart, and are copied from the tape and placed upon a blackboard, where all can see them. When new quotations are received the old ones are generally wiped out. The "ticker service is very slow, and the value of it depends on the

time it is received. After it is put upon the blackboard it becomes public property, so far as concerns the value of it." And it was testified that a firm by the name of Ganong & Fitzgerald received their quotations about five minutes before appellant, they having better wire service. And also that there was a wire running into the Memphis Cotton Exchange, and that not quite a minute elapsed from the time the ticker registers the market quotations to the time they are registered on the blackboard in the city of Memphis and open to the public. Appellant testified that the amount of his business in cotton for future delivery amounted to one half million dollars per year, and when he took a trade himself he was prepared to deliver the cotton or commodity in conformity with the agreement between himself and his customer, and goes so far as to write across all orders that actual delivery is contemplated and understood.

A witness on the part of the exchange testified that he was employed by the board of trade as expert to investigate persons who pretended to be brokers, "but who were in fact bucket shops," and was in that position for several years, gathered statistics, made estimates of the volume of business during 1901 and 1902, and has kept pretty well informed ever since as to the number of bucket shops in the United States. And he further testified that trades are carried on in such shops in all commodities that are traded in on the New York Cotton Exchange, New York Stock Exchange, and the Chicago Board of Trade. Of the value of the right of the New York Cotton Exchange to control the distribution of its quotation he said: "One can only estimate or approximate the value of the right, for the reason that the volume of speculative business in the country changes, and that changes the value of the right. If there is a large volume [335] of speculative business *in cotton the value to the New York Cotton Exchange would probably amount to a million dollars, while with a depressed market it would not amount to more than $200,000 or $300,000." And this is the amount per year.

A superintendent of the exchange testified to his familiarity in a general way with what is called the independent trader, or independent trade, as distinguished from the trade or traders who carry their transactions to the cotton exchanges of the country, and in a measure with the volume of business done by such persons in an approximate way.

He further testified that the amount of business thus diverted from the exchange made a difference to the exchange of fully $1,000,000 a year, and that the value of the right to control the distribution of the quotations in the manner set out in the bill would very much exceed $2,000.

The witness was unable to state the relative amount of business done on the exchange in the years 1903, 1904, and 1905, because there was no record of the transactions kept, but he reached the conclusion in regard to the value of the business diverted from the exchange partly from the evidence given by appellee and partly as to the business done by the bucket shops. And he put the value "in dollars and cents," of the contract between the exchange and the telegraph company, independent of the amount of business diverted, at the amount the exchange received from the telegraph company. The following colloquy took place between the witness and counsel for appellant:

Q. Now, Mr. King, what time, up to this good moment and hour, has that exchange failed to receive the amount of that contract, that is, for giving the Western Union Telegraph Company the right to furnish this information gathered on the floor of the New York Cotton Exchange?

A. It has not.

Q. Then, in short, this here is nothing except fear and apprehension that unless these defendants are restrained that is likely to happen, and affect the value of the contract?

*A. And the business upon the exchange.

It is manifest that the injury to the exchange is not the rate paid by the appellant to the telegraph company. The purpose of the suit is to enjoin the appellant from receiving, using, or selling, directly or indirectly, the exchange's quotations, or permitting or maintaining any wire to his office over which the quotations are passing, or distributing the quotations, until he shall have acquired the right to receive them, either by contract of purchase from the exchange, or, with its consent and approval, from one of the telegraph companies authorized to distribute them. In other words, the object of the suit is to keep the control of the quotations by the exchange and its protection from the competition of bucket shops or the identity of its business with that of bucket shops. And the right to the quotations was declared, as we said in Board of Trade v. Christie Grain & Stock Co., to be property, and the exchange may keep them to itself or communicate them to others. The object of this suit is to protect that right. The right, therefore, is the matter in dispute, and its value to the exchange determines the jurisdiction, not the rate paid by appellant to the telegraph

mpany. The value of the right was tes-
fied to be much greater than $2,000. In
ississippi & M. R. Co. v. Ward, 2 Black,
5, 17 L. ed. 311, it was decided that juris-
ction is tested by the value of the object
be gained by the bill. To the same effect
Board of Trade v. Cella Commission Co.
5 Fed. 28. In the latter suit the Chicago
ard of Trade obtained a decree restrain-
g the use of its continuous quotations by
Cella Commission Company. It was
d that the amount or value of such right
not the sum a complainant might recover
an action at law for the damage already
stained, nor is he required to wait until
reaches the jurisdictional amount. The
ter declaration is supported by Scott v.
nald, 165 U. S. 107, 41 L. ed. 648, 17 Sup.
. Rep. 262.

Counsel for appellant do not deny that
risdiction is determinable by the object
ught to be accomplished by the bill, *but
ey assert that the value of that was specu-
tive, and changed with the volume of busi-
ss. Counsel lay great stress on the testi-
ny of the superintendent of the exchange,
the effect that the value of the contract
tween the exchange and the telegraph
mpany, independent of the business divert-
from the exchange, is, in dollars and
nts, the amount it receives from the tele-
aph company. Upon this testimony coun-
assert the right claimed by the exchange
be the narrow one of preventing the ap-
llant from receiving the continuous quo-
tions from the telegraph company, which
pays for, pending a litigation in the
te courts, and this distinguishes the case
m the Board of Trade v. Christie Grain
Stock Co. and contend that the jurisdic-
nal amount has not been established, as
telegraph company is fulfilling its con-
ct with the exchange. Of the latter con-
tion we have sufficiently indicated our
w, and it is only necessary to add that
ause the value of the quotations to the
hange varies with the volume of business
s not impair the effect of the testimony
t the value of its right to control them
'much greater than $2,000." We cannot
cur in the conclusion urged by appellant,
t this case is distinguishable in principle
n Board of Trade v. Christie Grain &
ck Co., either in the right asserted or
the defense against it. Even if the cases
e distinguishable, it might still be con-
ded, that would be of no consequence in
ermining the jurisdictional amount of
matter in dispute. But we will consider
difference claimed to exist between the
es. In the Christie Case, it is contended,
right asserted was "to prevent getting
the knowledge of a trade secret or the
tations of the market surreptitiously,
and using the knowledge so obtained," and
that, it is insisted, was the matter in con-
troversy. "Here," it is said, "there is no
violation of a duty or trust. The market
quotations are not received surreptitiously.
The appellant is not depriving the appellee
of the protection of the law." In the Chris-
tie Case the quotations were gotten and
published, "in some way not *disclosed," but, [338]
it was said, as the defendants did not get
them from the telegraph companies author-
ized to distribute them, had declined to sign
contracts satisfactory to the plaintiff (board
of trade), and denied the plaintiff's rights
altogether, it was a reasonable conclusion
that they got, and intended to get, their
knowledge in a way which was wrongful.
This, however, was not said to limit plain-
tiff's right, but to express a violation of it.
The right was clearly defined to be, the right
of the board of trade to keep the quotations
to itself or communicate them to others.
And this is also the right of the exchange in
the case at bar. It can be violated not only
by getting the quotations surreptitiously or
"in some way not disclosed," or by getting
them from a person forbidden to communi-
cate them.

The next contention of appellant is that
the court had no jurisdiction to grant the
injunction and pronounce the decree ap-
pealed from. The only question involved in
this branch of the case, appellant says, is
"whether it comes within the provision of
the Revised Statutes, § 720, U. S. Comp.
Stat. 1901, p. 581, which is to the effect that
no writ of injunction shall be granted by
a court of the United States to stay proceed-
ings of any court except in matters of bank-
ruptcy."

And appellant insists that this suit nec-
essarily offends that section, because under
its decree he "cannot have the benefit of the
judgment of the state court without being
in contempt of the Federal court," and that
he is restrained by the circuit court from
receiving from the telegraph company what
the company is forbidden to refuse him by
the state court. To sustain his contention
appellant cites United States v. Parkhurst
Davis Mercantile Co. 176 U. S. 317, 44 L.
ed. 485, 20 Sup. Ct. Rep. 423, and cases
there referred to. Also Diggs v. Wolcott, 4
Cranch, 179, 2 L. ed. 587; Watson v. Jones,
13 Wall. 679, 20 L. ed. 666; Dial v. Rey-
nolds, 96 U. S. 340, 24 L. ed. 644; Central
Nat. Bank v. Stevens, 169 U. S. 433, 42 L.
ed. 807, 18 Sup. Ct. Rep. 403. These cases
do not sustain his contention. In Central
Nat. Bank v. Stevens it was decided that a
state court had no power to enjoin a party
whose rights had been adjudged by a circuit
court of *the United States from proceeding [339]
with a sale of property under a decree of

that court. In the other cases cited, except Watson v. Jones, the purpose was to directly enjoin parties from proceeding in the state courts. In Watson v. Jones was considered what identity of parties, rights, and relief prayed for was necessary to enable the pendency of an action in one court to be pleaded in bar in another court, and it was said: "The identity in these particulars should be such that, if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties." The principle was also expressed in that case, and sustained by authorities, that the possession of property by one court cannot be interfered with by another, and, that the act of Congress of March 2, 1793 (1 Stat. at L. 334, chap. 22, § 5), (now § 720 of the Revised Statutes of the United States [U. S. Comp. Stat. 1901, p. 581]), as construed in Diggs v. Wolcott, supra, and Peck v. Jenness, 7 How. 625, 12 L. ed. 846, is equally conclusive against any injunctions from the circuit court, forbidding the defendants in the case to take possession of property which an unexecuted decree of a state court required the marshal to deliver to them. The case at bar has not that feature, nor has it identity with the case in the chancery court of Shelby county. Its parties and purposes are different. The pendency of a suit in a state court does not deprive a Federal court of jurisdiction. Gordon v. Gilfoil, 99 U. S. 168, 25 L. ed. 383; Mutual L. Ins. Co. v. Brune, 96 U. S. 588, 24 L. ed. 737; Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983; Merritt v. American Steel-Barge Co. 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed. 228; Bank of Kentucky v. Stone, 88 Fed. 383.

The Circuit Court had jurisdiction, and its decree is affirmed.

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[340]*WILLIAM W. BIERCE, Limited, a Corporation, Appt.,

v.

CLINTON J. HUTCHINS, Trustee.

(See S. C. Reporter's ed. 340–349.)

Election of remedies—inconsistent claims.

1. The seller in a contract of conditional sale does not, by instituting proceedings to enforce a material man's lien, based upon the mistaken theory that the title has passed to the purchaser, make an election which prevents him from bringing suit in replevin, based on the theory that title still remains in the seller.

Conditional sale—what constitutes.

2. A contract for the sale of certain rails, cars, engines, and goods, to remain the property of the seller until payment of the note given for the purchase price, is no less a conditional sale because possession was to be, and was, delivered, and it must have been contemplated that the rails would be put down upon a roadway assumed to belong to the purchaser, or because the contract required additional security in the form of first-mortgage bonds of the purchaser.

[No. 212.]

Argued March 20, 21, 1907. Decided April 1, 1907.

APPEAL from the Supreme Court of the Territory of Hawaii to review a judgment which reversed a judgment of the Circuit Court of the First Judicial Circuit of that territory in favor of plaintiff in an action of replevin, and ordered judgment for defendant. Reversed.

See same case below, 16 Haw. 418; on rehearing, 16 Haw. 717.

The facts are stated in the opinion.

Mr. Charles H. Aldrich argued the cause, and, with Messrs. Henry S. McAuley and Henry W. Prouty, filed a brief for appellant:

The findings of fact by the trial court were adopted by the supreme court of the territory, though different legal conclusions were held to follow from such facts. This is equivalent to a special finding by the supreme court.

Stringfellow v. Cain, 99 U. S. [illegible], [illegible] L. ed. 421; Harrison v. Perea, 168 U. S. [illegible], 323, 42 L. ed. 478, 483, 18 Sup. Ct. Rep. [illegible].

The doctrine of election, whether on the common-law or equity side of the court, depends not upon technical rules, but upon principles of equity and justice, and upon actual intention.

Watson v. Watson, 128 Mass. 155; Standard Oil Co. v. Hawkins, 33 L.R.A. [illegible], [illegible] C. C. A. 468, 46 U. S. App. 115, 74 Fed. [illegible].

No rights of third parties are involved. The property was in the custody of a court of equity. The attorney said to have made the election was acting for other creditors, who, with a creditors' committee and the approval of the court, were carrying on the business of the insolvent debtor. [illegible] would have made these plans impossible. The attorney swears he had no intention of making an el[illegible], and the facts show he could not have m[illegible], if [illegible]

NOTE.—On election of remedy under contract of conditional sale—see note to Cole v. Hines, 32 L.R.A. 471.

As to what constitutes a conditional sale—see notes to Hineman v. Matthews, 10 L.R.A. 233; Weinstein v. Freyer, 12 L.R.A. 700; and Sturm v. Boker, 37 L. ed. U. S. 1093.

In such a case the party is not
n election.
i-Brinkman Commission Co. v.
P. R. Co. 126 Mo. 344, 26 L.R.A.
m. St. Rep. 675, 28 S. W. 870;
& Co. v. Robinson, 13 Cal. 134;
Norman, 41 Minn. 496, 43 N. W.
rett v. John V. Farwell Co. 199
5 N. E. 361.
r that a person who is put to his
should be concluded by it two
e necessary:
full knowledge of the nature of
sistent rights and of the neces-
ecting between them.
An intention to elect, manifested
pressly or by acts which imply
d acquiescence.
v. Morgan, 11 H. L. Cas. 615.
here there are inconsistent rights
ion of the conclusive effect of an
lepends upon whether the rights
arties have intervened. If so, the
conclusive. If not, it is not con-

v. Patterson, 160 U. S. 584, 592,
543, 549, 16 Sup. Ct. Rep. 373;
Printing Press & Mfg. Co. v.
Pub. Co. 56 N. J. L. 676, 44 Am.
410, 29 Atl. 681; Johnson-Brink-
mission Co. v. Missouri P. R. Co.
lard Oil Co. v. Hawkins, supra.
es cited in the opinion of the court
l relied upon involved the rights
parties, taking without notice.
v. Van Winkle, 92 Ala. 443, 8 So.
Winkle v. Crowell, 146 U. S. 42,
380, 13 Sup. Ct. Rep. 18.
party does not in fact have two
nt rights, and merely attempts to
right he does not have, but sup-
ias, and without obtaining any le-
action therefrom, he is not pre-
m asserting his actual right.
. Alley, 156 Mass. 195, 30 N. E.
son v. Watson, supra; Fuller-War-
. Harter, 110 Wis. 80, 53 L.R.A.
n. St. Rep. 867, 85 N. W. 698; Re
nan and Garrett v. John V. Far-
supra.
aii only the materials actually en-
o the construction can be allowed
; others delivered under the same
but not used, cannot be so em-

Redward, 10 Haw. 151.
the property sued for in this ac-
ding railroad rolling stock, was
t used in the construction of the
f the Kona Sugar Company, Lim-
was not lienable.
v. Iowa Eastern R. Co. 51 Iowa,
m. Rep. 124, 1 N. W. 434; New
Car Spring Co. v. Baltimore & O.
R. Co. 11 Md. 81, 69 Am. Dec. 181; 20 Am. & Eng. Enc. Law, 2d ed. p. 290; 23 Am. & Eng. Enc. Law, 2d ed. p. 721.

Where a contract is for a lump sum and contains lienable and nonlienable items, no lien can attach.

Phillips, Mechanic's Liens, § 296; Adler v. World's Pastime Exposition Co. 126 Ill. 373, 18 N. E. 809; Morrison v. Minot, 5 Allen, 403; Graves v. Bemis, 8 Allen, 573; Mulrey v. Barrow, 11 Allen, 152; Driscoll v. Hill, 11 Allen, 154; Allen v. Elwert, 29 Or. 444, 44 Pac. 823, 48 Pac. 54; Getty v. Ames, 30 Or. 573, 60 Am. St. Rep. 835, 48 Pac. 355; Whitney v. Joslin, 108 Mass. 104; First Nat. Bank v. Redman, 57 Me. 405.

The agreement was a conditional sale, and not a chattel mortgage.

Harkness v. Russell, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51; Segrist v. Crabtree, 131 U. S. 287, 292, 33 L. ed. 125, 127, 9 Sup. Ct. Rep. 687; Black Diamond Coal Min. Co. v. The H. C. Grady, 87 Fed. 234; McRea v. Merrifield, 48 Ark. 162, 2 S. W. 780; Van Allen v. Francis, 123 Cal. 478, 56 Pac. 339; W. W. Kimball Co. v. Mellon, 80 Wis. 145, 48 N. W. 1100; Palmer v. Howard, 72 Cal. 295, 1 Am. St. Rep. 60, 13 Pac. 858; Rodgers v. Bachman, 109 Cal. 556, 42 Pac. 448; Dodd v. Bowles, 3 Wash. Terr. 387, 19 Pac. 156; Standard Implement Co. v. Parlin & O. Co. 51 Kan. 546, 33 Pac. 360; Schneider v. Lee, 33 Or. 582, 17 Pac. 269; De Saint Germain v. Wind, 3 Wash. Terr. 193, 13 Pac. 753; Singer Mfg. Co. v. Graham, 8 Or. 17, 34 Am. Rep. 572; Rosendorf v. Baker, 8 Or. 240; Wadleigh v. Buckingham, 80 Wis. 236, 49 N. W. 745; Kellogg v. Burr, 126 Cal. 38, 58 Pac. 306; Standard Steam Laundry v. Dole, 20 Utah, 469, 58 Pac. 1109; The John K. Shaw, 32 Fed. 496; Warren v. Liddell, 110 Ala. 248, 20 So. 89; Redewill v. Gillen, 4 N. M. 84, 12 Pac. 872; New Haven Wire Co. Cases, 57 Conn. 386, 5 L.R.A. 307, 18 Atl. 266; Hirsch v. Steele, 10 Utah, 20, 36 Pac. 49; McManus v. Walters, 62 Kan. 128, 61 Pac. 686; 6 Am. & Eng. Enc. Law, 2d ed. pp. 440, 441, 481; Coggill v. Hartford & N. H. R. Co. 3 Gray, 547; Hirschorn v. Canney, 98 Mass. 150; Nichols v. Ashton, 155 Mass. 205, 29 N. E. 519; Wentworth v. S. A. Woods Mach. Co. 163 Mass. 28, 39 N. E. 414; C. B. Cottrell & Sons Co. v. Carter, R. & Co. Corp. 173 Mass. 155, 53 N. E. 375; Oliver Ditson Co. v. Bates, 181 Mass. 455, 57 L.R.A. 289, 92 Am. St. Rep. 424, 63 N. E. 908; Raymond v. Dole, 4 Haw. 232; Grinbaum v. Heeia Sugar Plantation Co. 5 Haw. 410.

The giving of a note does not make the sale an absolute one.

Ex parte Crawcour, L. R. 9 Ch. Div. 419; Herring v. Hoppock, 15 N. Y. 409; Call v. Seymour, 40 Ohio St. 670; Pettyplace v.

Groton Bridge & Mfg. Co. 103 Mich. 155, 61 N. W. 266; Hollenburg Music Co. v. Morris (Tex. Civ. App.) 35 S. W. 396; Thomason v. Lewis, 103 Ala. 426, 15 So. 830; McPherson v. Acme Lumber Co. 70 Miss. 649, 12 So. 857; Duke v. Shackleford, 56 Miss. 552; Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339; Kirby v. Tompkins, 48 Ark. 273, 3 S. W. 363; Levan v. Wilten, 135 Pa. 61, 19 Atl. 945.

Nor did taking the bonds as collateral to the note change the conditional sale into an absolute one.

Hollenburg Music Co. v. Morris, supra; Cherry v. Arthur, 5 Wash. 787, 32 Pac. 744; Page v. Edwards, 64 Vt. 124, 23 Atl. 917; Matthews v. Lucia, 55 Vt. 308; Clark v. Hayward, 51 Vt. 14; Child v. Allen, 33 Vt. 476; Pettyplace v. Groton Bridge & Mfg. Co. supra; Peninsular General Electric Co. v. Norris, 100 Mich. 496, 59 N. W. 151; Standard Steam Laundry v. Dole, supra; Sargent v. Metcalf, 5 Gray, 306, 66 Am. Dec. 368; Dodd v. Bowles, 3 Wash. Terr. 383, 19 Pac. 156; Lippincott v. Rich & W. Drug Co. 19 Utah, 140, 56 Pac. 806.

Messrs. David L. Withington and A. B. Browne argued the cause, and, with Messrs. Alexander Britton, John W. Cathcart, and William R. Castle, filed a brief for appellee:

The transaction did not constitute a conditional sale.

Heryford v. Davis, 102 U. S. 235, 26 L. ed. 160; Andrews v. Colorado Sav. Bank, 20 Colo. 313, 46 Am. St. Rep. 291, 36 Pac. 902; Silver Bow Min. & Mill. Co. v. Lowry, 6 Mont. 288, 12 Pac. 652; C. Aultman & Co. v. Silha, 85 Wis. 359, 55 N. W. 711; Palmer v. Howard, 72 Cal. 293, 1 Am. St. Rep. 60, 13 Pac. 858; Grinbaum v. Heeia Sugar Plantation Co. 5 Haw. 410.

A conditional sale should not be inferred but where the intent to preserve the title in the vendor is clear, and there is nothing inconsistent therewith in the transaction; particularly, if the right to possession is reserved, then the condition will be maintained.

Harkness v. Russell, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51; Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 32 L. ed. 854, 9 Sup. Ct. Rep. 458; Chicago R. Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 268, 34 L. ed. 349, 10 Sup. Ct. Rep. 999.

Whether the mortgage be prior, contemporaneous, or subsequent, it is inconsistent with the theory of the vendor's retention of the title that the plaintiff should have delivered the property to be affixed to the realty.

Fuller-Warren Co. v. Harter, 110 Wis. 80, 53 L.R.A. 603, 84 Am. St. Rep. 867, 85 N. W. 698; Jones, Railway Securities, § 109; Porter v. Pittsburg Bessemer Steel Co. 122 U. S. 267, 30 L. ed. 1210, 7 Sup. Ct. Rep. 1206; Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 546; Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. 459, 20 L. ed. 199; Thompson v. White Water Valley R. Co. 132 U. S. 68, 33 L. ed. 256, 10 Sup. Ct. Rep. 29; New Mexico v. United States Trust Co. 172 U. S. 171, 43 L. ed. 407, 19 Sup. Ct. Rep. 128.

The strong inclination of the courts is to hold that a conditional sale is not binding upon creditors, purchasers, or encumbrancers who are deceived, or are likely to be deceived, by the secrecy of the contract.

Collins v. Houston, 138 Pa. 481, 21 Atl. 234; Loving Pub. Co. v. Johnson, 68 Tex. 273, 4 S. W. 532; Ryder v. Cooley, 58 Conn. 367, 20 Atl. 470.

Any inequitable act on the part of the vendor, treating the property as the property of the vendee, is a waiver and abandonment of the title reserved on the sale.

Hickman v. Richburg, 122 Ala. 638, 26 So. 136.

The sale of machinery or other personal property to be attached to the freehold by the vendee is such an inequitable act, and trover will not lie on behalf of one who furnishes machinery for a mill under a contract providing for a payment down and the balance on time, the title not to pass or the machinery become a fixture by being put into any mill until full payment is made; yet, if the plaintiff understands, when he sells the machinery, that it is purchased for the purpose of being attached to the realty, he cannot maintain replevin.

Jenks v. Colwell, 66 Mich. 420, 11 Am. St. Rep. 502, 33 N. W. 528; Oskamp v. Crites, 37 Neb. 837, 56 N. W. 394.

Where machinery consisting of motive power, such as generators for an electric railroad, is affixed thereto and an indispensable part of the railway, the court will not permit the title to be asserted on a conditional sale any more than in the case of the tracks of the railway itself.

Phœnix Iron Works v. New York Secur. & T. Co. 28 C. C. A. 76, 54 U. S. App. 68, 83 Fed. 757; New York Secur. & T. Co. v. Capital R. Co. 77 Fed. 529; Evans v. Kiser, 35 C. C. A. 28, 92 Fed. 828.

Where property, whether it be machinery, rails, or similar property, is delivered to be attached, and which is attached, to a railroad, it becomes so inseparably incorporated that it cannot be removed for nonpayment of the price, as against a bona fide purchaser or encumbrancer or mortgagee.

Hunt v. Bay State Iron Co. 97 Mass. 268; Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519, 6 L.R.A. 249, 15 Am. St. Rep. 235, 23 N. E. 327; Meagher v. Hayes, 183 U. S.

Mass. 228, 23 Am. St. Rep. 819, 25 N. E. 105.

Whether the rolling stock and equipment of a railroad is real estate or personal property,—and it has been well said that this court inclined to regard them as chattels real,—it is well settled that the rolling stock, as respects mortgages, is inseparably connected with the roadbed, and is a fixture.

Milwaukee & M. R. Co. v. James, 6 Wall. 750, 18 L. ed. 854; Pennock v. Coe, 23 How. 117, 16 L. ed. 436; Galveston, H. & H. R. Co. v. Cowdrey, supra; Palmer v. Forbes, 23 Ill. 301; Hunt v. Bay State Iron Co. supra; New Haven v. Fair Haven & W. R. Co. 38 Conn. 422, 9 Am. Rep. 399.

The innocent purchaser for value, which includes an execution creditor, a mortgagee, and anyone claiming under such, is not affected by the agreement, and, as to him, it is waived.

Thomson v. Smith, 111 Iowa, 718, 50 L.R.A. 780, 82 Am. St. Rep. 541, 83 N. W. 789; Stillman v. Flenniken, 58 Iowa, 450, 43 Am. Rep. 120, 10 N. W. 842; Fifield v. Farmers' Nat. Bank, 148 Ill. 163, 39 Am. St. Rep. 166, 35 N. E. 802; Western Transp. Co. v. Marshall, 37 Barb. 509.

The rights of the mortgage bondholders are available here as a defense in replevin for the rolling stock as well as the rail, as Hutchins, as the successor to the rights of the mortgagees under the sale, is entitled to make this defense.

Ryle v. Knowles Loom Works, 31 C. C. A. 340, 59 U. S. App. 653, 87 Fed. 976.

He is also entitled to make all the defenses which the receiver, whose title he received, could make, and replevin would not have lain against the receiver under these circumstances.

Hart v. Barney & S. Mfg. Co. 7 Fed. 543.

Taking the negotiable promissory note,—the indorsement of it and the proposed sale of the collateral are inconsistent with a conditional sale.

Merchants & P. Bank v. Thomas, 69 Tex. 537, 6 S. W. 565; Burch v. Pedigo, 113 Ga. 457, 54 L.R.A. 808, 39 S. E. 493; Farrar v. Brackett, 86 Ga. 463, 12 S. E. 686; McCullough v. Pritchett, 120 Ga. 585, 48 S. E. 158.

Taking the mortgage bonds as security was inconsistent with the retention of title by the plaintiff.

Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 536; Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. 459, 20 L. ed. 199; Austin v. Hammond, 96 Ga. 759, 22 S. E. 304; McCormick Harvesting Mach. Co. v. Lewis, 52 Kan. 358, 34 Pac. 12; C. Aultman & Co. v. Silha, 85 Wis. 359, 55 N. W. 711; Silver Bow Min. & Mill. Co. v. Lowry, 6 Mont. 288, 12 Pac. 652.

The delivery of the property and its use without claim of title for two years is inconsistent with the claim of the vendor's retaining title.

Peabody v. Maguire, 79 Me. 572, 12 Atl. 630; Farlow v. Ellis, 15 Gray, 229; Cole v. Hines, 81 Md. 476, 32 L.R.A. 455, 32 Atl. 196; Hutchings v. Munger, 41 N. Y. 155.

The filing of the mechanic's lien is a decisive act of the party, determining his election between two alternative and inconsistent rights, namely, the right to claim the title to the property as in the plaintiff, or the abandonment of the claim of title, and the assertion of the right to clai ma lien against it as the property of Kona Sugar Company.

Sanger v. Wood, 3 Johns. Ch. 416; Butler v. Hildreth, 5 Met. 49; Robb v. Vos, 155 U. S. 13, 39 L. ed. 52, 15 Sup. Ct. Rep. 4; Hickman v. Richburg, 122 Ala. 638, 26 So. 136; National Foundry & Pipe Works v. Oconto City Water Supply Co. 51 C. C. A. 465, 113 Fed. 793; Renne v. Townsend, 124 Iowa, 332, 100 N. W. 48; Lehman v. Van Winkle, 92 Ala. 443, 8 So. 870.

Under the law, of Hawaii, whether plaintiff could have enforced its lien or not, it could have obtained a judgment in its assumpsit suit against the receiver, whom it had been allowed to sue. What priority would have been allowed the judgment is another matter. The remedy was not ineffectual even if it be admitted that the lien could not be established.

Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 Pac. 435; Ormsby v. Dearborn, 116 Mass. 386; Nield v. Burton, 49 Mich. 53, 12 N. W. 906.

The words "settle or adjust," when applied to a liquidated account or demand, as in this case, mean to pay it.

1 Am. & Eng. Enc. Law, p. 641; State v. Staub, 61 Conn. 568, 23 Atl. 924.

When a second contract does not expressly abrogate the first, and is not wholly inconsistent with it, then the second contract is supplementary to the first, and the two will be construed together.

9 Cyc. Law. & Proc. p. 596; Uhlig v. Barnum, 43 Neb. 584, 61 N. W. 749.

Bringing an action for the price is an election between two alternative and inconsistent rights.

Richards v. Schreiber, C. & W. Co. 98 Iowa, 422, 67 N. W. 569; Marston v. Baldwin, 17 Mass. 611; Smith v. Barber, 153 Ind. 322, 53 N. E. 1014; Dowagiac Mfg. Co. v. White Rock Lumber & Hardware Co. 18 S. D. 105, 99 N. W. 854.

Even if an action for the price does not constitute an election, such an action, accompanied by an attachment of the property, is an estoppel by election, on the the-

ory that the attachment recognizes the title as being in the vendee.

Crompton v. Beach, 62 Conn. 25, 18 L.R. A. 187, 36 Am. St. Rep. 323, 25 Atl. 446; Smith v. Barber, supra; Bailey v. Hervey, 135 Mass. 172; Fuller v. Eames, 108 Ala. 464, 19 So. 366; Heller v. Elliott, 45 N. J. L. 564; Button v. Trader, 75 Mich. 295, 42 N. W. 834; Parke & L. Co. v. White River Lumber Co. 101 Cal. 37, 35 Pac. 442: Ormsby v. Dearborn, supra; Albright v. Meredith, 58 Ohio St. 194, 50 N. E. 719.

The presentation of the claim and intervention in the receivership is also a waiver.

Holt Mfg. Co. v. Ewing and Butler v. Hildreth, supra; Holden v. Metropolitan Nat. Bank, 151 Mass. 112, 23 N. E. 733; Whiteside v. Brawley, 152 Mass. 133, 24 N. E. 1088; Fosdick v. Southwestern Car. Co. 99 U. S. 256, 25 L. ed. 344; Central Trust Co. v. Texas & St. L. R. Co. 23 Fed. 673.

The lien was waived by the conduct of the plaintiff with respect to the receivership.

Hinchman v. Point Defiance R. Co. 14 Wash. 349, 44 Pac. 867; Tanner & D. Engine Co. v. Hall, 89 Ala. 630. 7 So. 187.

Irrespective of all the other considerations. the delay in asserting the title under the circumstances is of itself a waiver.

Patten v. Smith, 5 Conn. 196; Leatherbury v. Connor, 54 N. J. L. 172, 33 Am. St. Rep. 672. 23 Atl. 684; Gorham v. Holden, 79 Me. 317, 9 Atl. 894: Owenby v. Swann (Tenn. Ch. App.) 59 S. W. 378.

The transaction, construed most strongly in favor of plaintiff, constitutes, at best, a mortgage, and not a conditional sale.

Heryford v. Davis, 102 U. S. 235, 26 L. ed. 160; Andrews v. Colorado Sav. Bank. 20 Colo. 313. 46 Am. St. Rep. 291, 36 Pac. 902; Hart v. Barney & S. Mfg. Co. 7 Fed. 543; Dowdell v. Empire Furniture & Lumber Co. 84 Ala. 316. 4 So. 31; Chicago R. Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 268. 34 L. ed. 349. 10 Sup. Ct. Rep. 999; Osborne v. Connor, 4 Kan. App. 609. 45 Pac. 327.

There being no statement of facts, it must be assumed that the evidence supports the judgment.

Marshall v. Burtis, 172 U. S. 630. 43 L. ed. 579. 19 Sup. Ct. Rep. 290; Cohn v. Daley, 174 U. S. 539. 43 L. ed. 1077, 19 Sup. Ct. Rep. 802.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a decision upon a [344] bill of exceptions *in a case tried by the court of first instance without a jury. Hecht v. Boughton, 105 U. S. 235, 26 L. ed. 1018. The facts were found by the trial court and certain conclusions of law were stated, which the supreme court of the territory held to be wrong. It sustained the except one point which went to the ro plaintiff's cause of action, and, plaintiff's motion coupled with a that it would have no further ev present at a second trial, ordered a for the defendant, in order that might be brought to this court. ings of fact were taken to be tr supreme court, and are not open t except so far as they depend upo of law, so that the questions fo here are definite and plain, and th need to send the case back for a of facts by the supreme court, alth should have been made. String Cain, 99 U. S. 610, 25 L. ed. 421; v. Perea, 168 U. S. 311, 323, 42 L 482, 18 Sup. Ct. Rep. 129.

The suit was replevin for cert cars, engines, and goods, delivered pellant to the Kona Sugar Comp ited, and sold by a receiver of pany to the appellee with full not appellant's claim. Originally the contract for the sale of this pro cash, but the Kona Company hav to pay, the appellant offered certa in setlement of the contract" made, as follows: "We will take ment of this contract the sum of $ S. gold coin, and the promissory n Kona Sugar Company, Limited, fo of $37,044.53, in favor of William Limited, payable six months afte the Whitney National Bank in Ne bearing interest at the rate of seve half per cent (7½ per cent) pe and secured by first-mortgage bo Kona Sugar Company, Limited, of equal to the note, said bonds bei of a duly authorised issue not $200,000. This offer is conditio its acceptance by you, payment of ey. and the delivery of the note, lateral, before 4 P. M. on Thurs 14th, A. D. 1901. Upon such pay made to us before *the hour name deliver to you the bills of sale a you to take charge of the rails, lo cars, scales, and other materials n ing delivery, upon the express co understanding that said rails, lo cars, scales, and other material shall remain the property of W Bierce. Limited, until the full p the note above described, accord terms." This offer was accepted, tract took the place of that previo and the property was delivered.

For purposes of decision th court assumed that, under the fo strument, the passing of title w

to a condition precedent, but intimated that the majority of the court thought otherwise, if it had been necessary to decide the point. It was not necessary because the court was of opinion that, if there was such a condition, it was lost by what was considered an election on the plaintiff's part. The court below had found that there was no election, and therefore the question was and is whether the acts done by the appellant constituted one as matter of law. If not, then it must be considered whether the sale was on a condition precedent, and those are the two questions of law in the case.

The facts are simple. After the last contract was made the Kona Company got into trouble and a receiver was appointed. The appellant thereupon filed a claim of lien upon the railroad supposed to belong to the Kona Company, for materials used in the construction and equipment of the road, the materials referred to being the property in question. On or about August 1, 1902, it brought a suit to enforce this lien, and in November of the same year filed a petition in the Kona Company proceedings, asking that a decree already made for the sale of all the Kona Company's property should be modified so as to except all liens from the operation of the sale. Only a part of the property was used in the construction of the road, and, under any circumstances, the claim of a lien would have been bad. The lien suit was dismissed, before anything had been done in it, in January, 1903. On February 13 the appellant, *by leave of court, filed a petition in the Kona Company proceedings for an order that the receiver either should pay the amount due upon its note or deliver the property, setting up the contract and alleging that its title to the property still remained. The abortive lien proceedings constitute the election that is supposed to have brought the appellant's title to an end. We have not gone into further particulars because there can be no doubt that to claim a lien upon anything is inconsistent with asserting a title to it, and may be assumed to be sufficient to manifest an election if one is possible. The appellant's allegations in its first petition could give no additional strength to its choice.

Election is simply what its name imports; choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone. Thus, "if a man maketh a lease, rendering rent or a robe, the lessee shall have the election." Co. Litt. 145a. So a man may ratify or repudiate an unauthorized act done in his name. Metcalf v. Williams, 144 Mass. 452, 454, 11 N. E. 700. He may take the goods or the price when he has been induced by fraud to sell. Dickson v. Patterson, 160 U. S. 584, 40 L. ed. 543, 16 Sup. Ct. Rep. 373. He may keep in force or may avoid a contract after the breach of a condition in his favor. Oakes v. Manufacturers' F. & M. Ins. Co. 135 Mass. 248, 249. In all such cases the characteristic fact is that one party has a choice independent of the assent of anyone else. But if a man owns property he has no election to transfer it to another. He cannot make the transfer unless the other assents. And equally, if he owns property subject to be devested by the performance of a condition, he has no election to devest it without performance. The other party must assent. Transfer is very different from election, and requires acts of a different import on the part of the owner, and corresponding acts on the part of the transferee.

In the case at bar there is no pretense that the appellant's conduct purported to convey the property to the Kona Company in advance of the performance of the stipulated conditions. *The case stands on election alone, and the appellant had no right to elect in the sense of the argument. It could not obliterate the condition and leave the contract in force. It may be that it had an election to avoid the contract altogether, but, if so, it did not attempt to do it. It insisted on the contract as the ground of its claim to a lien for the price of the goods. The election supposed and relied upon is an election to keep the contract in force, but to leave out the reservation of title. It must be kept in mind that the effect attributed to the assertion of the lien is attributed to it as a strictly unilateral act, not as an offer to which an assent might be presumed. As such an act the appellant could not give it the supposed effect. It is quite true, as we have said, that the assertion of a lien is inconsistent with the assertion of a title (Van Winkle v. Crowell, 146 U. S. 42, 36 L. ed. 880, 13 Sup. Ct. Rep. 18), and, therefore, if a lien had been established by judgment or decree, the title would be gone by force of an adjudication inconsistent with its continuance. But the assertion of a lien by one who has title, so long as it is only an assertion, and nothing more, is merely a mistake. It does not purport to be a choice, and it cannot be one, because the party has no right to choose. The claim in the lien suit, as was said in a recent case, was not an election, but an hypothesis. Northern Assur. Co. v. Grand View Bldg. Asso. 203 U. S. 106, 108, ante, 109, 27 Sup. Ct. Rep. 27. The fact that a party, through mistake, attempts to exercise a right to which he is not entitled, does not prevent his afterwards exercising one which he had and still has un-

less barred by the previous attempt. Snow v. Alley, 156 Mass. 193, 195, 30 N. E. 691.

There remains the question whether the sale was conditional. Such sales sometimes are regulated by statute and put more or less on the footing of mortgages. With the development of its effects there has been some reaction against the Benthamite doctrine of absolute freedom of contract. But courts are not legislatures, and are not at liberty to invent and apply specific regulations according to their notions of convenience. In the absence of a statute their only [348] duty is to discover the *meaning of the contract and to enforce it, without a leaning in either direction, when, as in the present case, the parties stood on an equal footing and were free to do what they chose.

The contract says in terms that it is conditional, and that the goods are to remain the property of the seller until payment of the note given for the price. This stipulation is perfectly lawful. Harkness v. Russell, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51. So that the only question is whether any other provision of the contract is inconsistent with this one, or qualifies and explains it as intended to do less than it purports to do when taken alone. Chicago R. Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 268. 34 L. ed. 349. 10 Sup. Ct. Rep. 999. The fact that possession was to be and was delivered, and that it must have been contemplated that the rails would be put down upon a roadway no doubt assumed, it seems, wrongly, to belong to the Kona Company, had no such effect, as between vendor and vendee. Neither did the requirement of additional security in the form of first-mortgage bonds of the company. It may have been expected that the mortgage would embrace a part or the whole of this property, but there is nothing more common than a provision in a mortgage that it shall apply to and embrace after-acquired property, with sufficient description to ascertain the same and bring it within the mortgage when acquired. And if the mortgage would have been operative at once by way of estoppel in favor of third persons, there was the more reason for exacting an interest under it to save the vendor's rights in that event. Of course, the absolute liability for the price, and putting that liability in the form of a note, are consistent with the retention of title until the note is paid. Parties can agree to pay the value of goods upon what consideration they please (White v. Solomon, 164 Mass. 516, 30 L.R.A. 537. 42 N. E. 104), and when a purchaser has possession and the right to gain the title by payment, he cannot complain of a bargain by which he binds himself to pay and is not to get the title until he does.

It was suggested that the ratification of the contract by the Kona Company did not mention the condition. But it got *its rights [349] from the contract, and, of course, got only such rights as the contract gave. Some other subordinate suggestions were made, but we have disposed of the only questions that are open here.

Judgment reversed.

DAVID KAWANANAKOA, Jonah Kalanianaole, Abigail W. Kawananakoa, and Elizabeth K. Kalanianaole, Appts.,

v.

ELLEN ALBERTINA POLYBLANK, Otherwise Known as Sister Albertina, Trustee for Stella Keomailani Cockett, and Stella K. Cockett, Sole Beneficiary under Said Trust.

(See S. C. Reporter's ed. 349-354.)

Mortgage—foreclosure—deficiency judgment—territory as defendant.

Jurisdiction to decree foreclosure and sale under a mortgage and to enter a deficiency judgment is not defeated because of the inability to join all the parties and to sell all the land, due to a conveyance of a part of the mortgaged property to the territory of Hawaii, which insists upon its immunity from suit.

[No. 273.]

Argued and submitted March 21, 1907. Decided April 8, 1907.

APPEAL from the Supreme Court of the Territory of Hawaii to review a decree which affirmed a decree of foreclosure and sale under a mortgage, rendered by the Circuit Court of the First Circuit in that territory. Affirmed.

See same case below, 17 Haw. 82.

The facts are stated in the opinion.

Mr. Sidney M. Ballou submitted the cause for appellants:

The owners of the equity of redemption of all parts of the premises covered by a mortgage must be made defendants in a suit in equity to foreclose that mortgage.

Detweiler v. Holderbaum, 42 Fed. 337.

No deficiency judgment should be entered against the mortgagors until all of the mortgaged premises have been sold and the proceeds applied to the payment of the mortgage debt.

Hull v. Young, 29 S. C. 64, 6 S. E. [illegible]; Bull v. Coe, 77 Cal. 60, 11 Am. St. Rep. [illegible], 18 Pac. 808; Powell v. Patison, 100 Cal. [illegible], 34 Pac. 677; Clapp v. Maxwell, 13 Neb. [illegible], 205 U. S.

653; Seckel v. Backhaus, 7 Biss. Cas. No. 12,599.

ritory of Hawaii is a municipal n, with capacity to sue and be

Mun. Corp. §§ 20, 31; 1 Shearm. eg. § 249; 1 Thomp. Corp. § 1.

rt has called the territories "or- unicipalities," and likened them trict of Columbia.

v. Silver Bow County, 139 U. S. 5 L. ed. 210, 212, 11 Sup. Ct. Rep. v. Franklin, 172 U. S. 416, 423, 98, 500, 19 Sup. Ct. Rep. 183.

est analogy that can be drawn is he territory of Hawaii and the Columbia. The latter has been a municipal corporation.

. District of Columbia, 91 U. S. ed. 440.

unicipal corporation may be sued. . Corp. § 7360; 2 Dill. Mun. Corp. ersoll, Pub. Corp. p. 492; Prout v. ct, 154 Mass. 450, 28 N. E. 679; v. Milwaukee & M. R. Co. 7 Wis.

itory has assumed the right and bring suits, which capacity has questioned.

v. Liliuokalani, 14 Haw. 88; Ter- ahu County, 15 Haw. 365; Terri- r, 16 Haw. 363; Territory v. Mc- 6 Haw. 728; Territory v. Cotton, 4, 645.

itory has also been defendant in ts, two of which have come be- ourt.

. Hawaii, 194 U. S. 154, 48 L. ed. . Ct. Rep. 617; Carter v. Hawaii, 55, 50 L. ed. 470, 26 Sup. Ct. Rep.

the past two years the territory counties, giving each county the ver to sue and be sued in its cor- ne. It can hardly be urged that ry could delegate a power which itself possess yet this enactment xpressly sustained by the courts. ex rel. Oahu County v. Whitney, 0.

uption of the United States and several states from suit, except authorized by their own legisla- nothing to do with the corporate either the United States or the es, but is a mere privilege, which, ed, leaves the sovereign state lia- like any other public corporation. solely upon sovereignty, and the any of the cases which discuss le will show how inapplicable the of those cases will be when ap- territory which has no sover-

Memphis & C. R. Co. Tennessee, 101 U. S. 337, 339, 25 L. ed. 960, 961; United States v. Lee, 106 U. S. 196, 206, 27 L. ed. 171, 176, 1 Sup. Ct. Rep. 240; Carroll v. Price, 81 Fed. 141; Talbott v. Silver Bow County, supra; Metropolitan R. Co. v. District of Columbia, 132 U. S. 1, 9, 33 L. ed. 231, 234, 10 Sup. Ct. Rep. 19; Barnes v. District of Columbia, supra.

Moreover, a mortgagee of land may have relief even against a sovereign state.

Jackson ex dem. People v. Pierce, 10 Johns. 417; Reeve v. Atty. Gen. 2 Atk. 223; Hodge v. Atty. Gen. 3 Younge & C. Exch. 342; Rogers v. Maule, 1 Younge & C. Ch. Cas. 4.

Mr. **Aldis B. Browne** argued the cause, and, with Messrs. Alexander Britton and E. A. Douthitt, filed a brief for appellees:

It is elemental that the state or sovereign cannot be sued in its own courts without its consent.

Beers v. Arkansas, 20 How. 527, 529, 15 L. ed. 991, 992; Memphis & C. R. Co. v. Tennessee, 101 U. S. 337, 339, 25 L. ed. 960, 961; Briscoe v. Bank of the Commonwealth, 11 Pet. 257, 9 L. ed. 709.

And, when a state grants a right of remedy against itself, it may attach whatever limitations or conditions it chooses to the remedy; and, under our Federal Constitution, if one of the several states gives a right of action against itself, it may thereafter withdraw its consent to be sued, without impairing the obligation of contracts, within the meaning of the constitutional prohibition.

De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 468, 2 Sup. Ct. Rep. 91; Memphis & C. R. Co. v. Tennessee, 101 U. S. 337, 25 L. ed. 960; Beers v. Arkansas, 20 How. 527, 15 L. ed. 991.

And this rule is equally applicable to the organized territories of the United States.

Territory v. Doty, 1 Pinney (Wis.) 405; Langford v. King, 1 Mont. 38; Fisk v. Cuthbert, 2 Mont. 598.

The territory of Hawaii is not a municipal corporation.

Dill. Mun. Corp. 3d. §§ 18, 31; Chisholm v. Georgia, 2 Dall. 419, 447, 1 L. ed. 440, 452; Coffield v. Territory, 13 Haw. 479.

The territory not being suable, it necessarily follows that the entire available security was covered by suit and decree, and deficiency judgment after sale of all security which could be reached is proper.

Clark v. Simmons, 55 Hun, 175, 8 N. Y. Supp. 74; 2 Jones, Mortg. 6th ed. § 1709b.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a decree affirming

a decree of foreclosure and sale under a mortgage executed by the appellants to the appellee, Sister Albertina. 17 Haw. 82. The defendants (appellants) pleaded to the jurisdiction that after the execution of the mortgage a part of the mortgaged land had been conveyed by them to one Damon, and by Damon to the territory of Hawaii, and was now part of a public street. The bill originally made the territory a party, but the territory demurred and the plaintiffs dismissed their bill as to it before the above plea was argued. Then the plea was overruled, and after answer and hearing the decree of foreclosure was made, the appellants having saved their rights. The decree excepted from the sale the land conveyed to the territory, and directed a judgment for the sum remaining due in case the proceeds of the sale were insufficient to pay the debt. Eq. Rule 92.

The appellants contend that the owners of the equity of redemption in all parts of the mortgage land must be joined, and that no deficiency judgment should be entered until all the mortgaged premises have been sold. In aid of their contention they argue that the territory of Hawaii is liable to suit like a municipal corporation, irrespective of the permission given by its statutes, which does not extend to this case. They liken the territory to the District of Columbia (Met-[353] ropolitan *R. Co. v. District of Columbia, 132 U. S. 1, 33 L. ed. 231, 10 Sup. Ct. Rep. 19), and point out that it has been a party to suits that have been before this court (Damson v. Hawaii, 194 U. S. 154, 48 L. ed. 916, 24 Sup. Ct. Rep. 617; Carter v. Hawaii, 200 U. S. 255, 50 L. ed. 470, 26 Sup. Ct. Rep. 248).

The territory, of course, could waive its exemption (Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919), and it took no objection to the proceedings in the cases cited if it could have done so. See act of April 30, 1900, chap. 339, § 96. 31 Stat. at L. 141, 160. But in the case at bar it did object, and the question raised is whether the plaintiffs were bound to yield. Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. Leviathan, chap. 26, 2. A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. "*Car on peut bien recevoir loy d'autruy, mais il est impossible par nature de se donner loy.*" Bodin, Republique, 1, chap. 8, ed. 1629, p. 132; Sir John Eliot, De Jure Maiestatis, chap. 3. *Nemo suo statuto ligatur necessitative.* Baldus, De Leg. et Const. Digna Vox, 2. ed. 1496, fol. 51b, ed. 1539, fol. 61.

As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the territory itself is the fountain from which rights ordinarily flow. It is true that Congress might intervene, just as, in the case of a state, the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by *Congress or the Con-[354] stitution, except to the extent of certain limitations of power. The District of Columbia is different, because there the body of private rights is created and controlled by Congress, and not by a legislature of the District. But for the territory of Hawaii it is enough to refer to the organic act. Act of April 30, 1900, chap. 339, §§ 6, 55. 31 Stat. at L. 141, 142, 150. Coffield v. Territory, 13 Haw. 478. See, further, Territory v. Doty, 1 Pinney (Wis.) 396, 405; Langford v. King, 1 Mont. 33; Fisk v. Cuthbert, 2 Mont. 593, 598.

However it might be in a different case, when the inability to join all parties and to sell all the land is due to a conveyance by the mortgagor directly or indirectly to the territory, the court is not thereby deprived of ability to proceed.

Decree affirmed.

Mr. Justice Harlan concurs in the result.

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†IROQUOIS TRANSPORTATION COMPANY, Claimant of the Steamer "Winnebago," etc., Plff. in Err.,

v.

DE LANEY FORGE & IRON COMPANY. (No. 218.)

IROQUOIS TRANSPORTATION COMPANY, Claimant of the Steamer "Winnebago," etc., Plff. in Err.,

v.

GEORGE W. EDWARDS, Frank W. Bibb, and George W. Edwards, Executor of the Estate of H. D. Edwards, Deceased, Or

†These cases are reported by the official Reporter under the title of "The Winnebago."

's as H. D. Edwards & Company. (No. 219.)

S. C. Reporter's ed. 354-363.)

state court—review of questions of aw.

he decision of a state court upon of local law is not subject to re- he Federal Supreme Court on writ to the state court.

ional law—who may raise question.

he question whether a state statute lien upon a vessel, enforceable in ourt, for materials and supplies fur- the credit of the vessel, is an un- ional infringement upon the exclu- iralty jurisdiction of the Federal liens of a maritime character, is in a case in which no maritime lien ed.

state or Federal jurisdiction—en- lien on vessel.

he enforcement of a lien given by a tute upon a vessel for materials after she was launched is within liction of a state court, where such were really furnished for the com- f the vessel, and were fairly a part iginal construction.

e—state regulation—enforcing lien el.

he exclusive control over interstate vested in Congress by the Federal ion or laws is not infringed by the ent against a vessel engaged in in- commerce of a lien given by a state or materials furnished for her con- .

state or Federal jurisdiction—en- lien on vessel.

contract to build a ship, not being ne contract, which can only be en- a court of admiralty, a lien given te statute for materials furnished nstruction may be enforced against l in a state court.

[Nos. 218, 219.]

'ebruary 28, 1907. Decided April 8, 1907.

ROR to the Supreme Court of the of Michigan to review two judgments affirming decrees of the Circuit Court of Wayne County, in that state, enforcing liens against a vessel for materials and supplies furnished for her construction. Affirmed.

See same case below, 142 Mich. 84, 105 N. W. 527.

Statement by Mr. Justice Day:

These cases may be considered together. They are writs of error to the judgments of the supreme court of Michigan affirming the decrees of the circuit court of Wayne county, Michigan, enforcing liens for the De Laney Forge & Iron Company, defendant in error, in 218, and George W. Edwards and others, defendants in error in 219, and interveners in the original case.

The Winnebago, a steel steamer of 1,091 tons burden, was built by the Columbia Iron Works, at St. Clair, Michigan. The contract price was $95,000; date of contract, March 8, 1902; between the Columbia Iron Works and John J. Boland and Thomas J. Prindeville. It was understood that these persons should organize a corporation to be known as the Iroquois Transportation Company. The contract price was to be paid, $31,000 in cash, from time to time; for the balance the transportation company was to execute its notes to the amount of $16,000, to issue bonds for $48,000, to be secured by mortgage upon its property. On April 5, 1902, Boland and Prindeville assigned the contract to the Iroquois Transportation Company. Payments were made on the contract as follows:

$7,500, at date of signing contract;
7,500, April 3, 1902;
4,000, April 14, 1902;
4,000, June 15, 1902;
4,000, July 15, 1902.

An additional $4,000 was paid on October 3, 1902, and two negotiable notes of $4,000 given, maturing respectively November 1, 1903, and November 1, 1904.

The steamer was launched March 21, 1903. After she was in the water the work on the contract continued. On July 18, 1903, she was inspected, measured, enrolled, and licensed to *be employed in domestic and [356] foreign trade. This license was issued in the name of the Columbia Iron Works as owner.

On July 19, 1903, the Iroquois Transportation Company received a bill of sale of the steamer and delivered to the Columbia Iron Works ninety-six negotiable bonds of $500 each, secured by mortgage on the steamer, and paid the balance of the purchase money, which was to be paid in cash, then amounting between $400 and $500.

The agreement recited that possession was given to the Iroquois Transportation Com-

-On what questions the Federal Su- urt will consider in reviewing the s of state courts—see note to rel. Hill v. Dockery, 63 L.R.A. 571. jurisdiction in admiralty to en- is created by state laws—see note lectron, 21 C. C. A. 21.

he limits of admiralty jurisdiction es to Allen v. Newberry, 16 L. ed. 0; The Curtis, 3 L.R.A. 711; and oftus, 5 L.R.A. 684.

ting liens on vessels under mechan- laws—see note to Baizley v. The l L.R.A. 505.

pany for the purpose of completing and finishing up those things still remaining undone on the steamer and required to be done by the iron works by the terms of the contract for the construction of the steamer, "it being the sole intent and purpose of this agreement to enable the Iroquois Transportation Company to obtain immediate possession of the steamer, and without intending either to limit the extent of the obligation of said Columbia Iron Works under the original specifications."

The steamer left St. Clair for Lorain, Ohio, July 19, 1903. At that time she was not completed, and workmen remained on her and went with her to St. Clair, where additional work was done upon her. She was afterwards engaged in carrying cargoes between points on Lake Erie and Lake Superior.

On July 30, 1903, the Columbia Iron Works made an assignment for the benefit of creditors. On August 25, 1903, the De Laney Forge & Iron Company served notice on the Iroquois Transportation Company that it made a claim of lien against the steamer for forging and material furnished; and on October 6, 1903, complaint was filed in the circuit court of Wayne county, Michigan, and shortly thereafter Edwards and others intervened in the case, claiming a lien. The Iroquois Company gave a bond under the statute for the release of the vessel. Decrees were rendered in favor of the claimants and interveners in the circuit court of Wayne county, and upon appeal they were affirmed in the supreme court of Michigan. 142 Mich. 84, 105 N. W. 527.

Mr. Charles E. Kremer argued the cause, and, with Mr. William T. Gray, filed a brief for plaintiff in error:

A proceeding under the statutes of Michigan against a vessel which has already been enrolled and licensed under the laws of the United States, and which, at the time of the seizure, was actually engaged in interstate commerce, is unconstitutional and void because in conflict with the Constitution and laws of the United States.

The Glide, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930; Johnson v. Chicago & P. Elevator Co. 119 U. S. 397, 30 L. ed. 450, 7 Sup. Ct. Rep. 254; White's Bank v. Smith (White's Bank v. The Robert Emmett) 7 Wall. 646, 19 L. ed. 211; The Menominie, 36 Fed. 197; The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8; The Edith, 11 Blatchf. 451, Fed. Cas. No. 4,283; The Edith (Poole v. Tyler) 94 U. S. 519, 24 L. ed. 167; Moir v. The Du Saque, 4 Am. L. T. 84, Fed. Cas. No. 9,696; The Roanoke, 189 U. S. 185, 47 L. ed. 770, 23 Sup. Ct. Rep. 491.

The steamer Winnebago, engaged in interstate commerce, was not subject to seizure while passing from port to port through the waters within the jurisdiction of the courts of the state of Michigan.

Michigan C. R. Co. v. Chicago & M. L. S. R. Co. 1 Ill. App. 399; Wall v. Norfolk & W. R. Co. 52 W. Va. 485, 64 L.R.A. 501, 94 Am. St. Rep. 948, 44 S. E. 294; Connery v. Quincy, O. & K. C. R. Co. 92 Minn. 20, 64 L.R.A. 624, 104 Am. St. Rep. 659, 99 N. W. 365.

The contract to build a ship is a maritime contract, and therefore there is a lien for material and labor furnished which can be enforced in a court of admiralty, there being a lien under the state law.

People's Ferry Co. v. Beers, 20 How. 393, 15 L. ed. 961; Roach v. Chapman, 22 How. 129, 16 L. ed. 294; The J. E. Rumbell, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 499; Davis v. A New Brig, Gilpin, 473, Fed. Cas. No. 3,643; Read v. The Hull of a New Brig, 1 Story, 244, Fed. Cas. No. 11,609; The Chinto, 2 Ware, 37, Fed. Cas. No. 2,316; The Hull of a New Ship, 2 Ware, 203, Fed. Cas. No. 6,859; Van Pelt v. The Ohio, Fed. Cas. No. 16,870a; The Abby Whitman, 17 Law Rep. 322, Fed. Cas. No. 15; Sewall v. The Hull of a New Ship, 1 Ware, 565, Fed. Cas. No. 12,682; Purington v. The Hull of a New Ship, 1 Ware, 556, Fed. Cas. No. 11,473; The Richard Busteed, 1 Sprague, 441, Fed. Cas. No. 11,764; Drew v. The Hull of a New Ship, 17 Phila. Leg. Int. 405, Fed. Cas. No. 4,078; Parmlee v. The Charles Mears, Newberry, Adm. 197, Fed. Cas. No. 10,766; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 378, 12 L. ed. 480; Benedict, Admiralty, 3d ed. § 264; De Lovio v. Boit, 2 Gall. 475, Fed. Cas. No. 3,776; New England Mut. M. Ins. Co. v. Dunham, 11 Wall. 10, 20 L. ed. 90; 2 Parsons, Shipping & Admiralty, 327; Dupont de Nemours v. Vance, 19 How. 162, 15 L. ed. 584; The Grapeshot (The Grapeshot v. Wallerstein) 9 Wall. 129, 19 L. ed. 651; The Guy (The James Guy v. Tall) 9 Wall. 758, 19 L. ed. 710; The Lulu (Hazlehurst v. The Lulu) 10 Wall. 192, 19 L. ed. 906; The Custer (Pendergast v. The General Custer) 10 Wall. 204, 19 L. ed. 942; The Patapsco (The Patapsco v. Boyce) 13 Wall. 329, 20 L. ed. 696; The Robert W. Parsons, supra; The Blackheath (United States v. Evans) 195 U. S. 361, 49 L. ed. 236, 25 Sup. Ct. Rep. 46; Jackson v. The Magnolia, 20 How. 296-307, 15 L. ed. 909-914; Tucker v. Alexandroff, 183 U. S. 424, 46 L. ed. 264, 22 Sup. Ct. Rep. 195; Globe Iron Works Co. v. The John B. Ketcham, 2nd, 100 Mich. 583, 43 Am. St. Rep. 464, 59 N. W. 247; The Elias Ladd, 3 Sawy. 519, Fed. Cas. No. 4,364.

Mr. Herbert K. Oakes argued the cause, and, with Messrs. John C. Shaw, Charles B.

ren, William B. Cady, Joseph G. Hamb- Jr., and Hugh Shepherd, filed a brief for ndants in error:

ren if the statute is unconstitutional in respects, it is constitutional and valid far as it relates to the claims in con- ersy here, and the part being dealt with his controversy is not so related in sub- ce, and the provisions are not so inter- ndent, that one cannot operate without other. Under such circumstances the that is constitutional will, under all the horities, stand.

Am. & Eng. Enc. Law. 2d ed. p. 1088; kuk Northern Line Packet Co. v. Keo- , 95 U. S. 80, 24 L. ed. 377; Unity v. rage, 103 U. S. 447–459, 26 L. ed. 405–

may be true that the effect of the stat- even where it attempts to enforce a lien nonmaritime contract, would be to shut maritime liens if the vessel went to sale. the issues here are not burdened with question. It cannot, in this case, have effect of cutting off any maritime liens. vessel has been bonded, and her owner appeared in the action. Then, again, fact that the act, in case of a sale, as- es to distribute the proceeds and mar- the claims in an order not accepted in admiralty court, does not affect the case bar, even though it may be unconstitu- al in that regard.

he Winnebago, 73 C. C. A. 300, 141 Fed.

o long as the materials are to be used part of the original construction of the , the admiralty will not take cognizance hem.

he Iosco, Brown, Adm. 495, Fed. Cas. 7,060; The Victorian, 24 Or. 135, 41 Am. Rep. 838, 32 Pac. 1040; The Winnebago, C. C. A. 301, 141 Fed. 951; Detroit v. mmond, 58 C. C. A. 301, 121 Fed. 971.

he state here had compete power to make enforce the law here made and enforced, so far as it relates to the nonmaritime ter here under discussion, and its en- ement is not a regulation of commerce. mith v. Maryland, 18 How. 71, 74, 15 L. 269, 270; Johnson v. Chicago & P. Eleva- Co. 119 U. S. 388, 398, 30 L. ed. 447, 450, p. Ct. Rep. 254; Cannon v. New Orleans, Wall. 577, 582, 22 L. ed. 417, 420; Cin- ati, P. B. S. & P. Packet Co. v. Catletts- g, 105 U. S. 559, 26 L. ed. 1169; Parkers- g & O. River Transp. Co. v. Parkersburg, U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. The Winnebago, supra.

he admiralty jurisdiction does not ex- to a contract for building a vessel, o work done or materials furnished in construction.

napp, S. & Co. Co. v. McCaffrey, 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 824; People's Ferry Co. v. Beers, 20 How. 393, 15 L. ed. 961; Roach v. Chapman, 22 How. 129, 16 L. ed. 294; Edwards v. Elliott, 21 Wall. 532–553, 22 L. ed. 487–491; Graham & M. Transp. Co. v. Craig Shipbuilding Co. 203 U. S. 577, ante, 325, 27 Sup. Ct. Rep. 777.

Mr. Justice Day delivered the opinion of the court:

The Michigan statute under which the liens are claimed in this case is as follows:

"Third Compiled Laws of Michigan, p. 3254:

"(10789) Sec. 2. Every water craft of above 5 tons burden, used or intended to be used, in navigating the waters of this state, shall be subject to a lien thereon:

"First, for all debts contracted by the owner or part owner, master, clerk, agent, or steward of such craft, on account of supplies and provisions furnished for the use of said water craft, on account of work done or services rendered, on board of such craft by seamen or any employee other than the master thereof; on account of work done or service rendered by any person in or about the loading or unloading of said water craft; on account of work done or materials furnished by mechanics, tradesmen, or others, in or about the building, repairing, fitting, furnishing, or equipping such craft: *Provided*, That when labor shall be performed or materials furnished, as aforesaid, by a subcontractor or workman other than an original contractor, and the same is not paid for, said person or persons may give the owner or his agent, or the master or clerk of said craft, timely notice of his or their said claim, and from thenceforth said person or persons shall have a lien upon said craft *pro rata* for his or their said claims, to the amount that may be due by said owner to said original contractor for work or labor then done on said water craft."

*Several objections are urged by the plain- [360] tiff in error which, if sustained, will result in the reversal of the judgments of the supreme court of Michigan. Some of them are of a non-Federal character. It is insisted that the statute does not apply in this case, because the steamer Winnebago was not to be used in navigating the waters of Michigan, within the terms of the statute. But this only presents a question of state law, upon which the judgment of the state court is final and conclusive. The same may be said as to the objection because the transportation company was a bona fide purchaser without notice of complainant's lien, and because complainant did not within a year file its claim for a lien with the proper court in the county in which

it resided. These are state questions, likewise concluded by the decision of the state court.

It is further contended that to seize the vessel and subject her to sale and the proceeds thereof to distribution in the state court would be in direct conflict with the exclusive jurisdiction in admiralty in the courts of the United States in favor of liens of a maritime character, and therefore the Michigan act is unconstitutional. No maritime lien is asserted in this case, and it is merely a matter of speculation as to whether any such claim existed, or might be thereafter asserted. No holder of any such maritime lien is here contesting the constitutionality of the state law.

In a case from a state court, this court does not listen to objections of those who do not come within the class whose constitutional rights are alleged to be invaded; or hold a law unconstitutional because, as against the class making no complaint, the law might be so held. This was distinctly ruled in a case decided at this term. New York ex rel. Hatch v. Reardon, 204 U. S. 152, ante, 415, 27 Sup. Ct. Rep. 188. See also Albany County v. Stanley, 105 U. S. 305-311, 25 L. ed. 1044-1049; Lampasas v. Bell, 180 U. S. 276, 283, 284, 45 L. ed. 527, 530, 531, 21 Sup. Ct. Rep. 368; Clark v. Kansas City, 176 U. S. 114-118, 44 L. ed. 392-396, 20 Sup. Ct. Rep. 284; Cronin v. Adams, 192 U. S. 108-114, 48 L. ed. 365-368, 24 Sup. Ct. Rep. 219.

There is no one in position in this case to make this objection, and, for aught that [361] this record discloses, no such maritime *lien existed. If this statute is broad enough to include strictly maritime liens, it can only be held unconstitutional, in a case coming from a state court, where the complaint on that ground is made by the holder of such a demand. We agree with Judge Severns, speaking for the circuit court of appeals for the sixth circuit, in a case directly involving this question, where other claimants upon the Winnebago had removed a case to the United States circuit court for the eastern district of Michigan, whence it was taken to the circuit court of appeals:

"And the fact that she [the Winnebago] might become subject to maritime liens would not destroy liens already lawfully acquired. It is true she might become subject to maritime liens which would be superior to the existing lien, and that such liens would have to be enforced in the admiralty. But that possibility does not defeat the enforcement by a state court of the nonmaritime lien to which she is subject. How else is the owner of the latter to obtain his remedy? It may be the vessel will never become subject to maritime liens at all; and, if so, the holder of the existing lien may never have even the privilege of proving his claim in some cause instituted for another purpose. But no such supposed embarrassment has yet occurred. And they are as yet imaginary. But suppose such other liens should attach. That should not prevent the enforcement of the earlier lien in the proper court. If the holder of the earlier lien delays his action, he subjects himself to the danger of superior liens becoming fastened, and the enforcement of his own lien in the state court must leave the vessel subject to the superior liens of which the state court cannot take cognizance. If occasion requires, and the admiralty court enforces the superior liens, it is in no wise obstructed by the action of the state court, and a title under a decree of the former court would defeat the title gained under the decree of the state court. The case of Moran v. Sturges, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019, is a good illustration of this subject. There is no difficulty other than such as may happen in case one court should take and have possession of the vessel at a time when the other "should re-[362] quire it; but that is an incident common along all the lines of concurrent proceedings in the state and Federal courts, and gives no ground for the denial of jurisdiction to either." The Winnebago, 73 C. C. A. 295, 141 Fed. 945.

It is next insisted that the materials and supplies were not furnished on the credit of the vessel, but were contracted for, furnished, and delivered on the credit of the Columbia Iron Works.

The findings upon this proposition are again questions within the exclusive jurisdiction of the state court. The findings will not be disturbed here.

It is next objected that the court erred because certain items were allowed for material furnished the vessel after she was launched, and therefore the subject of exclusive jurisdiction for which a lien could only be enforced in the admiralty. But we agree with the state court that these items were really furnished for the completion of the vessel, and were fairly a part of her original construction. In such a case the remedy was within the jurisdiction of the state court. The Iosco, 1 Brown, Adm. [illegible], Fed. Cas. No. 7,060; The Victorian, 24 Or. [illegible], [illegible] Am. St. Rep. 838, 32 Pac. 1040; The Winnebago, 73 C. C. A. 295, 141 Fed. 945.

It is urged that the attempt to enforce the lien on [illegible] vessel was while she was engaged in [illegible] commerce, and therefore proceedings [illegible] her were unlawful and void, in view [illegible] exclusive [illegible]

f this subject by Congress under the Constitution and laws of the United States. But t must be remembered that concerning contracts not maritime in their nature, the state as authority to make laws and enforce ens, and it is no valid objection that the forcement of such laws may prevent or struct the prosecution of a voyage of an terstate character. The laws of the states forcing attachment and execution in cases gnizable in state courts have been sustained and upheld. Johnson v. Chicago & P. levator Co. 119 U. S. 388-398, 30 L. ed. 7-450, 7 Sup. Ct. Rep. 254. The state ay pass laws enforcing the rights of its tizens which affect interstate commerce, it fall short of regulating such commerce the sense *in which the Constitution gives xclusive jurisdiction to Congress. Sherlock . Alling, 93 U. S. 99-103, 23 L. ed. 819, 20; Kidd v. Pearson, 128 U. S. 1, 23, 32 . ed. 346, 351, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132.

Upon the subject, Mr. Justice Brown, speaking for the court in Knapp, S. & Co. Co. v. McCaffrey, 177 U. S. 638-642, 44 L. ed. 921-923, 20 Sup. Ct. Rep. 824-827, said:

"That wherever any lien is given by a state statute for a cause of action cognizable n admiralty, either *in rem* or *in personam*, proceedings *in rem* to enforce such lien are within the exclusive jurisdiction of the admiralty courts.

"But the converse of this proposition is equally true, that if a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of the state. Thus, as the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or materials furnished in its construction (People's Ferry Co. v. Beers, 20 How. 393, 15 L. ed. 961; Roach v. Chapman, 22 How. 129, 16 L. ed. 294), we held in Edwards v. Elliott, 21 Wall. 532, 22 L. ed. 487, that in respect to such contracts it was competent for the states to enact such laws as their legislatures might deem just and expedient, and to provide for their enforcement *in rem*."

The contract in this case being for the construction of a vessel, and its enforcement within the power and jurisdiction of the state courts, we do not think that execution of such a decree can be avoided because the vessel engaged in interstate commerce.

Finally, an elaborate and able argument is made in support of the contention that a contract to build a ship is a maritime contract, and therefore can be enforced only in admiralty; but, as late as this term, in Graham & M. Transp. Co. v. Craig Shipbuilding Co., this contention was overruled upon the authority of the previous decisions of this court. 203 U. S. 577, ante, 325, 27 Sup. Ct. Rep. 777.

The judgments of the Supreme Court of Michigan are affirmed.

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*AUGUSTA A. PETERSON and Ida Peterson, a Minor, Plffs. in Err., [364]

v.

CHICAGO, ROCK ISLAND, & PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 364-394.)

Writ and process—service on foreign corporation.

1. The ownership by a foreign railway company of a controlling interest in the stock of a domestic railway company which retains its own officers, has property of its own, and is responsible for its contracts and to persons with whom it deals, does not make the foreign corporation liable to service of process within the state on the theory that it is doing business therein through the agency of the domestic corporation.

Writ and process—service on foreign corporation.

2. Service of process on an agent of a foreign corporation doing business within the state, in order to be valid, must be upon an agent representing the corporation with respect to such business.

[No. 225.]

Argued and submitted March 6 and 7, 1907. Decided April 8, 1907.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas to review a judgment dismissing, for want of jurisdiction, an action against a foreign corporation. Affirmed.

Statement by Mr. Justice Day:

This case comes here upon a certificate from the circuit court of the United States for the northern district of Texas, raising the question of the jurisdiction of that court over an action brought by plaintiffs in error,

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NOTE.—As to service of process upon foreign corporations—see notes to Foster v. Charles Betcher Lumber Co. 23 L.R.A. 490; Eldred v. American Palace-Car Co. 45 C. C. A. 3; and Cella Commission Co. v. Bohlinger, 78 C. C. A. 473.

That a foreign corporation must be engaged in business within the state in order to validate service of process upon it—see note to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 591.

Augusta A. Peterson and Ida Peterson, the latter a minor, suing by her mother and next friend, and both being citizens of Texas, against the Chicago, Rock Island, & Pacific Railroad Company, an Illinois corporation.

The plaintiffs in error, wife and daughter of one John Peterson, an employee of the Pacific company, sought recovery for the alleged negligent killing of said John Peterson while engaged as an engineer in its employ at Chickasha, in the Indian territory, on October 19, 1903. It is charged in the petition that the Pacific company was then engaged in carrying on its business in the state of Texas in the name and through the Chicago, Rock Island, & Gulf Railroad, a corporation of the state of Texas, which lat-
[365] ter corporation, it was alleged, was *an auxiliary corporation and agent of the defendant, and was then and there dominated and controlled by it, its lines of railroad being operated by the Pacific company as a part of the Rock Island system.

It was charged that S. B. Hovey, vice president and general manager of the Gulf company, residing in Tarrant county, Texas, was also the general manager and local agent of the Pacific company in that state. It was also alleged that F. E. Merrell was the local agent in Tarrant county, Texas, of the Pacific company, and that M. E. Sebree was the local agent for it in said county and state.

Service of citation was made on the defendants by serving the parties above named as its agents in Tarrant county, Texas, in pursuance of the statute of the state. The defendant moved to quash the service on the ground that none of the parties were such agents, and filed in support of its motion the affidavits of each,—Hovey, Merrell, and Sebree,—denying such agency. Thereafter plaintiffs made application for additional process in pursuance of a later statute of the state of Texas, to be hereinafter noticed, and charged that A. L. Thomas, who resides in Tarrant county, Texas, was a train conductor engaged in handling trains over the tracks of the Gulf railroad in the state of Texas and over those of the Pacific railroad beyond the limits of the state, and that he was engaged in running and handling passenger trains on the tracks of both said companies on both sides of the state line, and is an agent and representative of the defendant company, residing in Tarrant county, Texas. It was further charged that V. N. Turpin, who resides in Fort Worth, Tarrant county, Texas, was a ticket agent engaged in the selling of tickets and the making of contracts for transportation and for and in behalf of the Pacific company from the city of Fort Worth, Texas, over the lines of the Gulf company, in the state of Texas, and over the line of the defendant company beyond the line of said state, and was an agent and representative of the defendant company in said state and county.

*These persons, Thomas and Turpin, were [366] accordingly served under the application for new process as the agents and representatives of the defendant company in the said county and state.

The defendant company filed a supplemental motion to quash this service upon the grounds that these persons were not the agents or representatives of the defendant company, filing their affidavits in support of said motion. In the return of the writ served on Hovey it was also set forth that he was general manager of the Pacific company, residing in Tarrant county, Texas. The motion and supplemental motion to quash the service was heard by the court, the motion sustained, and the cause dismissed for want of jurisdiction, the court holding that the defendant had not been properly served with process.

From the stipulated facts, documentary evidence, and testimony embodied in the bill of exceptions, the following facts, pertinent to the determination of the issues, may be gathered:

The Pacific company and the Gulf company are both of the "Rock Island system" of railroads. The second annual report of the "Rock Island company" (June 30, 1904) shows that it is the owner of the entire capital stock, except directors' shares, of the Chicago, Rock Island, & Pacific Railroad Company, a corporation of Iowa; that company owns 695,574.75 shares of the capital stock of the Chicago, Rock Island, & Pacific Railway Company, a corporation of the states of Illinois and Iowa, and [illegible] shares of the common capital stock of the St. Louis & San Francisco Railroad Company, a corporation of the state of Missouri, and the report adds:

"Each of the two latter companies operates independently its lines of railway and each is interested through the ownership, directly or indirectly, of at least the majority of the capital stock in certain subsidiary companies, each of which operates its property independently. The lines of the Chicago, Rock Island, & Pacific Railway Company, including lines *formerly of the Choctaw, Oklahoma, & Gulf Railroad Company, the Burlington, Cedar Rapids, & Northern Railway Company, and the Rock Island, & Peoria [illegible] ay Company, together with the lines of [illegible] bsidiary companies, namely, the Chic[illegible], Rock Island, & Gulf Railway Company, and the Chicago, Rock

& El Paso Railway Company, com-
hat is known as the 'Rock Island sys-

he Rock Island company is the own-
e entire capital stock, except direct-
res, of the Chicago, Rock Island, &
Railroad Company, the income of
e companies is included in the fol-
statement."
report purports to be made by order
oard of directors, was dated October
, and was signed by Robert Mather,
t. Appended to this report, as a
it, under the head of "Statements
hibits, Rock Island System Lines,"
following statement, to wit:
page 23 of said report, under the
of 'Rock Island System—State of
Operated:'
hicago, Rock Island, & Gulf Railway
y:
I. T. (Red River), to Dallas,
..... 126.67
ort, Texas, to Graham, Texas 53.29
a, O. T., to Bravo, Texas-New
o state line 91.75
O. T. (Texas state line), to
illo, Texas 112.97

hicago, Rock Island, & Gulf
ay Company .....386.68"
tiff also introduced in evidence a
folder, dated July 10, 1904, on
vas printed in large letters, "Rock
System Time-table," in which ap-
the names of the Chicago, Rock
& Pacific Railway Company, Chi-
Rock Island, & El Paso Railway
y, and the Chicago, Rock Island, &
ilway Company, with a list of the
nd residences of the passenger and
agents, and a schedule of the pas-
trains on said lines. *On the inside
over of the folder is a map showing
s of the said railroad company, so
d as to belong to one system. Be-
map is printed:
Rock Island System of America.
Rock Island system covers a terri-
ich is 1,000 miles long by 1,000 miles
pports a population of more than
00 people, and is capable of sup-
at least four times that many. The
this territory is as great as the
d area of France, Germany, Italy,
Austria-Hungary, Denmark, the
nds, Turkey, Switzerland, and
and its productive capacity is great-

are produced more than half the
nore than half the corn, and nearly
cotton, silver, and gold produced in
ted States."

The origin of the Gulf company is thus stated in the annual report of the Rock Island road, June 30, 1904:

"Consolidation of Texas Lines.

"The legislature of the state of Texas, by an act passed March 27th, 1903, authorized the sale of the railroads and properties of the Chicago, Rock Island, & Texas Railway Company, extending from the Red river to Fort Worth, Texas, with a branch from Bridgeport, Texas, to Graham, Texas; the Chicago, Rock Island, & Mexico Railway Company, extending from the Texas-Oklahoma line, near Texhoma, to the Texas-New Mexico line at Bravo; and the Choctaw-Oklahoma & Texas Railroad Company, extending the Texas-Oklahoma line near Texola, Texas, to Amarillo, Texas, to the Chicago, Rock Island, & Gulf Railway Company, which had constructed a line of railroad from Dallas, Texas, to Fort Worth, Texas, where it connected with the line first named above.

"In accordance with the authority granted, the properties referred to were, by appropriate corporate action, deeded to the Chicago, Rock Island, & Gulf Railway Company on December 1, 1903.

*"This consolidation permits the properties [369] in question to be operated by one management instead of four separate sets of officials, as heretofore, resulting in economy of operation and greater efficiency in service.

"In stating the assets and liabilities of the companies forming the system, the holdings of the Chicago, Rock Island, & Pacific Railway Company in the bonds and capital stock of auxiliary lines, together with loans between system companies, have been eliminated from the liabilities, and a like reduction made in the value of the assets; the figures as stated, therefore, represent the value of the assets and the real liability without duplication."

Plaintiffs also introduced in evidence the twenty-fourth annual report of the Pacific company for the year ending June 30, 1904, in which it is set forth:

"They have included therein operations and affairs of the operated lines and auxiliary companies forming the 'Rock Island system.'

"In order to make exhibits comparative the figures for the last preceding year have been restated to meet changed conditions due to the including in this report the operation of the auxiliary companies.

"These lines, thus forming the Rock Island system, are the following:

Mileage Operated.

The Chicago, Rock Island, & Pacific Railway 6,760.74
The Chicago, Rock Island, & El

Paso Railway 111.50
The Chicago, Rock Island, & Gulf Railway 386.92

"On page 9 of said report, under the head of 'Property' and 'Franchises,' occur the following:

"During the year expenditures were made for construction of extensions and completion of system lines as follows:

Fort Worth, Texas, to Dallas, Texas $111,371 55
Yarnall, Texas, to Amarillo, Texas 108,615 64
Jacksboro, Texas, to Graham, Texas 32,138 96
[370] *Red River to Fort Worth, Texas 28,013 04
Texhoma (Texas state line) to Bravo, Texas 9,646 03
Texola (Texas state line) to Yarnall, Texas 2,328 30

"In addition to the expenditures during the year as above, there has been transferred to property account sundry amounts expended prior to July 1st, 1903, for construction of new lines and shops, and purchase of equipment, which have been heretofore stated in the system assets as 'Advances for Construction and Equipment,' the property represented by such amounts having been deeded to the Chicago, Rock Island, & Pacific Railway Company or the Chicago, Rock Island, & Gulf Railway Company, $23,169.83.

"There has also been transferred to this account the expenditures made prior to July 1st, 1903, for the purchase of shares of capital stock of the Burlington, Cedar Rapids, & Northern Railway Company and the Rock Island & Peoria Railway Company, also cost of stock of the Choctaw, Oklahoma, & Gulf Railroad Company in excess of its par value and the value of bonds of the Chicago, Rock Island, & Texas Railway Company, owned by the Chicago, Rock Island, & Pacific Railway Company, the value of said property appearing upon balance sheets shown in prior year's report as 'Stocks and Bonds of Constituent Companies,' $16,446,009.73.

"On page 11 of said report, under the heading 'New Lines Open for Operation,' the following statements are made, *viz.:*

"Additions have been made to the operated system—mileage since the last report as follows:

"By the Chicago, Rock Island, & Gulf Railway Company, Fort Worth, Texas, to Dallas, Texas, 33.26 miles, opened for operation in December, 1903.

"Yarnall, Texas, to end of track west of Amarillo, Texas, 18.40 miles, opened for operation in November, 1903.

"Corrections in measurements, Red River to Fort Worth, Texas, .83 miles.

"Operated system mileage was decreased 18.22 miles between Yarnall, Texas, and Amarillo, Texas.

*"Forth Worth, Texas, to Dallas, Texas.—[37 This line was completed and the line opened for operation by the Chicago, Rock Island, & Gulf Railway Company, December 1st, 1903. It is 33.26 miles in length, connecting with the line of the former the Chicago, Rock Island, & Texas Railway Company at Fort Worth, and extending to Dallas, where, by an agreement with the Gulf, Colorado, & Santa Fé Railway Company, it has the joint use of the latter company's terminal facilities.

"The opening of this line gives the Gulf company direct entrance into Dallas, enabling it to compete for the traffic of that important commercial center.

"On page 12 of said report is the following statement, *viz.:*

System Mileage Under Construction.

By the Chicago, Rock Island, & Gulf Railway Company:

Amarillo, Texas, to Texas-New Mexico boundary 63.57

"Amarillo, Texas, to Tucumcari, New Mexico. The grading for a considerable portion of this line has been done from Amarillo westward.

"It was deemed advisable, however, to suspend active construction until such time as the business outlook would warrant the expenditure necessary to complete."

Upon the hearing counsel made an agreed statement of facts, as follows:

"The Chicago, Rock Island, & Pacific Railway Company is a consolidated corporation, chartered under the laws of Illinois and Iowa. It has been an existing railroad corporation for over twenty years. In June of the year 1892, and for some years prior to that time, the said railway company owned and operated a line of railway from the city of Chicago, in a southwesterly direction through the states of Illinois, Iowa, Missouri, and Kansas to Minco, Indian territory. During the year 1892 this company extended its line from Minco, Indian territory, in a southerly direction to the south boundary line of Texas in Montague county.

*"The Chicago, Rock Island & Texas Railway Company was a corporation organized under the laws of Texas on the 18th day of July, 1892. It had an authorized capital stock of $3,000,000 in shares of $100 each, of which 754 shares were subscribed for at the time of its organization. Below is a list of the names of the stockholders and the number of shares of capital stock of the company subscribed for by each, at its original organization.

[The list shows that of the 754 shares

ubscribed, 745 were held by one of the at-
orneys of the Pacific company, and of the
ther nine shares, three were held by other
nployees of that road.]

"Under the charter of the Chicago, Rock
land, & Texas Railway Company, it was
uthorized to construct a line of road from
e north boundary line of Texas at a point
Montague county in a southerly direction
rough Montague, Wise, and Parker coun-
es; the charter, being afterward amended,
uthorized the construction into Tarrant
unty. This charter authorized the issu-
nce of first-mortgage bonds amounting to
15,000 per mile for construction and not
xceeding $5,000 per mile for equipment,

"When the Chicago, Rock Island, & Pacific
ailway Company constructed its line to a
oint near the north bank of the Red river,
orth of Montague county, construction
ork stopped for a period of time. The
hicago, Rock Island, & Texas Railway
ompany began the construction of its line
t the north line of the state in Montague
ounty some time after the Chicago, Rock
sland, & Pacific Railway Company stopped
ork at a point north of Red river. After
onstruction work began on the Chicago,
ock Island, & Texas Railway Company
outh of Red river, the Chicago, Rock Is-
and, & Pacific Railway Company construct-
d its line from the point where work had
topped north of Red river, to a connection
ith the Chicago, Rock Island, & Texas
ailway Company at the state line. The
exas company *finished the construction of
s line into Forth Worth in the latter part
f 1893. Some of the same contractors who
onstructed the Chicago, Rock Island, & Pa-
ific Railway from Minco south to Red river
lso took contracts for work on the Texas
ne.

"On the 2d day of January, 1893, after the
hicago, Rock Island, & Texas Railway Com-
any had constructed and was operating its
ne as far south as Bowie, Texas, it entered
to an agreement with the Chicago, Rock
land, & Pacific Railway Company, a true
py of which is hereto attached and marked
xhibit A' for identification. This agree-
ent went into effect immediately after it
s executed, and was acted upon and ob-
rved by said companies until the 14th day
April, 1903, when the same was canceled
der authority of the board of directors
each company by a written agreement, a
e copy of which is hereto attached,
rked 'Exhibit B' for identification.

'Exhibits A and B are not printed, as
y are the contract and cancelation there-
both made before the present case arose.]

After the Chicago, Rock Island, & Texas
lway Company had constructed its line,
issued first-mortgage bonds to the ex-
tent of $15,000 per mile thereon, and these bonds were purchased by the Chicago, Rock Island, & Pacific Railway Company, for which it paid the Texas line 100 cents on the dollar. The Chicago, Rock Island, & Texas line cost a large sum of money in excess of the amounts for which it issued bonds, which additional cost was paid by application of money subscribed by the stockholders and by borrowing from the Chicago, Rock Island, & Pacific Railway Company, which money so borrowed has long since been returned with interest.

"At the time the Chicago, Rock Island, & Pacific Railway Company constructed its line to Red River there was no town or city at that particular point, but there were towns and cities south, east, and west of there in the state of Texas, *and a railroad [374] line, being a part of the Missouri, Kansas, & Texas Railway of Texas, 9 miles south of that point.

"When the Chicago, Rock Island, & Texas Railway Company was first organized its general offices were located at Bowie, Montague county, Texas, and remained there for some time, until the charter was amended removing them to Fort Worth. The first general officers elected by the Chicago, Rock Island, & Texas Railway Company, and their residences, were as follows: M. A. Low, Topeka, Kansas, president; J. C. McCabe, Bowie, Texas, general freight agent, and H. F. Weber, Bowie, Texas, vice president, superintendent, secretary, and treasurer. All these men, prior to the time they were elected officials of the Chicago, Rock Island, & Texas Railway Company had been employed in some capacity by the Chicago, Rock Island, & Pacific Railway Company. In 1893 S. B. Hovey was elected vice president of the Texas company and remained the vice president and superintendent of the Chicago, Rock Island, & Texas Railway Company from that date until it was sold out under an act of the legislature in 1903. Mr. M. E. Sebree, who was served with citation in this case, was, for a number of years and until the date of its sale, trainmaster of the Chicago, Rock Island, & Texas Railway Company and assistant trainmaster of the Chicago, Rock Island, & Pacific Railway Company, with jurisdiction on that line up to Chickasha, Indian territory. Prior to the time he was employed by the Chicago, Rock Island, & Texas Railway Company he had been employed by the Chicago, Rock Island, & Pacific Railway Company as brakeman, conductor, etc. M. A. Low, of Topeka Kansas, remained the President of the Chicago, Rock Island, & Texas Railway Company from its organization until the 8th day of November, 1900, during all of which time he was one of the general attorneys of the

Chicago, Rock Island, & Pacific Railway Company.

"The Chicago, Rock Island, & Texas Railway Company never issued or sold any [375] equipment bonds, but before it was *sold out under special act of the legislature to the Chicago, Rock Island, & Gulf Railway Company, it had purchased and was the owner of between one thousand and twelve hundred freight cars of various kinds. During the time it had no equipment of its own, it rented rolling stock from various railway companies, but principally from the Chicago, Rock Island, & Pacific Railway Company, and paid therefor prices prevailing between other lines of railway in the state of Texas.

"After the Chicago, Rock Island, & Texas Railway Company constructed its line into Forth Worth from Bowie, and after the execution of the contract between it and the Chicago, Rock Island, & Pacific Railway Company, of date of January 2d, 1893, the most of the passenger and freight trains running over its line from Red River to Fort Worth and from Fort Worth to Red River were operated beyond its lines as the trains of the Chicago, Rock Island, & Pacific Railway Company. The employees operating these trains were under the control of and paid by the Chicago, Rock Island, & Texas Railway Company while working on its line, and they were also under the control of and paid by the Chicago, Rock Island, & Pacific Railway Company while on its line. The equipment in the various trains went as far north as the business justified, some of the passenger equipment going as far as Chicago, and some to Kansas City, while the freight equipment stopped at points beginning at Chickasha, and from there north wherever the freight was destined. The passenger equipment coming south stopped at Fort Worth, and the freight equipment, where the freight was handled in car-load lots, went to destination, wherever that might be.

"Whenever necessary the Texas company would operate a local train to handle freight between Fort Worth and Red River, but as a general rule the through service maintained took care of this business. It operated a local freight and passenger train between Bridgeport and Jacksboro and afterward to Graham from the time that branch was built until it was sold out, which was [376] several years. On the through *freight trains the run made by the crews was from Fort Worth to Chickasha and on the through passenger train the run made by the crews was from Fort Worth to Caldwell, Kansas, these crews being handled and paid as above set forth. Outside the Pullman cars, which were in each passenger train, nearly all the passenger equipment used by the Chicago, Rock Island, & Texas Railway Company belonged to the Chicago, Rock Island, & Pacific Railway Company, for which it paid rental, as provided for under the terms of the contract herein first referred to.

"Defendant's witness will testify that the Texas company paid no part of the cost of operating the Chicago, Rock Island, & Pacific Railway, nor did the Pacific company pay any part of the cost of the operation of the Chicago, Rock Island, & Texas Railway, nor did either of them participate in the earnings of the other. The relationship between the companies is fully disclosed by the terms of the contract dated January 2d, 1893, which was observed up to the time of its cancelation.

"The passenger conductors, brakemen, and train guards wear regular train uniforms and on the lapel of the coat are the words 'Rock Island,' and on the cap is the word 'Conductor,' 'Brakeman' or 'Porter.' Any member of these train crews, while working on the line of the Texas company, may be discharged by the proper officer of that company; and while working on the line of the Pacific company may be discharged by the proper officer of that company. Either company, of course, employs additional men when needed.

"At the time the contract of January 2d, 1893, was canceled, the Chicago, Rock Island, & Texas Railway Company was operating about 140 miles of road, and the Chicago, Rock Island, & Pacific was operating about 3,300 miles. For a considerable time after the Chicago, Rock Island, & Texas Railway Company was built into Fort Worth it employed and maintained at its Fort Worth office a train despatcher, who gave orders for the *movement of trains over [377] its line, but as a matter of economy this was abolished, and the Texas company paid a part of the salary of the train despatcher located at Chickasha to give orders for the movement of trains over its rails.

"On the 22d day of September, 1903, the Chicago, Rock Island, & Texas Railway Company, under authority of a special act of the legislature known as Senate Bill No. 161, was purchased and absorbed by the Chicago, Rock Island, & Gulf Railway Company, and since that time has ceased to exist as a railroad or do any business as such.

"At the time the Gulf company purchased the Texas company it had constructed and was operating a line of road from Fort Worth in Tarrant county to Dallas in Dallas county. The Chicago, Rock Island, & Gulf Railway C now owns and operates 386 miles of road, all of which is located inside of the state of Texas. It does not own any railroad outside the state of Texas. It owns at present time about

1,600 cars, including ballast, refrigerator, and cattle cars, twenty locomotives, and eight cabooses, but does not own any passenger equipment other than the Pullman cars which are used in each of its passenger trains; it rents its passenger equipment from the Chicago, Rock Island, & Pacific Railway Company, and pays therefor current rental charged by connecting lines in Texas. The train crews on both the through passenger and freight trains are handled in the same way that they were when the line into Fort Worth was operated by the Chicago, Rock Island, & Texas Railway Company, but the Chicago, Rock Island, & Gulf Railway Company is now operating in many places local trains between local points in Texas.

"The following is a list of stockholders and the amount of stock of the Chicago, Rock Island, & Gulf Railway Company owned by each.

[The list is not printed, as the record discloses that, except directors' shares, the stock is held for the Chicago, Rock Island, & Pacific Railway Company.]

*"The Chicago, Rock Island, & Gulf Railway Company is operating under a lease that part of the line of the Chicago, Rock Island, & Pacific Railway Company which begins at the north boundary line of the state of Texas, extending northward to the town of Terral, Indian territory, a distance of about one and one-sixth miles.

"Blank passes, properly signed by different railroads, including the Chicago, Rock Island, & Pacific, Texas & Pacific, Houston & Texas Central, and other lines, are sometimes placed with S. B. Hovey, and when so placed he has the permission of such line to fill in the names of parties and countersign the pass, and when so countersigned such pass is recognized by the line over which it is issued. The local ticket agents of the Chicago, Rock Island, & Gulf Railway Company sell coupons tickets over the Chicago, Rock Island, & Pacific Railway Company's line and nearly all other lines in the United States, which tickets are duly honored by the respective roads over which they read. The Chicago, Rock Island, & Gulf Railway Company operates only one passenger train each way daily between Fort Worth and Dallas, while it operates two trains each way from Fort Worth north. It operates also only a local freight service between Fort Worth and Dallas, but no through freight service. Proper officials of the Chicago, Rock Island, & Gulf Railway Company and of the Chicago, Rock Island, & Pacific Railway Company exchange reports with each other as to the amount of exchange business done.

"No dividends were ever paid on the stock of the Chicago, Rock Island, & Texas Railway Company, and none have been paid on that of the Chicago, Rock Island, & Gulf Railway Company. The net earnings of the Chicago, Rock Island, & Texas Railway Company were put into betterments and improvements, and the same is the case with the Chicago, Rock Island, & Gulf.

"In 1897 L. G. Hastings, then secretary of the Chicago, Rock Island, & Texas Railway Company, reported to the *Interstate [379] Commerce Commission that the Chicago, Rock Island, & Texas Railway Company was controlled by the Chicago, Rock Island, & Pacific Railway Company, through the ownership of a majority of its bonds. In 1899 he reported it as controlled by the Pacific company, through its ownership of a majority of its capital stock.

"On the 2d day of August, 1904, M. E. Sebree, who resides in Fort Worth, Texas, was trainmaster of the Chicago, Rock Island, & Gulf Railway Company, and was also assistant trainmaster of the Chicago, Rock Island, & Pacific Railway Company between the north line of Texas and Chickasha, Indian territory. He is paid by the Gulf company for the work he does for it and by the Pacific company for the work he does for it. S. B. Hovey is vice president and superintendent of the Chicago, Rock Island, & Gulf Railway Company, and will testify that he is not connected with, nor does he perform any service for, any other railroad.

"After making certain changes and addition, the Chicago, Rock Island, & Gulf Railway Company adopted the book of rules issued by the Chicago, Rock Island, & Pacific Railway Company for the control of the operation of its line, and such rules are now in force. The cars and engines belonging to the Chicago, Rock Island, & Gulf Railway Company, when in need of repairs, have the work done at its shops at Fort Worth and Dalhart, if the cars and engines are convenient to these two points; otherwise, the work is done at some other convenient place, either on or off the line of the Chicago, Rock Island, & Pacific Railway Company, wherever the cars or engines may be at the time the repairs are needed.

"On the 2d day of August, 1904, the Chicago, Rock Island, & Gulf Railway Company had a different president and altogether different executive officers from any of the lines above listed as included in the Rock Island system. The Chicago, Rock Island, & Gulf Railway Company does not now and never has paid any part of the salary of any officer of the Chicago, Rock Island, & Pacific Railway Company, *or of any of the lines [380] named as constituting the Rock Island system.

"Before the Chicago, Rock Island, & Gulf

Railway Company purchased the Chicago, Rock Island, & Texas Railway Company, the Chicago, Rock Island, & Mexico Railway Company and the Choctaw, Oklahoma, & Texas Railroad Company, M. E. Sebree was trainmaster of the Chicago, Rock Island, & Texas Railway Company, and division trainmaster of the Chicago, Rock Island, & Pacific Railway Company, with jurisdiction to Chickasha, Indian territory. Since the purchase by the Gulf company of the above-named Texas lines Mr. Sebree's jurisdiction extends over what were the Chicago, Rock Island, & Mexico Railway Company and the Choctaw, Oklahoma, & Texas Railroad Company; otherwise there has been no change in his employment or jurisdiction for the past five to ten years.

"The Chicago, Rock Island, & Gulf Railway Company pays a portion of the salary of a joint train despatcher located at Chickasha, Indian territory, under the same character of arrangement which existed between the Chicago, Rock Island, & Texas Railway Company and the Chicago, Rock Island, & Pacific Railway Company. This train despatcher, in giving orders for the handling of trains on the Chicago, Rock Island, & Gulf Railway Company, is subject to the control, direction, and supervision of the executive officers of the Chicago, Rock Island, & Gulf Railway Company as if exclusively employed by it.

"The rails of the Chicago, Rock Island, & Gulf Railway Company on the line running from Fort Worth north connect at the state line with the rails of the Chicago, Rock Island, & Pacific Railway Company. The point of connection is somewhere near the middle of Red river on a bridge. At this particular point there is no town, station, or turnout, and the trains going in either direction do not stop at said point. It was not possible to build a town or station at the exact point of connection."

[381] *It was further stipulated as to Thomas, the conductor, and Turpin, the ticket agent, after they were served with process, as follows:

A. L. Thomas "was, at the date of said service, and is now, and has for many years been, a conductor running on and handling passenger trains for the defendant, the Chicago, Rock Island, & Pacific Railway Company, the Chicago, Rock Island, & Texas Railway Company, and later on the Chicago, Rock Island, & Gulf Railway Company, after its purchase of the Texas company, running and handling such trains between Fort Worth, Texas, and Caldwell, Kansas. That the run of said Thomas is now and has been from Fort Worth, Texas, to Caldwell, Kansas, as aforesaid, on both sides of the state line, and that Caldwell, Kansas, is the end of the first passenger division on said lines north of Fort Worth. And it is further agreed that V. N. Turpin, upon whom process was served herein as the ticket agent of the defendant company, was, at the date of the service of said process and has been for a long time, ticket agent of the Chicago, Rock Island, & Gulf Railway Company at Fort Worth, engaged in selling tickets for the said Chicago, Rock Island, & Gulf Railway Company, over its lines and also over the lines of the Chicago, Rock Island, & Pacific Railway Company and all of its connections. It is further agreed that the facts are that 'Thomas is carried on the Pacific company's pay roll and paid for services rendered while on that company's line north of the Texas state line; and is carried on the Gulf company's pay roll and paid by the Gulf company for services rendered on its line south of the Texas state line; and that Turpin is carried on the Gulf company's pay roll alone, and is not carried on the Pacific company's pay roll, and is not an agent of the Pacific company, unless the above-stated facts make him one.' "

The annual report of the Pacific company shows that the board of directors of said company consists of thirteen members, with an executive committee of eight members.

*The report of the Rock Island company [382] shows that the board of directors of said company consists of sixteen members and its financial committee of six members.

Eleven members of the board of directors of the Pacific company are also members of the board of directors of the Rock Island company. Five members of the executive committee of the Pacific company are also members of the finance committee of the Rock Island company. The officers of the Rock Island company, with two exceptions, are also officers of the Pacific company, and a majority of the officers of either said companies are common to both of them.

S. B. Hovey, upon whom service was made as aforesaid, was also produced as a witness, and testified that at the time of the service of citation upon him he was the vice president and superintendent of the Gulf railroad company, and resided at Fort Worth, Texas; that he held the same position in the Chicago, Rock Island, & Texas Company before it acquired the Gulf company, and before that time he had been for many years an employee of the Pacific company; that the train despatcher of the Pacific company, located on its lines at Chickasha, in the Indian territory, is also train despatcher of the [illegible] company. He was a "joint man," as the [illegible] trains were operated by the same crews [illegible] on the Texas state line without stop[illegible] that the movements

f trains on the Gulf route are directed from Chickasha as are those on the line of the Pacific company after they cross the state ine going northward. The daily reports of he cars on the Gulf line are made to the hief despatcher at Chickasha; that the usiness could not be handled in any other ay.

Settlements between the two companies re made on a mileage basis. Reports are ade by the officers of the Gulf company to Ir. Winchel, who is president of the Gulf ompany and of the Pacific company. The ulf company keeps a fund on deposit with he Pacific company at Chicago and receives nterest thereon; that when the defendant ompany *constructed its line of road across he Red river in 1892 the Texas company vas organized, and the Pacific company furnished the money with which the road was constructed south from Red River to Fort Worth. Most of the directors of the Texas company were employees of the Pacific company. No dividends were paid on the stock of the Texas company, and when the Gulf company took over its property the directors surrendered their stock in the old company and got back their $5.00 each; that the transfer to the Gulf company of the Texas road, the El Paso road, and the Mexico road was for the purpose of consolidating these roads and getting under one management the management of the system. The employees who run over both the Pacific and Gulf lines while in Texas are employed and discharged by the latter company; north of the Texas line they are employed and discharged by the Pacific company; the operation of trains was then as it had been before the Rock Island & Texas road ceased to exist; that the Pacific company did not pay any part of the salaries of the heads of the departments of the Gulf company,—none for the general office. It, the Pacific company, pays the train men according to the number of miles run on its rails. The Gulf company pays the expenses of the men while on the rails of that company according to the number of miles run; that the Rock Island & Gulf Company had separate cars, servants, and agents of its own; that the Gulf company lines booked trains daily between Fort Worth and its northern terminus and back, which trains do not run on the lines of the Pacific road. He also testified that he lines mentioned on the Rock Island folder as constituents of the Rock Island system, namely, the Chicago, Rock Island, & Mexico; the Chicago, Rock Island, & El Paso; the Choctaw, Oklahoma, & Gulf; the Chicago, Rock Island, & Texas; and the Chicago, Rock Island, & Pacific, were not operated as one road, but were operated separately; that the revenues were divided, just as revenues earned by the Chicago, Rock Island, & Gulf and T. & P. would be divided; that they were *divided on a mileage basis; [384] that no reports were made by the Gulf company to the head of the traffic department of the Pacific company; that reports were made by the Gulf company to the president of the Gulf company, who was also president of the Pacific company; that no representative of the Pacific company was sent to examine the books of the Gulf company further than just as a representative of any other connecting line would occasionally check up business with the Gulf company; that the books of the latter company had never been audited from the Chicago office; that there was no contract between the Gulf company and the Pacific company, except a traffic agreement as to the division of rates, made by the general freight agent of each line, of the same character of contract which exists between the Gulf company and other line with which it interchanges business; that the Gulf company owned about 1,500 or 1,600 freight and cattle cars and about twenty engines, which were marked C. R. I. and G.; the train despatcher has no power to furnish cars on the Gulf road if I instruct him not to do so; that since he had been vice president of the Gulf company he had had no connection whatever with the Pacific company and no duties to perform with any other railroad than the Gulf company; that for traffic hauled over the two lines the Gulf company received the amount agreed upon by the general freight agents in the same manner that the Gulf company and the T. and P. divided the revenues; that neither road pays any part for moving freight over the other line, nor pays any part of the loss sustained while in the hands of the other company by damage to freight; that the Gulf company has on deposit with the Pacific company several hundred thousand dollars, for which it receives 6 per cent interest per annum. When needed it is checked out.

A copy of the folder of the "Rock Island system's" lines was sent up with the record. A copy of the map shown on the folder is printed on the freight window of the office of the agent of the Gulf company and calendars with that map *printed on them are [385] distributed for the purpose of advertising the system lines.

Mr. D. T. Bomar submitted the cause for plaintiffs in error. Messrs. S. W. Stewart, Templeton, and Sam J. Hunter were on the brief:

The service was good.

Buie v. Chicago, R. I. & P. R. Co. 95 Tex. 51, 55 L.R.A. 861, 65 S. W. 32; Northern

Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Van Dresser v. Oregon R. & Nav. Co. 48 Fed. 202; Norton v. Atchison, T. & S. F. R. Co. (C. C.) 61 Fed. 618; Lehigh Valley R. Co. v. Dupont (C. C.) 64 C. C. A. 478, 128 Fed. 846; Newcomb v. New York C. & H. R. R. Co. 182 Mo. 687, 81 S. W. 1073; Oriental Invest. Co. v. Barclay, 25 Tex. Civ. App. 543, 64 S. W. 88; Pennsylvania R. Co. v. Anoka Nat. Bank, 47 C. C. A. 458, 108 Fed. 482; Hatcher v. United Leasing Co. (C. C.) 75 Fed. 368; Chesapeake & O. R. Co. v. Howard, 178 U. S. 153–167, 44 L. ed. 1015–1020, 20 Sup. Ct. Rep. 880; Tuchband v. Chicago & A. R. Co. 115 N. Y. 437, 22 N. E. 360; 6 Thomp. Corp. §§ 7505, 8034, 8037, 8038; Barrow S. S. Co. v. Kane, 170 U. S. 100–113, 42 L. ed. 965–969, 18 Sup. Ct. Rep. 526; New York, L. E. & W. R. Co. v. Estill, 147 U. S. 607, 37 L. ed. 301, 13 Sup. Ct. Rep. 444; Ex parte Schollenberger, 96 U. S. 369, 24 L. ed. 853; Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. ed. 354; Lafayette Ins. Co. v. French, 18 How. 404, 409, 15 L. ed. 451, 453; Dinzy v. Illinois C. R. Co. 61 Fed. 53; Merchants' Mfg. Co. v. Grand Trunk R. Co. 63 How. Pr. 459; New Albany & S. R. Co. v. Grooms, 9 Ind. 245; New Albany & S. R. Co. v. Tilton, 12 Ind. 4, 74 Am. Dec. 195; New Albany & S. R. Co. v. Powell, 13 Ind. 373; Cincinnati, H. & I. R. Co. v. McDougall, 108 Ind. 180, 8 N. E. 571; Fowler v. Detroit & M. R. Co. 7 Mich. 79; Mineral Point R. Co. v. Keep, 22 Ill. 16, 74 Am. Dec. 124.

Mr. M. A. Low argued the cause and filed a brief for defendant in error:

A foreign corporation can only do business in a state with its consent, expressed or implied. The laws of Texas give no such express consent to a foreign railway company, and none can be implied, either from its laws or its action with respect to such corporations. It does not authorize a foreign railway company to own, lease, or operate a railway within the state. There is nothing in the record to show that the Rock Island company was doing business in Texas with the consent of the state.

Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; Barrow S. S. Co. v. Kane, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526.

The fact that the Rock Island company loaned money to the Texas company to assist it in constructing or extending its railway, that it owned all or any part of the capital stock of the Gulf company, and that it exercised such authority in the selection of directors of the company as a stockholder lawfully may, does not tend to show that it was doing business in Texas.

United States v. American Bell Teleph. Co. 29 Fed. 17; Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 587, 596, 29 L. ed. 499, 501, 6 Sup. Ct. Rep. 194; Porter v. Pittsburg Bessemer Steel Co. 120 U. S. 649, 30 L. ed. 830, 7 Sup. Ct. Rep. 1206; Pennsylvania R. Co. v. Jones, 155 U. S. 333, 344, 39 L. ed. 176, 179, 15 Sup. Ct. Rep. 136; Earle v. Chesapeake & O. R. Co. 127 Fed. 235; Central Grain & Stock Exchange v. Board of Trade, 60 C. C. A. 290, 125 Fed. 463; St. Louis & S. W. R. Co. v. Gate City Co-op. Grocery Co. 70 Ark. 10, 65 S. W. 706; St. Louis Southwestern R. Co. v. Smith, 71 Ark. 290, 73 S. W. 101; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 722.

An agreement for the interchange of business and the division of the through rate over a through route, each company undertaking to act independently on its own line, does not make the contracting companies partners; nor does it create a partnership agency.

United States v. American Bell Teleph. Co. 29 Fed. 37; St. Louis Ins. Co. v. St. Louis, V. T. H. & I. R. Co. 104 U. S. 146, 26 L. ed. 679; Pennsylvania R. Co. v. Jones, 155 U. S. 333, 344, 345, 39 L. ed. 176, 179, 180, 15 Sup. Ct. Rep. 136.

The fact that the Gulf company was reported and advertised as a part of the Rock Island system did not show that the Rock Island company was, through the agency of the Gulf company, doing business in Texas, the evidence showing that each member of the system managed its own affairs through its own officers, paid its own expenses, and retained its own earnings.

Kingsley v. Great Northern R. Co. 91 Wis. 380, 64 N. W. 1036; Pennsylvania R. Co. v. Jones, 155 U. S. 333, 341, 345, 39 L. ed. 176, 178, 180, 15 Sup. Ct. Rep. 136; White Star Line v. Star Line of Steamers, 141 Mich. 604, 113 Am. St. Rep. 551, 105 N. W. 135.

The agent upon whom service is made must sustain such a representative relation to the business transacted by the corporation in the state as to charge him with the duty of accepting service.

Story, Agency, § 140; St. Clair v. Cox, 106 U. S. 350, 357, 27 L. ed. 222, 225, 1 Sup. Ct. Rep. 354; Fitzgerald & M. Constr. Co. v. Fitzgerald, 137 U. S. 98–106, 34 L. ed. 608–611, 11 Sup. Ct. Rep. 36; Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859; Goldey v. Morning News, 156 U. S. 518, 521, 522, 39 L. ed. 517–519, 15 Sup. Ct. Rep. 559; United States v. American Bell Teleph. Co. 29 Fed. 17; Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 617, 619, 43 L. ed. 569, 574, 576, 19 Sup. Ct. Rep. 308; Earle v. Chesapeake & O. R. Co. 127 Fed. 240; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 722.

1113, 23 Sup. Ct. Rep. 728; Central Grain & Stock Exchange v. Board of Trade, 60 C. C. A. 299, 125 Fed. 463; N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co. 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 423; Strain v. Chicago Portrait Co. 126 Fed. 834; Frawley v. Pennsylvania Casualty Co. 124 Fed. 259; Union P. R. Co. v. Miller, 87 Ill. 45.

Service upon one partner or joint obligor will not confer jurisdiction to render a personal judgment against another partner or joint obligor.

D'Arcy v. Ketchum, 11 How. 165, 13 L. ed. 648; Goldey v. Morning News, 156 U. S. 521, 39 L. ed. 518, 15 Sup. Ct. Rep. 559; Re Grossmayer, 177 U. S. 48, 44 L. ed. 665, 20 Sup. Ct. Rep. 535; Kingsley v. Great Northern R. Co. 91 Wis. 380, 64 N. W. 1036.

Mr. Justice Day delivered the opinion of the court:

This case presents a question of jurisdiction to be determined as one of fact. It may be divided into two propositions: First. Was the Pacific company doing business in the state of Texas? Secondly. If so, were the alleged agents served with process in the state of Texas duly authorized as such, and competent to be thus served, in such wise as to give jurisdiction of the Pacific company?

The statutes which concern service on corporations in the state of Texas are as follows (Sayles' Texas Civil Statutes):

*"Art. 1194, § 25. Foreign private or public corporations, etc.—Foreign private or public corporations, joint stock companies, or associations, not incorporated by the laws of this state, and doing business within this state, may be sued in any court within the state having jurisdiction over the subject-matter, in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in the state, then in the county where the plaintiffs or either of them reside."

"Art. 1223. Foreign corporations, how served.—In any suit against a foreign private or public corporation, joint stock company, or association, or acting corporation or association, citation or other process may be served on the president, vice president, secretary, or treasurer, or general manager, or upon any local agent within this state, of such corporation, joint stock company, or association, or acting corporation or association."

By the act of March 13, 1905 (General Laws of Texas, 1905, p. 30), an additional method of serving foreign corporations was provided as follows:

"Sec. 2. That service may be had on foreign corporations having agents in this state in addition to the means now provided by law by serving citation upon any train conductor who is engaged in handling trains for two or more railway corporations, whether said railway corporations are foreign or domestic corporations, if said conductor handles trains over foreign or domestic corporations' tracks across the state line of Texas, and on the track of a domestic railway corporation within the state of Texas, or upon any agent who has an office in Texas, and who sells tickets or makes contracts for the transportation of passengers or property over any line of railway or part thereof, or steamship or steamboat of any such foreign corporation or company.

*"Sec. 3. For the purpose of obtaining [390] service of citation on foreign railway corporations, conductors who are engaged in handling trains and agents engaged in the sale of tickets or the making of contracts for the transportation of property as described in § 2 of this act, are hereby designated as agents of said foreign corporations or companies, upon whom citation may be served."

It is settled by the decisions of this court that foreign corporations can be served with process within the state only when doing business therein, and such service must be upon an agent who represents the corporation in its business. St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; Goldey v. Morning News, 156 U. S. 518, 521, 522, 39 L. ed. 517, 519, 15 Sup. Ct. Rep. 559; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728.

It is contended upon the part of the plaintiffs in error that the Pacific company was doing business in the state of Texas, because of a partnership arrangement with the Gulf company, or because the latter company was the agent of the Pacific company, or, as is sometimes said, the representative of the Pacific company in the state of Texas. As to the question of partnership, we do not think this record presents a question of that sort. The suit is not for a partnership liability. It is an action upon a single cause of action for the tort of the Pacific company. Service is not had by serving one partner. The real contention is that the service reaches the Pacific company because of the agency or representative character of the Gulf company.

Is it true that the Gulf company was the agent of the Pacific company or its mere

creature in such a sense that to serve it is equivalent to serving the controlling company? It is a fact that both companies had common agents and employees to a certain extent, but the record shows that such employees were paid in proportion to the business done for each company. And that while in the service of the companies respectively they were under the exclusive management and control of the company in whose service [391] they were engaged, with no *power to discharge or employ the one company for the other; and that, although the service was in a sense common, it was kept distinct and separate in the control and payment of the employees while in the separate service of the respective companies.

It is true that the Pacific company practically owns the controlling stock in the Gulf company, and that both companies constitute elements of the Rock Island system. But the holding of the majority interest in the stock does not mean the control of the active officers and agents of the local company doing business in Texas. That fact gave the Pacific company the power to control the road by the election of the directors of the Gulf company, who could, in turn, elect officers or remove them from the places already held; but this power does not make it the company transacting the local business.

This record discloses that the officers and agents of the Gulf company control its management. The fact that the Pacific company owns the controlling amount of the stock of the Gulf company and has thus the power to change the management does not give it present control of the corporate property and business. Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 587, 597, 29 L. ed. 499, 502, 6 Sup. Ct. Rep. 194.

In Conley v. Mathieson Alkali Works, supra, suit was brought upon a contract with the Mathieson Alkali Works. The defendant had designated no agent upon whom summons could be served, and service was made upon two members of the board of directors resident of the city of New York. Upon motion made to set aside the service of summons a reference was directed to ascertain whether the defendant corporation was doing business in the state of New York. The master reported, among other things, that the defendant had operated a plant at Niagara Falls, but had conveyed all its property to another corporation organized under the laws of Virginia. That the consideration expressed for the conveyance was $1 and other valuable consideration, but the substantial consideration was [392] the entire capital stock of the *grantee, the Castner Electrolytic Alkali Company. That the business of the defendant since said transfer was carried on in Providence, where it had its principal place of business. The master found that the company at the time of attempted service was not doing business in New York. Of the effect of the transfer of the entire stock of the new company to the defendant the master found: "The fact that it held the entire capital stock of the Castner Electrolytic Alkali Company, and that the operations of that company were carried on under the same management as before December 31, 1899, is not material. The new corporation was a separate legal entity, and, whatever may have been the motives leading to its creation, it can only be regarded as such for the purposes of legal proceedings. It was that corporation alone which transacted any business in this state, notwithstanding it may have been for all practical purposes merely the instrument of the defendant corporation. People v. American Bell Teleph. Co. 117 N. Y. 241, 22 N. E. 1057; United States v. American Bell Teleph. Co. 29 Fed. 17."

Upon exceptions the master's report and conclusions were affirmed and the service set aside. That judgment was affirmed in this court. In the course of the opinion, Mr. Justice McKenna, speaking for the court, coming to deal with the effect of the transfer to the Castner Company, said: "The defendant was competent to convey its property to the Castner Electrolytic Alkali Company and afterwards make the locality of its own business Providence and Saltville. Whether the transfer to the latter company was fraudulent we certainly cannot decide from this record, and the by-law which provided for a monthly meeting in New York could not of itself keep the corporation in New York. The testimony is positive that no business of the corporation was done in New York city after the transfer of the Niagara Falls plant; and that all of the business of the corporation was conducted at Providence, except that of a purely manufacturing character, which was conducted at Saltville."

*So, in the case at bar, notwithstanding the ownership of the stock in the Gulf company by the Pacific company, the former company transacts the business in Texas, and is a separate legal entity, authorized under the laws of Texas and legitimately carrying on business there.

There is no evidence that the Pacific company may not lawfully hold the stock of the Gulf company, and [illegible]ler the statute of Illinois it seems to be authorized so to do. 3 Starr & C. Anno. Stat. (Ill.) p. [illegible] It is true that the Pacific company [illegible]

ıey to build the road of the Texas y, predecessor of the Gulf company. was well observed by Judge (after- ustice) Jackson in United States v. n Bell Teleph. Co. supra: "For one to supply means for another to do on is not the doing of that business former."

onduct and control of the business in as intrusted to the Gulf company. largest stockholder the Pacific com- d an interest in that business, but a corporation had been legally creat- exas, with authority to make con- nd control its own affairs and carry wn business. This separate corpo- ad its own officers, a large amount of property, was responsible for its s and to persons with whom it dealt.

o we think that the persons served ocess are agents of the Pacific com- ing the business of the company in Section 2 of the act of March 13, aws of Texas, 1905, p. 30), is very nd would seem to comprehend con- who handle trains for two or more ions over foreign or domestic roads he state lines of Texas and on the a domestic railroad within the state s, or upon any agent who has an Texas and who sells tickets or makes s for the transportation of passen- property over any line of railroad or reof of any such foreign corpora- company; and such companies and by § 3 of the act, are made agents reign corporation or company, upon he citation *may be served. But it ial to the validity of such service corporation shall be doing business he state, and that the service be agent representing the corporation pect to such business. Goldey v. News and Conley v. Mathieson Vorks, ubi supra.

onductors, one of whom was served, crossed the Texas line, this record ecame the servant and agent of the apany. The ticket agent sold tick- he Gulf company, in whose employ- was. He would also sell tickets on its line and over the lines of the ompany, but he transacted this busi- he agent of the Gulf company. As y, the record fails to show that he nt of the Pacific company; on the , it shows that he had no connection company, and that his duties were to the affairs of the Gulf company. is true of Merrell, and as to Sebree, rd shows that for the services rendered as trainmaster he was paid by each company for the service performed by it and had no charge as agent of the business of the Pacific company in the state of Texas.

We reach the conclusion that the Pacific company was not doing business in the state of Texas, and that the attempted service was not upon agents of that company transacting its business in that state in such a sense as to give jurisdiction by service of citation upon them. The judgment of the Circuit Court is affirmed.

Dissenting: The CHIEF JUSTICE and Mr. Justice Moody.

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*METROPOLITAN LIFE INSURANCE [395] COMPANY OF NEW YORK, Plff. in Err.,

v.

CITY OF NEW ORLEANS, The Board of Assessors for the Parish of Orleans, and John Fitzpatrick, State Tax Collector, etc.

(See S. C. Reporter's ed. 395-403.)

Taxes—situs—property of nonresidents.

State taxation of credits arising out of loans made in the regular course of business by the local agent of a foreign insurance company to its policy holders is not forbidden by U. S. Const. 14th Amend., where the loans were negotiated, the notes signed, the security taken, the interest collected, and the debts paid within the state, because the promissory notes which are the evidences of such credits are kept at the home office at all times when not needed in the state.

[No. 199.]

Argued January 31, 1907. Decided April 8, 1907.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which, reversing in part a judgment of the Civil District Court of the Parish of Orleans, in that state, sustained a tax on credits arising out of loans made by the local agent of a foreign insurance company to its policy holders. Affirmed.

See same case below, 115 La. 698, 39 So. 846.

The facts are stated in the opinion.

NOTE.—On the situs, for purpose of taxation, of debts evidenced by notes and mortgages—see notes to Boyd v. Selma, 16 L.R.A. 729, and New Orleans v. Stempel, 44 L. ed. U. S. 174. And see case note to Monongahela River Consol. Coal & Coke Co. v. Board of Assessors, 2 L.R.A.(N.S.) 637.

On the taxation of intangible property of nonresidents—see note to Walker v. Jack, 31 C. C. A. 467.

Mr. Charles Pollard Cocke argued the cause, and, with Messrs. William Wirt Howe and Walker B. Spencer, filed a brief for plaintiff in error:

Can the state of Louisiana tax, as the property of a New York corporation doing business in Louisiana, promissory notes which became its property in New York, and which, at all times subsequent to the moment when they became its property, were owned and held by it, and were, with the collateral securing them, physically located in the state of New York?

Liverpool & L. & G. Ins. Co. v. Board of Assessors, 44 La. Ann. 760, 16 L.R.A. 56, 11 So. 91; Railey v. Board of Assessors, 44 La. Ann. 765, 11 So. 93; Clason v. New Orleans, 46 La. Ann. 1, 14 So. 306; Bluefields Banana Co. v. Board of Assessors, 49 La. Ann. 43, 21 So. 627; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 51 La. Ann. 1028, 45 L.R.A. 524, 72 Am. St. Rep. 483, 25 So. 970; Comptoir Nat. D'Escompte v. Board of Assessors, 52 La. Ann. 1319, 27 So. 801; Monongahela River Consol. Coal & Coke Co. v. Board of Assessors, 115 La. Ann. 564, 2 L.R.A.(N.S.) 637, 112 Am. St. Rep. 275, 39 So. 601; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; Northern C. R. Co. v. Jackson, 7 Wall. 262, 19 L. ed. 88; Murray v. Charleston, 96 U. S. 432–440, 24 L. ed. 760, 761; New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628–648, 38 L. ed. 846–854, 14 Sup. Ct. Rep. 952; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; State Assessors v. Comptoir Nat. D'Escompte, 191 U. S. 389, 48 L. ed. 233, 24 Sup. Ct. Rep. 109.

The tax is not one imposed on the plaintiff in error as owner, but one imposed, by the terms of the statute, on its property situated within the state.

St. Louis v. Wiggins Ferry Co. 11 Wall. 423–430, 20 L. ed. 192–194.

But, even if the statute does attempt to impose a personal liability to pay taxes on property within the limits of the state of Louisiana, the plaintiff in error, being a resident of New York, without power to change its residence, the tax is unconstitutional and void.

Germania F. Ins. Co. Francis, 11 Wall. 210–216, 20 L. ed. 77–79; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5–11, 26 L. ed. 643–645; Shaw v. Quincy Min. Co. (Ex parte Shaw) 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; Dewey v. Des Moines, 173 U. S. 193–202, 43 L. ed. 665–668, 19 Sup. Ct. Rep. 379.

Messrs. H. Garland Dupré, George H. Terriberry, and F. C. Zacharie argued the cause, and, with Mr. Samuel L. Gilmore, filed a brief for defendants in error:

The taxation of these notes under the Louisiana statutes does not offend against the 14th Amendment of the Constitution of the United States.

Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585.

Mr. Justice Moody delivered the opinion of the court:

This is a writ of error to review the judgment of the supreme court of Louisiana, which sustained a tax on the "credits, money loaned, bills receivable," etc., of the plaintiff in error, a life insurance company incorporated under the laws of New York, where it had its home office and principal place of business. It issued policies of life insurance in the state of Louisiana, and, for the purpose of doing that and other business, had a resident agent, called a superintendent, whose duty it was to superintend the company's business generally in the state. The agent had a local office in New Orleans. The company was engaged in the business of lending money to the holders of its policies, which, when they had reached a certain point of maturity, were regarded as furnishing adequate security for loans. The money lending was conducted in the following manner: The policy holders desiring to obtain loans on their policies applied to the company's agent in New Orleans. If the agent thought a loan a desirable one he advised the company of the application by communicating with the home office in New York, and requested that the loan be granted. If the home office approved the loan the company forwarded to the agent a check for the amount, with a note to be signed by the borrower. The agent procured the note to be signed, attached the policy to it, and forwarded both note and policy to the home office in New York. He then delivered to the borrower the amount of the loan. When interest was due upon the notes it was paid to the agent and by him transmitted to the home office. It does not appear whether or not the notes were returned to New Orleans for the indorsement of the payments of interest. When the notes were paid it was to the agent, to whom they were sent "to be delivered back to the makers. At all other times the notes and policies securing them were kept at the home office in New York. The disputed tax was not on [illegible] these notes, but was expressed to be on "cr[illegible]dits receivable," etc., and its [illegible] ertained by computing the [illegible] of the [illegible] value of all the notes held [illegible] any at the time of

assessment. The tax was assessed un- a law (act 170 of 1898) which provided a levy of annual taxes on the assessed ue of all property situated within the te of Louisiana, and in 7 provided as lows:

'That it is the duty of the tax assessors oughout the state to place upon the as- sment list all property subject to taxa- n, including merchandise or stock in de on hand at the date of listing within ir respective districts or parishes. . . . d provided further, In assessing mercan- firms the true intent and purpose of this shall be held to mean the placing of such ue upon stock in trade, all cash, whether rowed or not, money at interest, open ounts, credits, etc., as will represent in ir aggregate a fair average on the capi- both cash and credits, employed in the iness of the party or parties to be as- ed. And this shall apply with equal e to any person or persons representing this state business interests that may m domicil elsewhere, the intent and pur- being that no nonresident, either by self or through any agent, shall transact iness here without paying to the state a esponding tax with that exacted of its citizens; and all bills receivable, obliga- s, or credits arising from the business e in this state, are hereby declared as as- able within this state and at the busi- domicil of said nonresident, his agent epresentative."

he evident purpose of this law is to lay burden of taxation equally upon those do business within the state. It re- es that in the valuation for the purposes taxation of the property of mercantile s the stock, goods, and credits shall be en into account, to the end that the av- ge *capital employed in the business shall axed. This method of assessment is ap- d impartially to the citizens of the state to the citizens of other states or coun- s doing business, personally or through nts, within the state of Louisiana. To mplish this result the law expressly pro- s that all bills receivable, obligations, redits arising from the business done in state shall be assessable at the business icil of the resident. Thus it is clear the measure of the taxation designed he law is the fair average of the capital loyed in the business. Cash and its and bills receivable are to be taken account merely because they represent capital, and are not to be omitted be- e their owner happens to have a domicil nother state. The law was so construed he supreme court of Louisiana, where, ustaining the assessment, it was said:

'here can be doubt that the 7th section of the act of 1898, quoted in the judgment of the district court, announced the policy of the state touching the taxation of credits and bills of exchange representing an amount of the property of nonresidents equivalent or corresponding to said bills or credits which was utilized by them in the prosecution of their business in the state of Louisiana. The evident object of the statute was to do away with the discrimination theretofore existing in favor of nonresidents as against residents, and place them on an equal footing. The statute was not arbitrary, but a legitimate exercise of legislative power and discretion." [115 La. 708, 39 So. 850.]

The tax was levied in obedience to the law of the state, and the only question here is whether there is anything in the Constitution of the United States which forbids it. The answer to that question depends upon whether the property taxed was within the territorial jurisdiction of the state. Property situated without that jurisdiction is beyond the state's taxing power, and the exaction of a tax upon it is in violation of the 14th Amendment to the Constitution. Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; Delaware L. & W. *R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077 25 Sup. Ct. Rep. 669; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36. But personal property may be taxed in its permanent abiding place, although the domicil of the owner is elsewhere. It is usually easy to determine the taxable situs of tangible personal property. But where personal property is intangible, and consists, as in this case, of credits reduced to the concrete form of promissory notes, the inquiry is complicated not only by the fiction that the domicil of personal property follows that of its owner, but also by the doctrine, based upon historical reasons, that where debts have assumed the form of bonds or other specialties, they are regarded for some purposes as being the property itself, and not the mere representative of it, and may have a taxable situs of their own. How far promissory notes are assimilated to specialties in respect of this doctrine need not now be considered.

[400]

The question in this case is controlled by the authority of the previous decisions of this court. Taxes under this law of Louisiana have been twice considered here, and assessments upon credits arising out of investments in the state have been sustained. A tax on credits evidenced by notes secured by mortgages was sustained where the owner, a nonresident, who had inherited them, left them in Louisiana in the possession of

an agent, who collected the principal and interest as they became due. New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110. Again, it was held that where a foreign banking company did business in New Orleans, and through an agent lent money which was evidenced by checks drawn upon the agent, treated as overdrafts and secured by collateral, the checks and collateral remaining in the hands of the agent until the transactions were closed, the credits thus evidenced were taxable in Louisiana. State Assessors v. Comptoir National D'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109. In both of these cases the written evidences of the credits were continuously present in the state, and their presence was clearly the dominant factor in the decisions. Here the notes, though present in the state at all times when *they were [401] needed, were not continuously present, and during the greater part of their lifetime were absent and at their owner's domicil. Between these two decisions came the case of Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585. It appeared in that case that a resident of New York was engaged, through an agent, in the business of lending money in Minnesota, secured by mortgages on real property. The notes were made to the order of the nonresident, though payable in Minnesota, and the mortgages ran to her. The agent made the loans, took and kept the notes and securities, collected the interest, and received payment. The property thus invested continued to be taxed without protest in Minnesota until finally the course of business was changed by sending the notes to the domicil of the owner in New York, where they were kept by her. The mortgages were, however, retained by the agent in Minnesota, though his power to discharge them was revoked. The interest was paid to the agent and the notes forwarded to him for collection when due. Taxes levied after this change in the business were in dispute in the case. In delivering the opinion of the court Mr. Chief Justice Fuller said: "Nevertheless, the business of loaning money through the agency in Minnesota was continued during all these years, just as it had been carried on before, and we agree with the circuit court that the fact that the notes were sent to Mrs. Bristol in New York, and the fact of the revocation of the power of attorney, did not exempt these investments from taxation under the statutes, as expounded in the decision to which we have referred."

Referring to the case of New Orleans v. Stempel, the Chief Justice said:

"There the money, notes, and evidences of credits were in fact in Louisiana, though their owners resided elsewhere. Still, under the circumstances of the case before us, we think, as we have said, that the mere sending of the notes to New York and the revocation of the power of attorney did not take these investments out of the rule.

*"Persons are not permitted to avail them-[402] selves, for their own benefit, of the laws of a state in the conduct of business within its limits, and then to escape their due contribution to the public need, through action of this sort, whether taken for convenience or by design."

Accordingly it was held that the tax was not forbidden by the Federal Constitution.

In this case the controlling consideration was the presence in the state of the capital employed in the business of lending money, and the fact that the notes were not continuously present was regarded as immaterial. It is impossible to distinguish the case now before us from the Bristol Case. Here the loans were negotiated, the notes signed, the security taken, the interest collected, and the debts paid within the state. The notes and securities were in Louisiana whenever the business exigencies required them to be there. Their removal with the intent that they shall return whenever needed, their long-continued though not permanent absence, cannot have the effect of releasing them as the representatives of investments in business in the state from its taxing power. The law may well regard the place of their origin, to which they intend to return, as their true home, and leave out of account temporary absences, however long continued. Moreover, neither the fiction that personal property follows the domicil of its owner, nor the doctrine that credits evidenced by bonds or notes may have the situs of the latter, can be allowed to obscure the truth. Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277. We are not dealing here merely with a single credit or a series of separate credits, but with a business. The insurance company chose to enter into the business of lending money within the state of Louisiana, and employed a local agent to conduct that business. It was conducted under the laws of the state. The state undertook to tax the capital employed in the business precisely as it taxed the capital of its own citizens in like situation. For the purpose of arriving at the amount of capital actually employed, it caused the credits arising [illegible] of the business to be assessed. We think the state had the power to do this, and that the foreigner [illegible] ness cannot escape taxation upon [illegible] by removing temporarily from the [illegible] evidences of credits in the form of [illegible]. Under such circum-

they have a taxable situs in the their origin.
udgment of the Supreme Court of a is affirmed.

N, MEYER, & CO., Plffs. in Err.,
v.
CAMPBELL & GO TAUCO.

e S. C. Reporter's ed. 403-410.)

-distinction between appeal and writ or.
Errors alleged to have been commit- in action at law can be reviewed in preme Court of the United States writ of error.

-review of facts on writ of error.
Only questions of law apparent on rd can be considered by the Supreme of the United States on a writ of nd there can be no inquiry whether as error below in dealing with quea- f fact.

-review of facts on writ of error.
Whether the supreme court of the ine Islands, acting under the authori- the P. I. Code of Procedure, § 497, , erred in setting aside the conclu- the court of first instance as being and manifestly against the weight of e, is a question which is not open on of error from the Federal Supreme

-questions reviewable—errors not ned.
Alleged errors of law in the opinion court below, which was engaged with ssion of evidence and the inferences might properly be drawn from it, t be considered by the Supreme Court United States on a writ of error if e not contained in the assignment of filed with the petition for the writ, on the whole, it is clear that the ound justify the judgment rendered.

[No. 227.]

March 7, 1907. Decided April 8, 1907.

RROR to the Supreme Court of the ippine Islands to review a judgment reversing the judgment of the Court t Instance of the City of Manila, or- udgment for plaintiffs in an action ver a sum alleged to be due for labor aterials furnished under a building t. Affirmed.

ment by Mr. Justice Moody:
lefendants in error, hereinafter called the plaintiffs, brought an action in the court of first instance of the city of Manila, in the Philippine Islands, to recover from the plaintiffs in error, hereinafter called the defendants, the sum of 9,250.62 pesos, alleged to be due on account of labor and materials furnished under a building contract and its modifications. The defendants, among other defenses, set up first, that the labor *was[404] performed in a negligent and unworkmanlike manner, which caused the defendants great damages; and, second, that the plaintiffs contracted in writing with the defendants to fill a certain lot of land with earth and sand at a given rate per cubic meter, and had been paid upon their representation of the amount of earth and sand used in the filling, $81,497.65, Mexican currency; that the amount of sand and earth used was much less than that represented, and that the plaintiffs had been overpaid $41,197.63, Mexican currency. The defendants sought to recover this overpayment by way of counterclaim. A trial before the judge of the court of first instance resulted in a finding that the defendants had been damaged through the negligent and unworkmanlike manner of furnishing the labor under the building contract and its modifications, to an amount equal to the sum remaining due under the terms of that contract and that there had been an overpayment on the filling contract, as alleged by the defendants. Accordingly judgment was rendered dismissing the plaintiffs' complaint, and that the defendants recover from the plaintiffs $52,000 Mexican currency. The plaintiffs appealed to the supreme court of the Islands. That court found as a fact substantially that the plaintiffs had fully complied with their contract and were entitled to recover the amount they alleged to be due; that the amount paid by the defendants to the plaintiffs on account of filling was determined by actual measurements made at the time of the filling by defendants' representatives; that there was no fraud or mistake, and that the defendants, therefore, were not entitled to recover anything on account of overpayment on that account. The judgment of the court of first instance was reversed, and judgment ordered for the plaintiffs in the sum of $9,250.62, Mexican currency. Thereupon the defendants appealed to this court. The appeal was dismissed by this court for want of jurisdiction. The defendants then sued out a writ of error, which was allowed by a justice of the supreme court of the Philippine Islands, and filed with its petition the following assignment of errors:

*"1. The supreme court of the Philippine[405] Islands erred in reversing the judgment of

.—On distinction between appeal and error—see note to Miners' Bank v. 3 L. ed. U. S. 867.

the court of first instance for the city of Manila to the effect that the plaintiffs in error were entitled to the sum of $9,250.62, Mexican currency, as damages sustained by reason of the faulty construction of the premises in question.

"2. The supreme court of the Philippine Islands erred in reversing the judgment of the court of first instance for the city of Manila granting judgment in favor of the plaintiff in error in the sum of $52,000, Mexican currency, the amount overpaid by the plaintiffs in error to the defendants in error for the delivery of sand.

"3. The supreme court of the Philippine Islands erred in finding as matters of fact the following:

"(1) That in the construction of the building the contract, plans, and specifications have been complied with, with the exception of a variation to the advantage of the owner, which is that the principal posts rest upon layers of stone, instead of upon the ground, as called for by the plan.

"(2) That, if there has been any variation from the original plan, this was done largely, if not wholly, with the consent of the owner, and, at all events, with that of his agent, the inspecting engineer, and that these changes have been improvements.

"(3) That the house was constructed under a contract and specifications which did little more than to designate the size of the building, the material to be employed, and, with the plan, gave a drawing of the building, leaving the details necessary almost completely to the direction of the inspecting architect or engineer.

"(4) That the owner intrusted the direction of the work to an inspecting engineer selected by himself, with full authority to represent him, and that the contractor has performed the work solely in accordance with the direction of the said inspecting engineer.

"(5) That although there is some evidence [406] to indicate that *a part of the house has settled more than other parts, this is due either to the ground itself or to a defect in plan, or to the directions of the inspecting engineer, and cannot be attributed to a failure on the part of the contractor to comply with the conditions of the contract.

"(6) If there are any cracks in the floor and in the joints in the building, this is due to the class of lumber which was selected by the owner.

"(7) That the plan of the work and the placing of the principal posts were approved by the city engineer and were in conformity with the ordinances.

"(8) That the owner took possession of the house in the month of May, 1902, and has occupied it since that time as a dwelling house.

"By the very fact of accepting the house and occupying it, the defendants acknowledged that it was constructed substantially as required by the contract, plans, and specifications; and this is the law even when the work is not done according to the contract, but accepted.

"4. The supreme court of the Philippine Islands erred in not finding that the evidence in the case was not sufficient to justify the court reversing the judgment of the court of first instance.

"5. The supreme court of the Philippine Islands erred in reversing the judgment of the court of first instance for the city of Manila, and in giving judgment against the plaintiff in error in the sum of $9,250.62, Mexican currency.

"6. The supreme court of the Philippine Islands erred in not confirming the judgment of the court of first instance of the city of Manila in giving judgment in favor of the plaintiff in error in the sum of $52,000, Mexican currency."

Mr. Henry E. Davis argued the cause, and, with Mr. Charles C. Carlin, filed a brief for plaintiffs in error.

Mr. Aldis B. Browne argued the cause, and, with Mr. Alexander Britton, filed a brief for defendants in error.

*Mr. Justice Moody, after making the foregoing statement, delivered the opinion of the court: [407]

The defendants first appealed from the judgment of the supreme court of the Philippine Islands, which had been rendered against them and the appeal was dismissed. 200 U. S. 611, 50 L. ed. 619, 26 Sup. Ct. Rep. 753. The reason, so plain that it seemed not to require statement, was that errors alleged to have been committed in an action at law can be reviewed here only by writ of error. This, in the absence of modification by statute, is the rule in respect to all courts whose records are brought here for review. Walker v. Dreville, 12 Wall. 44, 20 L. ed. 429; United States v. Halley, 118 U. S. 233, 30 L. ed. 173, 6 Sup. Ct. Rep. 1049; Deland v. Platte County, 155 U. S. 221, 39 L. ed. 128, 15 Sup. Ct. Rep. 81; Comstock v. Eagleton, 196 U. S. 99, 49 L. ed. 402, 25 Sup. Ct. Rep. 210.

The defendants, having failed in their appeal, have now brought a writ of error and ask this court to review the facts to the same extent that they would be reviewed on appeal. But this overlooks the vital distinction between appeals and writs of error which has always been observed by this court, and recognized by legislation. As an

peal brings up questions of fact as well as of law, but upon a writ of error only questions of law apparent on the record can be considered, and there can be no inquiry whether there was error in dealing with questions of fact. Wiscart v. Dauchy, 3 Dall. 321, 1 L. ed. 619; Generes v. Campbell, 11 Wall. 193, 20 L. ed. 110; United States v. Dawson, 101 U. S. 569, 25 L. ed. 791; England v. Gebhardt, 112 U. S. 502, 28 L. ed. 811, 5 Sup. Ct. Rep. 287; Martinton v. Fairbanks, 112 U. S. 670, 28 L. ed. 862, 5 Sup. St. Rep. 301; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452 (where the cases are reviewed by Mr. Justice Gray); Elliott v. Toeppner, 187 U. S. 327, 47 L. ed. 200, 23 Sup. Ct. Rep. 133; Rev. Stat. § 1011, U. S. Comp. Stat. 1901, p. 715.

The assignment of errors in the case at bar does not allege any errors of law, but deals exclusively with questions of fact. There are six assignments. The first, second, fifth, and sixth assignments severally allege that the supreme court erred in rendering the judgment which it did and in reversing the judgment of the court of first instance. The third assignment specifically recites that "the supreme court of the Philippine *Islands erred in finding as matters of fact the following:" Then come eight specifications of errors in such findings. It is, however, argued by counsel that the fourth assignment of errors in effect alleges an error in law. That assignment is as follows: "The supreme court of the Philippine Islands erred in not finding that the evidence in the case was not sufficient to justify the court reversing the judgment of the court of first instance."

The Philippine Code of Procedure (Public Laws of Philippine Commission, act 190, 1901), prescribes in chapter 22 the practice of the supreme court in reviewing the judgments of courts of first instance. It confines the review to questions of law, with certain exceptions, one of which is as follows:

"If the excepting party filed a motion in the court of first instance for a new trial, upon the ground that the findings of fact were plainly and manifestly against the weight of evidence, and the judge overruled said motion, and due exception was taken to his overruling the same, the supreme court may review the evidence and make such findings upon the facts and render such final judgment as justice and equity require. But, if the supreme court shall be of the opinion that the exception is frivolous and not made in good faith, it may impose double or treble additional costs upon the excepting party, and may order them to be paid by the counsel prosecuting the bill of exceptions, if, in its opinion, justice so requires." § 497, subdiv. 3.

The supreme court, in the case at bar, acted upon the authority conferred by this subdivision. It is said that the supreme court can review the evidence taken in the court of first instance and thereby arrive at a different conclusion of facts from that found by the trial court only in the case that "the findings of fact were plainly and manifestly against the weight of evidence." It is therefore urged that whether the court erred in setting aside the conclusions of the lower court as plainly and manifestly against the weight of evidence is a question of law which may be brought here by writ of error. *It was held in De la Rama v. De[409] la Rama, 201 U. S. 303, 50 L. ed. 765, 26 Sup. Ct. Rep. 485, that, upon an appeal, this court will consider whether a reversal by the supreme court of the findings of the court of first instance was justified on the ground that the findings below were plainly and manifestly against the weight of evidence, and, upon being satisfied that the action of the supreme court was not warranted, on that ground would reverse it. But this case was one of appeal, and the vital distinction between an appeal and a writ of error has already been shown. The principle acted upon in that case is not applicable to writs of error. The fourth assignment of error, therefore, raises no question of law.

The case would stop here were it not for the fact that the defendants in their brief and in the oral argument in their behalf go beyond the assignment of errors and set up three alleged errors of law not contained in them.

It is said that the court below erred:

"(1) In holding as a matter of law that the fact of taking possession of said dwelling house was an acknowledgment by the plaintiffs in error that it was constructed substantially as required by the said contract.

"(2) In holding as a matter of law that the plaintiffs in error were not entitled to recover their overpayments for earth and sand because no mutual mistake was shown in the premises.

"(3) In rendering judgment for a sum in Mexican currency instead of in Philippine pesos."

It is provided in the act giving this court jurisdiction to review the judgments of the supreme court of the Philippine Islands that they may be reviewed here "in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States." In such cases alleged errors not stated in the assign-

ment of errors filed with the petition for the writ have sometimes been considered. The limits of this practice are accurately stated in the thirty-fifth rule of this court. There it is said that if errors are not as-
[410] signed *with the petition for the writ they will be disregarded, except that the court at its option may notice a plain error not thus assigned.

But we find no such plain error in the opinion of the supreme court as warrants us in reversing its judgment. The findings of fact made by that court support and require the judgment which it rendered. We do not think it necessary or desirable to select from an opinion, which was engaged with a discussion of evidence and the inferences which might properly be drawn from it, statements of law and subject them to minute scrutiny, where, on the whole, it is clear that the facts found by the court justify the judgment which it rendered. Therefore we do not consider any questions except those set forth in the assignment of errors, and, deeming that they allege no errors in law, we affirm the judgment.

Affirmed.

MARY AMIS QUINLAN, Executrix,
v.
GREEN COUNTY, Kentucky.

(See S. C. Reporter's ed. 410-423.)

Cases certified—form of question.

1. A question containing more than a single question or proposition of law cannot be certified by a circuit court of appeals to the Supreme Court of the United States for determination.

Evidence — presumption — performance of condition precedent to issue of municipal bonds.

2. A presumption, though not a conclusive one, that there has been a compliance with the condition precedent to the issuance of county bonds in payment of a subscription to the capital stock of a railway company that the county should first be exonerated from a prior subscription to the stock of another railroad company, arises from the mere fact of subscription and issuance by the officer charged with the duty of issuing the bonds upon the performance of the condition precedent.

[No. 213.]

Argued February 27, 28, 1907. Decided April 8, 1907.

NOTE.—On the definiteness of question to be certified—see note to Waco Water & Light Co. v. Waco, 31 L.R.A. 392.

As to presumption of performance of official duty—see note to Douglass v. Bishop, 10 L.R.A. 857.

IN A CERTIFICATE from the States Circuit Court of Appeals Sixth Circuit presenting the que to whether a bona fide purchaser o bonds for value and before maturity titled to assume that a condition p to the issue of such bonds had b formed. Answered in the affirmati

Statement by Mr. Justice Moody:

Plaintiff in error brought an acti circuit court of *the United States western district of Kentucky upo bonds and coupons purporting to h issued by the defendant in error, o counties of the state of Kentucky. lowing was the form of the bond:

United States of America,
County of Green, State of Kent
$500.00
For the Cumberland & Ohio Rail

Twenty years after date, the co Green, in the state of Kentucky, wil the holder of this bond the sum of $ interest thereon at the rate of 6 per annum, payable semiannuall presentation of the proper coupon attached, the principal and intere payable at the Bank of America, in of New York.

In testimony whereof, the judge county of Green has hereunto set h and affixed the seal of said county, 1st day of April, A. D., 1871, and ca same to be attested by the count who has also signed the coupons be tached.

(Green county seal.)

T. R. Barnett,
D. T. Towles,

The case was tried without a ju the court, after finding facts, rendr ment for the defendant. The case th to the court of appeals for the sixth and that court has certified here tw tions of law upon which it desires tions, with a statement of facts up the questions arise. In addition statement of facts we take into ac material parts of the charter of the land & Ohio Railroad Company, which contains the following provi

"Sec. 15. That any city, town, or through which said proposed road sh is hereby authorized to subscribe s said railroad company in any amo such city, town, or county may dul the county court of any such *count thorized to issue the bonds of the tive counties in such amount as the court may direct; and the chairm

board of trustees, or mayor and aldermen of any town, and the mayor and aldermen or council of any city, are hereby authorized to issue the bonds of their respective towns or cities in like manner. All said bonds shall be payable to bearer, with coupons attached, bearing any rate of interest not exceeding 6 per cent per annum, payable semi-annually in the city of New York, payable at such times as they may designate, not exceeding thirty years from date; but before any such subscriptions on the part of any city, town, or county shall be valid or binding on the same the mayor and aldermen, or chairman and board of trustees of any town, the mayor and aldermen or council of any city, and the county court of any county, having jurisdiction, shall submit the question of any such subscription to the qualified voters of such city, town, or county in which the proposed subscription is made, at such time or times as said chairman and board of trustees, or mayor and aldermen of any town, mayor and aldermen or council of any city, or the county court of any county, as aforesaid, may, by order, direct; and should a majority of the qualified voters voting at any such election vote in favor of subscribing said stock in said railroad company, it shall be the duty of such county court, trustees, or other authorities aforesaid, to make the subscription in the name of their respective cities, towns, or counties, as the case may be, and proceed to have issued the bonds to the amount of such subscription as hereinbefore directed;

. . . . . .

"That, if preferred, the application herein authorized to be made to the county court may be made to the presiding judge of the county court; and all the powers herein given to the county court are hereby vested in the presiding judge of the county court. At all meetings of the stockholders for the purpose of electing officers, or any other purpose, the said town, cities, and counties may, by proxies duly authorized by the *authorities thereof, cast a vote for each share so subscribed by said town, city, or county."

The charter gives to the Cumberland & Ohio Railroad "all the powers and privileges conferred upon the Louisville & Nashville Railroad Company by the laws of Kentucky for constructing and operating their said proposed railroad." The charter of the Louisville & Nashville Railroad Company provides "that said railroad company may receive subscriptions of stock to their company by individuals, towns, cities, counties, or other corporations, whether payable in money or other things, with such terms and time of payment, conditions annexed, and kind of payment that may be set forth in the subscription." The commissioners of the Cumberland & Ohio Railroad requested the county court to submit to the qualified voters of the county the question whether the county should subscribe to $250,000 of the capital stock of the company, payable in bonds of the county, whereupon the judge of the county court on the 17th of June, 1869, ordered an election in the following terms:

"Whereas the commissioners of the Cumberland & Ohio Railroad Company, by virtue of the authority delegated to them by the charter of said company, have requested the county court of Green county to order an election in said county of Green, and to submit to the qualified voters of said county the question whether said county court shall subscribe for and on behalf of said county $250,000 to the capital stock of the Cumberland & Ohio Railroad Company, and payable in the bonds of said county, having twenty years to run, and bearing 6 per cent interest from date, and upon condition that said company shall locate and construct said railroad through said county of Green, and within 1 mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green county; and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland *& Ohio Railroad Company, until said [414] county of Green is fully and completely exonerated from the payment of the capital stock voted by said county, and authorized to be subscribed by said Green county court to the Elizabethtown & Tennessee Railroad, or any part of the interest thereon. It is therefore ordered by the court that an election, by the qualified voters of Green county, at the voting places in said county, be held and conducted by the several officers, as prescribed by law, for holding elections, on the 3d day of July, 1869, to vote on the question as to whether or not the said county court shall, for and on behalf of said county, subscribe $250,000 to the capital stock of said Cumberland & Ohio Railroad, conditioned and to be paid as above stated."

The election was duly held July 3, 1869, and the vote was in the affirmative. During the year before this vote the voters of the county had voted in favor of a proposition to subscribe to the stock of the Elizabethtown & Tennessee Railroad, and thereupon the county judge had ordered the clerk of his court to make a subscription to the stock of the Elizabethtown & Tennessee Railroad Company, "on the terms specified in the order submitting the question to a vote." This

was the subscription from which Green county desired to be exonerated before the Cumberland & Ohio Railroad bonds should be issued, or any part of their principal or interest paid. On June 3, 1870, the county judge entered an order reciting the election at which the qualified voters had approved the subscription to the capital stock of the Cumberland & Ohio Railroad, and concluding: "Now, therefore, I, Thomas R. Barnett, the presiding judge of the Green county court, by virtue of the authority in me vested by law, and to carry out the wishes of said voters, do hereby subscribe for $250,000 of the capital stock of said Cumberland & Ohio Railroad Company for and on behalf of said county of Green, which subscription is to be paid in the bonds of said county as prescribed in said order of submission, [415] and *this subscription is made with the conditions set out in the order of this court ordering said election, and now of record in the office of this county."

At the April term, 1871, the supreme court of the state rendered a decision in the case of Mercer County Court v. Kentucky River Nav. Co. 8 Bush, 300. It is argued that this decision shows that the subscription to the stock of the Elizabethtown & Tennessee Railroad was void. However that may be, at a time which does not distinctly appear, but later than that decision, the judge of the county court issued and delivered to the Cumberland & Ohio Railroad Company bonds of Green county to a small amount. On August 15, 1872, the judge, in a formal order, reciting that application had been made for the issue of the balance of the bonds, directed that, "the court being sufficiently advised," they be signed and issued. Thereupon certificates of 2,500 shares of that stock of the par value of $100 per share were delivered to Green county, which has since held and owned them. It was conceded at the argument that the county had made payment of interest on the bonds thus issued to the Cumberland & Ohio Railroad. No formal or express exoneration of said county from the payment of the subscription to the stock of the Elizabethtown & Tennessee Railroad was ever made or attempted, but nothing further has, up to this date, ever been done in respect to it, and neither bonds by the county nor stock by the said last-named railroad company have ever been issued or delivered in execution of said orders or under the terms of said subscription. The proceeds of $150,000 of the bonds were expended within Green county in the partial construction of 5 miles of the road to Greensburg. This 5 miles was completed by a lessee at its own expense. Nothing else has been done within the county.

The plaintiff is the bona fide holder for value of the bonds and coupons in suit but had notice that the railroad had not been laid further than Greensburg, and therefore did not extend "through" the county.

*The questions certified by the circuit [416] court of appeals are:

"1st. Do the facts found by the circuit court conclude or estop the county from denying liability to the plaintiff upon the bonds and coupons in suit, by reason of noncompliance with the terms and conditions imposed by the favorable vote of the county authorizing a subscription to the stock of the Cumberland & Ohio Railroad Company and the issuance of bonds in payment therefor? Or, if this question should be deemed too broad, then,

"2d. Assuming the facts to be as found, was a bona fide purchaser, before maturity, of these bonds and coupons for value, entitled to assume in his purchase that Green county had, before their issuance, been 'fully and completely exonerated from the payment of the capital stock subscribed for by the county court of said county for and in behalf of said county to the Elizabethtown & Tennessee Railroad Company?'"

Messrs. Edmund F. Trabue and George R. Relle argued the cause, and, with Messrs. John J. McHenry, John C. Doolan, and Attila Cox, Jr., filed a brief for Quinlan:

The county court was the judge of the exoneration, and held the county to be exonerated.

Provident Life & T. Co. v. Mercer County, 170 U. S. 593, 42 L. ed. 1156, 18 Sup. Ct. Rep. 788.

Mr. Ernest Macpherson argued the cause, and, with Mr. John W. Lewis, filed a brief for Green County:

The purchaser of municipal bonds is bound to take notice of the law under which the obligations are issued.

Barnett v. Denison, 145 U. S. 138, 36 L. ed. 652, 12 Sup. Ct. Rep. 819.

In the absence of a recital in a municipal bond or coupon that the conditions essential to its validity have been performed, it is open to the municipality to show the nonperformance of the conditions.

Citizens' Sav. & L. Asso. v. Perry County, 156 U. S. 701, 39 L. ed. 590, 15 Sup. Ct. Rep. 547; Coloma v. Eaves, 92 U. S. 484, 23 L. ed. 579; Provident Life & T. Co. v. Mercer County, 170 U. S. 593, 42 L. ed. 1156, 18 Sup. Ct. Rep. 788; Carroll County v. Smith, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; Independent School District v. Stone, 106 U. S. 183-191, 27 L. ed. 90, 91, 1 Sup. Ct. Rep. 84; Hopper v. Covington, 118 U. S. 148, 30 L. ed. 190, 6 Sup. Ct. Rep. 1025.

In the alleged b[illegible] of Green county,

here being no recitals, and no reference to the law or authority under which they were issued, it was the duty of every person dealing therein to look to the records of the Green county court.

Crow v. Oxford, 119 U. S. 222, 30 L. ed. 390, 7 Sup. Ct. Rep. 180; McClure v. Oxford Twp. 94 U. S. 432, 24 L. ed. 129; Hainer, Modern Law of Municipal Securities, § 413; Marsh v. Fulton County, 10 Wall. 683, 19 L. ed. 1042; Dixon County v. Field, 111 U. S. 90, 28 L. ed. 363, 4 Sup. Ct. Rep. 315; Merchants' Exch. Nat. Bank v. Bergen County, 115 U. S. 392, 29 L. ed. 432, 6 Sup. Ct. Rep. 88.

When the law confers no authority to issue the bonds in question, the mere fact of their issue cannot bind the town to pay them, even to a purchaser before maturity and for value.

Hopper v. Covington, 118 U. S. 148, 30 L. ed. 190, 6 Sup. Ct. Rep. 1025.

Mr. Justice **Moody,** after making the foregoing statement of facts, delivered the opinion of the court:

The first question certified is thought by a majority of the court to contain more than a single question or proposition of law, and for that reason it is not answered.

The second question deals with the exoneration from subscription to the stock of the Elizabethtown & Tennessee Railroad Company which was made by the vote of the county a condition to the issue of the bonds, and we confine our consideration to that question and the facts relevant to it.

There is no doubt of the power of the defendant to issue the bonds. The legislature of Kentucky gave it in plain terms, upon the condition that its exercise receive the approval of the qualified voters. That approval was given upon the condition imposed by the vote that the bonds should not be issued before the county had been exonerated from a subscription to the stock of another railroad company. The law gave the county the right to impose conditions. This particular condition is a condition precedent to the lawful issue of the bonds although it must not be understood that this statement applies to the other so-called conditions expressed in the vote. *Of them nothing is intended to be said. If there had been a recital in the bonds which imported that the condition had been performed, that would have been conclusive in favor of a bona fide holder. Provident Life & T. Co. v. Mercer County, 170 U. S. 593, 42 L. ed. 1156, 18 Sup. Ct. Rep. 788; Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep. 390. But there was no such recital in the body of these bonds, and the words of the heading, "For the Cumberland & Ohio Railroad," cannot be interpreted as such without going beyond the decided cases, which themselves have gone far. In the absence of a recital it is open to the defendant to show that the condition which it had a right to impose and did impose by the vote of its electors had not been complied with. Citizens' Sav. & L. Asso. v. Perry County, 156 U. S. 692, 39 L. ed. 585, 15 Sup. Ct. Rep. 547. In other words, in the absence of a recital, the performance of the condition is not conclusively presumed.

But, by the terms of the law, it was the duty of the judge of the county court, in whom the powers of the court were vested, to issue the bonds. After a favorable vote has been had in an election called by the court, the law provides that "it shall be the duty of said county court . . . to make the subscription in the name of their . . . counties . . . and proceed to have issued the bonds to the amount of such subscription, as hereinbefore directed." This clearly placed upon the judge the duty and responsibility of ascertaining and determining whether the condition of the issue of the bonds had been complied with. Coloma v. Eaves, 92 U. S. 484, 23 L. ed. 579.

If he had issued the bonds and they had contained in them recitals which fairly imported a compliance with the condition upon the happening of which their issue was authorized, they would have gone into the hands of innocent holders with a conclusive presumption that the condition had been performed. This principle has been announced by repeated decisions of this court and needs no other citations to support it than those already made. Without such recital the presumption is, as has been shown, not conclusive. The further question arises, *therefore, whether there is an [420] presumption at all of the performance of the condition from the facts of subscription and issue. In the first case dealing with this question (Knox County v. Aspinwall, 21 How. 539, 16 L. ed. 208), it was said that a purchaser of such bonds had the right to assume that the condition of their issue had been complied with, merely from the facts of the subscription and issue. But in this case there was a recital, and subsequent cases have limited the adjudication to the precise point necessarily decided. Citizens' Sav. & L. Asso. v. Perry County, ubi supra. In Marshall County v. Schenck, 5 Wall. 772, 18 L. ed. 556, it was said *obiter* by Mr. Justice Clifford, speaking of bonds of the kind under consideration, "the bona fide holder has a right to presume they were issued under the circumstances which gave the

requisite authority." The same *dictum* was in substance repeated by the same justice in Lexington v. Butler, 14 Wall. 282–296, 20 L. ed. 809–812.

In Pendleton County v. Amy, 13 Wall. 297, 20 L. ed. 579, it appeared that the county of Pendleton had issued bonds in aid of a railroad company. An act of the legislature gave the county the authority to issue the bonds, provided a majority of the real estate owners of the county should so vote. One of the pleas of the defendant in an action on the bonds was that they had never been authorized by the vote prescribed in the act which gave the power to issue them. This plea was demurred to, and the court passed upon the question thus raised. Mr. Justice Strong, in delivering the opinion of the court, said:

"If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote had been taken as directed by law, and what the vote was. When, therefore, they make a subscription, and issue county bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attached to the exercise of the power has been fulfilled. To issue the bonds without the fulfilment of the precedent conditions would be a misdemeanor, and it is to be presumed that public officers [421] act rightly. We do *not say this is a conclusive presumption in all cases, but it has more than once been decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled."

In this case there was no recital in the bond. It appeared by the pleadings that the bonds had been exchanged for the stock of the railroad company which was retained, and the decision was based upon the ground that the retention of the stock created an estoppel.

In the case of Coloma v. Eaves, supra, the opinion of the court lends some countenance to the broad principle stated in Knox County v. Aspinwall, but Mr. Justice Bradley, in a concurring opinion, said:

"I dissent from the opinion of the court in this case, so far as it may be construed to reaffirm the first point asserted in the case of Knox County v. Aspinwall, to wit, that the mere execution of a bond by officers charged with the duty of ascertaining whether a condition precedent has been performed is conclusive proof of its performance. If, when the law requires a vote of taxpayers before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute, and who does execute, the bonds, and if the bonds themselves contain a statement or recital that such vote has been given, then the bona fide purchaser of the bonds need go back no further. He has a right to rely on the statement as a determination of the question. But a mere execution and issue of the bonds without such recital is not, in my judgment, conclusive. It may be prima facie sufficient, but the contrary may be shown. This seems to me to be the true distinction to be taken on this subject; and I do not think that the contrary has ever been decided by this court."

These cases left it uncertain whether the court would give to the facts of subscription to stock and issue of bonds in payment therefor by officers charged with the duty of ascertaining *whether conditions prec- [422] dent had been complied with, the same conclusive effect as to the validity of the bonds which would exist when to those facts was added a recital in the bonds themselves. But the tendency, observable in the earlier cases, to deny to bonds in the hands of an innocent holder any other defense than a want of power of the maker was arrested by the cases of Buchanan v. Litchfield, 102 U. S. 278, 26 L. ed. 138, and Citizens' Sav. & L. Asso. v. Perry County, ub. sup., which held that the mere facts of the subscription to stock and issue of bonds containing no recital left it open to the obligor to show that a condition precedent had not been fulfilled. But these cases in no way conflict with the view expressed by Mr. Justice Strong in Pendleton County v. Amy, and by Mr. Justice Bradley in Coloma v. Eaves, that a presumption arises from the mere fact of subscription and issue, though not a conclusive one. Independent of authority such a presumption exists and is but an instance of the broader presumption that officers charged with the performance of a public duty perform it correctly. In the case at bar the judge of the county court was charged with the duty of issuing the bonds upon the performance of the condition precedent. That condition was that the county should be "fully and completely exonerated from the payment of the capital stock voted by said county, and authorized to be subscribed by said Green county court to the Elizabethtown & Tennessee Railroad." The performance of that condition did not necessarily require any formal release or the execution of any paper whatever. It was completely [illegible] d if, from any circumstance, it should appear that the county had been effectively relieved from any

account of the vote in aid of ethtown & Tennessee Railroad. impossible for any purchaser of to ascertain whether this condi- een complied with, except by an ich would naturally be made of himself. The judge determined d been complied with, and the or thirty-eight years no one has claim against the county on ac- s supposed liability to subscribe k of the Elizabethtown & Ten- road shows conclusively that he

ng the second question to inquire, er there is conclusive presump- hether, on the facts found, there sumption at all that the county xonerated from its former sub- another railroad, we answer it

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. TRAVERS, Charles E. Travers, Travers, Joseph Travers, James vers, and Kate M. M. Owens,

v.

REINHARDT, Louis F. Rein- Margaret M. Mitchell, Elizabeth Mary L. Wallis, Samuel Wallis, Rohrer, William H. Rohrer, Sid- chell, Annie Mitchell, Annie E. and "The Sisters of the Visita- Corporation.

. C. Reporter's ed. 423–444.)

struction—substituting "and" for

word "and" will not be substi- 'or" in the clause in a will pro- the disposition of the testator's case any of his sons should die eaving a wife or child," unless context of the will plainly and estion requires such substitution give effect to the intention of r.

per verba de præsenti.

ons whose alleged marriage in ight have been invalid for want e had they remained there, and , for want of a religious cere-

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s to how far the intention of a to govern in the construction of notes to Pray v. Belt, 7 L. ed. Dougherty v. Rogers, 3 L.R.A. n Safe Deposit & T. Co. v. Cof- 740; Davidson v. Coon, 9 L.R.A. Casterson v. Townshend, 10 L.R.A.

iage by mutual agreement—see dger v. Ackerman, 52 C. C. A. v. Bittick, 11 L.R.A. 587; and Jewell, 11 L. ed. U. S. 108.

mony, have been invalid in Maryland, where they afterwards resided, must be deemed married in New Jersey, when, as husband and wife, they took up their permanent residence there, and lived together in that relation continuously in good faith and openly up to the time of the man's death, being regarded by themselves and in the community as husband and wife, since their conduct towards each other in the eye of the public while in New Jersey, taken in connection with their previous association, was equivalent in law to a declaration by each that they did, and during their joint lives were to, occupy the relation of husband and wife, which was as effective to establish the status of marriage in New Jersey as if it had been made in words of the present tense after they became domiciled in that state.

[No. 76.]

Argued November 1, 2, 1906. Decided April 15, 1907.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, confirming a report of the auditor in a suit for partition, and decreeing the distribution of the proceeds of the sale in accordance therewith. Affirmed.

See same case below, 25 App. D. C. 567.

The facts are stated in the opinion.

Messrs. **Bernard Carter** and **Arthur A. Birney** argued the cause, and, with Messrs. Charles H. Stanley, Edward A. Newman, and Fillmore Beall, filed a brief for appellants:

The language of the devises was, without more, ample to create a fee simple. Qualified by the general provision, each of the devises affected thereby became a determinable fee in the first taker, with an executory devise over to the surviving sons and the child or children of such as might be dead.

Abbott v. Essex Co. 18 How. 202, 15 L. ed. 352; Richardson v. Noyes, 2 Mass. 56, 3 Am. Dec. 24; Underhill, Wills, pp. 1272, 1274.

Where a general intent is apparent upon the face of the will, and a particular intent is also expressed which conflicts with such general intent, the latter will prevail.

2 Wms. Exrs. 7th Am. ed. p. 333; Chase v. Lockerman, 11 Gill & J. 186, 35 Am. Dec 277; Thompson v. Young, 25 Md. 459; Taylor v. Watson, 35 Md. 524; Smith v. Bell 6 Pet. 68, 8 L. ed. 322; Re Banks, 87 Md. 425, 40 Atl. 268; Schouler, Wills, § 476.

The construction of the will is to be made from the entire instrument, including the codicil, and the intent of the testator thus ascertained must be permitted to govern.

Jesson v. Doe, 2 Bligh, 49.

We must be guided by the testator's lexi-

son, and understand his language as he defines it.

White v. Crenshaw, 5 Mackey, 115, 60 Am. Rep. 370.

Where two clauses in a will operate on the same property, devising it differently, giving it to different devisees, or showing a different technical intention, the latter clause will prevail.

Dugan v. Hollins, 13 Md. 149; Manning v. Thruston, 59 Md. 226.

Courts will change or mold language so as to give effect to the intention.

Schouler, Wills, 3d ed. § 477; Jarman, Wills, 505, 507; Doe ex dem. Cheesman v. Watson, 8 How. 263, 272, 12 L. ed. 1072, 1077; Home for Incurables v. Noble, 172 U. S. 383, 389, 43 L. ed. 486, 488, 19 Sup. Ct. Rep. 226; Hardenbergh v. Ray, 151 U. S. 126, 38 L. ed. 97, 14 Sup. Ct. Rep. 305; Slingluff v. Johns, 87 Md. 273, 39 Atl. 872; Scarlett v. Montell, 95 Md. 157, 51 Atl. 1051.

There is nothing but the unsupported statement of a perjured witness to show a ceremony.

Arnold v. Chesebrough, 46 Fed. 701, Affirmed in 7 C. C. A. 508, 20 U. S. App. 87, 58 Fed. 840.

The witness proved herself unworthy of belief, and this discredited her entire testimony.

The Santissima Trinidad, 7 Wheat. 339, 5 L. ed. 468; Dunlop v. Patterson, 5 Cow. 243; Huber v. Teuber, 3 McArth. 484, 36 Am. Rep. 110; 2 Elliott, Ev. § 955.

Without supplemental proof of reputation among neighbors and friends, the unsworn recitals of the mortgage and wills do not even tend to prove a marriage.

Maryland use of Markley v. Baldwin, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. Rep. 278; Barnum v. Barnum, 42 Md. 251.

The auditor and the courts should have found there was no marriage in fact.

Reading Fire Ins. & T. Co.'s Appeal, 113 Pa. 204, 57 Am. Rep. 448, 6 Atl. 60; Arnold v. Chesebrough, supra.

Public recognition is necessary as evidence of its existence, in the case of a marriage without ceremony or record.

Maryland use of Markley v. Baldwin, 112 U. S. 490, 495, 28 L. ed. 822, 824, 5 Sup. Ct. Rep. 278.

By reputation, as here used, is understood the speech of the people who have an opportunity to know the parties.

Com. v. Stump, 53 Pa. 132, 91 Am. Dec. 198.

The testimony of a single witness is consequently held insufficient to establish reputation as husband and wife.

Ibid.; Jones v. Hunter, 2 La. Ann. 254; Taylor v. Swett, 22 Am. Dec. 159, note, 3 La. 33.

While these declarations are evidence from which, coupled with other proofs not found in this case, marriage might, under other circumstances, be inferred, there is no room for inference testimony that at an indefinite time and place a contract was made, when the parties have selected a particular time and place for such contract.

Cunningham v. Cunningham, 2 Dow. [illegible]; Lapsley v. Grierson, 1 H. L. Cas. [illegible]; Cann v. Burnham, 5 Me. 213, 17 Am. Dec. [illegible]; Barnum v. Barnum, supra.

Assuming, *ex gratia argumenti*, that they cohabited as man and wife; that she was treated and acknowledged as his wife after they took up their residence in New Jersey, —such cohabitation and acknowledgment did not constitute the marriage status between them; at the best, and in the absence of evidence as to the real facts, they would be only prima facie evidence that a marriage had theretofore taken place between them. For it is well settled that cohabitation, acknowledgment, and reputation do not create the marriage status, but that they are only facts from which, under certain circumstances, a prima facie presumption arises that theretofore a marriage had taken place between the parties; that is, that the union was, from the first, lawful.

Voorhees v. Voorhees, 46 N. J. Eq. [illegible], 19 Am. St. Rep. 404, 19 Atl. 172; Smith v. Smith, 52 N. J. L. 208, 19 Atl. 255.

It is the settled law of New Jersey, as it is of other jurisdictions, that the validity of what took place in Virginia on the 15th of August, 1865, to constitute James Travers and Sophia V. Grayson man and wife, is to be determined by the law of Virginia at the time of the transaction; and that if, by that law, there was no valid creation of the status of husband and wife, nothing that took place there created that status between them in any other state or jurisdiction.

Clark v. Clark, 52 N. J. Eq. [illegible], 30 Atl. 81; Smith v. Smith, supra.

It has been adjudged as the law of New Jersey, that mere proof of cohabitation as man and wife, by a man and a woman, and the acknowledgment of each other as husband and wife before the world, does not create the marriage status between them; and that where it is in proof that no marriage ceremony has taken place between the parties, then proof of cohabitation as man and wife will not prove that a marriage has taken place between them, but in such a case it is necessary that there should be proof of a contract of marriage, assented to by both par[illegible] into between them.

Goldbe[illegible] v. [illegible], 18 N. J. Eq. [illegible]; Smith v. [illegible]h, [illegible]

Wherever [illegible] shown that an [illegible]

ual marriage ceremony has taken place, hough it be an illegal one, and it is shown hat the cohabitation and acknowledgments ook place in pursuance of this ceremony, he subsequent cohabitation, acknowledgnent, and reputation of the parties will be onsidered as having had their origin in such narriage ceremony, and will not justify a presumption that the parties contracted a ubsequent marriage.

Voorhees v. Voorhees, 46 N. J. Eq. 416, 19 Am. St. Rep. 404, 19 Atl. 172; Cartwright v. McGown, 121 Ill. 402, 2 Am. St. Rep. 105, 12 N. E. 737; Randlett v. Rice, 141 Mass. 394, 6 N. E. 238; Re Wallace, 49 N. J. Eq. 535, 25 Atl. 260; Pearson v. Howey, 11 N. J. L. 23.

The well-established rule is that, when an abortive attempt is made to prove a marriage at a fixed time and place, parties will not be permitted to rely upon other facts and circumstances as a ground of presumption that a marriage may have taken place at some different time and place.

Barnum v. Barnum, 42 Md. 297; Blackburn v. Crawford, 3 Wall. 175, 18 L. ed. 186; Reading Fire Ins. & T. Co.'s Appeal, supra; Hunt's Appeal, 86 Pa. 294; Lapsley v. Grierson and Cunningham v. Cunningham, supra.

The decision of this court in Blackburn v. Crawford (3 Wall. 194, 18 L. ed. 194), directly condemns such reasoning as that indulged in by the court of appeals in this case, and rejects presumptive evidence where an attempt to prove a valid ceremony has failed. To the same effect are many state decisions.

Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; O'Gara v. Eisenohr, 38 N. Y. 296; Rose v. Rose, 67 Mich. 119, 35 N. W. 802; Williams v. State, 44 Ala. 24; Jones v. Jones, 45 Md. 144; Williams v. Williams, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98.

The true doctrine is that cohabitation and reputation do not constitute marriage, but are evidence upon which, in proper cases, a presumption of marriage may be founded.

Clark v. Clark; Smith v. Smith; Goldbeck v. Goldbeck; and Williams v. State,—supra.

While they lived in Maryland, neither their cohabitation as man and wife, nor the acknowledgment by him of her as his wife, whether orally or in the mortgage or in the will of 1881, offered in evidence, operated in any way to convert their unlawful relations into a legal status of marriage. There cannot, in the nature of things, be any reason why the same character of acts taking place across the New Jersey line should have the effect of creating, under the circumstances of this case, the status of a valid marriage.

Voorhees v. Voorhees, 46 N. J. Eq. 413, 19 Am. St. Rep. 404, 19 Atl. 172; Collins v. Voorhees, 47 N. J. Eq. 555, 14 L.R.A. 364, 24 Am. St. Rep. 412, 22 Atl. 1054; Cartwright v. McGown, 121 Ill. 402, 2 Am. St. Rep. 105, 12 N. E. 737; Atlantic City R. Co. v. Goodin, 62 N. J. L. 400, 45 L.R.A. 671, 72 Am. St. Rep. 652, 42 Atl. 333.

In complete harmony with the rule that the validity in any state of a marriage will be referred to the law of the place where the alleged marriage occurred is the law for determining the status of persons. This must be decided by reference to the law of the state or country where such status or condition had its origin, and the status so ascertained adheres to the party everywhere.

Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321; Smith v. Kelly, 23 Miss. 167, 55 Am. Dec. 87.

So, a person born before wedlock, who, in the country of his birth, is deemed illegitimate, may not, by a subsequent marriage of his parents in another country, by whose laws such a marriage would make him legitimate, cease to be illegitimate in the place of his birth.

Story, Confl. L. §§ 93, 106; Munro v. Saunders, 6 Bligh, N. R. 468; Rose v. Ross, 4 Wilson & S. 289.

Messrs. **George E. Hamilton, M. J. Colbert,** and **William A. Gordon** argued the cause, and, with Mr. J. Holdsworth Gordon, filed a brief for appellees:

The intent of the testator, as ascertained from the will, must prevail. The will speaks for itself, and it is the intention of the testator as expressed in said will which is to govern; and this must be judged exclusively by the words of the instrument, as applied to the subject-matter and the surrounding circumstances. Every expressed intention of the testator must be carried out where it can, and such a construction will, if possible, be adopted, as will uphold the will and bring it as near reason and good sense as possible.

1 Redf. Wills, 433, 434.

No word in a will can be rejected and another substituted in its place without the clearest certainty that such was the intention of the testator.

1 Redf. Wills, 472.

It seems to be admitted on all hands, by the experienced and able writers and judges, that no liberty of transposition or supplying of words is allowable unless in furtherance of the most unquestionable purpose of the testator.

1 Redf. Wills, 470.

The safest course is to abide by the words, unless, upon the whole, there is something amounting almost to demonstration that the

plain meaning of the words is not the meaning of the testator.

Crooke v. De Vandes, 9 Ves. Jr. 205.

It is the duty of the court to give effect to all the words of a will if, by the rules of law, it can be done; and when words occur in a will their plain and ordinary sense is to be attached to them unless the testator manifestly applies them in some other sense. We may indulge in conjectures, but the law does not decide upon conjectures, but the plain, reasonable, and certain expressions of intent found on the face of the will.

Wright v. Denn, 10 Wheat. 239, 6 L. ed. 312.

There is no rule of more universal application than that the plain and unambiguous words of the will must prevail, and that they are not to be controlled or qualified by any conjectural or doubtful constructions growing out of the situation, circumstances, or conditions, either of the testator, his property, or family.

1 Redf. Wills, 430.

There is a rule of common sense as strong as any case can be, that words in a will are to be construed according to their natural sense unless some obvious inconvenience or incongruity would result from so construing them.

Doe ex dem. Usher v. Jessep, 12 East, 288; 1 Redf. Wills, 477, note.

No change will be made where it will do violence to the expressed intention of the testator.

Van Vechten v. Pearson. 5 Paige. 514.

The American cases seem to have required very clear evidence that the word "or" was used for "and" to justify the substitution of one for the other,—evidence amounting almost to certainty.

1 Redf. Wills, 476, 487, note.

While the word "or" is changed into "and," and *vice versa*, it appears only to be done where the change prevents the heirs of the first taker from being disinherited, and never where the change would have the effect of disinheriting such heir.

Jarman. Wills, 506, 507, 525; Raborg v. Hammond, 2 Harr. & G. 53.

Where a devise is to A, and, if he die without arriving at twenty-one years or having issue, then over, it is clear that both events must concur to pass the estate over.

1 Redf. Wills, 481.

If a common-law marriage was contracted at any time between James and Sophia V. Travers, such marriage would be recognized in the District of Columbia.

Thomas v. Holtzman, 7 Mackey, 66.

There was a perfect common-law marriage, valid in New Jersey, betwe and Sophia Travers.

Atlantic City R. Co. v. Goodi J. L. 394, 45 L.R.A. 671, 72 Am. 652, 42 Atl. 333; Stevens v. Steve J. Eq. 490, 38 Atl. 460; Meister v. U. S. 76, 24 L. ed. 826; Meyers v. Mass. 314; Smith v. Smith, 52 N. 19 Atl. 255.

The testimony of Sophia V. O'B the marriage in Virginia, the cohabi man and wife for nearly twenty y the general reputation that she a Travers were married, is not o positive, and uncontradicted, bu roborated by the documentary ev fered; and said evidence is such court has prescribed in Marylan Markley v. Baldwin, 112 U. S. 490, 822, 5 Sup. Ct. Rep. 278, and J Jewell, 1 How. 219, 11 L. ed. 10 missible to establish the existence riage.

Mr. Justice Harlan delivered th of the court:

This suit was originally brought partition or sale of *certain real the city of Washington devised by (and codicils thereto) of Nicholas who died in the year 1849, leaving and three daughters.

The only parts of that estate in dispute are certain lots in squa Washington, and the questions to mined depend upon the constructio will and upon the evidence touch alleged marriage of James Trave of the testator, with Sophia V. Gr

By the first item of the will cer are devised to the testator's son E his heirs and assigns forever in fe By the same item other lots are d the same son, "which last two dev be subject to the general provision after made in case of any sons dying leaving a wife or child or children."

By the second item the testator lot 5, in square 291, to his son "Je vers and his heirs forever," and t specified lots "to him and his heir in fee simple;" lot 5 "being subje general provision aforesaid hereaft

By the third item he devised to Nicholas and his heirs forever cer in square 291 "subject to the ge vision hereinafter made;" also "to his heirs forever, in fee simple," e estate in square 36, and a designat of ground in square 291, "said pie cel of ground to be subject to the provision hereafter made."

By the fourth item certain de made to the son "James Travers

eirs forever," "all of which devises are to e subject to the general provision hereinfter made."

Here follows, at the close of the fourth em, the "general provision" referred to: With regard to the several estates hereinefore devised to my several sons, it is herey declared to be my will, and I do order nd direct, as a general provision, that if ny of my sons should die *without leaving a wife or a child or children living at his death*, then his estate herein devised to him, saving and excepting those portions thereof expressly granted and so named to be 'in fee simple,' and which they *can sell and dispose of as they think fit, shall go, and be invested in fee, to my surviving sons and the child or children of such as may be dead, such child or children representing the share of the father; but if either of my sons shall, at his death, leave a wife either with or without a child or children, such wife shall be entitled to her dower rights and privileges."

This was followed in the will by certain devises for the benefit of the daughters, as well as by several codicils to the will, but it is not necessary to give their provisions in detail.

By a codicil, dated June 26th, 1848, the testator revoked certain parts of his will, providing: "And in lieu thereof I do hereby give and devise all of said lots or part of lots, so as aforesaid described, with the house and other improvements and appurtenances, to my son James and his heirs, subject to the express stipulations and restrictions contained in the will to which this is a codicil, wherein I declare that all and every portion of my real estate not devised by the use of the words 'in fee simple' shall be held by such devisees for life, and then according to stipulations and restrictions as therein contained and declared by said will."

It is contended here, as it was in the courts below, that the words in the above general provision, that "if any of my sons should die without leaving a wife or child or children living at his death," should be interpreted as if it read "if any of my sons should die without leaving a wife *and* child or children living at his death." The court is thus asked, by interpretation, to substitute the word "and" in place of "or" in the above sentence.

Looking at all the provisions of the will, and ascertaining, as best we may, the intention of the testator, we perceive no reason for interpreting the words used by him otherwise than according to their ordinary, natural meaning.

It is insisted by appellants that the general, dominant purpose of the testator was that his real estate should descend only through his sons, and that his daughters and their descendants should have no share therein. And the doctrine is invoked *that [431] "the predominant idea of the testator's mind, if apparent, is heeded as against all doubtful and conflicting provisions which might of themselves defeat it. The general intent and particular intent being inconsistent, the latter [the particular] must be sacrificed to the former [the general intent]." Schouler, Wills, § 476. This general doctrine is not controverted, but there are other cardinal rules in the interpretation of wills which must be regarded. Mr. Justice Story, speaking for this court, said that effect must be given "to all the words of a will, if, by the rules of law, it can be done. And where words occur in a will their plain and ordinary sense is to be attached to them, unless the testator manifestly applies them in some other sense." Wright v. Denn, 10 Wheat. 204, 239, 6 L. ed. 303, 312. "The first and great rule in the exposition of wills," said Chief Justice Marshall, "to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law." Smith v. Bell, 6 Pet. 68, 75, 8 L. ed. 322, 325; Finlay v. King, 3 Pet. 346, 377, 7 L. ed. 701, 712. The same thought, in substance, was expressed by Lord Chancellor Eldon in Crooke v. De Vandes, 9 Ves. Jr. 197, 205. He said that "where words have once got a clear, settled, legal meaning, it is very dangerous to conjecture against that, upon no better foundation than simply that it is improbable the testator could have meant to do one thing by one set of words, having done another thing, using other words, as to persons in the same degree of relation to him." It would seem clear that the words "without leaving a wife or child or children," where they first appear in the above general provision, were purposely chosen. They appear three times in the will, and their usual meaning is not doubtful. We think the testator meant "or," not "and." The court would not be justified in making the proposed substitution unless the whole context of the will plainly and beyond question requires that to be done in order to give effect to the will of the testator. That the words in the general provision, "without leaving a wife or a child or children," were deliberately selected, is to *some [432] extent shown by the last sentence in the first item of the will, "which two devises shall be subject to the general provision hereinafter made in case of any sons dying with-

out leaving a wife *or* child or children." We do not think that the testator used the word "or," intending thereby to convey the same thought as would be expressed by "and." We concur with the court of appeals, speaking by Chief Justice Shepard, in holding that the words in question are unambiguous, and their obvious, ordinary meaning must not be defeated by conjecture. 25 App. D. C. 567, 576.

The important question remains whether James Travers, the son of the testator, died leaving a wife or a child or children. If he did, then the decree below must be affirmed.

The original bill averred that James Travers died in 1883 "without widow or lawful child or children or descendants of a child or children surviving him." This averment was not specifically denied in the answers, but in the progress of the cause the defendants, children of the sisters of James Travers, amended their answer and alleged that he left surviving him "his widow, Sophia V. Travers, now Sophia V. O'Brien, who was his lawful wife at the time of his death and who had been his lawful wife for many years prior thereto, and he left one child, Annie E. Travers, one of the defendants herein, who was his lawful child." The issue thus made constituted the principal matter to which the proof was directed. Both of the courts below held that under the evidence Sophia V. was to be deemed the lawful wife of James Travers at the time of his death. Children were born to them, but they died very young. It is conceded that they left no child surviving them, Annie E. Travers being only an adopted child.

The appellants insisted throughout the case, and now insist, that the relation between James Travers and Sophia V. was not at any time one of a matrimonial cohabitation, but an illicit or meretricious cohabitation, which did not create the relation of husband and wife.

Upon a careful scrutiny of all the evi-
[433] dence as to the alleged *marriage we think that the following facts may be regarded as established:

1. James Travers, whose domicil was in the District of Columbia, and Sophia V. Grayson, whose domicil was in West Virginia, were in Alexandria together on the 15th of August, 1865, when some sort of marriage ceremony (exactly what does not appear) was performed by a friend of Travers, whom the woman, then only about seventeen years of age, and without living parents, supposed at the time was a minister, entitled to officiate in that capacity at a marriage. She thought it was a real marriage by a minister, although he did not produce or have any license to solemnize the marriage of these parties. It must be taken upon the evidence that he was not a minister. By the statutes of Virginia then in force it was provided: "Every marriage in this state shall be under a license and solemnized in the manner herein provided, but no marriage solemnized by any persons professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected on account of any want of authority in such persons, if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage."

2. Immediately after the affair at Alexandria the parties—the woman, from and after that occasion, assuming the name of Mrs. Travers—left Virginia and went to Shrewsbury, New Jersey, where, as husband and wife, they remained for a short time, after which they went to Belair, Harford county, Maryland, living there, as husband and wife, at a rented place.

3. In 1867 Travers purchased a farm in Talbot county, Maryland, on which he lived with said Sophia until some time in 1881, when that farm was sold, and, on account of Travers's health, they removed to Point Pleasant, New Jersey, and purchased property there, having lived on the Talbot county farm, as husband and wife, for more than fifteen years. Travers died at Point Pleasant in the latter part of the year 1883, and *five years after his death the woman, claiming to be and recognized in the community as the widow of James Travers, married a lawyer of Philadelphia, the ceremony being performed at the Catholic church in Point Pleasant.

From the 15th of August, 1865, up to his death, on the 1st day of November, 1883,—a period of more than eighteen years,—Travers and Mrs. Travers continuously cohabited *as husband and wife*. During all that period they acted as if they were lawfully husband and wife, and uniformly held themselves out as sustaining that relation; and beyond all question they were regarded as husband and wife in the several communities in which they lived after leaving Alexandria in 1865. There is no proof that anyone coming in contact with them regarded them otherwise.

5. About five or six years after the [illegible] date Mrs. Travers learned, for the first time, that Travers's "friend," who had officiated at the [illegible] in A[illegible]xandria, was not a minister. [illegible] was asked, when giving his de[illegible]: "Q. After you [illegible]

vered, some four or five years after you ent to live with Mr. Travers, that you had ot been married to him according to any remony, did he ever make any promise to ou in that regard? A. Always. Poor fel- w, he would have it all right—— Mr. irney. We object to that. Q. And what d he say? A. Well, he would always say at it was all right, and we were just as uch married as if we had been married be- ore a priest or a minister." Upon the basis f their being husband and wife the parties ontinuously rested their relations to each ther up to the death of Travers.

6. That Travers recognized Mrs. Travers s his wife and held her out as such, ap- pears from many facts: (a) In a mortgage xecuted September 27th, 1867, to secure he balance of the purchase money due on he Talbot county farm, the mortgagors are described, both in the body of the mortgage s "James Travers and Sophia V. Travers, his wife, of Hartford county, in the state of Maryland," and in the certificate of ac- knowledgment as "James Travers and So- phia V. Travers, his wife," and she signed and acknowledged the mortgage as Sophia V. Travers. (b) By a mutilated, holo- graphic will dated February 8th, 1881, and signed by James Travers, he gave, devised, and bequeathed "to my wife, Sophy Vir- ginia Travers," all his household furniture, books, pictures, etc., to have and to hold the same to her, and her executors, adminis- trators, and assigns forever; also, to her he use, improvement, and income of his dwelling house and farm, "to have and to hold the same to her for and during her natural life; and from and after the de- ease of my said wife, I give and bequeath," etc.; and by which, further, he gave, de- vised, and bequeathed "to my wife, Sophy Virginia Travers, for her sole use," all the est and residue of the testator's estate, eal, personal, or mixed, of which he died ised and possessed, or to which he should e entitled at the time of his decease. That ill concluded: "Lastly, I do nominate and ppoint my said wife sole executrix of this, y last will and testament." (c) By a will ted at Point Pleasant, New Jersey, Oc- ber 5th, 1883, witnessed by three persons, mes Travers devised to his brothers and sters all his interest and property in the strict of Columbia, and "to my wife, while e remains *my widow*, all my property of ery description and character not herein- fore disposed of, with full power of dis- sition and alienation, provided, however, at in case our daughter survives her, that the property not disposed of prior to *my e's* decease shall be and become the prop- y of our said daughter, and, in the event of *my wife's* contracting *another* marriage, then, it is my will that she shall possess and enjoy as of her own right, only one third of the property then remaining, and that the other two thirds shall be invested and held in trust for my daughter, Annie, and paid to her upon attaining her majority. . . . I hereby appoint *my wife* sole executrix of this, my last will and testament." That will was duly proven before the surrogate of Ocean county, New Jersey, partly by Mrs. Travers, and that officer certified that "Sophia Virginia Travers, of the county of Ocean, the executrix therein named, proved the *same before me and she is duly author- [436] ized to take upon herself the administration of the estate of the testator, agreeably to said will." That will was duly filed and recorded in the proper office in the District of Columbia.

In view of these facts, the question is whether the woman Sophia was to be deemed the lawful wife of James Travers at the time of his death, in 1883. Marriage in fact, as distinguished from a ceremonial marriage, may be proven in various ways. Of course, the best evidence of the exchange of marriage consent between the parties would come from those who were personally present when they mutually agreed to take each other as husband and wife,[1] and to assume all the responsibilities of that relation. But a legal marriage may be established in other ways. It may be shown by what is called habit or repute. Referring to marriage at common law, Kent says: "The consent of the parties may be declared before a magistrate, or simply before witnesses, or subsequently confessed or acknowledged, or the marriage may even be inferred from continual cohabitation and reputation as husband and wife, except in cases of civil actions for adultery, or in public prosecutions for bigamy or adultery, when actual proof of the marriage is required." 2 Kent, Com. 12th ed. 88.

Naturally, the first inquiry must have reference to what occurred at Alexandria, Virginia, in 1865, when, as the woman supposed,—in good faith, we think,—that there was a real, valid marriage between her and James Travers. But we will assume for the purposes of this case only that that marriage was not a valid one under the laws of Virginia. We do this in deference to the decision of the supreme court of appeals of Virginia in Offield v. Davis, 100 Va. 250, 263, 40 S. E. 910, in which that court, construing the above statute of that commonwealth, held it to be mandatory, not directory, and had abrogated the common law in force in Virginia, and that no marriage or attempted marriage, if it took place there,

would be held valid there, unless it be shown to have been under a license, and solemnized according to the statute of that common-
[437] wealth. We will also *assume, but only for the purposes of the present decision, and because of the earnest contentions of the appellants, that cohabitation in Maryland, as husband and wife, for more than fifteen years, and the recognition of that relation in the communities where they resided in that state, did not entitle James Travers and the woman Sophia to be regarded in that state as lawfully husband and wife. We make this assumption also because it appears here that James Travers and Sophia V. Grayson did not become husband and wife in virtue of any religious ceremony, and because it has been decided by the court of appeals of Maryland that in that state "there cannot be a valid marriage without a religious ceremony," although "a marriage may be competently proved without the testimony of witnesses who were present at the ceremony." Richardson v. Smith, 80 Md. 89, 93, 30 Atl. 568. That court also said in the same case: "The law has wisely provided that marriage may be proved by general reputation, cohabitation, and acknowledgment; when these exist, it will be inferred that a religious ceremony has taken place; and this proof will not be invalidated because evidence cannot be obtained of the time, place, and manner of the celebration of the marriage. On this point we think it unnecessary to do more than quote from Redgrave v. Redgrave, 38 Md. 97: 'Where parties live together ostensibly as man and wife, demeaning themselves towards each other as such, and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married. 1 Taylor, Ev. §§ 140, 517; Hervey v. Hervey, 2 W. Bl. 877; Goodman v. Goodman, 28 L. J. Ch. N. S. 745; Jewell v. Jewell, 1 How. 219, 232, 11 L. ed. 108, 114. Indeed, the most usual way of proving marriage, except in actions for criminal conversation and in prosecutions for bigamy, is by general reputation, cohabitation, and acknowledgment. Sellman v. Bowen, 8 Gill & J. 50, 29 Am. Dec. 524; Boone v. Purnell, 28 Md. 607, 92 Am. Dec. 713.' " We may refer, in this connection, to what the supreme court
[438] of the District of Columbia, *speaking by Judge Merrick, who was learned in the law of Maryland, said in Thomas v. Holtzman, 7 Mackey, 62, 66: "In the first place, it is not at all apparent that it ever was the law that a marriage *in facie ecclesiæ* was necessary for the purpose of legitimating the issue. It is true that the court of appeals of Maryland in the last four or five years has decided that such was the law, but that decision is not binding upon us. It is laid down by Blackstone that a marriage *per verba de præsenti*, without the intervention of a clergyman, is a legitimate marriage. And both Story and Kent say that, according to the universal understanding in this country, a marriage *per verba de præsenti*, without the intervention of a clergyman, followed by cohabitation, makes a legitimate marriage."

In Voorhees v. Voorhees, 46 N. J. Eq. 411, 413, 414, 19 Am. St. Rep. 404, 406, 19 Atl. 172, 173, the court of chancery of New Jersey said: "Two essentials of a valid marriage are capacity and consent. . . . Marriage is a civil contract, and no ceremonial is indispensably requisite to its creation. A contract of marriage made *per verba de præsenti* amounts to an actual marriage and is valid," quoting O'Gara v. Eisenlohr, 38 N. Y. 296. In Atlantic City R. Co. v. Goodin, 62 N. J. L. 394, 400, 45 L. R.A. 671, 674, 72 Am. St. Rep. 652, 658, 42 Atl. 333, 336, the New Jersey court of errors and appeals said: "In the Voorhees case Vice Chancellor Van Fleet concedes that a contract of marriage made *per verba de præsenti* amounts to an actual marriage and is valid, and in the case of Stevens v. Stevens, 56 N. J. Eq. 488, 38 Atl. 469. Vice Chancellor Pitney declares the law on the subject to the same effect, citing abundant authority."

This brings us to consider what were the relations of these parties after selling the Maryland farm and after taking up their residence in New Jersey in 1883. That their cohabitation, as husband and wife, after 1865 and while they lived in Maryland, continued without change after they became domiciled in New Jersey and up to the death of James Travers, and that they held themselves out in New Jersey as lawfully husband and wife, and recognized themselves and were recognized in the community as sustaining that relation, is manifest from *all the evidence and circumstances. It is impossible to explain their conduct towards each other while living in New Jersey upon any other theory than that they regarded each other as legally holding the matrimonial relation of husband and wife. It is true that no witness proves express words signifying an actual agreement or contract between the parties to live together as husband and wife. No witness heard them say in words, in the presence of each other, "We have agreed to take each other as husband and wife, and live together as such." But their conduct towards each other, from the time they left Maryland, in 1865, up to

the death of James Travers, in 1883, admits of no other interpretation than that they had agreed, from the outset, to be husband and wife. And that agreement, so far as this record shows, was faithfully kept up to the death of James Travers. When it is remembered that James Travers assured the woman Sophia that they were as much married as if they had been married by a priest or minister; that in his mortgage of 1867 she is described as his wife; that in the holographic will of 1881 he recognized her as his wife; that in his last will, made at his domicil in New Jersey, he referred to her as his wife, and devised by that will property to her while she remained his widow and did not contract another marriage; and that he made her the sole executrix of his will, describing her as his wife,—when these facts are supplemented by the fact that they lived together, without intermission, in good faith, and openly, for more than eighteen years as husband and wife, nothing more is needed to show that he and the woman had mutually agreed to sustain the relation of husband and wife. Under the evidence in the cause they are to be held as having, prior to the death of James Travers, agreed per verba de præsenti to become husband and wife.

Did the law of New Jersey recognize them as husband and wife after they took up their residence in that state and lived together, in good faith, as husband and wife, and were there recognized as such? Upon the authorities cited this question must be answered in the affirmative.

*We are of opinion that even if the alleged marriage would have been regarded as valid in Virginia for want of license, had the parties remained there, and invalid in Maryland for want of a religious ceremony, and they remained in that state, it was to be deemed a valid marriage in New Jersey after James Travers and the woman Sophia, as husband and wife, took up their permanent residence there and lived together in that relation, continuously, in good faith, and openly, up to the death of Travers, being regarded by themselves and in the community as husband and wife. Their conduct towards each other in the eye of the public, while in New Jersey, taken in connection with their previous association, was equivalent, in law, to a declaration by each that they did, and during their joint lives were to, occupy the relation of husband and wife. Such a declaration was as effective to establish the status of marriage in New Jersey as if it had been made in words of the present tense after they became domiciled in that state.

The views we have expressed find support in the authorities. In Meister v. Moore, 96 U. S. 76, 79, 24 L. ed. 826, 827, it was said that an informal marriage by contract *per verba de præsenti* constituted a marriage at common law, and that a statute simply requiring "all marriages to be entered into in the presence of a magistrate or clergyman, or that it be preceded by a license, or publication of banns, or be attested by witnesses," may be construed "as merely directory, instead of being treated as destructive of a common-law right to form the marriage relation by words of present assent."

In Maryland use of Markley v. Baldwin, 112 U. S. 490, 494, 495, 28 L. ed. 822, 824, 5 Sup. Ct. Rep. 278, the court said: "It is proper to say that, by the law of Pennsylvania, where, if at all, the parties were married, a marriage is a civil contract, and may be made *per verba de præsenti;* that is, by words in the present tense, without attending ceremonies, religious or civil. Such is also the law of many other states in the absence of statutory regulation. It is the doctrine of the common law. But, where no such ceremonies are required, and no record is made to attest the marriage, some public recognition *of it is necessary as evi- [441] dence of its existence. The protection of the parties and their children and considerations of public policy require this public recognition; and it may be made in any way which can be seen and known by men, such as living together as man and wife, treating each other and speaking of each other in the presence of third parties as being in that relation, and declaring the relation in documents executed by them whilst living together, such as deeds, wills, and other formal instruments."

So in Hoggan v. Craigie, Macl. & Rob. 942, 965, in which Lord Chancellor Cranworth, referring to contracts of marriage *per verba de præsenti*, said: "It is not necessary to prove the contract itself; *it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place;* upon this principle the acknowledgment of the parties, their conduct towards each other, and the repute consequent upon it, may be sufficient to prove a marriage. . . . Everything, therefore, is pertinent and relevant in an inquiry like the present, which indicates the present or previous consent of the parties." Again, in Campbell v. Campbell, known as the Breadalbane Case, L. R. 1 H. L. Sc. App. Cas. 182, 192, 196, 211, Lord Chancellor Chelmsford said: "Habit and repute . . . arise from parties cohabiting together openly and constantly, as if they were husband and wife, and so conducting themselves to-

wards each other for such a length of time in the society or neighborhood of which they are members as to produce a general belief that they are really married." In the same case Lord Westbury, after observing that it might not be strictly correct to speak of cohabitation with habit and repute as a mode of contracting marriage, said: "It is rather a mode of making manifest to the world that tacit consent which the law will infer to have been already interchanged. If I were to express what I collect from the different opinions on the subject I should rather be inclined to express the rule in the following language: that cohabitation as husband and wife is a manifestation of the parties having consented to contract that re-[442]lation *inter se*. *It is a holding forth to the world, by the manner of daily life, by conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbors, friends, and acquaintances, to these representations and this continued conduct, then habit and repute arise and attend upon the cohabitation. The parties are holden and reputed to be husband and wife; and the law of Scotland accepts this combination of circumstances as evidence that consent to marry has been lawfully interchanged." In his treatise on Domestic Relations, Eversley says: "Marriage may also be proved between the parties by their conduct towards each other, and the first consent need not be proved; 'it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place; the acknowledgment of the parties, their conduct towards each other, and the repute consequent upon it, may be sufficient to prove a marriage.'" P. 41. See also 2 Greenl. Ev. Harriman's ed. §§ 461, 462, and notes; 3 Wigmore, Ev. §§ 2082, 2083, and authorities cited.

Without further discussion or citation of authorities, we adjudge that the courts below did not err in holding that, under the evidence, James Travers and the Mrs. Travers, who lived with him constantly and openly as his wife for more than eighteen years, were, in law, to be deemed husband and wife at the time of his death, in New Jersey, in 1883. It results from this view that the decree of the Court of Appeals, affirming the decree of the Supreme Court of the District, must itself be affirmed.

It is so ordered.

Mr. Justice McKenna and Mr. Justice Moody did not participate in the decision of this case.

Mr. Justice Holmes dissenting:

I feel some doubts in this case which I think that I ought *to state. I understand it[443] to be assumed, as it must be admitted, that James Travers and Sophia V. Grayson lived together for many years, calling themselves man and wife, when they were not man and wife, and probably knew that they were not man and wife. This condition of things lasted from 1865, the time of the pretended marriage in Virginia, to which their cohabitation referred for its justification, until 1883, the year of James Travers's death. So long as they lived in Maryland, that is, until some time in 1883, if they had attempted to make their union more legitimate by simple mutual agreement they could not have done it. Therefore the instances of James Travers calling Sophia his wife during that period may be laid on one side.

Just before he died Travers moved to New Jersey and there made his will. As in Maryland, he spoke of his wife in that instrument, and, as I understand it, the decision that he was married must rest wholly on this recognition and the fact that in New Jersey a marriage may be made without the intervention of a magistrate. I do not see how these facts can be enough. Habit and repute might be evidence of a marriage when unexplained. But they must be evidence of a contract, however informal, to have any effect. When an appellation shown to have been used for nearly eighteen years with conscious want of justification continues to be used for the last month of lifetime, I do not see how the fact that the parties have crossed a state line can make that last month's use evidence that in that last moment the parties made a contract which then, for the first time, they could have made in this way.

It is imperative that a contract should have been made in New Jersey. Therefore, even if both parties had supposed that they were married, instead of knowing the contrary, it would not have mattered. To live in New Jersey and think you are married does not constitute a marriage by the law of that state. If there were nothing else in the case it might be evidence of marriage but, on these facts, the belief, if it was entertained, referred to the original inadequate ground. *Collins v. Voorhees, 47 N. J. Eq. 555, 14 L.R.A. 364, 24 Am. St. Rep. 418, 22 Atl. 1054. A void contract is not made over again or validated by being acted upon at a time when a valid contract could be made. When a void contract is acted upon, the remedy, wh[illegible] there is one, is not on the contract, but u[illegible] a quasi-contract, for a *quantum meruit*. [illegible]ere is no such alternative when a marri[illegible] fails.

:O, BURLINGTON, & QUINCY RAILWAY COMPANY.
v.
EDGAR C. WILLIAMS.

e S. C. Reporter's ed. 444-454.)

ertified—by circuit court of appeals stion of mixed law and fact.
A question of mixed law and fact, e decision of which the whole case annot be certified by a circuit court als to the Federal Supreme Court for nation.

[No. 243.]

and submitted March 14, 15, 1907. Decided April 15, 1907.

CERTIFICATE from the United tes Circuit Court of Appeals for the Circuit presenting a question as to dity of a contract for the transpor- f live stock. Dismissed because pre- a mixed question of law and fact.

ment by Mr. Justice Harlan:
case is before the court upon a ques- tified by the circuit court of appeals he 6th section of the judiciary act of 3d, 1891, providing that in every case its appellate jurisdiction a circuit f appeals may certify to this court estions or propositions of law con- which it desires instruction for the decision of such case. 26 Stat. at chap. 517, U. S. Comp. Stat. 1901,

npanying the certificate is a detailed nt of the case as disclosed by the e. It is well to give that statement It is as follows:

judgment which the writ of error ges was rendered after a trial and a of a jury for $5,000 damages caused lefendant in error, who will hereafter d the plaintiff, by the negligence of ants of the railway company, the de- below, in the operation of a cattle n the caboose of which the plaintiff ing under this contract:

Burlington Route.
Live-Stock Contract.
by Chicago, Burlington, & Quincy Railway Company.
ts of this company are not author- agree to forward live stock to be d at any specified time or for any lar market.

Agents will permit only the names of the owners or bona fide employees, who accompany the stock, to be entered on the back of the contract without regard to passes allowed by number of cars.

The contract, when indorsed by the person or persons in charge and signed in ink by agent, will entitle such person or persons to ride on same train with stock to care for same, but will not entitle holder of contract to ride on any other train, nor will contract be accepted for passage on any passenger train.

Conductor of freight train must punch contract, or, in absence of punch, will indorse his name on back of contract, when presented for passage.

Live-stock contracts are not good for return passage. Parties entitled to return passage will be provided with return ticket on application to proper office. Conductors will be held strictly responsible for permitting persons to ride on stock contracts except when in charge of live stock.

No. of waybill.	No. and initial of car.	No. of animals in each car.
42	50043Q	17
43	16168Q	17

Read the Contract.
Robertson, Mo., Station.

*This contract, made and entered into this [446] 26 day of Sept., 1903, by and between Ed Williams of Robertson, of the first part, and the Chicago, Burlington, & Quincy Railway Company, of the second part.

Witnesseth, That for and in consideration of 23½ per cwt., subject to minimum weights as shown in published tariffs, the said railway company agrees to transport 2 cars loaded with cattle (number of cars, number of waybill, and number of animals as noted above), from Robertson to U. S. yds. consigned to Drumm Com. Co.; and the said first party, in consideration thereof, agrees to deliver the said animals to the said railway company, for transportation between the points aforesaid, upon the following terms, *viz.:*

That whereas, the said first party, before delivering the said animals to said railway company, demanded to be advised of the rate to be charged for the carriage of said animals, as aforesaid, and thereupon was offered by the said railway company alternative rates proportionate to the value of the said animals, such value to be fixed and declared by the first party or his agent, and

Whereas, such alternative rates are made in pursuance of the provisions relating thereto of the classification of freights adopted as regulations by the said railway company, and fully set forth as follows, to wit:

Live Stock.—Ratings given above are

.—On the definiteness of question to ified—see note to Waco Water & Co. v. Waco, 31 L.R.A. 392.

based upon declared valuations by shippers, not exceeding the following:

Each horse or pony (gelding, mare, or stallion), mule or jack	$100 00
Each ox, bull, or steer	50 00
Each cow	30 00
Each calf	10 00
Each hog	10 00
Each sheep or goat	3 00

When the declared value exceeds the above, an addition of 25 per cent will be [447]made to the rate for each 100 per cent *or fraction thereof, of "additional declared valuation per head;" which said alternative rates are fully shown in and upon the regular tariffs and classifications printed, published, and posted by the said company as required by law, and

Whereas, the first party, in order to avail himself of said alternative rates, and to secure the benefit thereof, has declared, and does hereby declare, said animals to be of the value as follows, to wit: Each steer, value, $50.00.

To which value the rate aforesaid is proportioned by the classifications and tariffs aforesaid.

Now, in consideration of the premises and of the foregoing, it is expressly agreed that for all purposes connected with, resulting from, or in any manner growing out of, this contract, and the transportation of the said animals pursuant thereto, the value of the said animals and of each thereof shall in no case exceed the said valuation.

It is further agreed in consideration of the alternative rate so made by the said railway company and accepted by the first party, that in case of loss or of damage to said animals, whether resulting from accident or negligence of said railway company, or its servants, the said railway company shall not be liable in excess of the actual loss or damage; and in no case shall the said railway company be liable in any manner in excess of the agreed valuation upon each animal lost or damaged. Nor shall said railway company be liable for loss or damage after delivery to any connecting line, nor for any loss or damage not incurred upon its own line; but, nevertheless, in the event that the said animals are to be transported beyond the line of the railway of the second party upon and by any connecting line forming a part of the system known as the "Burlington System," then it is expressly understood and agreed that this contract shall be for, and shall inure to the benefit of, the corporation operating such connecting line, and such connecting line shall be liable to perform all the obligations of this contract.

It is further agreed that the said railway [448]company shall *in no case be liable for any loss or damage to said animals u claim shall be made in writing by t er or owners thereof, or his or their and delivered to a general freight a the said railway company, or to th of said railway company at the stati which the animals are shipped, or agent at the point of destination, ten (10) days from the time the a mals are removed from the cars. case of loss or damage upon any co line, such connecting line shall not b manner liable unless claim shall be like manner in writing to such gen cer or agent of such connecting line.

And in consideration of free tra tion for one person, designated by party, hereby given by said railw pany, such persons to accompany th it is agreed that the said cars, and animals contained therein, are and in the sole charge of such persons, purpose of attention to and care of animals, and that the said railway shall not be responsible for such a and care; and, further, that the sec ty shall not be liable to the first p any of his servants, agents, or co or other person, carried pursuant contract, for any injury or dama whatever cause, suffered or incurr being so carried. And the first part that, before setting out upon the he will fully inform each of the pe be carried pursuant hereto of the pr of this contract in this regard.

It is agreed that the said animal be loaded, unloaded, watered, and fe owner or his agent in charge; that ond party shall not be liable for lo theft, heat, or cold, jumping from other escape, injury in loading or un injury which animals may cause t selves or to each other, or which res the nature or propensities of such a and that the railway company d agree to deliver the stock at destin any specified time, nor for any pa market.

Witness the name of the railway c by its agent, *and the hand of the firs the day and year first above written.

Chicago, Burlington, &
Railway Company,
By C. M. Holt, A

Ed. Williams, Shipper.

If this contract is for two or mo and is presented to the company's at the below-named addresses within from date, it may be exchanged for a pass for the above-named party in

it being distinctly understood that said pass must be used the same day as issued.

Atchison, Kans., General Agent's Office.

Beardstown, Ill., Local Freight Agent's Office.

Burlington, Iowa, Division Freight Agent's Office.

Chicago, Ill., General Freight Office, Union Stock Yards.

The defendant pleaded that it was exempt from liability for damages to the plaintiff by virtue of the italicized paragraph of the foregoing agreement. At the close of the trial there was substantial evidence that the injury to the plaintiff was caused by the negligence of the defendant's servants in the operation of the cattle train, the evidence relative to the contract between the parties for the free transportation of the plaintiff was uncontradicted and it established these facts: The plaintiff resided at Robertson in the state of Missouri. He had been engaged in dealing in and shipping cattle in that state for eighteen years, had frequently made contracts of the character of that here in evidence, and was familiar with this agreement, and with the rates and terms upon which the railway company transported cattle from Robertson to the city of Chicago. The defendant operated regular passenger trains and carried passengers thereon between these stations for a regular fare of about $12. The danger of accident and injury to one riding in the caboose of a cattle train is about four times the danger to one riding in a coach of a passenger train. The defendant offered to carry and did transport cattle from Robertson to Chicago and between other places on its railroad, *and assumed the entire responsibility and care of them during the transportation, without furnishing free transportation to the shipper or any of his agents, and without any agreement that he or any of his agents should water, feed, or give care or attention to the cattle during the transportation, for the same price and rate as it charged and received in cases in which the owner or his agent received free transportation upon the cattle train and agreed to assume the responsibility of the care of the cattle and the risk of his own injury while riding upon the freight train, as he did in the contract in evidence. The railway company preferred to carry and care for the cattle without furnishing transportation to anyone upon the freight trains, but nevertheless it offered to provide, and, when desired, did provide, free transportation on the cattle train for one person for every two cars shipped upon the terms specified in the italicized paragraph of the agreement. Cattle were shipped each way. The railway company charged and received the same rate whichever method was adopted, and left the shippers free to make their choice. The majority of the shippers accepted the free transportation on the train with their cattle, and agreed to care for them and to hold the company exempt from liability for any injury to themselves while they were riding on the freight train. The plaintiff and other shippers had the option to ship their cattle without free transportation for anyone, and to throw the entire care of the cattle on the company, or to accept the free transportation and to make the agreement to care for their cattle during the transportation, and to exempt the defendant from liability for their injuries while riding on the cattle train. The plaintiff was not requested, required, or constrained to accept the free transportation upon the cattle train upon which he rode, to assume the care of the cattle during their carriage, or to ride on the cattle train and to agree that the defendant should not be liable for his injuries while he was so carried, but he did so voluntarily because he wished to accompany his cattle to Chicago and to sell them there. In this state of the case the trial court denied the request of counsel *for the [451] defendant to instruct the jury to return a verdict in its favor, an exception was taken to this ruling, and it was assigned as error.

And the circuit court of appeals for the eighth circuit further certifies that the following question of law is presented by the assignment of errors in this case, that its decision is indispensable to a determination of this case, and that to the end that this court may properly decide the issues of law presented it desires the instruction of the Supreme Court of the United States upon the following question:

Where the owner of cattle has the option to ship them to market at the same rate without free transportation for himself or his agents on the cattle train, to throw the entire responsibility of the care of the cattle during the transportation upon the railroad company, and to travel to the market town on a passenger train of that company for the regular fare, or to accept free transportation to the market town upon the cattle train which carries his cattle, to assume the responsibility of their care during the transportation, and to agree that the railroad company shall not be liable to him for any injury or damage which he sustains while he is being so carried, and, without request, requirement, or constraint, he voluntarily chooses the latter alternative, is his contract that the railroad company shall not be liable to him for such injury or damage valid?

Mr. O. H. Dean argued the cause, and, with Messrs. W. D. McLeod, Hale Holden, H. C. Timmonds, and O. M. Spencer, filed a brief for the Chicago, B. & Q. R. Co.

Mr. John H. Denison submitted the cause for Williams. Messrs. John Hipp and Ralph Talbot were on the brief.

Mr. Timothy J. Butler also submitted the cause for Williams. Messrs. D. C. Allen and Sandusky & Sandusky were on the brief.

Mr. Justice Harlan delivered the opinion of the court:

In Jewell v. Knight, 123 U. S. 426, 432, 434, 435, 31 L. ed. 190-194, 8 Sup. Ct. Rep. [452] 193-196, the court *had occasion to determine the scope of those provisions of the Revised Statutes which authorized the judges of the circuit court in any civil suit or proceeding before it, where they were divided in opinion, to certify to this court the point upon which they so disagreed. Rev. Stat. § 650, U. S. Comp. Stat. 1901, p. 527; Rev. Stat. §§ 652, 693. Speaking by Mr. Justice Gray, this court held that each question certified must be a distinct point or proposition of law, clearly stated, so that it could be definitely answered without regard to other issues of law or of fact in the case. It said: "The points certified must be questions of law only, and not questions of fact, or of mixed law and fact,—'not such as involve or imply conclusions or judgment by the court upon the weight or effect of testimony of facts adduced in the cause.' . . . The whole case, even when its decision turns upon matter of law only, cannot be sent up by certificate of division." In that case the general creditors of one of the parties sought to set aside, as fraudulent, a warrant of attorney to confess judgment. The court further said: "The statement (embodied in the certificate and occupying three closely printed pages in the record) of what the judges below call 'the facts found' is in truth a narrative in detail of various circumstances as to the debtor's pecuniary condition, his dealings with the parties to this suit and with other persons, and the extent of the preferred creditors' knowledge of his condition and dealings. It is not a statement of ultimate facts, leaving nothing but a conclusion of law to be drawn; but it is a statement of particular facts, in the nature of matters of evidence, upon which no decision can be made without inferring a fact which is not found. The main issue in the case, upon which its decision must turn, and which the certificate attempts in various forms to refer to the determination of this court, is whether the sale of goods was fraudulent as against the plaintiffs. That is not a pure question of law, but a question either of fact or of mixed law and fact. . . . Not one of the questions certified presents a distinct point of law; and each of them, either in express terms or by necessary implication, involves in its decision a consideration 'of all [453] the circumstances of the case. . . . 'They are mixed propositions of law and fact, in regard to which the court cannot know precisely where the division of opinion arose on a question of law alone;' and 'it is very clear that the whole case has been sent here for us to decide, with the aid of a few suggestions from the circuit judges of the difficulties they have found in doing so.' Waterville v. Van Slyke, 116 U. S. 699, 704, 29 L. ed. 772, 774, 6 Sup. Ct. Rep. 602." See also Fire Ins. Asso. v. Wickham, 125 U. S. 426, 434, 32 L. ed. 503, 506, 9 Sup. Ct. Rep. 113.

In United States v. Rider, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983, the Chief Justice, speaking for the court, said that "it has always been held that the whole case could not be certified," and that "under the Revised Statutes, as to civil cases, the danger of the wheels of justice being blocked by difference of opinion was entirely obviated." In that case it was also held that certificates of questions of law by the circuit courts of appeals under the judiciary act of March 3d, 1891, are governed by the same general rules as were formerly applied to certificates of division of opinion in the circuit court,—citing Columbus Watch Co. v. Robbins, 148 U. S. 266, 37 L. ed. 445, 13 Sup. Ct. Rep. 594; Maynard v. Hecht, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353.

In United States v. Union P. R. Co. 168 U. S. 505, 512, 41 L. ed. 559, 561, 18 Sup. Ct. Rep. 167 (which was the case of certified questions from a circuit court of appeals), the rule as announced in the Rider Case was affirmed. To the same effect are Graver v. Faurot, 162 U. S. 435, 436, 40 L. ed. 1030, 1031, 16 Sup. Ct. Rep. 799; Cross v. Evans, 167 U. S. 60, 64, 42 L. ed. 77, 78, 17 Sup. Ct. Rep. 733; McHenry v. Alford, 168 U. S. 657, 658, 42 L. ed. 616, 617, 18 Sup. Ct. Rep. 242.

The present certificate brings to us a question of mixed law and fact, and, substantially, all the circumstances connected with the issue to be determined. It does not present a distinct point of law, clearly stated, which can be decided without passing upon the weight or effect of all the evidence out of which the question arises. The question certified is rat[illegible] a condensed, argumentative narrative of the facts upon which, in the opinion of the judges of the circuit court of appeals, depends the validity of

stock contract in suit. Thus, prac- the whole case is brought here by ified question, and we are, in effect, indicate what, under all *the facts should be the final judgment. It usly, as if the court had been asked, y, upon a statement of all the facts, mine what, upon those facts, is the he case. We thus state the matter, it is apparent that the case turns er upon the question propounded as alidity, in view of all the facts stat- he contract under which the plain- tle were transported. This court is jurisdiction to answer the question in its present imperfect form and ificate must be dismissed. Sadler er, 7 How. 646, 12 L. ed. 855.
so ordered.

ustice Brewer dissented.

AS M. PATTERSON, Plff. in Err.,
v.
E OF THE STATE OF COLORADO REL. ATTORNEY GENERAL OF STATE OF COLORADO.

S. C. Reporter's ed. 454–466.)

state court—Federal question—lo- w.
The objections that the information mpt was not supported by an affi- ntil after it was filed, and that the ferred to in the published articles ned of as constituting the contempt t then pending, present questions of w, which will not sustain a writ of om the Federal Supreme Court to a urt.

state court—Federal question.
A decision of a state court upon a question of law cannot be reviewed in the Federal Supreme Court as presenting a question of the violation of the 14th Amendment to the Federal Constitution because such decision is asserted to be wrong, and contrary to previous decisions of the same court.

Error to state court—Federal question.
3. The objection that certain published articles did not constitute a contempt of court does not present a question which will sustain a writ of error from the Federal Supreme Court to a state court; at least, where there is no showing that innocent conduct has been laid hold of as an arbitrary pretense for an arbitrary punishment.

Error to state court—frivolousness of Federal question.
4. The claim of a right under the Federal Constitution to prove the truth of certain published articles held to constitute a contempt of court is too clearly unfounded to serve as the basis of a writ of error from the Federal Supreme Court to a state court.

[No. 223.]

Argued March 5, 6, 1907. Decided April 15, 1907.

IN ERROR to the Supreme Court of the State of Colorado to review a judgment upon an information for contempt. Dismissed for want of jurisdiction.

See same case below (Colo.) 84 Pac. 912.

The facts are stated in the opinion.

Mr. Thomas M. Patterson *in propria persona* argued the cause and filed a brief for plaintiff in error.

Messrs. Henry M. Teller, Charles S. Thomas, Sterling B. Toney, James H. Blood, Harvey Riddell, S. W. Belford, John A. Rush, and Richardson & Hawkins also filed a brief for plaintiff in error.

Mr. Horace G. Phelps argued the cause, and, with Messrs. I. B. Melville, William H. Dickson, and Samuel Huston Thompson, Jr., filed a brief for defendant in error.

Mr. I. B. Melville also argued the cause, and, with Mr. N. C. Miller, filed a brief for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is a writ of error to review a judgment upon an information for contempt. 84 Pac. 912. The contempt alleged was the publication of certain articles and a cartoon, which, it was *charged, reflected upon the [459] motives and conduct of the supreme court of Colorado in cases still pending, and were intended to embarrass the court in the impartial administration of justice. There was a motion to quash on grounds of local law and the state Constitution and also

—On the general subject of writs of om the United States Supreme Court e courts—see notes to Martin v. 4 L. ed. U. S. 97; Hamblin v. West- d Co. 37 L. ed. U. S. 267; Re Buch- 9 L. ed. U. S. 884; and Kipley v. 42 L. ed. U. S. 998.
at adjudications of state courts can ght up for review in the Supreme f the United States by writ of error e courts—see note to Apex Transp. Garbade, 62 L.R.A. 513.
ow and when questions must be nd decided in a state court in order e a case for a writ of error from reme Court of the United States— e to Mutual L. Ins. Co. v. McGrew, A. 33.
the necessity of color of merit in question to sustain writ of error e court—see note to Offield v. New I. H. & H. R. Co. ante, 231.

of the 14th Amendment to the Constitution of the United States. This was overruled and thereupon an answer was filed, admitting the publication, denying the contempt, also denying that the cases referred to were still pending, except that the time for motions for rehearing had not elapsed, and averring that the motions for rehearing subsequently were overruled, except that in certain cases the orders were amended so that the Democratic officeholders concerned could be sooner turned out of their offices. The answer went on to narrate the transactions commented on, at length, intimating that the conduct of the court was unconstitutional and usurping, and alleging that it was in aid of a scheme, fully explained, to seat various Republican candidates, including the governor of the state, in place of Democrats who had been elected, and that two of the judges of the court got their seats as a part of the scheme. Finally the answer alleged that the respondent published the articles in pursuance of what he regarded as a public duty, repeated the previous objections to the information, averred the truth of the articles, and set up and claimed the right to prove the truth under the Constitution of the United States. Upon this answer the court, on motion, ordered judgment fining the plaintiff in error for contempt.

The foregoing proceedings are set forth in a bill of exceptions, and several errors are alleged. The difficulties with those most pressed is that they raise questions of local law, which are not open to re-examination here. The requirement in the 14th Amendment of due process of law does not take up the special provisions of the state Constitution and laws into the 14th Amendment for the purposes of the case, and in that way subject a state decision that they have been complied with to revision by this court. [460] French v. *Taylor, 199 U. S. 274, 278, 50 L. ed. 189, 192, 26 Sup. Ct. Rep. 76; Rawlins v. Georgia, 201 U. S. 638, 639, 50 L. ed. 899, 900, 26 Sup. Ct. Rep. 560; Burt v. Smith, 203 U. S. 129, 135, ante, 121, 27 Sup. Ct. Rep. 37. For this reason, if for no other, the objection that the information was not supported by an affidavit until after it was filed cannot be considered. See, further, Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569. The same is true of the contention that the suits referred to in the article complained of were not pending. Whether a case shall be regarded as pending while it is possible that a petition for rehearing may be filed, or, if in an appellate court, until the remittitur is issued, are questions which the local law can settle as it pleases without interference from the Constitution of the United States. It is admitted that this may be true in some other sense, but it is not true, it is said, for the purpose of fixing the limits of possible contempts. But here again the plaintiff in error confounds the argument as to the common law, or as to what it might be wise and humane to hold, with that concerning the state's constitutional power. If a state should see fit to provide in its Constitution that conduct otherwise amounting to a contempt should be punishable as such if occurring at any time while the court affected retained authority to modify its judgment, the 14th Amendment would not forbid. The only question for this court is the power of the state. Virginia v. Rives (Ex parte Virginia) 100 U. S. 313, 318, 25 L. ed. 667, 669; Missouri v. Dockery, 191 U. S. 165, 171, 48 L. ed. 133, 134, 24 Sup. Ct. Rep. 53.

It is argued that the decisions criticised, and in some degree that in the present case, were contrary to well-settled previous adjudications of the same court, and this allegation is regarded as giving some sort of constitutional right to the plaintiff in error. But while it is true that the United States courts do not always hold themselves bound by state decisions in cases arising before them, that principle has but a limited application to cases brought from the state courts here on writs of error. Except in exceptional cases the grounds on which the circuit courts are held authorized to follow an earlier state decision rather than a later one, or to apply the rules of commercial law as understood by this court rather than those *laid down by the local tribunals, are not grounds of constitutional right, but considerations of justice or expediency. There is no constitutional right to have all general propositions of law once adopted remain unchanged. Even if it be true, as the plaintiff in error says, that the supreme court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. It is unnecessary to lay down an absolute rule beyond the possibility of exception. Exceptions have been held to exist. But, in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed.

It is argued that the articles did not constitute a contempt. In view of the answer, which sets out more plainly and in fuller detail what the articles intimate and suggest, and in view of the position of the plaintiff in error that he was performing a public

duty, the argument for a favorable interpretation of the printed words loses some of its force. However, it is enough for us to say that they are far from showing that innocent conduct has been laid hold of as an arbitrary pretense for an arbitrary punishment. Supposing that such a case would give the plaintiff in error a standing here, anything short of that is for the state court to decide. What constitutes contempt, as well as the time during which it may be committed, is a matter of local law.

The defense upon which the plaintiff in error most relies is raised by the allegation that the articles complained of are true, and the claim of the right to prove the truth. He claimed this right under the Constitutions both of the state and of the United States, but the latter ground alone comes into consideration here, for reasons already stated. Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930. We do not pause to consider whether the claim was sufficient in point of form, although it is easier to refer to *the Constitution generally for the supposed right than to point to the clause from which it springs. We leave undecided the question whether there is to be found in the 14th Amendment a prohibition similar to that in the 1st. But even if we were to assume that freedom of speech and freedom of the press were protected from abridgments on the part not only of the United States but also of the states, still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practised by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. Com. v. Blanding, 3 Pick. 304, 313, 314, 15 Am. Dec. 214; Respublica v. Oswald, 1 Dall. 319, 325, 1 L. ed. 155, 158, 1 Am. Dec. 246. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. Com. v. Blanding, ubi supra; 4 Bl. Com. 150.

In the next place, the rule applied to criminal libels applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

What is true with reference to a jury is true also with reference to a court. Cases like the present are more likely to arise, no doubt, when there is a jury, and the publication may affect their judgment. Judges generally perhaps are less apprehensive that publications impugning their own *reasoning or motives will interfere with [463] their administration of the law. But if a court regards, as it may, a publication concerning a matter of law pending before it, as tending toward such an interference, it may punish it as in the instance put. When a case is finished courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied. Ex parte Terry, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77; Telegram Newspaper Co. v. Com. 172 Mass. 294, 44 L.R.A. 159, 70 Am. St. Rep. 280, 52 N. E. 445; State v. Hart, 24 W. Va. 416, 49 Am. Rep. 257; Myers v. State, 46 Ohio St. 473, 491, 15 Am. St. Rep. 638, 22 N. E. 43; Hunt v. Clarke, 58 L. J. Q. B. N. S. 490, 492; King v. Parke [1903] 2 K. B. 432. It is objected that the judges were sitting in their own case. But the grounds upon which contempts are punished are impersonal. United States v. Shipp, 203 U. S. 563, 574, ante, 319, 324, 27 Sup. Ct. Rep. 165. No doubt naturally would be slower to punish when the contempt carried with it a personal dishonoring charge, but a man cannot expect to secure immunity from punishment by the proper tribunal, by adding to illegal conduct a personal attack. It only remains to add that the plaintiff in error had his day in court and opportunity to be heard. We have scrutinized the case, but cannot say that it shows an infraction of rights under the Constitution of the United States, or discloses more than the formal appeal to that instrument in the answer to found the jurisdiction of this court.

Writ of error dismissed.

Mr. Justice Harlan, dissenting:

I cannot agree that this writ of error should be dismissed.

By the 1st Amendment of the Constitution of the United States, it is provided that "Congress shall make no law respecting an establishment of religion, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble and to petition the government for redress."

In the Civil Rights Cases, 109 U. S. 1, 20, 27 L. ed. 835, 843, 3 Sup. Ct. Rep. 18, it was [464] adjudged that *the 13th Amendment, although in form prohibitory, had a reflex character, in that it established and decreed universal civil and political freedom throughout the United States. In United States v. Cruikshank, 92 U. S. 542, 552, 23 L. ed. 588, 591, we held that the right of the people peaceably to assemble and to petition the government for a redress of grievances—one of the rights recognized in and protected by the 1st Amendment against hostile legislation by Congress—was an attribute of "national citizenship." So the 1st Amendment, although in form prohibitory, is to be regarded as having a reflex character, and as affirmatively recognizing freedom of speech and freedom of the press as rights belonging to citizens of the United States; that is, those rights are to be deemed attributes of national citizenship or citizenship of the United States. No one, I take it, will hesitate to say that a judgment of a Federal court, prior to the adoption of the 14th Amendment, impairing or abridging freedom of speech or of the press, would have been in violation of the rights of "citizens of the United States" as guaranteed by the 1st Amendment; this, for the reason that the rights of free speech and a free press were, as already said, attributes of national citizenship before the 14th Amendment was made a part of the Constitution.

Now, the 14th Amendment declares, in express words, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." As the 1st Amendment guaranteed the rights of free speech and of a free press against hostile action by the United States, it would seem clear that, when the 14th Amendment prohibited the states from impairing or abridging the privileges of citizens of the United States, it necessarily prohibited the states from impairing or abridging the constitutional rights of such citizens to free speech and a free press. But the court announces that it leaves undecided the specific question whether there is to be found in the 14th Amendment a prohibition [465] as to the rights of free *speech and a free press similar to that in the 1st. It yet proceeds to say that the main purpose of such constitutional provisions was to prevent all such "*previous restraints*" upon publications as had been practised by other governments, but not to prevent the subsequent punishment of such as may be deemed contrary to the public welfare. I cannot assent to that view, if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public welfare requires that to be done. The public welfare cannot override constitutional privileges, and if the rights of free speech and of a free press are, in their essence, attributes of national citizenship, as I think they are, then neither Congress nor any state, since the adoption of the 14th Amendment, can, by legislative enactments or by judicial action, impair or abridge them. In my judgment the action of the court below was in violation of the rights of free speech and a free press as guaranteed by the Constitution.

I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the 14th Amendment forbidding a state to deprive any person of his liberty without due process of law. It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the nation or by the states, which does not embrace the right to enjoy free speech and the right to have a free press.

Mr. Justice Brewer, dissenting:

While not concurring in the views expressed by Mr. Justice Harlan, I also dissent from the opinion and judgment of the court. The plaintiff in error made a distinct claim that he was denied that which he asserted to be a right guaranteed by the Federal Constitution. His claim cannot be regarded as a frivolous one, nor can the proceedings for contempt be *entirely disso- [466] ciated from the general proceedings of the case in which the contempt is charged to have been committed. I think, therefore, that this court has jurisdiction and ought to inquire and determine the alleged rights of the plaintiff in error. As, however, the court decides that it does not have jurisdiction, and has dismissed the writ of error, it would not be fit for me to express any opinion on the merits of the case.

WINTHROP ASTOR CHANLER, Thomas T. Sherman, as Committee for John Armstrong Chanler, et al., Plffs. in Err.,

v.

OTTO KELSEY, Comptroller of the State of New York.

(See S. C. Reporter's ed. 466-482.)

Constitutional law—due process of law—state inheritance tax.

1. Property is not taken without due

of law, in violation of U. S. Const. end., by imposing a transfer tax, e authority of the amendment of ral transfer-tax law by N. Y. Laws ap. 284, upon the exercise by will ower of appointment conferred by executed prior to the passage of tute.

tional law—impairing contract ob-ns—state inheritance tax.

he reduction of the estate resulting imposition of a transfer tax, under hority of the amendment of the transfer-tax law by N. Y. Laws ap. 284, upon the exercise by will ver of appointment conferred by a cuted prior to the passage of the does not render such statute re- to U. S. Const. art. 1, § 10, as im- ontract obligations.

[No. 240.]

March 14, 1907. Decided April 15, 1907.

ROR to the Surrogates' Court of the ity of New York in the State of rk to review a judgment entered to the remittitur from the Court ls of that State, which had affirmed of the Appellate Division of the Court in and for the First Judicial ent, which had in turn affirmed r of the Surrogates' Court assess- nsfer tax upon the exercise by will er of appointment. Affirmed.

me case below, 183 N. Y. 543, 76 93.

nent by Mr. Justice Day:

s a writ of error to the surrogates' the county of New York, state of rk, but its real purpose is to *review on of the court of appeals of the staining an order of the surrogates' hich imposed a transfer tax upon estates arising under appointment Astor Delano, deceased. 176 N. Y. L.R.A. 279, 68 N. E. 871.

Astor Delano was the daughter of B. Astor. Upon the occasion of her , in 1844, to Frank H. Delano, Mr. xecuted a deed in the nature of a marriage settlement, conveying certain real and personal property to trustees in trust to pay the income to said Laura Delano for life, with remainder to her issue in fee, or, in default of issue, to her heirs in fee; and giving her power, in her discretion, to appoint the remainder "amongst her said issue or heirs, in such manner and proportions as she may appoint by instrument in its nature testamentary, to be acknowledged by her as a deed, and in the presence of two witnesses, or published by her as a will."

In the years 1848, 1849, and 1865 William B. Astor made other deeds, by way of addition to the original marriage settlement, substantially similar in their terms. That of 1848 conveyed certain real estate to Mrs. Delano for life, with power of appointment as to said premises, or any part thereof, "to and among her said issue, brothers, sister Alida, or their issue, in such manner and proportions as she may appoint by instrument in its nature testamentary, to be acknowledged by her as a deed in the presence of two witnesses, or acknowledged by her as a will." The deed of 1849 conveyed to trustees certificates for $50,000 of the public debt of Ohio; "to hold the same in trust for the benefit of Laura Astor Delano during her life, and at her death to transfer and convey the capital of the said stock to her issue; but, in case she left no issue, then to her surviving brothers and sister Alida and to the issue of any of them who died leaving issue; and said instrument contained a power of appointment to Laura Astor Delano as follows: 'Provided, however, that it shall be lawful for the said Laura, by any instrument executed duly as a will of personal estate, to dispose of the said capital unto and amongst her *issue, brothers, sister and [468] their issue, in such shares and proportions as she may think fit, and upon such limitations, by way of trust or otherwise, as, in her discretion, may be lawfully devised.'" These deeds were absolutely irrevocable, took effect upon delivery, and were not made in contemplation of the death of the grantor.

Laura A. Delano died June 15, 1902, in Geneva, Switzerland, leaving no descendants. By her last will and testament, duly admit-

—As to what constitutes due proc- w—see notes to People v. O'Brien, 255; Kuntz v. Sumption, 2 L.R.A. Gannon, 5 L.R.A. 359; Ulman v. e, 11 L.R.A. 224; Gilman v. Tucker, . 304; Pearson v. Yewdall, 24 L. . 436; and Wilson v. North Caro- L. ed. U. S. 865.

what laws are void as impairing n of contracts—see notes to Frank- ty Grammar School v. Bailey, 10 05; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

As to taxes on succession and collateral inheritances—see notes to Re Howe, 2 L. R.A. 825; Wallace v. Myers, 4 L.R.A. 171; Com. v. Ferguson, 10 L.R.A. 240; Re Romaine, 12 L.R.A. 401; and Magoun v. Illinois Trust & Sav. Bank, 42 L. ed. U. S. 1037.

ted to probate in the county of New York on October 14, 1902, she exercised the power of appointment conferred in the deeds from her father in favor of the plaintiffs in error.

One of the plaintiffs in error, Arthur Astor Carey, a grandson of William B. Astor, and an appointee to whom Mrs. Delano had appointed the property originally conveyed by the deeds of 1848 and 1849, took an appeal from the order of the surrogates' court refusing to dismiss the petition to the appellate division of the supreme court, where it was held that the act under which the tax was imposed, as applied to this case, was unconstitutional. Re Delano, 82 App. Div. 147, 81 N. Y. Supp. 762. The state comptroller appealed to the court of appeals from the decision of the appellate division.

That court sustained the right to impose the transfer tax upon the interests appointed by Mrs. Delano under the powers created by the deeds above referred to. Subsequent decisions were made *pro forma* and a final order on the last remittitur of the court of appeals was made in the surrogates' court, and the case brought here by all the plaintiffs in error.

Mr. Lucius H. Beers argued the cause and filed a brief for plaintiffs in error:

Death is the generating source from which the particular taxing power takes its being.

Knowlton v. Moore, 178 U. S. 41, 56, 44 L. ed. 969, 975, 20 Sup. Ct. Rep. 747; Cahen v. Brewster, 203 U. S. 543, 550, ante, 310, 27 Sup. Ct. Rep. 174; Mager v. Grima, 8 How. 490, 493, 12 L. ed. 1168, 1170; United States v. Perkins, 163 U. S. 625, 627, 41 L. ed. 287, 288, 16 Sup. Ct. Rep. 1073; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Plummer v. Coler, 178 U. S. 115, 124, 44 L. ed. 998, 1004, 20 Sup. Ct. Rep. 829; Re Swift, 137 N. Y. 83, 18 L.R.A. 709, 32 N. E. 1096; Re Sherman, 153 N. Y. 5, 46 N. E. 1032; Re Lansing, 182 N. Y. 248, 74 N. E. 882; Minot v. Winthrop, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; Re Wilmerding, 117 Cal. 281, 49 Pac. 181; State v. Dalrymple, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82; State ex rel. Fath v. Henderson, 160 Mo. 190, 60 S. W. 1093; State v. Alston, 94 Tenn. 674, 28 L.R.A. 178, 30 S. W. 750; Kochersperger v. Drake, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; Strode v. Com. 52 Pa. 181.

The validity of a succession tax depends not on the general taxing power of the state, but on the existence of a power in the state to regulate the particular succession sought to be "taxed."

United States v. Perkins, 163 U. S. 625, 629, 41 L. ed. 287, 288, 16 Sup. Ct. Rep. 1073; State v. Alston, 94 Tenn. 681, 28 L.R.A. 178, 30 S. W. 750; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

The powers under which this property was appointed to the plaintiffs in error were created by deed *inter vivos*, and that fact distinguishes this case from the case of Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213, where the power was created by will.

Cahen v. Brewster, 203 U. S. 543, 551, ante, 310, 27 Sup. Ct. Rep. 174; 4 Kent, Com. 337; 2 Washb. Real Prop. 320; Emmons v. Shaw, 171 Mass. 410, 50 N. E. 1033.

The amendment of 1897 was not an exercise of the state's general power to tax, but was intended to impose a succession tax.

Re Pell, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789.

There has been no succession to the remainders originally transferred by the deeds of 1844, 1848, and 1849 which would permit the imposition of a succession tax.

Re Seaman, 147 N. Y. 69, 41 N. E. 401; Heath v. Withington, 6 Cush. 497; Re Lansing, 182 N. Y. 238, 74 N. E. 882.

The instrument by which Mrs. Delano exercised these powers of appointment created by deed was not a "will" in so far as it exercised those powers.

Strong v. Wilkin, 1 Barb. Ch. 13; Heath v. Withington, supra; Sewall v. Wilmot, 132 Mass. 136.

A power of appointment is exercised (even when exercised by an instrument in the form of a will) under a contract right, and not under a privilege granted by the state.

Parker v. Parker, 11 Cush. 522; Ela v. Edwards, 16 Gray, 100.

States have repeatedly attempted to treat an appointment as a succession for the purpose of collecting a succession tax, but such attempts have uniformly failed for the reason that an appointment is not legally a succession, because the appointed property does not belong to the donee of the power.

Emmons v. Shaw, supra; Com. v. Duffield, 12 Pa. 277; Com. v. Williams, 13 Pa. 2[illegible]; Re Stewart, 131 N. Y. 281, 14 L.R.A. [illegible], 30 N. E. 184; Re Harbeck, 161 N. Y. 21, 55 N. E. 850.

The difficulty which the New York legislature here sought to overcome was, that Mrs. Delano did not own the property which she appointed under the power, and, as the power had been brought into effect by the delivery of a deed, and not by the death of an owner, the state had no jurisdiction to impose a succession tax. And this difficulty it sought to overcome by declaring that the appointment should be taxed as though the property belonged to [illegible]ra. Delano.

Such a devise for [illegible]ading constitutional provisions has been [illegible]reatly condemned by this court.

St. Louis v. Wiggins Ferry Co. 11 Wall. 423, 430, 20 L. ed. 192, 194; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 208, 29 L. ed. 158, 163, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

The legislature has no jurisdiction by which it can decide that property shall be treated as though it belonged to one who does not own it, and, if it had, the parties in interest have had no notice or opportunity to be heard prior to such decree. Where there is due process of law there must be jurisdiction, notice, and an opportunity to be heard.

Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. ed. 565, 572; Scott v. McNeal, 154 U. S. 34, 46, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108.

The parties here in interest had no day in court or hearing when this property of theirs was declared by the legislature to be the property of Mrs. Delano as a preliminary step to an exaction which should deplete it.

Wilkinson v. Leland, 2 Pet. 627, 658, 7 L. ed. 542, 553.

Each of the remaindermen named in the original deeds took a vested remainder, subject to being devested only by the exercise of the power in favor of some other member of the class.

Root v. Stuyvesant, 18 Wend. 267.

A transfer tax cannot constitutionally e imposed on a remainder which vested be-re the tax was created.

Re Pell, 171 N. Y. 55, 57 L.R.A. 540, 89 p. St. Rep. 791, 63 N. E. 789; Re Lang, 182 N. Y. 248, 74 N. E. 882.

The fact that the interests of any of the ain dermen under the deeds of 1844, 1848, 1849 could be devested does not de-re them of constitutional protection.

e Vanderbilt, 172 N. Y. 73, 64 N. E.

o impose a tax under the amendment of 7 will impair the contracts contained in e deeds, to the detriment of all of those ho take any power or estate under those eeds.

Fletcher v. Peck, 6 Cranch, 87, 136, 3 L. ed. 162, 177; Murray v. Charleston, 96 U. S. 432, 444, 24 L. ed. 760, 762; Forster v. Scott, 136 N. Y. 584, 18 L.R.A. 543, 32 N. E. 976; Watson v. Bonney, 2 Sandf. 416; State Tax on Foreign-held Bonds, 15 Wall. 300, 320, 21 L. ed. 179, 187.

The appointees in this case are not eached by this succession tax any more han the nonresident bondholders were eached by the tax in the case just cited. 'or, as has repeatedly been held, this tax not imposed on them (United States v. erkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073) nor on their property (Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829).

No state, by virtue of its taxing power, can say to a debtor, "You need not pay to your creditor all of what you have promised to him. You may satisfy your duty to him by retaining a part for yourself or for some municipality, or for the state treasury."

Murray v. Charleston, supra.

As the states are forbidden to pass any laws impairing the obligation of contracts, they are, of course, precluded from levying any taxes which would have that effect.

Cooley, Const. Lim. 5th ed. p. 603.

This is not a case of the exercise of the state's general power of taxation; but, if it were, the state could not impair the obligation of a contract by a taxing statute (Piqua Branch of State Bank v. Knoop, 16 How. 369, 14 L. ed. 977), or even by a constitution (Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401).

This court has decided that such contracts as are here relied upon by the plaintiffs in error are protected against impairment by the United States Constitution.

Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629.

Mr. **David B. Hill** argued the cause and filed a brief for defendant in error:

The instrument by which Mrs. Delano exercised the power of appointment was a "will."

Strong v. Wilkin, 1 Barb. Ch. 13; American Home Missionary Soc. v. Wadhams, 10 Barb. 604; Albrecht v. Pell, 11 Hun, 129.

The decision of the court of appeals of the state of New York that the statute, chapter 284 of the Laws of 1897, subdivision 5 of § 220 of the tax law, does not violate any provision of the Constitution of the state of New York, will be regarded as conclusive upon this court upon that question.

Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705; Seneca Nation v. Christy, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88.

The legislature, by this act, does not impose a tax upon property but it does impose a tax upon the exercise of a power of appointment.

People ex rel. Eisman v. Ronner, 185 N. Y. 286, 77 N. E. 1061.

This statute did not deprive the plaintiffs in error of their property without due process of law.

People ex rel. Eisman v. Ronner, 185 N. Y. 293, 77 N. E. 1061; United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; United States v. Fox, 94 U. S. 315, 24 L. ed. 192; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283–288, 42 L. ed. 1037–1040, 18 Sup. Ct. Rep. 594; Re Cullum, 145 N. Y. 593, 40 N. E. 163; Wallace v. Myers, 4 L.R.A. 171, 38 Fed. 184; Re Hoffman, 143 N. Y. 327, 38 N. E. 311; Mager v. Grima, 8 How. 490, 12 L. ed. 1168; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; Re Dows, 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 509, 60 N. E. 439; Orr v. Gilman, supra; Re Vanderbilt, 50 App. Div. 246, 63 N. Y. Supp. 1079, Affirmed in 163 N. Y. 597, 57 N. E. 1127.

The amendment of 1897 was a tax upon the exercise of a power of appointment.

Re Swift, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096; Re Cullum and Re Hoffman, supra; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Strode v. Com. 52 Pa. 181.

The legislature had the right to control or regulate the making of a will, or to provide that it should not be made, or that no power of appointment could be exercised except upon the payment of a sum fixed for the privilege.

Re Delano, 176 N. Y. 486, 64 L.R.A. 279, 68 N. E. 871; Orr v. Gilman, supra.

Mr. Justice Day delivered the opinion of the court:

The tax in controversy was imposed under an amendment of the general transfer-tax law of the state of New York, chapter 284, Laws of 1897, which provides as follows:

"Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment, when made, shall be deemed a transfer, taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled *to [473] the possession or enjoyment of the property to which such power related had succeeded thereto *by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

The validity of this tax was attacked in the courts of New York upon objections pertaining to both the Federal and state Constitutions. The latter are not open here, and we shall consider the case only so far as it relates to the objections made to the validity of this statute by reason of alleged violations of the Federal Constitution. These are: First, that by the imposition of the tax the property of the beneficiaries is taken without due process of law, in violation of the 14th Amendment; and, second, that such taxation violates the obligation of a contract within the protection of § 10 of article 1 of the Federal Constitution.

The objection that the property is taken without due process of law is based upon the argument that the estate in remainder was derived from the deeds of William B. Astor, and not under the power of appointment received from those deeds by Mrs. Laura A. Delano. In support of this contention, common-law authorities are cited to the proposition that an estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power; that the beneficiary takes, not under the execution of the power by the donee, but by authority and under grant from the grantor, in like manner as if the power and the instrument which created it had been incorporated into one instrument. 4 Kent, Com. 327; 2 Washb. Real Prop. 320. The argument is that the estate which arose by the exercise of the power came from William B. Astor, and not from Laura A. Delano, and was vested long before the passage of the amendment of 1897, under the authority of which the tax was imposed, and to tax the exercise of the power therefore takes property without due process of law.

However technically correct it may be to say that the estate came from the donor, and not from the donee, of the power, it is *self-evident that it was only upon the exer- [474] cise of the power that the estate in the plaintiffs in error became complete. Without the exercise of the power of appointment the estates in remainder would have gone to all in the class named in the deeds of William B. Astor. By the exercise of this power some were deprived of their estates and the same were vested in others. It may be that the donee had no interest in the estate as owner, but it took her act of appoint-

ment to finally transfer the estate to some of the class and take it from others.

Notwithstanding the common-law rule that estates created by the execution of a power take effect as if created by the original deed, for some purposes the execution of the power is considered the source of title. It is so within the purpose of the registration acts. A person deriving title under an appointment is considered as claiming under the donee within the meaning of a covenant for quiet enjoyment. 2 Sugden, Powers, 3d ed. 19.

"So, on an issue to try whether the plaintiff was entitled by two writings, or any other, purporting a will of J. S., and the evidence was of a feoffment to the use of such person as J. S. should appoint by his will, in which case it was contended that the devisees were in by the feoffment, and not by the will, the court held that this was only *fictione juris*, for that they were not in *without* the will, and therefore that was the principal part of the title, and such proof was good enough and pursuant to the issue, and a verdict was accordingly given for the plaintiff." Sugden on Powers, vol. 2, p. 19, citing Bartlet v. Ramsden, 1 Keble, 570.

So, in the present case, the plaintiffs in error are not in *without* the exercise of the power by the will of Mrs. Delano.

By statute in England, for the purposes of taxation, it has been provided that the donee of the power shall be regarded, in case of a general power, as the one from whom the estate came. In Atty. Gen. v. Upton, L. R. 1 Exch. 224, the court of exchequer had under consideration the succession duty act (16, 17 Vict. chap. 51), and it was held that the *appointee under a general power of appointment, taking effect on the death happening since the commencement of the act, takes succession from the donee of the power. The testator, Admiral Fanshawe, by will devised certain lands to the use of his wife, Caroline Fanshawe, for life, remainder to such use as she should by deed or will appoint, and, in default of appointment, for the use and benefit of testator's nephews, C. F. and J. F. Fanshawe, and their issue. She by deed appointed to the use that trustees should, after her death, receive an annuity during the lives of the wife of the testator's nephew, and of the children of the nephew by her, in trust for the separate use of the wife, Elizabeth Fanshawe. Section 4 of the act, which is there construed, provides that any person having a general power of appointment, under any disposition of property, taking effect upon the death of any person dying after the time appointed for the commencement of the act, shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed as a succession derived from the donor of the power. All the judges agreed that under § 4 of the act the nephew's wife took the annuity as a succession from the testator's widow, and not from the testator himself; that, therefore, a duty of 10 per cent was payable. Bramwell, B., was of opinion that the duty was also payable under § 2, which provides that "every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property . . . shall be deemed to have conferred, or to confer, on the person entitled by reason of any such disposition . . . a succession." In speaking of this section the Baron said:

"Now, will these annuitants take by reason of the will of Admiral Fanshawe? We must look, not at the *causa remota*, but at the *causa proxima*, and that is the disposition of Caroline Fanshawe. Again, the act says that the term 'predecessor' 'shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or *shall be derived.'[476] From whom, then, is the interest derived? As I said in Re Barker, 7 Hurlst. & N. 116, these are ordinary English words, and ought to be construed by lawyers as ordinary Englishmen would construe them. Now, not one man in a hundred would say that this interest was derived from Admiral Fanshawe nor from any other person than the donee of the power. I do not mean to deny or attempt to cast any doubt on the rule of law that an appointee takes his estate from the donor of the power, but I say that it is a rule not applicable to the construction of this statute, and it is not true, as is supposed, that there is any decision of the House of Lords to the contrary."

The learned Baron seems to have gone farther, as to § 2, than his brethren were willing to. Atty. Gen. v. Mitchell, L. R. 6 Q. B. Div. 548. His observations are, nevertheless, suggestive.

While the entire bench recognized the common-law rule that the estate is taken to come from the donor of the power, it enforced the statutory change as to a subsequent exercise of the power treating the estate as coming from the donee, by whose act it was appointed to the beneficiary.

The statute of New York in question acts equally upon all persons similarly situated. It affects an estate which only became complete by the exercise of a power subsequent to its enactment.

The exercise of the power bestowing property in the present case was made by will. And we need not consider the case, expressly reserved by the court of appeals in its opinion, as to the result if it had been exercised by deed.

That the will was effectual to transfer the estate was ruled by the court of appeals, and its decision on this question is binding here, as was held in Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213, which came here for a review of a decision of the court of appeals of New York, rendered in Re Dows, 167 N. Y. 227, 52 L.R. A. 433, 88 Am. St. Rep. 509, 60 N. E. 439,—a case which arose under the same statute of 1897. In that case the testator devised real estate in trust to pay the income to his son for life, and, upon his death, to vest absolutely *and at once in his children and the [477] issue of his deceased children, as his son should appoint by will. If, however, the son should die intestate, the estate was to vest absolutely and at once in his children then living, and the issue of the deceased children. The son exercised the power of appointment by his last will, probated in 1899. The court of appeals held that the property was subject to the taxation imposed by the act of 1897; that such tax was on the right of succession, and not on the property. It became important in that case to determine whether the property passed by virtue of the will of the donor, David Dows, Senior, and then became vested in the grandchildren, or only became vested in them when the power of appointment was exercised by the will of David Dows, Junior.

This court held that the answer to this question must, of course, be furnished by the court of appeals in that case. 183 U. S. 282, 46 L. ed. 199, 22 Sup. Ct. Rep. 213. In other words, the court of appeals of New York had the exclusive right to construe instruments of title in that state, and determine for itself the creation and vesting of estates through wills under the laws of the state. "The court of appeals held that it was the execution of the power of appointment which subjected grantees under it to the transfer tax. This conclusion is binding upon this court in so far as it involves a construction of the will and of the statute." 183 U. S. 288, 46 L. ed. 202, 22 Sup. Ct. Rep. 217. In the present case the New York court of appeals has spoken in no uncertain language upon the subject:

"As the tax is imposed upon the exercise of the power, it is unimportant how the power was created. The existence of the power is the important fact, for what may be done under it is not affected by its origin. If created by deed its efficiency is the same as if it had been created in the same form by will. No more and no less could be done by virtue of it in the one case than in the other. Its effective agency to produce the result intended is neither strengthened nor weakened by the nature of the instrument used by the donor of the power to create it. The power, however or whenever created, authorized the donee by her will to divest certain defeasible estates, *and to vest them [477] absolutely in one person. If this authority had been conferred by will instead of by deed, the right to act would have been precisely the same, and the power would have neither gained nor lost in force. . . .

"As we said through Judge Cullen in the Dows Case: 'Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it.' This accords with the statutory definition of a power as applied to real estate, for it includes an authority to create or revoke an estate therein. Real Property Law, § 111. [Laws 1896, chap. 547, p. 577.] Such was the effect of the exercise of the power under consideration, for it both revoked and created estates in the real property and the interests in the personal property. No tax is laid on the power, or on the property, or on the original disposition by deed, but simply upon the exercise of the power by will, as an effective transfer for the purposes of the act." 176 N. Y. 493, 494, 64 L.R.A. 282, 68 N. E. 872, 873.

As in Orr v. Gilman, supra, we must accept this decision of the New York court of appeals holding that it is the exercise of the power which is the essential thing to transfer the estates upon which the tax is imposed. That power was exercised under the will of Laura Delano, a right which was conferred upon her under the laws of the state of New York, and for the exercise of which the statute was competent to impose the tax in the exercise of the sovereign power of the legislature over the right to make a disposition of property by will. United States v. Perkins, 163 U. S. 625-628, 41 L. ed. 287, 288, 16 Sup. Ct. Rep. 1073; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 288, 42 L. ed. 1037, 1040, 18 Sup. Ct. Rep. 594.

We cannot say that property has been taken without due process of law, within the protection of the 14th Amendment, by the manner in which the court of appeals has construed and enforced this statute. Orr v. Gilman, su[illegible]

Nor do we perceive that the effect has been to violate any contract right of the parties. It [illegible] this is so, however, [illegible]

instead of disposing of the entire estate, 5 per cent of the property included in the power has been transferred and 5 per cent taken by the state; but as there was a valid exercise of the taxing power of the state, we think the imposition of such a tax violated no contract because it resulted in the reduction of the estate.

Certainly the remainder-men had no contract with the donor or with the state. For whether the remainder-men received aliquot parts of the entire estate or the same was devested in whole or in part for the benefit of others in the class, depended upon the exercise of the power by the donee. The state was not deprived of its sovereign right to exercise the taxing power upon the making of a will in the future by which the estate was given to the appointees.

We find no error in the judgment of the Surrogates' Court entered on the remittitur from the Court of Appeals, and the same is affirmed.

Mr. Justice Holmes, dissenting:

I have the misfortune to differ from the majority of my brethren in this case, and although the argument which seemed and still seems to me unanswerable was presented and has not prevailed, I think that the principles involved are of sufficient importance to justify a statement of the reasons of my dissent. A state succession tax stands on different grounds from a similar tax by the United States or a general state tax upon transfers. It is more unlimited in its possible extent, if not altogether unlimited, and therefore it is necessary that the boundaries of the power to levy such taxes should be accurately understood and defined.

I always have believed that a state inheritance tax was an exercise of the power of regulating the devolution of property by inheritance or will upon the death of the owner,— a power *which belongs to the states; and I have been fortified in my belief by the utterances of this court from the time of Chief Justice Taney to the present day. Mager v. Grima, 8 How. 490, 493, 12 L. ed. 1168, 1170; United States v. Perkins, 163 U. S. 625, 627, 628, 41 L. ed. 287, 288, 16 Sup. Ct. Rep. 1073; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 288, 42 L. ed. 1037, 1040, 18 Sup. Ct. Rep. 594; Plummer v. Coler, 178 U. S. 115, 124, 126, 137, 44 L. ed. 998, 1004, 1009, 20 Sup. Ct. Rep. 829; Billings v. Illinois, 188 U. S. 97, 104, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272; Campbell v. California, 190 U. S. 87, 94, 50 L. ed. 382, 387, 26 Sup. Ct. Rep. 182; Cahen v. Brewster, 203 U. S. 543, 550, ante, 310, 314, 27 Sup. Ct. Rep. 174. See also Re Sherman, 153 N. Y. 1, 4, 46 N. E. 1032. For that reason the power is more unlimited than the power of a state to tax transfers generally, or the power of the United States to levy an inheritance tax. The distinction between state and United States inheritance taxes was recognized in Knowlton v. Moore, 178 U. S. 41, 58, 44 L. ed. 969, 976, 20 Sup. Ct. Rep. 747, and whatever may be thought of the decision in Snyder v. Bettman, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803, I do not understand it to import a denial of the distinction reaffirmed by the dissenting members of the court. 190 U. S. 256, 47 L. ed. 1038, 23 Sup. Ct. Rep. 803.

If, then, a given state tax must be held to be a succession tax in order to maintain its validity, or if in fact it is held to be a succession tax by the state court of which it is the province to decide that matter, it follows that such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it still is wanting when the tax law goes into effect. If some element is wanting at that time, the succession depends, for taking effect, on the continuance of the permission to succeed or grant of the right on the part of the state; and, as the grant may be withdrawn, it may be qualified by a tax. But if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the continuing of the state's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the 14th Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York. Re Pell, 171 N. Y. 48, 55, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; Re Seaman, 147 N. Y. 69, 41 N. E. 401.

*It is not denied that the tax under con- [481]
sideration is a succession tax. The court of appeals treated it as such in the present case. It said: "If the power had been exercised by deed, a different question would have arisen; but it was exercised by will, and, owing to the full and complete control by the legislature of the making, the form, and the substance, of wills, it can impose a charge or tax for doing anything by will." Re Delano, 176 N. Y. 486, 494, 64 L.R.A. 279, 282, 68 N. E. 871, 873, Reversing 82 App. Div. 147, 81 N. Y. Supp. 762. That it was such a tax and valid for that reason was decided in Re Dows, 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 509, 60 N. E. 439, Affirmed by this court. Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213, adopting the New York view, 183 U. S. 289,

46 L. ed. 202, 22 Sup. Ct. Rep. 213. And these decisions and some of the other decisions of this court cited above were relied upon by the court of appeals. 176 N. Y. 492, 64 L.R.A. 279, 68 N. E. 871. See, further, Re Vanderbilt, 50 App. Div. 246, 63 N. Y. Supp. 1079, Affirmed in 163 N. Y. 597, 57 N. E. 1127; Re Lansing, 182 N. Y. 238, 248, 74 N. Y. 882. Probably the tax would be invalid for other local reasons besides those mentioned in Re Dows, but for the construction which it has received. Re Pell, 171 N. Y. 48, 60, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789.

This being, then, a succession tax, I should have thought it plain that there was no succession for it to operate upon. More precisely, even if otherwise any element of succession could have been found,—a matter that I think would need explanation,—the execution of the power did not depend in any way upon the continued co-operation of the laws of New York by way of permission or grant. I am not concerned to criticize the statement of the court of appeals that in substance it is the execution of the power that gives to the grantee the property passing under it. It is enough if it is remembered that the instrument executing the power derives none of its efficiency in that respect from the present laws of New York. It is true that the instrument happens to be a will, and that it could not have operated as a will except by the grant of the privilege from the state at the time when Mrs. Delano died. But what would execute the power depended, in the first place, upon the deed creating it, and if that deed did not [482] *require a will, but only an instrument otherwise sufficiently characterized, it did not matter whether the instrument was also good as a will or not. Ela v. Edwards, 16 Gray, 91, 100.

What the deeds which I am considering required was "an instrument in its nature testamentary, to be acknowledged by her (Mrs. Delano) as a deed in the presence of two witnesses, or published by her as a will." The language was chosen carefully, I presume, in view of the incapacities of married women at that time. By the terms used a will was unnecessary. It was enough if Mrs. Delano sealed and acknowledged an instrument in its nature testamentary, in the presence of two witnesses, whether it was good as a will or not. Strong v. Wilkin, 1 Barb. Ch. 9, 13; Heath v. Withington, 6 Cush. 497. This she did. In Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213, the power was created by will, and, what is more obviously material, it required a will for its execution, and so might be held to invoke and submit itself to the law in force when the execution should take place. Therefore that case has no bearing upon this. The ground upon which this tax is imposed is, I repeat, the right of the state to regulate, or, if it sees fit, to destroy, inheritances. If it might have not appropriated the whole it cannot appropriate any part by the law before us. And I also repeat that it has no bearing upon the matter that, by a different law, the state might have derived an equal revenue from these donees in the form of a tax. I do not understand it to be suggested that the state, without compensation, could have appropriated the remainder after Mrs. Delano's life, which Mr. Astor parted with in 1844 and shortly following years. If it could not have done so I am unable to see on what ground this tax is not void. The English decisions throw no light upon the question before us because they are concerned only with the construction of statutes which, however construed, are law.

Mr. Justice Moody concurs in this dissent.

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*FREDERICK SEYMOUR BARRINGTON, Plff. in Err.,
v.
STATE OF MISSOURI.

(See S. C. Reporter's ed. 482–484.)

Error to state court—Federal question.

1. The refusal of a state court to grant, for local prejudice, the change of venue asked for in a criminal case, cannot involve a Federal question of sufficient merit to sustain a writ of error from the Federal Supreme Court, where the highest state court, after reviewing the testimony, decided that such refusal was not an abuse of the discretion vested in the trial court.

Error to state court—Federal question—when raised in time.

2. The suggestion of a Federal question, first made in a petition for rehearing filed in the highest state court, is too late to sustain a writ of error from the Supreme Court of the United States.

Error to state court—Federal question.

3. No Federal question which will sustain a writ of error from the Supreme Court of the United States to a state court is involved in the contention that the defendant in a criminal case was compelled to be a

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. [illegible] and Kipley v. Illinois, 42 L. ed. U. [illegible].

On what ad[illegible] of state courts [illegible]

is against himself, contrary to the mendment to the Federal Constitu- ince this Amendment does not operate estriction of the powers of the state, as intended to operate solely upon the al government.

to state court—Federal question.

The admission of evidence in a crim- ase which the highest state court de- did not violate the rights of the ac- under the state Constitution and laws involve a question of due process of sufficient merit to sustain a writ of from the Supreme Court of the United

to state court—Federal question.

Demurring to an indictment in a court on the ground that by reason inconsistency, multiplicity, and re- ncy of the different counts in such in- ent the defendant is being proceeded it in violation of the state and Federal nty of due process of law, and in vio- of his constitutional right to be spe- ly informed of the nature and cause e accusation against him, does not a Federal question of sufficient merit tain a writ of error from the Supreme of the United States.

to state court—citizenship of parties.

The citizenship of the parties is im- ial as affecting the jurisdiction of the al Supreme Court, under U. S. Rev. § 709, U. S. Comp. Stat. 1901, p. 575, rit of error to a state court.

to state court—Federal question.

A decision of the highest state court he defendant in a criminal case has ried in accordance with the local pro-, although the names of all the wit- were not indorsed on the indictment, be reviewed in the Supreme Court of nited States on the theory that a meri- s Federal question was involved in aim that the accused was a subject of Britain, and, by virtue of treaties, the nations, the laws and Constitution of nited States, and the laws of the was entitled to know who were the ses against him.

[No. 493.]

tted April 8, 1907. Decided April 22, 1907.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a conviction of murder in the Circuit Court of St. Louis County, in that state. Dismissed for want of jurisdiction.

See same case below, 198 Mo. 23, 95 S. W. 235.

The facts are stated in the opinion.

Mr. William G. Johnson submitted the cause for plaintiff in error:

In order to give this court jurisdiction to review, by writ of error, the judgment of the highest court of a state, it is not necessary that some specific provision of the Federal Constitution shall have been set up. By the decisions of this court there are some fundamental and natural rights which are protected by the Federal Constitution, though not in terms mentioned in that instrument.

Caldwell v. Texas, 137 U. S. 692, 697, 698, 34 L. ed. 816, 818, 11 Sup. Ct. Rep. 224; Holden v. Hardy, 169 U. S. 366, 389, 390, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Brown v. New Jersey, 175 U. S. 172, 175, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77.

Among the "fundamental rights" and the "immutable principles of justice which inhere in the very idea of free government" none can be more important than the right of a defendant on trial for his life or liberty to have a fair and impartial trial and the benefit of all the instrumentalities of the law designed to secure that right.

Carter v. Texas, 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 Sup. Ct. Rep. 687; Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387.

The right of a defendant in a criminal prosecution to be exempt from the obligation to give testimony against himself, while specifically protected by the Constitution in the United States courts, is still a matter of fundamental right, not to be denied in any court.

Bram v. United States, 168 U. S. 532, 544, 545, 42 L. ed. 568, 574, 18 Sup. Ct. Rep. 183.

The Federal question is not required to be raised in any special or formal manner.

Murray v. Charleston, 96 U. S. 432, 441, 24 L. ed. 760, 761.

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brought up for review in the Su- Court of the United States by writ or to those courts—see note to Apex . Co. v. Garbade, 62 L.R.A. 513.

how and when questions must be and decided in a state court in order ke a case for a writ of error from ipreme Court of the United States— te to Mutual L. Ins. Co. v. McGrew, L.A. 33.

what the record must show respect- e presentation and decision of a Fed- iestion in order to confer jurisdiction Supreme Court of the United States of a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

As to when Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts —see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 413.

On writs of error to state courts in cases involving questions of due process of law —see note to Burt v. Smith, ante, 121.

On the necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. ante, 231.

It is the effect of the judgment upon such rights of the party as are protected by the Federal Constitution which is to be considered. If the defendant objects to the action of the court as against his constitutional rights, and the court decides against him, then a Federal question is presented and the jurisdiction of this court attaches. If the action of the state court be erroneous, then it constitutes a violation by the state of the 14th Amendment.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234, 235, 41 L. ed. 979, 983, 984, 17 Sup. Ct. Rep. 581; Carter v. Texas, supra.

Mr. Herbert S. Hadley submitted the cause for defendant in error. Mr. John Kennish was on the brief:

The title, right, privilege, or immunity claimed by the plaintiff in error under the Constitution or any treaty or statute of, or commission held, or authority exercised under, the United States, in order to present a Federal question to sustain the jurisdiction of this court, must have been specially set up or claimed by him in the trial court. It is not sufficient that such claim was made for the first time in the appellate court.

Spies v. Illinois (Ex parte Spies) 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; Jacobi v. Alabama, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730; Dreyer v. Illinois, 187 U. S. 71, 47 L. ed. 79, 23 Sup. Ct. Rep. 28; Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; Baldwin v. Kansas, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193.

The question of citizenship is immaterial as affecting the jurisdiction of this court

French v. Hopkins, 124 U. S. 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589; Hughes, Fed. Proc. p. 485.

Plaintiff in error must be content with the same measure of justice which would have been meted to him under the same procedure had he been a citizen of the state.

McDonald v. State, 80 Wis. 407, 50 N. W. 185; State v. Neibekier, 184 Mo. 211, 83 S. W. 523; State v. Rudolph, 187 Mo. 67, 85 S. W. 584.

The question of international law does not enter into the question of the jurisdiction of this court, for it is general law that aliens are subject to the law of the territory where the crime is committed.

Wharton, Confl. L. § 819; 11 Cyc. Law & Proc. p. 106; 2 Am. & Eng. Enc. Law, pp. 65, 66; State v. Neibekier and State v. Rudolph, supra.

While the prosecution of an alien for an alleged crime may become the subject of diplomatic negotiations between the governments interested, courts do not take cognizance of the governmental allegiance of the accused.

People v. McLeod, 1 Hill, 377; 37 Am. Dec. 328.

The action of the court in overruling the demurrer and holding the indictment sufficient does not present a Federal question.

Howard v. Fleming, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49.

The first ten Amendments to the Federal Constitution contain no restrictions on the powers of the state, but were intended to operate solely on the Federal government.

Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Fox v. Ohio, 5 How. 410, 12 L. ed. 213; Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. ed. 223; United States v. Cruikshank, 92 U. S. 542, 552, 23 L. ed. 588, 591; Spies v. Illinois (Ex parte Spies) 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; Davis v. Texas, 139 U. S. 651, 35 L. ed. 300, 11 Sup. Ct. Rep. 675.

While the Federal and state Constitutions, in cases within their respective jurisdictions, guarantee to the accused the right to be confronted with the witnesses against him, the accused has no constitutional right to be notified in advance who those witnesses shall be.

3 Wigmore, Ev. § 1850; Hill v. People, 26 Mich. 497; 1 Bishop, New Crim. Proc. § 869a; Ballard v. State, 19 Neb. 609, 28 N. W. 271.

The decision of the supreme court of Missouri that he had been tried in accordance with the procedure provided for by the statutes of that state is final.

Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443.

The defendant in a criminal case has no constitutional right to a change of venue.

State v. Thompson, 141 Mo. 408, 42 S. W. 949; State ex rel. Vickery v. Woffard, 118 Mo. 375, 24 S. W. 764.

Questions relating to matters of pleading and practice under the laws of a state involve no Federal questions.

Taylor, Jurisdiction, § 219; Re Robertson, 156 U. S. 185, 39 L. ed. 390, 15 Sup. Ct. Rep 324; Brooks v Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 818, 11 Sup. Ct Rep. 224; Davis v. Texas, 139 U. S. 651, 35 L. ed. 300, 11 Sup. Ct. Rep. 675.

In the rulings of the trial court on the demurrer, motion to quash the indictment, plea in abatement, and application for a change of venue, there was clearly no denial of fundamental rights, no denial of due process of law or the equal protection of the laws to the pl[illegible] a error presenting a [illegible]

ederal question under the 14th Amendment the Federal Constitution.

Guthrie, 14th Amendment, p. 70; Brannon, 14th Amendment, p. 282; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 31, 25 L. ed. 993.

The supreme court of the state of Missouri has held that the trial court, in admitting testimony, did not commit error, and did not act contrary to the constitutional guaranty secured by the provisions of the Missouri Constitution. Its rulings upon that proposition are not subject to review by this court.

Jackson ex dem. Hart v. Lamphire, 3 Pet. 280, 7 L. ed. 679; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 425, 38 L. ed. 1036, 14 Sup. Ct. Rep. 1114; Murray v. Louisiana, 163 U. S. 101, 41 L. ed. 87, 16 Sup. Ct. Rep. 990; Missouri ex rel. Quincy, O. & P. R. Co. v. Harris, 144 U. S. 210, 36 L. ed. 407, 12 Sup. Ct. Rep. 838.

If the admission of this testimony did not violate the rights of the plaintiff in error under the Constitution and the laws of the state of Missouri, then he was awarded due process of law.

Howard v. Fleming, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49; Dreyer v. Illinois, 187 U. S. 71, 77, 78, 47 L. ed. 79, 82, 83, 23 Sup. Ct. Rep. 28.

There must be some color of right which is invoked under the provisions of the Federal Constitution before a Federal question can be reasonably said to exist or to have been raised.

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 591; Wabash R. Co. v. Flannigan, 192 U. S. 29, 48 L. ed. 328, 24 Sup. Ct. Rep. 224; Hughes, Fed. Proc. p. 486; Allen v. Georgia, 166 U. S. 140, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; Bonahan v. Nebraska, 125 U. S. 692, 31 L. ed. 854, 8 Sup. Ct. Rep. 1390; United States v. M'Daniel, 6 Pet. 634, 8 L. ed. 527.

Mr. Chief Justice Fuller delivered the opinion of the court:

Plaintiff in error was found guilty of murder in the first degree in the circuit court of St. Louis county, Missouri, and after *motions for new trial and in arrest of judgment were made and overruled, judgment was rendered on the verdict and sentence passed accordingly. The case was carried to the supreme court of the state and the judgment was affirmed by division No. of that court, having appellate jurisdiction of criminal cases. No Federal question was referred to in the opinion of the court. A motion for rehearing was filed, wherein Federal questions were sought to be raised. The court denied the motion without opinion.

Plaintiff in error then moved for the transfer of the cause to the court in banc, setting forth certain Federal questions, and the cause was transferred. The court in banc adopted the opinion of division No. 2 as its opinion, and the judgment was again affirmed. 198 Mo. 23, 95 S. W. 235. A motion for rehearing, assuming to raise Federal questions, was filed, and denied without opinion. This writ of error was thereupon brought and comes before us on motions to dismiss or affirm.

No assignment of errors was returned with the writ, as required by § 997 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 712), nor is there in the brief of counsel for plaintiff in error on these motions any specification of errors under Rule 21, but the brief does allege that certain Federal questions were duly raised and so disposed of as to sustain the jurisdiction of this court.

But if these questions are wholly without merit, or are no longer open by reason of our previous decisions, it has long been settled that the writ of error should be dismissed.

1. Before the trial of the cause was commenced, plaintiff in error applied for a change of venue on the ground of local prejudice.

The application was heard at length, and forty-one witnesses testified in its support and thirty-seven witnesses in opposition thereto; and the trial court decided that prejudice justifying a change of venue had not been made out, and denied the application. It is now contended that the refusal to grant the change of venue deprived plaintiff in error of a fair and impartial trial, to which, under the Federal Constitution, he *was entitled. The state supreme court held [485] it to be a well-settled rule of law in Missouri that the granting of a change of venue in a criminal case rested largely in the discretion of the trial court, and that "where the trial court has heard the evidence in favor of and against the application, and a conclusion reached adversely to granting the change, such ruling will not be disturbed by this court, and should not be unless there are circumstances of such a nature as indicates an abuse of the discretion lodged in such court." And the supreme court, after a full review of all the testimony, decided that the trial court had acted properly in overruling the application for a change of venue. In our judgment no Federal question was involved. Were this otherwise it would follow that we could decide in any case that the trial court had abused its discretion under the laws of the

state of Missouri, although the supreme court of that state had held to the contrary.

2. It is also contended that plaintiff in error "set up and claimed that, under the Federal Constitution, as well as under the Constitution of Missouri, he could not be compelled to give testimony against himself, and that this exemption and protection were denied to him by the court in permitting to be given in evidence against him alleged extrajudicial admissions extorted from him while under arrest by the police officers of the state." Certain statements made by plaintiff in error, defendant below, were admitted in evidence on the trial, but it does not appear that counsel objected to the introduction of this testimony on the ground that any rights, privileges, or immunities of defendant under the Constitution of the United States were thereby violated. Counsel for the state offered in evidence certain articles taken from defendant's trunk, and this was objected to on the ground that they were taken in violation of the state Constitution and without defendant's consent. The objection was not passed upon, and the articles were withdrawn. The trunk and its contents were again offered in evidence and objected to, but the objection was based entirely upon the ground of irrelevancy and immaterial-[486]ity, *and the fact that a proper foundation had not been laid in the identification of the trunk.

When the state offered in evidence the statements made by defendant following his arrest, the trial court excluded the jury and heard the testimony of the persons present at the time for the purpose of determining the competency thereof. After the examination of a number of witnesses, who detailed fully the circumstances under which the statements were made, counsel objected "because there is no foundation laid for it and because it was [not] voluntary." This objection was overruled and the evidence admitted.

The state supreme court held that the trial court, in admitting the testimony, did not commit error. This, notwithstanding the Constitution of Missouri provided "that no person shall be compelled to testify against himself in a criminal case." Its ruling upon that proposition is not subject to review in this court.

After the decision of the supreme court in banc, affirming the judgment, plaintiff in error filed a petition for rehearing which was denied without opinion. The third ground of that motion was as follows: "Because counsel for appellant, through neglect and inadvertence, failed to call the attention of the court to the proposition that the cross-examination of appellant, complained of as 'improper,' and the admission as evidence of statements or 'confessions' made by appellant while in the 'sweat box' of the St. Louis police department, was in direct violation of the Constitution of the United States, article 5, Amendments to the Constitution of the United States, in that it compelled the appellant to become a witness against himself." The suggestion came too late, and, moreover, article 5 of the Amendments, alone relied on, does not operate as a "restriction of the powers of the state, but was intended to operate solely upon the Federal government." Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 118, 20 Sup. C. Rep. 77. And if, as decided, the admission of this testimony did not violate the rights of the plaintiff in error under the Constitution and laws of the state of Missouri, the record *affords no basis for hold-[487] ing that he was not awarded due process of law. Howard v. Fleming, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49.

3. Plaintiff in error filed a demurrer to the indictment, one of the grounds of which was: "Because of the inconsistency, multiplicity, and repugnancy of said counts, the defendant is being proceeded against in violation of the state and Federal guaranty of due process of law, and in violation of his constitutional right to be specifically informed of the nature and cause of the accusation against him." The demurrer was overruled. And also a motion to quash assigning similar grounds, which was likewise overruled.

These rulings in respect of the sufficiency of the indictment present no Federal question. Howard v. Fleming, 191 U. S. 126, 135, 48 L. ed. 121, 124, 24 Sup. Ct. Rep. 49, and cases cited.

4. After the demurrer and motion to quash had been disposed of, a plea in abatement was filed, averring that the prosecuting attorney intentionally refrained from indorsing the names of certain witnesses on the indictment; that defendant was a native of Great Britain and a subject of the King, and that, by virtue of treaties, the law of nations, the laws and Constitution of the United States, and the laws of Missouri, defendant was entitled to know who were the witnesses against him.

A similar point, with like allegations, was made in the motion to quash. The court heard the evidence on the plea in abatement, and found the issues against defendant, except that it found that he was a native citizen and subject of Great Britain.

The question of [illegible]ship is immaterial as affecting the [illegible]ction of this court

under § 709, Rev. Stat. (U. S. Comp. Stat. 1901, p. 575). French v. Hopkins, 124 U. S. 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589. Nor are we aware, as Chief Justice Waite said in Spies v. Illinois (Ex parte Spies) 123 U. S. 131, 182, 31 L. ed. 80, 91, 8 Sup. Ct. Rep. 21, of any treaty giving to subjects of Great Britain any different measure of justice than secured to citizens of this country. And the general rule of law is that aliens are subject to the law of the territory where the crime is committed. Wildenhus's Case (Mali v. Keeper of Common Jail) 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 383; Carlisle v. United States, 16 Wall. 147, 21 L. ed. 426; People v. McLeod, 1 Hill, 377, 37 Am. Dec. 328; Wharton, Confl. L. § 819.

*As to the allegation that the prosecuting attorney intentionally refrained from indorsing the names of certain witnesses on the indictment, in the motion to quash as well as in the plea in abatement, the state courts held that the charge was not sustained by the evidence.

The right of the accused to the indorsement of names of witnesses does not rest on the common law, but is statutory, and provided for in Missouri by § 2517 of the Revised Statutes of 1899, whereby the right of the state to use other witnesses not so indorsed is recognized. The state supreme court discussed the matter at length, held there was no error, and added: "Aside from all this it is manifest that the defendant has no right to complain of any prejudicial error upon the action of the court upon this motion. This motion was filed October 6, 1903, and the record discloses upon the showing made upon such motion and plea in abatement that appellant had notice of these additional witnesses which were introduced by the state at the trial. The trial did not occur until the 23d of February, 1904, some three or four months subsequent to the time of which the record discloses that he had notice of these witnesses." [198 Mo. 70, 95 S. W. 250.]

The decision of the supreme court that defendant had been tried in accordance with the procedure provided by the statutes of Missouri is not open to revision here in the circumstances.

We have not been astute to apply to these motions the rigor of our rules, and have explored the record with care; but have not found therein any denial of fundamental rights, of due process of law, or of the equal protection of the laws. The Federal questions asserted in the brief or suggested by the record are wholly inadequate to justify our interference.

Writ of error dismissed.

*AMANDA S. WHITFIELD and the State of Missouri at the Relation of HERBERT S. HADLEY, Attorney General, Petitioners, [489]

v.

ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, Connecticut.

(See S. C. Reporter's ed. 489–501.)

Constitutional law—police power—insurance—suicide as defense.

1. The exclusion of suicide as a defense in suits on policies of life insurance which is effected by Mo. Rev. Stat. 1879, § 5982, unless such suicide was contemplated at the time application was made for the policy, is a legitimate exertion of power by the state.

Insurance—suicide as defense.

2. A policy of accident insurance issued after the passage of Mo. Rev. Stat. 1879, § 5982, providing that in all suits on policies of insurance on life it shall be no defense that the insured committed suicide unless it be shown that he contemplated suicide when applying for the policy, cannot lawfully restrict the liability of the insurance company to one tenth of the principal sum insured, in the event of suicide not contemplated by the insured at the time application was made for the policy.

[No. 258.]

Argued April 12, 1907. Decided April 22, 1907.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western District of Missouri, limiting the recovery on a policy of accident insurance because of the suicide of the insured to one tenth of the principal sum named in the policy. Reversed and remanded for further proceedings.

See same case below, 75 C. C. A. 358, 144 Fed. 356.

The facts are stated in the opinion.

Mr. Frank Hagerman argued the cause, and, with Mr. Herbert S. Hadley, filed a brief for petitioners:

There can, in case of suicide, be no limitation in the amount of the recovery.

Keller v. Travelers' Ins. Co. 58 Mo. App. 561; Logan v. Fidelity & C. Co. 146 Mo. 114, 47 S. W. 948; Berry v. Knights Templars' & M. Life Indemnity Co. 46 Fed. 440, 1 C. C.

NOTE.—On suicide as defense in action on policy of insurance—see notes to Billings v. Accident Ins. Co. 17 L.R.A. 89; Clement v. New York L. Ins. Co. 42 L.R.A. 247; Ætna L. Ins. Co. v. Florida, 16 C. C. A. 623; Fidelity & C. Co. v. Egbert, 28 C. C. A. 284; and Home Ben. Asso. v. Sargent, 35 L. ed. 1161.

A. 561, 4 U. S. App. 353, 50 Fed. 511; Jarman v. Knights Templars' & M. Life Indemnity Co. 95 Fed. 70, 44 C. C. A. 93, 104 Fed. 638, 187 U. S. 199, 47 L. ed. 140, 23 Sup. Ct. Rep. 108.

Any other construction is an evasion of the statute, which, under familiar rules, should be avoided.

26 Am. & Eng. Enc. Law, 2d ed. p. 657; Magdalen College Case, 11 Coke, 76; Endlich, Interpretation of Statutes, § 138; Philpott v. St. George's Hospital, 6 H. L. Cas. 349.

Both the trial and appellate courts denied that the statute established any substantial public policy. In this they erred.

Jarman v. Knights Templars' & M. Life Indemnity Co. 95 Fed. 73; Ætna L. Ins. Co. v. Florida, 30 L.R.A. 87, 16 C. C. A. 618, 32 U. S. App. 753, 69 Fed. 936; Berry v. Knights Templars' & M. Life Indemnity Co. 46 Fed. 441; Christian v. Connecticut Mut. L. Ins. Co. 143 Mo. 466, 45 S. W. 268; Logan v. Fidelity & C. Co. 146 Mo. 123, 47 S. W. 948.

Both the trial and appellate courts erroneously held that the statute, in providing that suicide should not be a defense, only meant that it should not be a complete defense; because, as the trial judge said, a defense was "a general assertion that plaintiff had no cause of action."

The policy should be construed as if there were written therein that "defendant should not plead thereto that the insured committed suicide."

Jarman v. Knights Templars' & M. Life Indemnity Co. 95 Fed. 73.

The legislature deemed best to exclude the defense of suicide altogether on such actions.

Knights Templars' & M. Life Indemnity Co. v. Jarman, 44 C. C. A. 93, 104 Fed. 643.

The words of the suicide statute must be taken in their ordinary, and not in their technical, sense.

Christian v. Connecticut Mut. L. Ins. Co. 143 Mo. 469, 45 S. W. 268.

Anything is a defense which partly diminishes a claim.

9 Am. & Eng. Enc. Law, 2d ed. p. 176; United States v. Ordway, 30 Fed. 32; Baier v. Humpall, 16 Neb. 128, 20 N. W. 108; Willis v. Taggard, 6 How. Pr. 433; Houghton v. Townsend, 8 How. Pr. 443; Kain v. Dickel, 46 How. Pr. 208; Foland v. Johnson, 16 Abb. Pr. 239; Bush v. Prosser, 11 N. Y. 347; McKyring v. Bull, 16 N. Y. 297, 69 Am. Dec. 696.

If this court were not bound by the decisions already rendered in the state courts, it should at least lean toward agreeing therewith.

Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.

Mr. James C. Jones argued the cause, and, with Messrs. Jones, Jones, & Hocker, Boyle, Guthrie, & Smith, and J. J. Darlington, filed a brief for respondent:

In the absence of any controlling statute, public policy condemns a contract to insure against death by intentional self-killing, and precludes a recovery on a life insurance policy where death is so caused, even though the policy contains no exception covering suicide.

Ritter v. Mutual L. Ins. Co. 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 329.

Hence the statute is in derogation of common law; and, being so, must be strictly construed.

Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 565, 25 L. ed. 894; Sutherland, Construction of Statutes, § 400; Endlich, Interpretation of Statutes, §§ 113, 127; United States v. Fisher, 2 Cranch, 390, 2 L. ed. 314; Sedgw. Stat. & Const. Law, p. 271; Little Rock & M. R. Co. v. St. Louis Southwestern R. Co. 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 777.

If the legislature of Missouri had intended to nullify the common-law right to contract, and intended absolutely to abrogate all powers of parties to contract with respect to the amount at risk in case of suicide, it would have used apt words for that purpose.

Union Cent. L. Ins. Co. v. Champlin, 54 C. C. A. 208, 116 Fed. 360; United States v. Union P. R. Co. 91 U. S. 72, 83, 23 L. ed. 224, 229.

The contract pleaded by defendant is not against the public policy of the state of Missouri.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 340, 41 L. ed. 1007, 1027, 17 Sup. Ct. Rep. 540; Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; Hadden v. The Collector (Hadden v. Barney) 5 Wall. 107, 111, 18 L. ed. 518, 519; Denn ex dem. Scott v. Reid, 10 Pet. 524–527, 9 L. ed. 519, 520; Ritter v. Mutual L. Ins. Co. 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 329.

The contract in question was not an evasion of the statute.

Endlich, Interpretation of Statutes, § 138; Neilson v. Lagow, 12 How. 98, 107, 13 L. ed. 909, 913; 26 Am. & Eng. Enc. Law, 2d ed. p. 675; United States v. Sheldon, 2 Wheat. 119, 121, 4 L. ed. 199, 200; United States v. Chase, 135 U. S. 255, 261, 34 L. ed. 117, 119, 10 Sup. Ct. Rep. 756.

Mr. Justice Harlan delivered the opinion of the court:

This is a suit upon an accident policy of insurance issued November 3d, 1900, by the Ætna Life Insurance Company of Hartford, Connecticut, upon the life of James Whitfield, a resident of Missouri. The policy specifies various kinds of injuries; also, the amount that will be paid by the company on account of such injuries respectively. It provides: "If death results solely from such injuries within ninety days, the said company will pay the principal sum of $5,000 to Amanda M. S. Whitfield, his wife, if living; and, in event of the death of said beneficiary before the death of the insured, to the executors, administrators, or assigns of the insured." The policy recites that it was issued and accepted by the assured, James Whitfield, subject to certain conditions, among which are these: ". . . 5. In event of death, loss of limb or sight, or disability due to injuries intentionally *inflicted upon the insured by any other person (except assaults committed for the sole purpose of burglary or robbery), whether such other person be sane or insane, or under the influence of intoxicants or not; or due to injuries received while fighting or in a riot; or due to injuries *intentionally inflicted upon the insured by himself; or due to suicide, sane or insane;* or due to the taking of poison, voluntarily or involuntarily, or the inhaling of any gas or vapor; or due to injuries received while under the influence of intoxicants or narcotics,—then, in all such cases referred to in this paragraph, the limit of this company's liability shall be *one tenth* the amount otherwise payable under this policy, anything to the contrary in this policy notwithstanding. . . . 8. The maximum liability of the company hereunder in any policy year shall not exceed the principal sum hereby insured, and in no event will claim for weekly indemnity be valid if claim is also made for any of the stated amounts herein provided for specified injuries, based upon the same accident and resulting injuries."

The insured died April 7th, 1902, the plaintiff, his widow and the beneficiary of the policy, alleging in her petition that he died "from bodily injuries, effected through external, violent, and accidental means, and by a pistol shot." The petition also states that the company, after receiving proofs as to the death of the insured, offered to pay $500 as the full amount due by § 5 of the policy, but refused to pay more. The plaintiff asked a judgment for $5,000 with interest from the date of the death of the insured.

The company, in its answer, denied liability for the whole principal sum, and averred, among other things, that, by the terms of the policy, "in the event death is caused by intentional injuries inflicted by the insured or any other person, whether such person be sane or insane, or while fighting or in a riot, or by suicide, sane or insane, or by poison, or by inhaling gas or vapor, or while under the influence of intoxicants or narcotics, then the amount to be paid shall be *one tenth* of the principal sum, or $500; . . . that said James Whitfield died from *bodily injuries caused by a [491] pistol shot intentionally fired by himself for the purpose thereby of taking his own life; that the cause of the death of said Whitfield was suicide." It was not averred in the answer that the insured contemplated suicide when applying for a policy.

The plaintiff demurred to the answer. The demurrer was overruled, and the plaintiff filed a reply, admitting that the insured "died from bodily injuries caused by a pistol shot fired by himself, and the cause of his death was suicide," but averring that the shot was fired and the suicide committed at a time when the insured was "incapable of realizing or knowing, and when he did not realize or know, what he was doing or the consequences of his act."

The case—a jury having been waived in writing—was tried by the court upon an agreed statement of facts, one of which was that the insured died "from bodily injuries caused by a pistol shot intentionally fired by himself, for the purpose of thereby taking his own life; that the cause of the death of said Whitfield was suicide."

The circuit court held that the plaintiff was not entitled to recover $5,000, but only $500, and judgment for the latter amount was entered. 125 Fed. 269. That judgment was affirmed by the circuit court of appeals, 75 C. C. A. 358, 144 Fed. 356, and the case is here upon writ of certiorari.

When the policy in suit was issued, and also when the insured committed suicide, it was provided by the statutes of Missouri that "in all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void." Mo. Rev. Stat. 1879, § 5982; Id. 1889, § 5855; Id. 1899, § 7896.

Assuming—as upon the record we must

do—that, within the true meaning of both [495] the statute and the policy, the insured *committed suicide, without having contemplated self-destruction at the time he made application for insurance, the question arises whether the contract of insurance limiting the recovery to *one tenth* of the principal sum specified was valid and enforceable.

1. That the statute is a legitimate exertion of power by the state cannot be successfully disputed. Indeed, the contrary is not asserted in this case, although it is suggested that the statute "seemingly encourages suicide, and offers a bounty therefor, payable, not out of the public funds of the state, but out of the funds of insurance companies." There is some foundation for this suggestion in a former decision of this court, in which it was held that public policy, even in the absence of a prohibitory statute, forbade a recovery upon a life policy, silent as to suicide, where the insured, when in sound mind, wilfully and deliberately took his own life. Ritter v. Mutual L. Ins. Co. 169 U. S. 139, 154, 42 L. ed. 693, 698, 18 Sup. Ct. Rep. 300. But the determination of the present case depends upon other considerations than those involved in the Ritter Case. An insurance company is not bound to make a contract which is attended by the results indicated by the statute in question. If it does business at all in the state, it must do so subject to such valid regulations as the state may choose to adopt. Even if the statute in question could be fairly regarded by the court as inconsistent with public policy or sound morality, it cannot, for that reason alone, be disregarded; for it is the province of the state, by its legislature, to adopt such a policy as it deems best, provided it does not, in so doing, come into conflict with the Constitution of the state or the Constitution of the United States. There is no such conflict here. The legislative will, within the limits stated, must be respected, if all that can be said is that, in the opinion of the court, the statute expressing that will is unwise from the standpoint of the public interests. See Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 243, ante, 168, 27 Sup. Ct. Rep. 126.

2. Did the courts below err in adjudging that the policy in suit was not forbidden [496] by the statute? Can an insurance *company and the insured lawfully stipulate that, in the event of suicide, not contemplated by the insured when applying for a policy, the company shall not be bound to pay the principal sum insured, but only a given part thereof? Will the statute, in a case of suicide, allow the company, when sued on its policy, to make a defense that will exempt it, simply *because of such suicide*, from liability for the principal sum?

We cannot agree with the learned courts below in their interpretation of the statute. The contract between the parties, evidenced by the policy, is, we think, an evasion of the statute, and tends to defeat the objects for which it was enacted. In clear, emphatic words the statute declares that in *all* suits on policies of insurance on life it shall be *no* defense that the insured committed suicide, unless it be shown that he contemplated suicide when applying for the policy. Whatever tends to diminish the plaintiff's cause of action or to defeat recovery in whole or in part amounts in law to a defense. When the company denied its liability for the whole of the principal sum, it certainly made a defense as to all of that sum except one tenth. If, notwithstanding the statute, an insurance company may, by contract, bind itself, in case of the suicide of the insured, to pay only one tenth of the principal sum, may it not lawfully contract for exemption as to the whole sum or only a nominal part thereof, and, if sued, defeat any action in which a recovery is sought for the entire amount insured? In this way the statute could be annulled or made useless for any practical purpose. Looking at the object of the statute, and giving effect to its words according to their ordinary, natural meaning, the legislative intent was to cut up by the roots any defense, as to the whole and every part of the sum insured, which was grounded upon the fact of suicide. The manifest purpose of the statute was to make all inquiry as to suicide wholly immaterial, except where the insured contemplated suicide at the time he applied for his policy. Any contract inconsistent with the statute must be held void.

*In Berry v. Knights Templars' & M. Life Indemnity Co. 46 Fed. 441, which was an action upon a policy of life insurance, it appears that the policy, among other things, provided that, in the case of the self-destruction of the insured, whether voluntary or involuntary, sane or insane, the policy should be void. Judgment was given for the plaintiff. The circuit court said: "It is contended that the provision in the policy, declaring that it shall be void if the insured commits suicide, is a waiver or nullification of the statute which declares such a stipulation in a policy 'shall be void.' The statute is mandatory and obligatory alike on the insurance company and the insured. Its [illegible] was to prohibit and annul such [illegible] in policies, and it cannot be waived or abrogated by any form of contract or by [illegible] vise whatever. The

legislative will, when expressed in the peremptory terms of this statute, is paramount and absolute, and cannot be varied or waived by the private conventions of the parties." Upon writ of error to the circuit court of appeals the judgment was affirmed, that court saying: "The company refused to pay the full amount named in the policy, claiming that, by the express provisions of the policy, self-destruction by the insured, whether sane or insane, rendered the contract for the payment of $5,000 void, and the company was only bound to pay the amount which had been paid in assessments by the insured. This action was brought in the circuit court for the western district of Missouri, to recover the full sum of $5,000. The case was tried to the court, a jury being waived. The parties stipulated that the company was liable for the full amount claimed by the plaintiffs, unless excused by the clause in the policy providing that the same should be void in case of suicide; . . . Judgment in favor of plaintiffs having been entered for the full amount of the policy, the case was brought to this court upon writ of error. . . . In our judgment, the court below ruled correctly in holding that the policy sued on was a contract made in Missouri, and, as such, that the provisions of § 5982 [the same as the statute now in question] are applicable thereto; and therefore the judgment is affirmed, at costs of plaintiff in error." 1 C. C. A. 561, 562, 569, 4 U. S. App. 353–355, 359, 50 Fed. 511, 512, 515.

In Knights Templars' & M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. Rep. 108, this court had occasion to consider the scope and effect of the statute here in question. That was an action upon a policy of life insurance for $5,000. A recovery for the whole sum was sought, but the company defended the action upon the ground that the provision in the statute that it should be no defense that the insured committed suicide related only to cases where he took his own life voluntarily, while sane, and in full possession of his mental faculties; that the provision in the policy that "'in case of the self-destruction of the holder of this policy, whether voluntary or involuntary, sane or *insane*, . . this policy shall become null and void,' applies, and exonerates the company from all liability beyond that provided in the policy, 'that, in the case of the suicide of the holder of this policy, then this company will pay to his widow and heirs or devisees such an amount of his policy as the member shall have paid to this company on the policy in assessments on the same, without interest.'" This view of the statute was not accepted in the circuit court, and there was judgment against the company for the whole sum insured. That judgment was affirmed here upon certiorari to the circuit court of appeals.

A leading case on the general subject is Logan v. Fidelity & C. Co. 146 Mo. 114, 119, 122, 123, 47 S. W. 948, which was a suit upon a policy which, according to the answer in the case, contained stipulations and covenants to the effect that, in the event of fatal injuries to the assured, wantonly inflicted upon himself, or inflicted upon himself while insane, the company's liability under its policy should be a sum equal to the premiums paid, and that sum the policy provided should be in full liquidation of all claims under it. The question before the court was whether or not the statute here in question applied to such a policy as the one there in suit. The trial court instructed the jury to return a verdict for the full amount *of the policy, with [499] interest. The court said: "The error into which respondent has fallen is in assuming that § 5855 [the statute now in question] was intended to affect a particular line, class, or department of insurance, as the same has been classified for legislation. The real object of the section, as the clear terms of its language express, is to affect *all policies of insurance on life* from whatever class, department, or line of insurance the policy may be issued, or by whatever name or designation the company may be known. It is policies of a given kind, and not companies of a class, that are to be affected by the provisions of § 5855. The section was enacted clearly to protect all policy holders *of insurance on life* against the defense that the insured committed suicide, all provisions in the policies to the contrary notwithstanding, unless, as provided in the section, it can be shown that the insured contemplated suicide at the time he made application for the policy. . . . When a policy covers loss of life from external, violent, and accidental means alone, why is it not insurance on life? Such a provision incorporated in a general life insurance policy admittedly would be insurance on life: then why less insurance on life because not coupled with provisions covering loss of life from usual or natural causes as well? If one holds a general life policy and an accident policy, and is killed by lightning or commits suicide, so that he may be said to have died by accidental means, both the companies should pay, and the stipulation against liability in the event of suicide in the policies should be no more a defense against the suit upon the accident policy, providing against death from acci-

dental cause, than against the policy which goes further and covers death from other causes as well. No such exception or exemption is found in the plain and comprehensive language of § 5855. . . . No rule of construction, short of one applied for distortion and destruction, can relieve accident insurance companies, issuing policies of insurance on life in this state, from the operation and influences of § 5855, which, in plain and unambiguous terms, declares that [500] in all suits upon policies of *insurance on life thereafter issued, it shall be no defense that the assured committed suicide, unless it shall have been shown, to the satisfaction of the court or judge trying the cause, that the insured contemplated suicide at the time of making his application for the policies; all stipulations in the policy to the contrary being void."

In Keller v. Travelers' Ins. Co. decided by the St. Louis court of appeals, 58 Mo. App. 557, 560, 561, we have a decision very much in point. That was an action on an insurance policy for $2,500. The company defended upon the ground that, by the terms of the policy, if the insured died of suicide, whether the act be voluntary or involuntary, it should be liable for the then full net value of said policy per the American Experience Table of Mortality and 4½ per cent interest, and no more, and that the same should be paid in manner and form as provided in the policy for the payment thereof in the event of death. The defense was that the insured committed suicide, and that the full net value of the policy, according to the contract, was only $814.50, and no more. The defense was overruled and judgment given for the principal sum. That judgment was affirmed in the court of appeals, the court saying: "The plain purpose of the statute, supra, was to prevent the insertion in policies of life insurance of exceptions to liability on the ground of the suicide of the insured, unless it could be proven 'that the insured contemplated suicide at the time he made the application for the policy.' This was, in effect, a legislative declaration of the public policy of this state. That it was intended to limit the power to contract for a lesser liability in cases of death by suicide, not within the limitation expressed in the statute, is also apparent from its terms, to wit: 'And any stipulation to the contrary shall be void.' . . . The fact that the premium warranted, and the policy guaranteed, full insurance in case of the death of the insured for any cause not specified in the clause set up in the defendant's answer, demonstrates that said clause was [501] designed to modify the liability of the *insurance company if the insured committed suicide. It necessarily follows, if this stipulation as to a decreased liability in the event of death by suicide is enforced, that it is *some* defense to the otherwise full liability agreed upon in the policy. As the statute in question declares that suicide, not committed as therein set forth, is 'no defense,' we cannot hold that the present stipulation can be enforced without violating the plain terms of a mandatory statute which the parties have no power to alter or abrogate."

Without further discussion, we adjudge that, under the statute in question, anything to the contrary in the policy issued by the insurance company notwithstanding, where liability upon a life policy is denied simply because of the suicide of the insured, the beneficiary of the policy can recover the whole of the principal sum, unless it be shown that the insured, at the time of his application for the policy, contemplated suicide. The judgment must, therefore, be reversed and the case remanded for further proceedings in conformity with this opinion and consistent with law.

It is so ordered.

THOMAS MILNER HARRISON, Pltf. in Err.,
v.
J. A. MAGOON, F. B. McStocker, Dorothea Emerson, L. C. Ables, T. E. Cowart, J. H. Kirkpatrick, A. E. Powter, J. Wolfinden, and George D. Moore.

(See S. C. Reporter's ed. 501–503.)

Error to Hawaiian supreme court—effect of amending jurisdictional statute.

A writ of error from the Federal Supreme Court to the supreme court of the territory of Hawaii which would not lie when final judgment was entered cannot be sustained as an exercise of the appellate jurisdiction conferred by the act of March 3, 1905 (33 Stat. at L. 1035, chap. 1495), § 3, amending the act of April 30, 1900 (31 Stat. at L. 141, 158, chap. 339), § 86, because a petition for rehearing, which the territorial supreme court entertained and acted upon, was not denied by that court until after the later statute went into effect.

[No. 107.]

Submitted March 18, 1907. Decided April 22, 1907.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a judgment which overruled exceptions from the Circuit Court of the First Circuit in that territory, which had ordered a nonsuit in

on on a contract. Dismissed for jurisdiction.

ame case below, 16 Haw. 332; on g, 16 Haw. 485.

acts are stated in the opinion.

s. Thomas Milner Harrison, *in propria sona*, D. L. Withington, and A. G. M. on submitted the cause for plaintiff . Mr. W. R. Castle was on the

s. J. Alfred Magoon, F. B. McStock- Mrs. Dorothea Emerson, *in propriis* submitted the cause for defendants

. B. McClanahan also submitted the or defendants in error. Mr. S. H. vas on his brief.

ustice Holmes delivered the opinion ourt:

is a writ of error to review a judg- r the defendants in a suit upon a . 16 Haw. 332, 485. At the trial it was ordered, subject to exceptions y the plaintiff. A motion for a new s made but was dismissed, and this l also was excepted to. The su- ourt held that the former exceptions esented too late, but that the latter n and raised the question whether gment of nonsuit was right as mat- aw. It discussed this question and d the judgment. This was on De- 14, 1904. In January, 1905, a peti- rehearing was filed; it was enter- y the court, and, after argument, ied on March 6, 1905. The defend- error now move to dismiss, the main being that the act of March 3, ap. 1465, § 3 (33 Stat. at L. 1035), g the act of April 30, 1900, chap. 6 (31 Stat. at L. 141, 158), granting error, etc., does not apply.†

answered for the plaintiff in error the petition for rehearing was en- d and acted upon by the supreme the territory, the time to be considered is the date when the petition was denied, and that that was after the statute went into effect. Voorhees v. John T. Noye Mfg. Co. 151 U. S. 135, 38 L. ed. 101, 14 Sup. Ct. Rep. 295; Northern P. R. Co. v. *Holmes, [503] 155 U. S. 137, 39 L. ed. 99, 15 Sup. Ct. Rep. 28. No doubt the decisions cited and others show that where a right to take the case up exists at the time of the original judgment, the time limited for the writ of error on appeal does not begin to run until the petition for rehearing is disposed of. But there are limits to even that rule. When an appeal in bankruptcy, required by general orders in bankruptcy, 36, ¶ 2, to be brought within thirty days after the judgment or decree, was not brought within that time, the fact that a petition for rehearing was filed within the time required by the court below, but after the thirty days, was held not to prolong the time for appeal. "The appellant could not reinvest himself with that right by filing a petition for rehearing." Conboy v. First Nat. Bank, 203 U. S. 141, 145, ante, 128, 130, 27 Sup. Ct. Rep. 50. If, at the time of final judgment, there is no right of appeal whatever, it is perhaps even plainer that a party cannot evoke a new one by filing a petition for rehearing, even if, by accident, it is kept along until an act giving an appeal is passed. Whether, in any event, a writ of error would lie in this case, it is unnecessary to decide.

Writ of error dismissed.

of April 30, 1900, chap. 339, § 86: The laws of the United States re- appeals, writs of error, removal of nd other matters and proceedings as the courts of the United States and ts of the several states, shall govern matters and proceedings as between rts of the United States and the f the territory of Hawaii. . . ." led by act of March 3, 1905, chap. 3, by adding at the end of the sec- *Provided*, That writs of error and may also be taken from the supreme the territory of Hawaii to the Court of the United States in all here the amount involved, exclusive exceeds the sum or value of five l dollars."

S.

HOME SAVINGS BANK, Plff. in Err.,
v.
CITY OF DES MOINES and the City Council of Said City as a Board of Review. (No. 82.)

PEOPLE'S SAVINGS BANK, Plff. in Err.,
v.
CITY OF DES MOINES and the City Council of Said City as a Board of Review. (No. 83.)

DES MOINES SAVINGS BANK, Plff. in Err.,
v.
CITY OF DES MOINES and the City Council of Said City as a Board of Review. (No. 92.)

(See S. C. Reporter's ed. 503-521.)

Taxes—immunity of national securities from state taxation.

The immunity of national securities from state taxation is violated by a tax

NOTE.—On the limitations on taxing power from mutual independence of Federal and state governments—see note to Grether v. Wright, 23 C. C. A. 515.

imposed under the authority of Iowa Code, § 1322, directing that shares of stock of state banks shall be assessed to such banks, and not to individual stockholders, the substantial effect of which is to require taxation upon the property, not including the franchises, of such banks, and to adopt the value of the shares as the measure of the taxable valuation of such property, without permitting any deduction from such valuation on account of bonds of the United States owned by the banks.

[Nos. 82, 83, 92.]

Argued November 2, 5, 1906. Ordered for reargument December 3, 1906. Reargued March 5, 1907. Decided April 22, 1907.

IN ERROR to the Supreme Court of the State of Iowa to review three judgments which affirmed judgments of the District Court of Polk County, in that state, affirming the action of the Board of Review of the City of Des Moines in refusing to deduct from the assessment of certain state banks upon their shares of stock the amount of government bonds owned by them. Reversed and remanded for further proceedings.

See same case below (Iowa) 101 N. W. 867.

The facts are stated in the opinion.

Mr. William G. Harbison argued the cause, and, with Mr. Horatio F. Dale, filed a brief for plaintiff in error in No. 82.

A state tax upon the capital or capital stock of a corporation is a tax upon United States bonds purchased with the whole or any part of such capital; and a tax assessed and levied by the state on U. S. bonds is in contravention of the Constitution of the United States giving the government the power to borrow money, etc., and in violation of the statutes of the United States exempting such bonds from state taxation.

Weston v. Charleston, 2 Pet. 449, 7 L. ed 481; Bank of Commonwealth v. Tax & A. Comrs. (New York ex rel. Bank of Commonwealth v. Tax & A. Comrs.) 2 Black, 635, note, 17 L. ed. 456; New York ex rel. Bank of Commerce v. Tax & A. Comrs. 2 Black, 620, 17 L. ed. 451; Bank Tax Case (New York ex rel. Bank of the Commonwealth v. Tax & A. Comrs.) 2 Wall. 200, 17 L. ed. 793; Bradley v. Illinois, 4 Wall. 459, 18 L. ed. 433; Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Home Ins. Co. v. New York, 134 U. S. 598, 33 L. ed. 1029, 10 Sup. Ct. Rep. 593; German American Sav. Bank v. Burlington, 54 Iowa, 609, 7 N. W. 105; Ottumwa Sav. Bank v. Ottumwa, 95 Iowa, 176, 63 N. W. 672; Campbell v. Centerville, 69 Iowa, 439, 29 N. W. 58.

The assessment was not only in legal effect, but in very fact, upon the capital of the bank.

Bank Tax Case, supra; Tennessee v. Whitworth, 117 U. S. 130, 29 L. ed. 831, 6 Sup. Ct. Rep. 645.

That some other or different assessment might have been made which would have been valid and constitutional does not validate the assessment actually made, if that assessment was unconstitutional and void, even though the state supreme court affirmed the assessment which was in fact made.

Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537.

Conceding, for the purpose of argument only, that the assessment was in form upon the "shares of stock," and not upon the "moneys and credits" or "personal property" (the capital) of the bank, the legal effect or result is the same.

New Orleans v. Houston, 119 U. S. 265, 30 L. ed. 411, 7 Sup. Ct. Rep. 198.

Shares of stock in national banks are "credits" within the meaning of the statutes of Iowa relating to taxation, and the shareholder is entitled to deduct his just debts from the value of such shares when the same are assessed for taxation.

Redhead v. Iowa Nat. Bank, 127 Iowa, 572, 103 N. W. 796; Primghar State Bank v. Rerick, 96 Iowa, 242, 64 N. W. 801; First Nat. Bank v. Albia, 86 Iowa, 34, 52 N. W. 334; Richards v. Rock Rapids, 31 Fed. 512.

The same is true of shares of stock other than those of national banks.

Equitable L. Ins. Co. v. Board of Equalization, 74 Iowa, 178, 37 N. W. 141; First Nat. Bank v. Albia, 86 Iowa, 28, 52 N. W. 334.

Congress has power to authorize or permit a state to assess a tax on the shares of stock in the hands of the shareholders of a corporation organized under an act of Congress, as an instrumentality or means of carrying on or conducting some of the operations of the government (such as a national bank, as established in the national banking act of 1864), without deducting from the value of such shares the value of the whole or any part of the capital of the corporation invested in U. S. bonds or other United States securities.

Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229.

The permission of Congress is necessary to authorize a state to tax Federal securities.

Owensboro Nat. Bank v. Owensboro, 173 U. S. 668, 43 L. ed. 852, 19 Sup. Ct. Rep. 537; Cleveland Trust Co. v. Lander, 184 U. S.

U. S. 114, 46 L. ed. 458, 22 Sup. Ct. Rep. 394.

The power of the state, for purpose of taxation, to make differentiation between the capital stock owned by the corporation and the shares of stock owned by the individual shareholders, is well settled; but there is nothing in any of the cases decided on this point by this court that in any manner limits or restricts the effect of the United States Constitution upon, or the power of Congress over, the securities of the United States, or which in any manner extends the powers of the state, legislative or judicial, over such Federal securities, except by permission of Congress.

Cleveland Trust Co. v. Lander, 184 U. S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 394; Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297; Tennessee v. Whitworth, 117 U. S. 135, 29 L. ed. 831, 6 Sup. Ct. Rep. 645.

No act of Congress is necessary to prohibit or prevent the state from taxing Federal securities or instrumentalities. This prohibition is constitutional.

Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; Lionberger v. Rouse, 9 Wall. 468, 19 L. ed. 721.

The power of the state to admit generally, to admit on terms, or to exclude foreign corporations from entering the state, is a matter solely within the discretion of the state legislature, so long as it acts within its province and jurisdiction; but this power must be so exercised as not to conflict with the Federal Constitution.

Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365.

So, also, the power of the state legislature to differentiate between the ownership of the capital stock and the shares of stock for purposes of taxation is equally a matter solely within the discretion of the state legislature so long as it acts within its province and jurisdiction; but in this matter also the power must be so exercised as not to conflict with the Federal Constitution.

Messrs. **Nathaniel T. Guernsey** and **George T. Henry** argued the cause and filed a brief for plaintiffs in error in Nos. 83 and 92.

In so far as § 1322 of the Code of Iowa authorizes the taxation of the bonds of the United States, it is void because in contravention of the Constitution and statutes of the United States.

Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; New York ex rel. Bank of Commerce v. Tax & A. Comrs. 2 Black, 620, 17 L. ed. 451; Bank Tax Case (New York ex rel. Bank of Commonwealth v. Tax & A. Comrs.) 2 Wall. 200, 17 L. ed. 793.

This section provides that shares of stock of state and savings banks shall be assessed to such banks, and not to the individual stockholders. It distinguishes between shares of stock in national banks and in savings banks, the former being assessed to the shareholders, the bank being merely the collecting agent, and the shareholders being permitted to deduct their debts, while the latter are assessed to the bank, which is required to pay the tax, without any right to reimbursement from the shareholder, the shareholder having no right to deduct debts.

Primghar State Bank v. Rerick, 96 Iowa, 242, 64 N. W. 801.

The supreme court of Iowa has construed § 1322 of the Code in—

German American Sav. Bank v. Burlington, 118 Iowa, 84, 91 N. W. 829; National State Bank v. Burlington, 119 Iowa, 696, 94 N. W. 234; First Nat. Bank v. Independence, 123 Iowa, 482, 99 N. W. 142.

The construction of this section announced by the supreme court of Iowa must be accepted.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 507, 46 L. ed. 298, 302, 22 Sup. Ct. Rep. 95.

The tax is against the owner of the bonds upon an assessment which includes the value of the bonds, without provision for reimbursement by the shareholder. It therefore does not come within the rule of Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229, because the tax is neither assessed against nor paid by the owner of the bonds.

The court will look to the substance and effect of the statute.

Home Ins. Co. v. New York, 134 U. S. 594, 598, 33 L. ed. 1025, 1029, 10 Sup. Ct. Rep. 593.

Applying this test, the statute is a tax on the capital of the corporation.

New Orleans v. Houston, 119 U. S. 273, 30 L. ed. 415, 7 Sup. Ct. Rep. 198; St. Johns Nat. Bank v. Bingham Twp. 113 Mich. 203, 71 N. W. 588.

The doctrine of equivalency, invoked by the supreme court of Iowa, makes the tax in fact a tax on the bonds.

Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537.

A tax on the value of the capital is a tax on the property in which the capital is invested.

Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 353, 49 L. ed. 1077, 1081, 25 Sup. Ct. Rep. 669; Stapylton v. Thaggard, 33 C. C. A. 353, 62 U. S. App. 638, 91 Fed. 93; National Bank v. Richmond, 42 Fed. 877; Brown v. French, 80 Fed. 166.

To the same effect in principle are the cases holding that the shares of a national bank cannot be taxed to it *in solido*.

First Nat. Bank v. Fisher, 45 Kan. 726, 26 Pac. 482; Chemung Nat. Bank v. Elmira, 53 N. Y. 49; Sumter County v. National Bank, 62 Ala. 464, 34 Am. Rep. 30; Springfield v. First Nat. Bank, 87 Mo. 441; First Nat. Bank v. Meredith, 44 Mo. 500; National Commercial Bank v. Mobile, 62 Ala. 284, 34 Am. Rep. 15. See also Farmers' & T. Nat. Bank v. Hoffmann, 93 Iowa, 119, 61 N. W. 418; People ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433, 12 L.R.A. 762, 27 N. E. 818.

The statute cannot be sustained upon the theory that it makes the bank a mere collecting agent for the state. In such cases the tax is not upon the property of the bank, and provision is always made for its reimbursement.

Stapylton v. Thaggard, supra; First Nat. Bank v. Kentucky, 9 Wall. 353, 362, 19 L. ed. 701, 703; Hershire v. First Nat. Bank, 35 Iowa, 277.

A tax exacted without jurisdiction is the taking of property without due process of law.

Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297.

If what this statute requires is a tax upon the property of the shareholders, assessed against and to be paid by the bank, without provision for its reimbursement, the bank is deprived of its property without due process of law, and the law itself is void.

State Tax on Foreign-held Bonds, 15 Wall. 300, 319, 21 L. ed. 179, 186; Cooley, Taxn. 3d ed. pp. 1, 3, 12, 27; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 392; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597; Henkle v. Keota, 68 Iowa, 334, 27 N. W. 250.

The court will look to the result effected by the law, and not to its form; and if the result of the law is to impose a tax upon bonds of the United States the law is void, whatever its form may be.

Home Ins. Co. v. New York, 134 U. S. 594, 598, 33 L. ed. 1025, 1029, 10 Sup. Ct. Rep. 593; New Orleans v. Houston, 119 U. S. 278, 30 L. ed. 415, 7 Sup. Ct. Rep. 198.

Section 1322 of the Code of Iowa, properly construed, imposes a tax upon the property of the corporation, and not upon the shares of the shareholder.

People ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433, 12 L.R.A. 762, 27 N. E. 818; Monroe County Sav. Bank v. Rochester, 37 N. Y. 365.

And the manner in which the tax was levied shows that it was a tax upon the property of the corporation, and it would, under the decisions of the supreme court of Iowa, be void as a tax against the shares.

Farmers' & T. Nat. Bank v. Hoffmann, supra.

Whatever the form of the transaction, if, as a matter of fact, an assessment is made by which the value of the bank's property is determined, and upon this assessment a tax is levied which must be paid by the bank without reimbursement, the tax is a tax on the property of the bank.

Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669.

A review of numerous cases decided by this court and a few of the cases decided by the state courts demonstrates that in every instance where the bank has been made a collecting agent the statute that has required it to pay the tax for the corporation has also contained a provision for the reimbursement of the bank, and has, in every instance, required the shares to be assessed to the shareholders, and not to the bank.

Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229; Bradley v. Illinois, 4 Wall. 459, 18 L. ed. 433; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Lionberger v. Rouse, 9 Wall. 468, 19 L. ed. 721; National Bank v. Boston, 165 U. S. 60, 31 L. ed. 689, 8 Sup. Ct. Rep. 772; Palmer v. McMahon, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; First Nat. Bank v. Chehalis County, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537; Cleveland Trust Co. v. Lander, 184 U. S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 304; Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297; Fraser v. Siebern, 16 Ohio St. 615; St. Louis Bldg. & Sav. Asso. v. Lightner, 42 Mo. 421; Adair v. Robinson, 6 Tex. Civ. App. 275, 25 S. W. 734; Utica v. Churchill, 33 N. Y. 161; National Bank v. Elmira, 53 N. Y. 49; Batterson v. Hartford, 50 Conn. 558.

Mr. William H. Brenner argued the cause, and, with Mr. M. H. Cohen, filed a brief for defendants in error:

The assessment is not void merely because it was assessed in the wrong name.

Wilson v. Cass County, 69 Iowa, 147, 28 N. W. 483; First Nat. Bank v. Concord, 58 N. H. 75.

The decision of the supreme court of Iowa as to the form of the assessment and failure to comply with the state statute in relation to the method of procedure is binding

ing on the Supreme Court of the United States.

Stanley v. Albany County, 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; Palmer v. McMahon, 133 U. S. 662, 33 L. ed. 772, 10 Sup. Ct. Rep. 324.

Questions not raised in the lower court will not be considered on appeal.

Sunley v. Metropolitan L. Ins. Co. (Iowa) 105 N. W. 408; McCormick Harvesting Mach. Co. v. McCormick, 128 Iowa, 155, 103 N. W. 204; Stelpflug v. Wolfe, 127 Iowa, 192, 102 N. W. 1130; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904.

The construction and meaning given to a statute of a state by the supreme court of such state is binding on the Supreme Court of the United States.

Cleveland Trust Co. v. Lander, 184 U. S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 394; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503–507, 46 L. ed. 298–302, 22 Sup. Ct. Rep. 95.

It is the shares of stock of savings banks which are to be assessed, and not the capital stock.

German American Sav. Bank v. Burlington, 118 Iowa, 84, 91 N. W. 829; National State Bank v. Burlington, 119 Iowa, 596, 94 N. W. 234; First Nat. Bank v. Independence, 123 Iowa, 482, 99 N. W. 142; Primghar State Bank v. Rerick, 96 Iowa, 238, 64 N. W. 801.

The state has the power to assess for taxation corporate shares of stock without deducting, in determining their value, the value of United States government bonds held by the corporation.

Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 584, 18 L. ed. 234; First Nat. Bank v. Farwell, 10 Biss. 270, 7 Fed. 518; New York v. Tax & A. Comrs. 4 Wall. 244, 18 L. ed. 344; Exchange Nat. Bank v. Miller, 19 Fed. 378; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Cleveland Trust Co. v. Lander, 184 U. S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 394.

A tax on the shares of stock of a national bank is not a tax on its capital stock.

Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229; Palmer v. McMahon, 133 U. S. 662, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; Cleveland Trust Co. v. Lander; German American Sav. Bank v. Burlington; and First Nat. Bank v. Independence,—supra.

A bank may be required to pay the taxes on the shares of stock of its stockholders.

Primghar State Bank v. Rerick, supra; German American Sav. Bank v. Burlington, supra; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; First Nat. Bank v. Douglass County, 3 Dill. 330, Fed. Cas. No. 4,799; Lionberger v. Rouse, 9 Wall. 470, 19 L. ed. 721.

The statute is not void because it does not provide for personal notice to the shareholders.

Nevada Nat. Bank v. Dodge, 56 C. C. A. 145, 119 Fed. 57; Palmer v. McMahon, supra; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 385.

The plaintiffs in error are Iowa corporations, and the right of the state to regulate such corporations, and to provide the terms upon which they may transact business, rests in the sound discretion of the legislature of Iowa, subject to such restrictions as may be found in the Constitution of the United States and the Constitution of the state of Iowa. If there is any restriction at all upon the power of the state to regulate its own corporations, in addition to the above, it is that the regulations must not be unreasonable.

First Nat. Bank v. Kentucky, supra; Corry v. Baltimore, 196 U. S. 466, 476, 49 L. ed. 556, 561, 25 Sup. Ct. Rep. 297.

Mr. Justice Moody delivered the opinion of the court:

These cases raise the same Federal question. The plaintiffs in error were banking institutions incorporated under the laws of the state of Iowa. Upon each of them a tax was levied under a law of that state, which provided that "*shares of stock of state and savings banks* and loan and trust companies *shall be assessed to such banks* and loan and trust companies, and *not to the individual stockholders.*" The material sections of the Code are printed in the margin.†

†Sec. 1322. Shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located. *Shares of stock of state and savings banks* and loan and trust companies, *shall be assessed to such banks* and loan and trust companies, *and not to the individual stockholders.* At the time the assessment is made, the officers of *national banks* shall furnish the assessor with a list of all the stockholders and the number of shares owned by each, and he shall list to each stockholder, under the head of corporation stock, the total value of such shares. To aid the assessor in fixing the value of such shares, the corporations shall furnish him a verified statement of all the matters provided in the preceding section, which shall also show, separately, the amount of capital stock, and the surplus and undivided earnings, and the assessor, from such statement and other information he can obtain, including

[509] *Each bank owned at the time to which the assessment related United States bonds, the value of which they insisted should be deducted from the valuation of the property assessed to them. The taxing authorities refused to make that deduction, and their action was sustained by the supreme court of the state, whose judgment has been brought here by writs of error for review.

These banks were corporations created by the state of Iowa. In imposing burdens upon them, their property, or their shares, the state does not, as in the case of national banks, require any authority from the United States. Its own governmental power is sufficient for the imposition of such taxes, assessed by such methods, and under such standards of valuation, as it may choose, unless something is done which violates some provision of the Federal Constitution, or of a Federal law which, by that Constitution, is made supreme. The only claim of violation of Federal right which need be considered here is that bonds of the United States have been taxed. It is conceded, and cannot be disputed, that these securities are beyond the taxing power of the state, and the only question, therefore, is whether, in point of fact, the state [510] *has taxed them. The first step useful in the solution of this question is to ascertain with precision the nature of the tax in controversy, and upon what property it was levied, and that step must be taken by an examination of the taxing law as interpreted by the supreme court of the state. A superficial reading of the law would lead to the conclusion that the tax authorized by it is a tax upon the shares of stock. The assessment is expressed to be upon "shares of stock of state and savings banks and loan and trust companies." But the true interpretation of the law cannot rest upon a single phrase in it. All its parts must be considered in the manner pursued by this court in New Orleans v. Houston, 119 U. S. 265, 278, 30 L. ed. 411, 415, 7 Sup. Ct. Rep. 198, and Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593, with the view of determining the end accomplished by the taxation, and its actual and substantial purpose and effect. We must inquire whether the law really imposes a tax upon the shares of stock as the property of their owners, or merely adopts the value of these shares as the measure of valuation of the property of the corporation, and by that standard taxes that property itself. The result of this inquiry is of vital importance, because there may be a tax upon the shares of a corporation, which are property distinct from that owned by the corporation, and with a different owner, without an allowance of the exemption due to the property of the corporation itself, while, if the tax is upon the corporation's property, all exemptions due it must be allowed. Looking, then, further into the law, it appears that the shares are to be "assessed to such banks . . . and not to the individual stockholders." When this is read the doubt instantly arises whether the law intended to tax the corporation for property which it does not own, but which, on the contrary, is owned by the stockholders. Certainly such a purpose, against common justice and of doubtful constitutionality, ought not to be attributed to the law if any other fair construction is possible. With respect to taxation, usually, if not necessarily, property and its owners are inseparable. Taxes are assessed against persons upon *the property which they own, not [511] upon property which others own. We should be reluctant to suppose that there has been any departure from this principle in this law. It, however, is not an uncommon, and is an entirely legitimate, method of collecting taxes, to require a corporation,

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any statement furnished to and information obtained by the auditor of state, which shall be furnished him on request, shall fix the value of such stock, taking into account the capital, surplus, and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate, owned by them, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporations shall not be otherwise assessed.

Sec. 1325. The corporations described in the preceding sections shall be liable for the payment of *the taxes assessed to the stockholders of such corporations*, and such tax shall be payable by the corporation in the same manner and under the same penalties as in case of taxes due from an individual taxpayer, and may be collected in the same manner as other taxes, or by action in the name of the county. Such corporations may recover from each stockholder his proportion of the taxes so paid, and shall have a lien on his stock and unpaid dividends therefor. If the unpaid dividends are not sufficient to pay such tax, the corporation may enforce such lien on the stock by public sale of the same, to be made by the sheriff at the principal office of such corporation in this state, after giving the stockholder thirty days' notice of the amount of such tax and the time and place of sale, such notices to be by registered letter, addressed to the stockholder at his postoffice address, as the same appears [illegible] the books of the company, or is kn[illegible] by its secretary.

as the agent of its shareholders, to pay in the first instance the taxes upon shares, as the property of their owners, and look to the shareholders for reimbursement. In this very law we have an example of this method. By § 1322, national bank shares are assessed to the stockholders, and by § 1325 the corporations are made liable to pay the tax and are secured by a lien on the stock and dividends, which may be enforced by sale. The state banking corporations are excluded *ex industria* from this statutory right of reimbursement by confining it to the cases of "taxes assessed to the stockholders of such corporation." This cannot include the case of state bank shares, which are not so assessed. Nor can the corporations in the case at bar have, by any possibility, a common-law right to recover the tax paid from the shareholders. The law imposes no obligation on the shareholder. In paying the tax the corporation has paid its own debt, and not that of others, and there is nothing in such a payment from which the law can imply a promise of reimbursement. These taxes, therefore, are not to be paid by the banks as agents of their stockholders, but as their own debt, and, unless it is supposed that the law requires them to pay taxes upon property which they do not own, the taxes must be regarded as taxes upon the property of the banks. The fair interpretation of the law is that the taxes are upon the property of the banks. In the valuation for taxation the assessor is required to "take into account the capital, surplus, and undivided earnings," must be furnished with "a verified statement of all matters provided by the preceding section," which, by reference, is seen to be a detailed statement showing the assets of the bank (§ 1321).† It is true that the assessor *may resort to[512] "other information he can obtain," but, although capital, surplus, and undivided earnings are expressly named, nothing is said of the franchise and good will, essential factors of the value of the shares, though not of the value of the assets of the bank. See People ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433, 12 L.R.A. 762, 27 N. E. 818. Moreover, the section closes with the words, "and the property of such corporation shall not be otherwise assessed," which plainly implies that the assessment already provided for is, in substance, an assessment upon the property of the corporation. That the law was administered upon the theory that the tax was upon the property of the corporation is signally illustrated by the proceedings in these cases. The valuation was first made on the exact figures of the capital, surplus, and undivided earnings, deducting the holdings of United States securities. Then, upon being advised that the deduction was erroneous, the assessor corrected the valuation *by[513[adding the value of the securities deducted. We therefore conclude that the substantial effect of the law is to require taxation upon the property, not including the franchise, of the banks, and that the value of the shares, ascertained in a manner appropriate to determine the value of the assets, is only the standard or measure by which the taxable valuation of that property is determined. This we think is consistent with the interpretation of the law by the supreme court of Iowa, which sustained the taxation upon grounds which will be presently considered.

The next question is whether such taxation violates any provision of the Federal Constitution or of any paramount Federal

†Sec. 1321. Private bankers. Private banks or bankers, or any persons other than corporations hereinafter specified, a part of whose business is the receiving of deposits subject to check, on certificates, receipts, or otherwise, or the selling of exchange, shall prepare and furnish to the assessor a sworn statement showing the assets, aside from real estate, and liabilities of such bank or banker on January 1st of the current year, as follows:

1. The amount of moneys, specifying separately the amount of moneys on hand or in transit, the funds in the hands of other banks, bankers, brokers, or other persons or corporations, and the amount of checks or other cash items not included in either of the preceding items;

2. The actual value of credits, consisting of bills receivable owned by them and other credits due or to become due;

3. The amount of all deposits made with them by others, and also the amount of bills payable;

4. The actual value of bonds and stocks of every kind and shares of capital stock or joint stock of other corporations or companies, held as an investment, or in any way representing assets, and the specific kinds and descriptions thereof exempt from taxation;

5. All other property pertaining to said business, including real estate, which shall be specially listed and valued by the usual description thereof;

The aggregate actual value of moneys and credits, after deducting therefrom the amount of deposits and of debts owing by such bank, as provided in this chapter, and the aggregate actual value of bonds and stocks after deducting the portion thereof, exempt or otherwise, taxed in this state, and also the other property pertaining to the business, shall be assessed at 25 per cent of the actual value of the same, not including real estate, which shall be listed and assessed as other real estate.

law. The state cannot, by any form of taxation, impose any burden upon any part of the national public debt. The Constitution has conferred upon the government power to borrow money on the credit of the United States, and that power cannot be burdened or impeded or in any way affected by the action of any state. This principle was announced in Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481, where it was held that taxes upon the stock of the United States, levied by one of the municipal corporations of South Carolina, were invalid. From that time no one has questioned the immunity of national securities from state taxation. It may well be doubted whether Congress has the power to confer upon the state the right to tax obligations of the United States. However this may be, Congress has never yet attempted to confer such a right. Until the time of the Civil War it was not thought to be necessary to express the constitutional prohibition in an act of Congress. But, on the occasion of authorizing the issue of Treasury notes, it was enacted that "all stocks, bonds, and other securities of the United States held by individuals, corporations, or associations within the United States shall be exempt from taxation by or under state authority." Act of February 25, 1862 (12 Stat. at L. 346, chap. 33, U. S. Comp. Stat. 1901, p. 2480). The substance of this enactment is embodied in § 3701 of the Revised Statutes, and has [514] usually, if not *invariably, since 1862, been inserted in acts authorizing the issue of bonds.

That the tax upon the property of a bank in which United States securities are included is beyond the power of the state, and, what perhaps is of lesser moment, within the prohibition of the statutory law, hardly needs to be proved by authority. But the authority is clear and conclusive. With the beginning of the Civil War large amounts of the national securities began to be issued. So important it was to sustain the national credit that, as we have seen, Congress for the first time began the practice of accompanying the authority for their sale with an express prohibition of their taxation by the states. The state banks often invested a large part or the whole of their resources in these securities, and the question of their liability to state taxation on their capital and surplus thus invested at once arose. The Bank of Commerce, incorporated under the laws of New York, invested all its capital, except its investment in real estate, in United States bonds. Under the authority of a law requiring that the capital stock should be assessed at its actual value a tax was levied. The court of appeals of New York sustained the tax so far as it applied to securities issued before the act of 1862, expressly declaring their exemption, and annulled it so far as it applied to securities thereafter issued. The case came here on a writ of error. New York ex rel. Bank of Commerce v. Tax Comrs. 2 Black, 620, 17 L. ed. 451. This court held the tax invalid on all securities, without even alluding to the act of 1862, but basing the decision entirely upon the constitutional inability of a state to affect, by taxation, the exercise of the sovereign power of the nation in borrowing money on its credit. This was the rule specifically declared in Weston v. Charleston, as an application of the general rule of the immunity from state control of the operations of the Federal government in the region of its supremacy. To the argument, which was strenuously urged, that the tax was not upon the securities, but upon the capital of the bank, and that thereby the case was *distinguished from [515] Weston v. Charleston, the court, by Mr. Justice Nelson, replied: "We cannot yield our assent to the soundness of the distinction."

The state of New York then amended its law, and enacted that banks should be "liable to taxation on a valuation equal to the amount of capital stock paid in, or secured to be paid in, and their surplus earnings." The validity of taxation under the amended law was considered in the Bank Tax Case (New York ex rel. Bank of Commonwealth v. Tax & A. Comrs.) 2 Wall. 200, 17 L. ed. 793. There it was insisted that the tax was imposed upon the corporation, and not its property, and that the statute only prescribed a measure of the amount annually to be paid for the franchises. But the court held that the amendment simply changed the method of fixing the amount of capital, and that the tax was upon the capital, which, so far as invested in national securities, was beyond the power of the state.

The case at bar cannot be distinguished in principle from these cases. In the first case the tax was on the capital stock at its actual value; in the second case on the amount of the capital stock and the surplus earnings; and, in the case at bar, on the shares of the stock, taking into account the capital, surplus, and undivided earnings. It would be difficult for the most ingenious mind and the most accomplished pen to state any distinction between these three [illegible], except in the manner by w[illegible] [illegible] sought the same end —the taxation o[illegible] property of the bank. The slight e[illegible] [illegible]t afforded by the omission of pr[illegible]ty co[illegible]

sufficient to disguise the fact that, in effect, it is the property which is taxed. If, included in that property, it is discovered that there is some which is entitled by Federal right to an immunity, it is the duty of this court to see that the immunity is respected.

It is, however, contended that although these cases have not been overruled, distinctions have been drawn in later cases which are applicable here, and withdraw the cases before the court from their authority. These later cases must therefore be considered and their exact effect determined. We *may quickly put out of view those not relied upon here, in which it has been held that the state may levy a tax upon the value of the franchise of corporations created by it, or upon the right of succession to property on the death of its owner, without first deducting the amount of United States securities owned by the corporation whose franchise is taxed, or by the estate transmitted under the inheritance laws of the state. Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829. The theory of all these cases is that the taxes are not imposed upon the assets of the corporation or the property of the decedent, but, in the one case, upon the franchise granted by the state, and, in the other case, upon the right of succession to property on the death of the owner which is conferred by the state.

But another line of cases cannot so easily be dismissed. They were relied upon by the supreme court of Iowa, and the respect due to the opinion of that court demands that the reasons why we think those cases do not apply to the case at bar should be fully stated. These cases relate to the right of the state to tax at their full value shares of stock as the property of the shareholders. Although the states may not, in any form, levy a tax upon United States securities, they may tax, as the property of their owners, the shares of banks and other corporations whose assets consist in whole or in part of such securities, and, in valuing the shares for the purposes of taxation, is not necessary to deduct the value of the national securities held by the corporation whose shares are taxed. The right to tax the shares of national banks arises by congressional authority, but the right to tax shares of state banks exists independently of any such authority, for the state requires no leave to tax the holdings in its own corporations. The right of such taxation rests upon the theory that shares in corporations are property entirely distinct and independent from the property of the corporation. *The tax on an individual [517] in respect to his shares in a corporation is not regarded as a tax upon the corporation itself. This distinction, now settled beyond dispute, was mentioned in M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579, where, in the opinion of Chief Justice Marshall declaring a tax upon the circulation of a branch bank of the United States beyond the power of the state of Maryland, it was said that the opinion did not extend "to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state." The distinction appears, however, to have been first made the basis of a decision in Van Allen v. Assessors (Churchill v. Utica), 3 Wall. 573, 18 L. ed. 229. The national bank act, as amended in 1864 [13 Stat. at L. 112, chap. 106] (Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502), permitted the states to include in the valuation of personal property for taxation the shares of national banks "held by any person or body corporate" under certain conditions not necessary here to be stated. Acting under the authority of this law, the state of New York assessed the shares of Van Allen in the First National Bank of Albany. At that time all the capital of the bank was invested in United States securities, and it was asserted that a tax upon the individual in respect of the shares he held in the bank was, unless the holdings in United States securities were deducted, a tax upon the securities themselves. But a majority of the court held otherwise, saying by Mr. Justice Nelson: "The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and, within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. . . . The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation *after [518] the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this

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It is, however, contended that although these cases have not been overruled, distinctions have been drawn in later cases which are applicable here, and withdraw the cases before the court from their authority. These later cases must therefore be considered and their exact effect determined. We *may quickly put out of view those not relied upon here, in which it has been held that the state may levy a tax upon the value of the franchise of corporations created by it, or upon the right of succession to property on the death of its owner, without first deducting the amount of United States securities owned by the corporation whose franchise is taxed, or by the estate transmitted under the inheritance laws of the state. Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829. The theory of all these cases is that the taxes are not imposed upon the assets of the corporation or the property of the decedent, but, in the one case, upon the franchise granted by the state, and, in the other case, upon the right of succession to property on the death of the owner which is conferred by the state.

But another line of cases cannot so easily be dismissed. They were relied upon by the supreme court of Iowa, and the respect due to the opinion of that court demands that the reasons why we think those cases do not apply to the case at bar should be fully stated. These cases relate to the right of the state to tax at their full value shares of stock as the property of the shareholders. Although the states may not, in any form, levy a tax upon United States securities, they may tax, as the property of their owners, the shares of banks and other corporations whose assets consist in whole or in part of such securities, and, in valuing the shares for the purposes of taxation, is not necessary to deduct the value of the national securities held by the corporation whose shares are taxed. The right to tax the shares of national banks arises by congressional authority, but the right to tax shares of state banks exists independently of any such authority, for the state requires no leave to tax the holdings in its own corporations. The right of such taxation rests upon the theory that shares in corporations are property entirely distinct and independent from the property of the corporation. *The tax on an individual [517] in respect to his shares in a corporation is not regarded as a tax upon the corporation itself. This distinction, now settled beyond dispute, was mentioned in M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579, where, in the opinion of Chief Justice Marshall declaring a tax upon the circulation of a branch bank of the United States beyond the power of the state of Maryland, it was said that the opinion did not extend "to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state." The distinction appears, however, to have been first made the basis of a decision in Van Allen v. Assessors (Churchill v. Utica), 3 Wall. 573, 18 L. ed. 229. The national bank act, as amended in 1864 [13 Stat. at L. 112, chap. 106] (Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502), permitted the states to include in the valuation of personal property for taxation the shares of national banks "held by any person or body corporate" under certain conditions not necessary here to be stated. Acting under the authority of this law, the state of New York assessed the shares of Van Allen in the First National Bank of Albany. At that time all the capital of the bank was invested in United States securities, and it was asserted that a tax upon the individual in respect of the shares he held in the bank was, unless the holdings in United States securities were deducted, a tax upon the securities themselves. But a majority of the court held otherwise, saying by Mr. Justice Nelson: "The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and, within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. . . . The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation *after [518] the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this

law. The state cannot, by any form of taxation, impose any burden upon any part of the national public debt. The Constitution has conferred upon the government power to borrow money on the credit of the United States, and that power cannot be burdened or impeded or in any way affected by the action of any state. This principle was announced in Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481, where it was held that taxes upon the stock of the United States, levied by one of the municipal corporations of South Carolina, were invalid. From that time no one has questioned the immunity of national securities from state taxation. It may well be doubted whether Congress has the power to confer upon the state the right to tax obligations of the United States. However this may be, Congress has never yet attempted to confer such a right. Until the time of the Civil War it was not thought to be necessary to express the constitutional prohibition in an act of Congress. But, on the occasion of authorizing the issue of Treasury notes, it was enacted that "all stocks, bonds, and other securities of the United States held by individuals, corporations, or associations within the United States shall be exempt from taxation by or under state authority." Act of February 25, 1862 (12 Stat. at L. 346, chap. 33, U. S. Comp. Stat. 1901, p. 2480). The substance of this enactment is embodied in § 3701 of the Revised Statutes, and has [514] usually, if not *invariably, since 1862, been inserted in acts authorizing the issue of bonds.

That the tax upon the property of a bank in which United States securities are included is beyond the power of the state, and, what perhaps is of lesser moment, within the prohibition of the statutory law, hardly needs to be proved by authority. But the authority is clear and conclusive. With the beginning of the Civil War large amounts of the national securities began to be issued. So important it was to sustain the national credit that, as we have seen, Congress for the first time began the practice of accompanying the authority for their sale with an express prohibition of their taxation by the states. The state banks often invested a large part or the whole of their resources in these securities, and the question of their liability to state taxation on their capital and surplus thus invested at once arose. The Bank of Commerce, incorporated under the laws of New York, invested all its capital, except its investment in real estate, in United States bonds. Under the authority of a law requiring that the capital stock should be assessed at its actual value a tax was levied. The court of appeals of New York sustained the tax so far as it applied to securities issued before the act of 1862, expressly declaring their exemption, and annulled it so far as it applied to securities thereafter issued. The case came here on a writ of error. New York ex rel. Bank of Commerce v. Tax Comrs. 2 Black, 620, 17 L. ed. 451. This court held the tax invalid on all securities, without even alluding to the act of 1862, but basing the decision entirely upon the constitutional inability of a state to affect, by taxation, the exercise of the sovereign power of the nation in borrowing money on its credit. This was the rule specifically declared in Weston v. Charleston, as an application of the general rule of the immunity from state control of the operations of the Federal government in the region of its supremacy. To the argument, which was strenuously urged, that the tax was not upon the securities, but upon the capital of the bank, and that thereby the case was *distinguished from [515] Weston v. Charleston, the court, by Mr. Justice Nelson, replied: "We cannot yield our assent to the soundness of the distinction."

The state of New York then amended its law, and enacted that banks should be "liable to taxation on a valuation equal to the amount of capital stock paid in, or secured to be paid in, and their surplus earnings." The validity of taxation under the amended law was considered in the Bank Tax Case (New York ex rel. Bank of Commonwealth v. Tax & A. Comrs.) 2 Wall. 200, 17 L. ed. 793. There it was insisted that the tax was imposed upon the corporation, and not its property, and that the statute only prescribed a measure of the amount annually to be paid for the franchises. But the court held that the amendment simply changed the method of fixing the amount of capital, and that the tax was upon the capital, which, so far as invested in national securities, was beyond the power of the state.

The case at bar cannot be distinguished in principle from these cases. In the first case the tax was on the capital stock at its actual value; in the second case on the amount of the capital stock and the surplus earnings; and, in the case at bar, on the shares of the stock, taking into account the capital, surplus, and undivided earnings. It would be difficult for the most ingenious mind and the most accomplished pen to state any distinction between these three laws, except in the manner by which they all sought the same end —the taxation of the property of the bank. The slight concealment afforded by the omission of the property so exempt is not

sufficient to disguise the fact that, in effect, it is the property which is taxed. If, included in that property, it is discovered that there is some which is entitled by Federal right to an immunity, it is the duty of this court to see that the immunity is respected.

It is, however, contended that although these cases have not been overruled, distinctions have been drawn in later cases which are applicable here, and withdraw the cases before the court from their authority. These later cases must therefore be considered and their exact effect determined. We *may quickly put out of view those not relied upon here, in which it has been held that the state may levy a tax upon the value of the franchise of corporations created by it, or upon the right of succession to property on the death of its owner, without first deducting the amount of United States securities owned by the corporation whose franchise is taxed, or by the estate transmitted under the inheritance laws of the state. Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829. The theory of all these cases is that the taxes are not imposed upon the assets of the corporation or the property of the decedent, but, in the one case, upon the franchise granted by the state, and, in the other case, upon the right of succession to property on the death of the owner which is conferred by the state.

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special term of the Supreme Court held in and for the county of Kings, in that state, which set aside a chattel mortgage given by a bankrupt as being in fraud of creditors. Affirmed.

See same case below, 107 App. Div. 594, 95 N. Y. Supp. 324.

Statement by Mr. Chief Justice Fuller:

[522] *This was a suit commenced in December, 1902, in the supreme court of New York for the county of Kings by Joseph Vollkommer, Jr., as trustee in bankruptcy of the estate of Jacob Vogt, bankrupt, against Solon L. Frank and Samuel Frank, doing business as S. L. & S. Frank, and Jacob Vogt, to set aside an alleged chattel mortgage on certain horses, harness, wagons, etc., given by Vogt to defendants Frank, April 16, 1902, as fraudulent, and intended to hinder, delay, and defraud creditors.

The mortgagees had taken possession, and creditors immediately thereafter filed petitions in bankruptcy against Vogt in the district court of the United States for the eastern district of New York, whereupon and on June 30, 1902, one Stoutenburgh was appointed temporary receiver and duly qualified as such.

As alleged in the complaint, by agreement between the Franks and the petitioning creditors, which was approved by the district court and entered of record therein July 2, A. D. 1902, it was provided that the property in question should be sold at public auction on July 3 by the temporary receiver; "that the expenses of the sale be paid out of the proceeds thereof; that the said temporary receiver deposit the net proceeds of said sale at the People's Trust Company of Brooklyn as a special fund, there to await the further order of the court upon due notice to all creditors who have or may hereafter appear; that the lien, if any, of the alleged chattel mortgage of the said defendants Frank be transferred to and attached to said special fund, or deposit, in lieu of and to the same extent as if attached to the said property thereinbefore directed to be sold; that, in pursuance thereof, said sale was had on the 3d of July, A. D. 1902, and the net proceeds thereof, amounting to about $5,482.47, were, on or about the 10th day of July, 1902, duly deposited in the People's Trust Company of Brooklyn, as provided by said agreement."

July 10, A. D. 1902, Vogt was duly adjudicated an involuntary bankrupt, and on No-

[523] vember 12 A. D. 1902, Vollkommer, *Jr., was appointed trustee in bankruptcy of Vogt, duly qualified November 21, and entered upon the duties of his office as trustee. He thereafter filed this complaint against the Franks and Vogt, setting up the proceedings, and averring that defendants Frank claimed a lien upon the special fund to the whole extent thereof, which constituted a cloud on plaintiff's title to the fund, and he demanded judgment that the chattel mortgage be declared null and void, and canceled and discharged of record, and that the special fund be declared free of the encumbrance of the alleged chattel mortgage, and from any lien or claim by the Franks under the mortgage or otherwise. The trial court held that the mortgage was made "with the intent and purpose of said Vogt and said defendants Frank to hinder, defeat, defraud, and delay said Vogt's creditors." And decreed the annulment of the mortgage, and that it was "no lien upon the moneys, *viz.*, $5,481.47, deposited on July 9th, 1902, by Arthur T. Stoutenburgh, temporary receiver, in the People's Trust Company of Brooklyn, New York, under an order of the district court of the United States for the eastern district of New York, made July 2d, 1902." The case was carried to the appellate division of the supreme court and the decree was affirmed. Leave to appeal to the court of appeals was denied by the appellate division, and subsequently by an associated judge of the court of appeals. This writ of error was then allowed.

Mr. Roger Foster argued the cause and filed a brief for plaintiffs in error:

The plaintiffs in error had a contractual right to have all questions concerning the title to the proceeds of the receiver's sale determined by the court of bankruptcy, which appointed the receiver, under whose direction the sale took place, and in whose custody the proceeds were deposited.

Havens & G. Co. v. Pierek, 57 C. C. A. 37, 120 Fed. 245; Guaranty Trust Co. v. North Chicago Street R. Co. 65 C. C. A. 66, 130 Fed. 813.

Every court with equitable powers, in whose possession property is placed, whether tangible property or a fund, has exclusive jurisdiction to determine the validity of all claims to a lien upon the same, and to distribute that fund amongst the rightful owners. No other court has any power to interfere with such property.

Covell v. Heyman, 111 U. S. 176, 182, 28 L. ed. 390, 392, 4 Sup. Ct. Rep. 355.

There is no difference in principle, nor in practical importance, so far as this rule is concerned, between a suit where the state court directs its [illegible] to exercise physical interference with [illegible] property in the custody of the Federal [illegible]l, and one in which the decree of the [illegible]te court affects the [illegible] 205 U. S.

title only to the same, without taking manual possession thereof.

Sharon v. Terry, 1 L.R.A. 572, 13 Sawy. 387, 36 Fed. 359; Julian v. Central Trust Co. 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399; Guardian Trust Co. v. Kansas City Southern R. Co. 76 C. C. A. 615, 146 Fed. 339; Jordan v. Taylor, 98 Fed. 643.

This rule has been applied to bankruptcy proceedings.

Tefft v. Sternberg, 5 L.R.A. 221, 40 Fed. 6; Moran v. Sturges, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; The Willamette Valley, 13 C. C. A. 635, 29 U. S. App. 447, 66 Fed. 565; Re Watts, 190 U. S. 1, 32, 47 L. ed. 933, 943, 23 Sup. Ct. Rep. 718; Whitney v. Wenman, 198 U. S. 539, 552, 49 L. ed. 1157, 1160, 25 Sup. Ct. Rep. 778; Re McMahon, 77 C. C. A. 668, 147 Fed. 686; Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; White v. Schloerb, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007; Re Whitener, 44 C. C. A. 434, 105 Fed. 186; Re McCallum, 113 Fed. 395; Re Antigo Screen Door Co. 59 C. C. A. 248, 123 Fed. 252; Re Kellogg, 113 Fed. 124, Affirmed in 57 C. C. A. 547, 121 Fed. 333; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Alabama Gold L. Ins. Co. v. Girardy, 9 Fed. 142.

The bankruptcy act expressly confers upon courts of bankruptcy, full power to determine all controversies in relation to estates of bankrupts, of which the court or its officers have taken possession. The only controversies of which state courts are given jurisdiction are those between trustees and persons claiming adversely to them property of which neither the trustees nor the receivers in bankruptcy preceding them have taken possession.

Bardes v. First Nat. Bank, 178 U. S. 524, 535, 44 L. ed. 1175, 1181, 20 Sup. Ct. Rep. 1000; Bush v. Elliott, 202 U. S. 477, 479, 50 L. ed. 1114, 1115, 26 Sup. Ct. Rep. 668; Whitney v. Wenman, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778; Re Whitener, supra; Re McCallum, 113 Fed. 393; Re Antigo Screen Door Co. supra; Re Kellogg, 113 Fed. 120, 57 C. C. A. 547, 121 Fed. 333; Havens & G. Co. v. Pierek, supra.

The jurisdiction given to the state courts in suits by trustees applies only to suits against persons claiming property adversely to the bankrupts' representatives.

Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; Re Muncie Pulp Co. 71 C. C. A. 530, 139 Fed. 546.

There is nothing in the Federal bankruptcy law which gives the state court jurisdiction in cases of this character.

Havens & G. Co. v. Pierek, supra.

The trustee had no right to attack the validity of the chattel mortgage.

York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 50 L. ed. 782, 785, 26 Sup. Ct. Rep. 481; Hewit v. Berlin Mach. Works, supra; Re Kellogg, 112 Fed. 52, 56 C. C. A. 383, 118 Fed. 1017; Re New York Economical Printing Co. 49 C. C. A. 133, 110 Fed. 514.

Mr. Francis B. Mullin argued the cause, and, with Mr. J. Frank Yawger, filed a brief for defendant in error Vollkommer:

The supreme court of the state of New York had jurisdiction of the cause.

Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; Collier, Bankr. 5th ed. p. 272; Wall v. Cox, 181 U. S. 244, 45 L. ed. 845, 21 Sup. Ct. Rep. 642; Brandenburg, Bankr. 3d ed. § 581; Jones v. Schermerhorn, 53 App. Div. 494, 65 N. Y. Supp. 999; Silberstein v. Stahl, 32 Misc. 353, 66 N. Y. Supp. 646, Affirmed in 63 App. Div. 614, 71 N. Y. Supp. 1148, Affirmed in 171 N. Y. 649, 63 N. E. 1122; Small v. Muller, 67 App. Div. 143, 73 N. Y. Supp. 667; Bryan v. Madden, 109 App. Div. 876, 96 N. Y. Supp. 465; Foster, Fed. Pr. 3d ed. 1085; Skilton v. Codington, 185 N. Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790; Bindseil v. Smith, 61 N. J. Eq. 645, 47 Atl. 456; Re Platteville Foundry & Mach. Co. 147 Fed. 832; Truda v. Osgood, 71 N. H. 185, 51 Atl. 633; Re Spitzer, 66 C. C. A. 35, 130 Fed. 879; Re Kanter, 58 C. C. A. 260, 121 Fed. 984; Re Russell, 41 C. C. A. 323, 101 Fed. 250; Guaranty Trust Co. v. North Chicago Street R. Co. 65 C. C. A. 65, 130 Fed. 801; Buck v. Colbath, 3 Wall. 334, 345, 18 L. ed. 257, 261.

It is probable that, even in the absence of an express act of Congress, the state courts would have jurisdiction of suits by a trustee, no act to the contrary existing; for they are nothing more than the assertion of property rights, of the title to which the bankruptcy act is the source.

Cook v. Waters, 9 Nat. Bankr. Reg. 155.

In general, it has been held that if the Federal courts be not given exclusive jurisdiction of a subject-matter, the state courts have concurrent jurisdiction thereof whenever, by their own Constitution, they are competent to take it; jurisdiction in the state courts exists where it is not excluded by express provision, or by incompatibility in its exercise, arising from the nature of the particular case.

Claflin v. Houseman, 93 U. S. 130, 136, 23 L. ed. 833, 838.

Jurisdiction cannot be conferred by consent upon a court which has none, nor does public policy sanction the selection by agreement of any particular court (ousting all others) for the trial of any particular cause.

17 Am. & Eng. Enc. Law, 2d ed. pp. 1060-1063.

It is not believed that the imperfect and partial possession of the funds in this case, which the record shows the bankruptcy court to have, is in any sense sufficient to change the ordinary rule giving the state courts jurisdiction, for in every bankruptcy case, as soon as an adjudication is made, the bankruptcy court is constructively in possession of all the property of the bankrupt, and the mere fact of an adjudication gives the bankruptcy court a power and dominion over the bankrupt's property which has been likened to an attachment.

State Bank v. Cox, 74 C. C. A. 285, 16 Am. Bankr. Rep. 32, 143 Fed. 91; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481, 15 Am. Bankr. Rep. 638; Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; Re Granite City Bank, 70 C. C. A. 316, 137 Fed. 818.

A trustee in bankruptcy may maintain an action to set aside a fraudulent conveyance, whether representing judgment creditors or not.

Southard v. Benner, 72 N. Y. 424; Skilton v. Codington, 185 N. Y. 87, 113 Am. St. Rep. 885, 77 N. E. 790; Zartman v. First Nat. Bank, 109 App. Div. 413, 96 N. Y. Supp. 633; Mitchell v. Mitchell, 147 Fed. 285; Re Pekin Plow Co. 50 C. C. A. 257, 112 Fed. 308; Re Metropolitan Store & Saloon Fixture Co. 15 Am. Bankr. Rep. 119; Shreck v. Hanlon (Neb.) 104 N. W. 193; Sheldon v. Parker, 66 Neb. 610, 92 N. W. 923, 95 N. W. 1015; Crary v. Kurtz (Iowa) 105 N. W. 592; Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229; Bunnell v. Bronson, 78 Conn. 679, 63 Atl. 398; Beasley v. Coggins, 48 Fla. 215, 12 Am. Bankr. Rep. 355, 37 So. 213; Andrews v. Mather, 134 Ala. 358, 9 Am. Bankr. Rep. 296, 32 So. 738.

Mr. Chief Justice Fuller delivered the opinion of the court:

Counsel for plaintiffs in error contended below that the state courts had no jurisdiction because the suit was brought to determine title to property or a fund in the possession of the district court of the United States. The bankruptcy act of July 1, 1898, provided that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." 30 Stat. at L. 544, chap. 541, § 23b, U. S. Comp. Stat. 1901, p. 3431.

In Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000, we held that the bankruptcy court, except by the consent of the defendant, had no jurisdiction to try and determine a suit brought by a trustee in bankruptcy to recover property alleged to be part of the bankrupt's estate, or to have been transferred by him in fraud of the act, but that such suits must be prosecuted either in the state courts or in the circuit courts of the United States where diversity of citizenship existed. The act of 1898 was amended by the act of February 5, 1903 (32 Stat. at L. 797, chap. 487, U. S. Comp. Stat. Supp. 1905, p. 682), § 19 of which provided that the act should "not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July first, eighteen hundred and ninety-eight."

The present case was commenced in 1902, and, besides, the amendment gave the bankruptcy court concurrent, and not exclusive, jurisdiction.

We give in the margin† quotations from

†Section 23b: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e.*"

Section 60b: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition, and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

"*If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

Section 67e: "That all conveyances, transfers, assignments, or encumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the

the acts of July 1, *1898, and February 5, 1903, the amendments made by the latter act being italicized.

Undoubtedly the state court, in which the trustee brought *this suit, was the court "where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them [suits], if proceedings in bankruptcy had not been instituted," and its jurisdiction under the applicable general rule must be conceded.

But plaintiffs in error contend that the possession by the bankruptcy court of the proceeds of the sale of the mortgaged chattels deprives the state court of its conceded jurisdiction to set aside the mortgage as fraudulent.

The contention is wholly inadmissible. The mortgaged property consisted of horses, vehicles, harness, etc., and the order of sale of the temporary receiver, agreed to by plaintiffs in error, was evidently in the interest of all parties, and provided for the deposit of the proceeds, not in the general funds of the estate, but as a special fund, to which the lien, if any, of the chattel mortgage was transferred, and clearly contemplated a plenary suit to determine the validity thereof, which, at that time, there being no diversity of citizenship, and no such possession as might lead to a different result, could only be commenced in the state court. The trustee himself commenced it there and obtained the decree, which was in its nature self-executing, and merely set aside the mortgage, and, as incident thereto, declared that the special fund was free from its lien, and, without seeking to interfere with the possession, left it to the bankruptcy court to carry the decree into effect by placing the money in the custody of its officer, the trustee.

*No principle of comity was violated and [529] there was no interference with the bankruptcy court. First Nat. Bank v. Chicago Title & T. Co. 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. Rep. 693; Davis v. Friedlander, 104 U. S. 570, 26 L. ed. 818; Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833; Re Platteville Foundry & Mach. Co. 147 Fed. 828; Guaranty Trust Co. v. North Chicago Street R. Co. 65 C. C. A. 65, 130 Fed. 801; Re Spitzer, 66 C. C. A. 35, 130 Fed. 879; Bindseil v. Smith, 61 N. J. Eq. 645, 47 Atl. 456; Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790. In the latter case the court of appeals by Cullen, Ch. J., in sustaining the jurisdiction of the state court, admirably expounds the applicable principles, with a full citation of authorities. That was a suit against the trustee, while the present case was brought by the trustee.

The possession of the temporary receiver of the special fund was not, in the circumstances, in any sense sufficient to change the ordinary rule giving the state courts jurisdiction any more than the constructive possession in every case created by adjudication. Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481.

It is objected that the trustee had no right to attack the validity of the chattel mortgage because it did not appear that he

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reditors of such debtor, except as to purhasers in good faith and for a present fair onsideration; and all property of the debtor onveyed, transferred, assigned, or encumered as aforesaid, shall, if he be adjudged bankrupt, and the same is not exempt rom execution and liability for debts by the aw of his domicil, be and remain a part of he assets and estate of the bankrupt, and hall pass to his said trustee, whose duty it hall be to recover and reclaim the same y legal proceedings or otherwise for the enefit of the creditors. And all conveyances, transfers, or encumbrances of his roperty made by a debtor at any time within four months prior to the filing of the etition against him, and while insolvent, which are held null and void as against he creditors of such debtor by the laws of he state, territory, or district in which such roperty is situate, shall be deemed null and oid under this act against the creditors f such debtor, if he be adjudged a bankupt, and such property shall pass to the ssignee and be by him reclaimed and recovered for the benefit of the creditors of he bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

Section 70e: "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

Section 19 of act of February 5, 1903: "*That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July first, eighteen hundred and ninety-eight.*"

represented any but simple contract creditors. But the record before us shows that the entire record of the proceedings in the bankruptcy court was in evidence before the trial court, though it was not returned here, so that if it were necessary that the trustee should represent judgment creditors, which we do not decide that it was, it must be presumed that the trial court, in passing upon all the evidence, found that he did. This may explain why the point was not made in the trial court, and it comes too late here.

Judgment affirmed.

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[530] *ROBERT M. GREEN, Plff. in Err.,

v.

CHICAGO, BURLINGTON, & QUINCY RAILWAY COMPANY.

(See S. C. Reporter's ed. 530–534.)

Writ and process—service on foreign corporation—what is doing business.

Soliciting through its district freight and passenger agent in Philadelphia, freight and passenger traffic for a railway company incorporated in Iowa and having its eastern terminal at Chicago, is not doing business within the eastern district of Pennsylvania in such a sense that process can be served upon the corporation there.

[No. 435.]

Submitted April 8, 1907. Decided April 29, 1907.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment making absolute a rule to show cause why the service of summons upon a foreign corporation should not be vacated, on the ground that the corporation was not doing business in the district. Affirmed.

See same case below, 147 Fed. 767.

The facts are stated in the opinion.

Messrs. John G. Johnson and Frank P. Prichard submitted the cause for plaintiff in error:

When a corporation, through its properly constituted agents, engages in business in a foreign jurisdiction, it may, irrespective of any consent, be found there for purposes of suit, and service upon its agents is service upon it, provided always that the agent is of such a representative character. Service upon him may properly be considered service upon the corporation.

Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; Ex parte Schollenberger, 96 U. S. 369, 24 L. ed. 853; St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; Barrow S. S. Co. v. Kane, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526.

There are two reported cases, one Federal and one state, in which the facts are almost, if not quite, identical with the present case.

Denver & R. G. R. Co. v. Roller, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738; Tuchband v. Chicago & A. R. Co. 115 N. Y. 437, 22 N. E. 360.

The question is not one of state law.

Barrow S. S. Co. v. Kane, supra.

Mr. Francis Rawle submitted the cause for defendant in error:

The defendant was not "doing business" in Pennsylvania.

Earle v. Chesapeake & O. R. Co. 127 Fed. 235; Maxwell v. Atchison, T. & S. F. R. Co. 34 Fed. 286; Union Associated Press v. Times-Star Co. 84 Fed. 419; N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co. 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 499; Honeyman v. Colorado Fuel & Iron Co. 133 Fed. 96; Re Alabama & C. R. Co. 9 Blatchf. 390, Fed. Cas. No. 124; Boardman v. S. S. McClure Co. 123 Fed. 614; Frawley v. Pennsylvania Casualty Co. 124 Fed. 259; Lamb v. Bowser, 7 Biss. 372, Fed. Cas. No. 8,089; Pennsylvania R. Co. v. Rodgers, 52 W. Va. 450, 62 L.R.A. 178, 44 S. E. 300; Strain v. Chicago Portrait Co. 126 Fed. 831; Bradbury v. Waukegan & W. Min. & Smelting Co. 113 Ill. App. 600; Mandel v. Swan Land & Cattle Co. 154 Ill. 177, 27 L.R.A. 313, 45 Am. St. Rep. 124, 40 N. E. 462; Rich v. Chicago, B. & Q. R. Co. 34 Wash. 14, 74 Pac. 1008; Kite v. Pittsburg, C. C. & St. L. R. Co. 38 Chicago Legal News, 57; People ex rel. A. J. Tower Co. v. Wells, 98 App. Div. 83, 90 N. Y. Supp. 313, Affirmed in 182 N. Y. 553, 75 N. E. 1132; Delaware River Quarry & Constr. Co. v. Bethlehem & N. Pass. R. Co. 204 Pa. 22, 53 Atl. 533; Marshon v. Pottsville Lumber Co. 187 Pa. 12, 67 Am. St. Rep. 560, 40 Atl. 1019; Blakeslee Mfg. Co. v. Hilton, 5 Pa. Super. Ct. 12; Wolff Dryer Co. v. Bigler, 192 Pa. 408, 43 Atl. 1092; People's Bldg. Loan & Sav. Assn. v. Berlin, 201 Pa. 1, 88 Am. St. Rep. 704, 50 Atl. 308.

NOTE.—As to service of process upon foreign corporations—see notes to Foster v. Charles Betcher Lumber Co. 23 L.R.A. 490; Eldred v. American Palace-Car Co. 45 C. C. A. 3; and Cella Commission Co. v. Bohlinger, 78 C. C. A. 473.

That a foreign corporation must be engaged in business within the state in order to validate service of process upon it—see note to Pinney v. Providence Loan & Invest. Co. 50 L.R.A.

Mr. Justice **Moody** delivered the opinion of the court:

The plaintiff in error, a citizen of Pennsylvania, brought an action in the circuit court for the eastern district of Pennsylvania to recover damages for personal injuries alleged to have been incurred in Colorado through the negligence of the defendant, against the defendant in error, a corporation *created by the laws of the state of Iowa, and, therefore, for jurisdictional purposes, a citizen of that state. The return upon the writ shows a service "on Chicago, Burlington, & Quincy Railway Company, a corporation which is doing business in the eastern district of Pennsylvania . . . by giving a true and attested copy to Harry E. Heller, agent of said corporation." The defendant appeared specially for the purpose of disputing jurisdiction. The circuit court held that the service was insufficient, because the defendant was not doing business within the district, and that decision is brought here by writ of error for review.

The jurisdiction of the circuit court in this case was founded solely upon the fact that the parties were citizens of different states. In such a case the suit may be brought in the district of the residence of either. Act of March 3, 1875, chap. 137, § 1 [18 Stat. at L. 470, chap. 137], as corrected by act of August 13, 1888, chap. 866, § 1 (25 Stat. at L. 434, U. S. Comp. Stat. 1901, p. 508). But to obtain jurisdiction there must be service, and the service was upon the corporation in the eastern district of Pennsylvania. Its validity depends upon whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that, through its agents, it was present there.

The eastern point of the defendant's line of railroad was at Chicago, whence its tracks extended westward. The business for which it was incorporated was the carriage of freight and passengers, and the construction, maintenance, and operation of a railroad for that purpose. As incidental and collateral to that business it was proper, and, according to the business methods generally pursued, probably essential, that freight and passenger traffic should be solicited in other parts of the country than those through which the defendant's tracks ran. For the purpose of conducting this incidental business the defendant employed Mr. Heller, hired an office for him in Philadelphia, designated him as district freight and passenger agent, and in many ways advertised to the public these facts. The business of the agent was to solicit and procure passengers *and freight [533] to be transported over the defendant's line. For conducting this business several clerks and various traveling passenger and freight agents were employed, who reported to the agent and acted under his direction. He sold no tickets and received no payments for transportation of freight. When a prospective passenger desired a ticket, and applied to the agent for one, the agent took the applicant's money and procured from one of the railroads running west from Philadelphia a ticket for Chicago and a prepaid order, which gave to the applicant, upon his arrival at Chicago, the right to receive from the Chicago, Burlington & Quincy Railroad a ticket over that road. Occasionally he sold to railroad employees, who already had tickets over intermediate lines, orders for reduced rates over the defendant's lines. In some cases, for the convenience of shippers who had received bills of lading from the initial line for goods routed over the defendant's lines, he gave in exchange therefor bills of lading over the defendant's line. In these bills of lading it was recited that they should not be in force until the freight had been actually received by the defendant.

The question here is whether service upon the agent was sufficient; and one element of its sufficiency is whether the facts show that the defendant corporation was doing business within the district. It is obvious that the defendant was doing there a considerable business of a certain kind, although there was no carriage of freight or passengers. In support of his contention that the defendant was doing business within the district in such a sense that it was liable to service there, the plaintiff cites Denver & R. G. R. Co. v. Roller, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738, and Tuchband v. Chicago & A. R. Co. 115 N. Y. 437, 22 N. E. 360. The facts in those cases were similar to those in the present case. But in both cases the action was brought in the state courts, and the question was of the interpretation of a state statute and the jurisdiction of the state courts.

The business shown in this case was, in substance, nothing more than that of solicitation. Without undertaking to *formulate any general rule defining what [534] transactions will constitute "doing business" in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it. This

view accords with several decisions in the lower Federal courts. Maxwell v. Atchison, T. & S. F. R. Co. 34 Fed. 286; N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co. 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 420; Union Associated Press v. Times-Star Co. 84 Fed. 419; Earle v. Chesapeake & O. R. Co. 127 Fed. 235.

The judgment of the Circuit Court is affirmed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

IN THE MATTER OF JOHN ARM-
HANLER, *Petitioner*. [No. —,

r Leave to File Petition for a
ohibition.
e W. Watt for petitioner.
h H. Choate, Jr., in opposition.
1907. *Denied*.

OWLER, Receiver, etc., *Appellant*,
. OSGOOD. [Nos. 210 and 211.]
rom the Circuit Court of the
es for the District of Colorado.
C. Helm and *N. T. Guernsey*
llant.
ass. E. Herrington and *D. C.*
the appellee.
.907. *Dismissed* for the want of
on the authority of *Louisville*
. *Knott*, 191 U. S. 225, 48 L.
Sup. Ct. Rep. 119, and cases
; *Bache* v. *Hunt*, 193 U. S. 523,
d. 774, 775, 24 Sup. Ct. Rep.

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et al., Appellants, v. MYRTLE
[No. 461.]
m the Supreme Court of the
Oklahoma.
case below (Okla.) 87 Pac.

Hoehling, Jr., for the appel-

nry F. Woodard and *A. A. Bir-*
ppellee.
1907. *Dismissed* for want of
Schlosser v. *Hemphill*, 198 U.
ed. 1000, 25 Sup. Ct. Rep. 654,
ted in *California Consol. Min.*
y, 203 U. S. 579, ante, 326, 27
. 779.

CHOD THOMAS, *Plaintiff in Error, v.* STATE OF KANSAS. [No. 478.]

In Error to the Supreme Court of the *State of Kansas. [536]

See same case below (Kan.) 86 Pac. 499.

Mr. C. C. Coleman in support of motions to dismiss or affirm.

Mr. Alfred M. Jackson in opposition thereto.

March 4, 1907. *Dismissed* for the want of jurisdiction. *Eilenbecker* v. *District Court*, 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424; *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Crowley* v. *Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Giozza v. Tiernan*, 148 U. S. 662, 37 L. ed. 601, 13 Sup. Ct. Rep. 721; *Otis* v. *Parker*, 187 U. S. 606, 608, 609, 47 L. ed. 323, 327, 23 Sup. Ct. Rep. 168; *Castillo* v. *McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Smiley* v. *Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289.

O. V. LAWSON, *Plaintiff in Error, v.* STATE OF WASHINGTON. [No. 221.]

In Error to the Supreme Court of the State of Washington.

See same case below, 40 Wash. 455, 82 Pac. 750.

Mr. F. B. Crosthwaite for plaintiff in error.

Messrs. F. D. McKenney, George H. Walker, and *J. S. Flannery* for defendant in error.

March 11, 1907. *Dismissed* for the want of jurisdiction. *Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *California Powder Works* v. *Davis*, 151 U. S. 393, 38 L. ed. 207, 14 Sup. Ct. Rep. 350; *Sayward* v. *Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Ansbro* v. *United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187.

PROCOPIA GARZA DE VILLEREAL *et al., Plaintiffs in Error, v.* STATE OF TEXAS. [No. 224.]

In Error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

See same case below (Tex. Civ. App.) 84 S. W. 1183.

Mr. H. G. Dickinson for the plaintiffs in error.

Mr. Robert V. Davidson for the defendant in error.

March 11, 1907. *Dismissed* for the want of jurisdiction. *O'Conor* v. *Texas*, 202 U. S. 501, 50 L. ed. 1120, 26 Sup. Ct. Rep. 726; *Bacon* v. *Texas*, 163 U. S. 219, 41 L. ed. 137, 16 Sup. Ct. Rep. 1023; *California Powder Works* v. *Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *Devine* v. *Los Angeles*, 202 U. S. 313, 337, 50 L. ed. 1046, 1054, 26 Sup. Ct. Rep. 652.

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[537] *CHARLES T. CHERRY, *Receiver, etc., Plaintiff in Error, v.* FIDELITY & DEPOSIT COMPANY. [No. 234.]

In Error to the Supreme Court of the Territory of Oklahoma.

See same case below, 16 Okla. 546, 7 L.R.A. (N.S.) 548, 85 Pac. 713.

Messrs. R. M. Campbell, D. T. Flynn, and *C. B. Ames* for the plaintiff in error.

Mr. Edgar H. Gans for the defendant in error.

March 18, 1907. Judgment affirmed with costs. *Fidelity & D. Co.* v. *Courtney*, 186 U. S. 342, 46 L. ed. 1193, 22 Sup. Ct. Rep. 833; *Guarantee Co. of N. A.* v. *Mechanics' Sav. Bank & T. Co.* 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. Rep. 124; *Sweeney* v. *Lomme*, 22 Wall. 208, 22 L. ed. 727.

STEVENSON IRON MINING COMPANY, *Plaintiff in Error, v.* ELMER A. KIBBE. [No. 242.]

In Error to the Circuit Court of the United States for the District of Minnesota.

Messrs. John G. Williams and *Moses E. Clapp* for the plaintiff in error.

Mr. Samuel A. Anderson for the defendant in error.

March 18, 1907. Judgment affirmed with costs and interest. *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159; *Holden* v. *Hardy*, 169 U. S. 366, 392, 42 L. ed. 780, 791, 18 Sup. Ct. Rep. 383; *Kibbe* v. *Stevenson Iron Min. Co.* 69 C. C. A. 145, 136 Fed. 147; *Kline* v. *Minnesota Iron Co.* 93 Minn. 63, 100 N. W. 681; *Schus* v. *Powers-Simpson Co.* 85 Minn. 447, 69 L.R.A. 887, 89 N. W. 68.

JOHN EDWARD MCCARTY, *Appellant,* UNITED STATES. [No. 235.]

Appeal from the Circuit Court of United States for the Northern Distric California.

Mr. H. V. Morehouse for appellant.

The Attorney General and *Assistant torney General Van Orsdel* for appelle

April 8, 1907. *Dismissed* for wan jurisdiction on the authority of *Che United States*, 155 U. S. 489, 39 L. ed. 15 Sup. Ct. Rep. 174.

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*MEXICAN CENTRAL RAILWAY COMP LIMITED, *v.* J. W. ECKMAN, Guardia [No. 247.]

On a Certificate from the United S Circuit Court of Appeals for the Circuit.

Mr. E. R. Thayer and *Mr. Mos Storey* for Mexican C. R. Co.

Mr. George E. Wallace for Eckman.

April 8, 1907. *Question answered i negative* on the authority of *Slater* v. *can Nat. R. Co.* 194 U. S. 120, 48 L. ed 24 Sup. Ct. Rep. 581.

WILL D. GOULD *et al., Appellants,* v. L YOUNGWORTH, United States Ma [No. 401]; WARREN GILLILEN *et al. pellants, v.* LEO V. YOUNGWORTH, U States Marshal [No. 415]; LEE R. M *Appellant, v.* H. Z. OSBORNE, U States Marshal [No. 432].

Appeals from the Circuit Court of United States for the Southern Distri California.

Messrs. Will D. Gould and *H. J. Go* for appellants.

Assistant Attorney General Sanford Solicitor General Hoyt for appellees.

April 8, 1907. Final orders *reversed* costs, and causes remanded with direct to discharge petitioners, respectively, out prejudice to renewal of application remove, on the authority of *Tinsley Treat*, decided at this term, 205 U. S. ante, 689, 27 Sup. Ct. Rep. 430.

EX PARTE: IN THE MATTER OF PE VAZQUEZ MORALES *et al., Petitioners,* 18, Original.]

Motion for Leave to File Petition for peal.

Messrs. Charles C. Lancaster and *bert E. Smith* for petitioners.

April 15, 1907. *Granted,* and appeal lowed on ant ants filing bond in the sum of $1, litioned according to to be approved by the Supreme Court Porto Rico.

McCOACH, Collector, etc., *Pe-*
v. PHILADELPHIA TRUST, SAFE
, & INSURANCE COMPANY *et al.*,
rs, etc. [Nos. 502, 503]; WIL-
COACH, Collector, etc., *Petitioner*,
GE W. NORRIS *et al.*, Executors,
o. 504].
ts of Certiorari to the United
rcuit Court of Appeals for the
uit.
e case below, 73 C. C. A. 610, 142

orney General, Solicitor General,
. *C. McReynolds* for petitioners.
Gordon McCouch for respondents.
22, 1907. Judgments *affirmed*,
by a divided court, and causes re-
the Circuit Court of the United
the Eastern District of Pennsyl-

SPAUGH, JR., *Appellant*, *v.* H. L.
Sheriff, etc. [No. 642.]
from the District Court of the
ates for the Eastern District of

rles F. Wilson for appellant.
N. T. Gentry and *Herbert S. Had-*
pellee.
, 1907. Final order *affirmed* with
lentina v. *Mercer*, 201 U. S. 131,
93, 26 Sup. Ct. Rep. 368; *Felts* v.
01 U. S. 123, 50 L. ed. 689, 26
Rep. 366; *Urquhart* v. *Brown*, de-
ch 18, 205 U. S. 179, ante, 760, 27
Rep. 459; *Re Eckart*, 166 U. S.
41 L. ed. 1085, 1086, 17 Sup. Ct.
Tinsley v. *Anderson*, 171 U. S.
43 L. ed. 91, 96, 18 Sup. Ct. Rep.
ner v. Washington, 168 U. S. 124,
407, 18 Sup. Ct. Rep. 1; *Ex parte*
20 U. S. 782, 30 L. ed. 824, 7 Sup.
80.

F. D. TAYLOR, *Petitioner*, *v.*
STATES. [No. 616.]
for a Writ of Certiorari to the
ates Circuit Court of Appeals for
l Circuit.
Lucius H. Beers and *William G.*
petitioner.
earance for respondent.
, 1907. *Granted.*

ESSLER *et al.*, *Petitioners*, *v.* ENS-
D COMPANY *et al.* [No. 595.]
for a Writ of Certiorari to the
ates Circuit Court of Appeals for
Circuit.
e case below, 148 Fed. 1019.
W. A. Gunter and *J. W. Baker*
titioners.
n B. Knox for the respondents.
, 1907. *Denied.*

WHITE STAR MINING COMPANY, *Plaintiff in Error*, *v.* NELS O. HULTBERG *et al.* [No. 412]; CLAES W. JOHNSON, *Plaintiff in Error*, *v.* WHITE STAR MINING COMPANY OF ILLINOIS *et al.* [No. 647]; PETER H. ANDERSON, *Plaintiff in Error*, *v.* WHITE STAR MINING COMPANY OF ILLINOIS *et al.* [No. 648].

In Error to the Supreme Court of the State of Illinois.

See same case below, 220 Ill. 578, 77 N. E. 327.

Messrs Frederick S. Winston, Silas H. Strawn, John Barton Payne, and *Harris F. Williams* in support of motions.

Messrs. Charles H. Hamill and *Carl R. Chindblom* in opposition thereto.

April 29, 1907. *Dismissed* for the want of jurisdiction. *Sayward* v. *Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *San Francisco* v. *Scott*, 111 U. S. 768, 28 L. ed. 593, 4 Sup. Ct. Rep. 688; *Delmas* v. *Merchants' Mut. Ins. Co.* 14 Wall. 661, 20 L. ed. 757; *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

ROBERT S. BRIGHT, TRUSTEE, *Petitioner*, *v.* FIFTH CONGREGATIONAL CHURCH OF WASHINGTON, D. C. [No. 574.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 28 App. D. C. 229.

Messrs. S. Herbert Giesy and *Herbert J. May* for the petitioner.

Mr. William C. Sullivan for the respondent.

March 4, 1907. *Denied.*

JOHN STEPHENS *et al.*, *Petitioners*, *v.* A. E. BRAST *et al.* [No. 596.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 149 Fed. 149.

Mr. V. B. Archer for the petitioners.

Mr. R. E. Hornor for the respondents.

March 4, 1907. *Denied.*

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, *Petitioner*, *v.* JOHN R. MCSWEAN. [No. 600.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Theodore Mack and *Thomas F. West* for the petitioner.

No appearance for respondent.

March 4, 1907. *Denied.*

WILLIAM H. WILDER, *Petitioner*, *v.* ATWELL J. BLACKFORD. [No. 621.]

[542] Petition for a Writ of Certiorari *to the Court of Appeals of the District of Columbia.

See same case below, 28 App. D. C. 535.

Messrs. Charles E. Littlefield and *Charles H. Duell* for the petitioner.

Mr. Philip Mauro for the respondent.

March 4, 1907. *Denied.*

CONTINENTAL PAPER BAG COMPANY, *Petitioner*, *v.* EASTERN PAPER BAG COMPANY. [No. 568.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Mr. Albert H. Walker for petitioner.

Messrs. Samuel R. Betts and *Francis T. Chambers* for respondent.

March 11, 1907. *Granted.*

T. M. ANGLE, *Petitioner*, *v.* UNITED STATES. [No. 602.]

Petition for a writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 150 Fed. 56.

Mr. George E. Hamilton for the petitioner.

Mr. Solicitor General Hoyt for the respondent.

March 11, 1907. *Denied.*

FREDERICK W. WARD, *Petitioner*, *v.* JOHN B. HART, *Trustee, et al.* [No. 624.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. V. B. Archer for the petitioner.

No appearance for respondents.

March 11, 1907. *Denied.*

LUIGI GANDOLFI *et al.*, *Petitioners*, *v.* ALFREDO C. SIEGERT, as Surviving Partner, etc. [No. 632.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 149 Fed. 100.

Messrs. John Brooks Leavitt and *Edmund Wetmore* for the petitioners.

Mr. E. B. Whitney for the respondent.

March 11, 1907. *Denied.*

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[543] *THOMAS J. SHEA, *Petitioner*, *v.* CITY OF MOBILE. [No. 620.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Harry T. Smith and *Gregory L. Smith* for the petitioner.

Mr. Burwell B. Boone for respondent.

March 18, 1907. *Denied.*

CONVENT OF ST. ROSE, *Petitioner*, *v.* UNITED STATES SAVINGS & LOAN COMPANY. [No 627.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 66 C. C. A. 416, 133 Fed. 354.

Mr. Charles W. Needham for the petitioner.

Mr. Corwin S. Shank for the respondent.

March 18, 1907. *Denied.*

LOUIS W. DOWNES, *Petitioner*, *v.* TEITE-HEANY DEVELOPMENT COMPANY. [No. 629.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 150 Fed. 122.

Messrs. Philip Mauro and *Reeve Lewis* for the petitioner.

Mr. Henry E. Everding for the respondent.

March 18, 1907. *Denied.*

KENTUCKY DISTILLERIES & WAREHOUSE COMPANY, *Petitioner*, *v.* J. I. BLANTON, *Assignee, etc. et al.* [No. 640.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 149 Fed. 31.

Messrs. William Marshall Bullitt, *Levy Mayer*, and *Alfred T. Austrian* for the petitioner.

Mr. Helm Bruce for the respondent.

March 18, 1907. *Denied.*

MORRIS EDELSTEIN, *Petitioner*, *v.* UNITED STATES. [No. 630.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 149 Fed. 636.

Mr. W. B. Matthews for the petitioner. [544]

Solicitor General Hoyt for respondent.

March 25, 1907. *Denied.*

SOUTHERN RAILWAY COMPANY, *Petitioner*, *v.* HUBBARD BROTHERS & Co. [No. 635.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 150 Fed. 312, on 1st appeal 76 C. C. A. 489, 146 Fed. 31.

Messrs. W. A. Henderson, *Caruthers Ewing*, and *A. P. Thom* for the petitioner.

No appearance for respondent.

March 25, 1907. *Denied.*

W. KELSEY KURTZ, *Petitioner*, *v.* ARTHUR K. BROWN, Surviving Receiver, etc. [No. 636.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 152 Fed. 372.

Mr. Rudolph M. Schick for petitioner.

Messrs. R. D. Brown, Malcolm Lloyd, Jr., and *Charles H. Burr* for respondent.

April 8, 1907. *Denied.*

ELIZABETH J. WARD, *Petitioner*, *v.* DAMPSKIBSSELSKABET KJOEBENHAVN. [No. 646.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 150 Fed. 541.

Mr. Frank R. Savidge for petitioner.

Messrs. J. Parker Kirlin and *Charles R. Hickox* for respondent.

April 8, 1907. *Denied.*

SMOKELESS FUEL COMPANY, *Petitioner*, *v.* SAMUEL H. COTTRELL & SON. [No. 663.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 148 Fed. 594.

Mr. Alexander H. Sands for petitioner.

Mr. H. R. Pollard for respondents.

April 8, 1907. *Denied.*

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[545] *COUNTY OF PRESIDIO, TEXAS, *Petitioner*, *v.* NOEL-YOUNG BOND & STOCK COMPANY. [No. 651.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. T. J. Beall for petitioner.

Mr. Millard Patterson for respondent.

April 15, 1907. *Granted.*

STANDARD OIL COMPANY, *Petitioner*, *v.* EDWARD ANDERSON. [No. 691.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Charles W. Fuller for petitioner.

No appearance for respondent.

April 15, 1907. *Granted.*

CLEVELAND CLIFFS IRON COMPANY, *Petitioner*, *v.* EAST ITASCA MINING COMPANY. [No. 603.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 76 C. C. A. 598, 146 Fed. 232.

Mr. W. P. Belden for petitioner.

Mr. J. L. Washburn for respondent.

April 15, 1907. *Denied.*

SCHOOL DISTRICT No. 11, DAKOTA COUNTY, NEBRASKA, *Petitioner*, *v.* EDWARD H. CHAPMAN *et al.*, Administrators, etc. [No. 658.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 152 Fed. 887.

Mr. Elbert H. Hubbard for petitioner.

No appearance for respondents.

April 15, 1907. *Denied.*

BAY PRAIRIE IRRIGATION COMPANY, *Petitioner*, *v.* RICHARD WOOD *et al.* [No. 659.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for *the Fifth Circuit. [546]

Messrs. Hannis Taylor, A. L. Jackson, and *H. M. Garwood* for petitioner.

Mr. Richard Wood in propria persona.

April 15, 1907. *Denied.*

DEUTSCHE LEVANTE LINIE, *etc.*, *Petitioner*, *v.* J. SAMUEL STEPHENSON *et al.* [No. 673]; DEUTSCHE LEVANTE LINIE, *etc.*, *Petitioner*, *v.* CONSTANTINE S. GALANOPULO [No. 674]; DEUTSCHE LEVANTE LINIE, etc., *Petitioner*, *v.* HILLS BROTHERS COMPANY [No. 675]; DEUTSCHE LEVANTE LINIE, etc., *Petitioner*, *v.* NATIONAL BOARD OF MARINE UNDERWRITERS [No. 676]; DEUTSCHE LEVANTE LINIE, etc., *Petitioner*, *v.* WILLIAM H. HARRIS [No. 677].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 151 Fed. 1022.

Mr. Harrington Putnam for petitioner.

Mr. Lawrence Kneeland for respondents.

April 15, 1907. *Denied.*

CATHARINE J. WHITE, Executrix, etc., *Petitioner*, *v.* PENNSYLVANIA RAILROAD COMPANY [No. 689]; CATHARINE J. WHITE, Executrix, etc., *Petitioner*, *v.* STEAM FERRY BOAT PHILADELPHIA, etc. [No. 690].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 152 Fed. 385.

Messrs. LaRoy S. Gove and *J. J. Macklin* for petitioner.

Mr. Henry Galbraith Ward for respondents.

April 15, 1907. *Denied.*

ROBERT T. NEILL, Trustee, etc., *Petitioner*, *v.* UNION NATIONAL BANK OF KANSAS CITY, Mo. [No. 693.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 149 Fed. 711.

547] *Mr. *E. C. Brandenburg* for petitioner.

Mr. M. L. Crawford for respondent.

April 15, 1907. *Denied.*

EUCLID PARK NATIONAL BANK OF CLEVELAND, OHIO, *et al.*, *Petitioners*, *v.* UNION TRUST & DEPOSIT COMPANY, Trustee. [No. 694.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 149 Fed. 975.

Mr. Charles D. Merrick for petitioners.

Mr. B. M. Ambler for respondent.

April 15, 1907. *Denied.*

WILLIAM BEATTIE & SON, *Petitioner*, *v.* UNITED SHIRT & COLLAR COMPANY *et al.* [No. 679.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 149 Fed. 736.

Messrs. Frank S. Black and *George A. Mosher* for petitioner.

Messrs. H. C. Messimer and *Livingston Gifford* for respondents.

April 29, 1907. *Denied.*

WEBSTER COAL & COKE COMPANY, *Petitioner*, *v.* A. J. CASSATT *et al.* [No. 705]; PENNSYLVANIA COAL & COKE COMPANY, *Petitioner*, *v.* A. J. CASSATT, *et al.* [No. 706].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. John W. Griggs and *George S. Graham* for petitioners.

Mr. John G. Johnson for respondents.

April 29, 1907. *Granted.*

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, *Petitioner*, *v.* CATHERINE McGRATH. [No. 708.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 151 Fed. 436.

Mr. J. H. McGowan for petitioner.

Mr. Holmes Conrad for respondent.

April 29, 1907. *Denied.*

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[548] *ED. SMITH, *Plaintiff in Error*, *v.* STATE OF TENNESSEE. [No. 628.]

In Error to the Supreme Court of the State of Tennessee.

Mr. Charles T. Cates, Jr., for the defendant in error.

February 27, 1907. Docketed and dismissed with costs, on motion of Mr. Charles T. Cates, Jr., for the defendant in error.

NORTH SHORE BOOM & DRIVING COMPANY, *Plaintiff in Error*, *v.* NICOMEN BOOM COMPANY. [No. 254.]

In Error to the Supreme Court of the State of Washington.

See same case below, 40 Wash. 315, 82 Pac. 412.

Mr. S. H. Piles for the plaintiff in error.

Mr. W. W. Cotton for the defendant in error.

March 11, 1907. *Dismissed* with costs, on motion of *Mr. S. H. Piles* for the plaintiff in error.

ANDREW PATTERSON, *Plaintiff in Error*, *v.* ISHAM TAYLOR, Jailer, etc. [No. 248.]

In Error to the Supreme Court of the State of Florida.

Messrs. J. Douglas Wetmore and *Isaac L. Purcell* for plaintiff in error.

No appearance for defendant in error.

March 13, 1907. *Dismissed* with costs, pursuant to the Tenth Rule.

MARGARET SAYLOR, *Appellant*, *v.* JOHN C. FRANTZ. [No. 354.]

Appeal from the Supreme Court of the Territory of Oklahoma.

Mr. S. H. Harris for appellant.

Messrs. Frank Dale and *A. G. C. Bierer* for appellee.

March 18, 1907. Dismissed with costs, on authority of counsel for appellant.

ROBERT MANFORD, *Plaintiff in Error*, *v.* STATE OF MINNESOTA. [No. 268.]

In Error to the Supreme Court of the *State of Minnesota.

Messrs. Moritz Rosenthal and *[illegible] Marshall* for plaintiff in error.

No appearance for defendant in error.

March 22, 1907. *Dismissed* with costs, pursuant to the Tenth Rule.

ABRAHAM RUEF, *Plaintiff in Error*, *v.* THOMAS F. O'NEIL, *Sheriff*, etc. [No. 661.]

In Error to the Superior Court of the City and County of San Francisco, State of California.

Mr. A. B. Browne for the plaintiff in error.

Messrs Frederic D. McKenney and *Francis J. He[illegible]* [illegible] defendant in error.

March 25. [illegible] missed with costs, on motion of [illegible] A. [illegible]rowne for the plaintiff in error.

EY KURTZ, *Petitioner*, *v.* ARTHUR WN, Surviving Receiver, etc. [No.

ı for a Writ of Certiorari to the ıates Circuit Court of Appeals for Circuit.

ıe case below, 152 Fed. 372.

dolph M. Schick for petitioner.

R. D. Brown, Malcolm Lloyd, Jr., *les H. Burr* for respondent.

, 1907. *Denied.*

H J. WARD, *Petitioner*, *v.* DAMP-ELSKABET KJOEBENHAVN. [No.

ı for a Writ of Certiorari to the ıates Circuit Court of Appeals for Circuit.

ıe case below, 150 Fed. 541.

ank R. Savidge for petitioner.

J. Parker Kirlin and *Charles R.* or respondent.

, 1907. *Denied.*

ıs FUEL COMPANY, *Petitioner*, *v.* H. COTTRELL & SON. [No. 663.]

ı for a Writ of Certiorari to the ıates Circuit Court of Appeals for ıh Circuit.

ıe case below, 148 Fed. 594.

ewander H. Sands for petitioner.

R. Pollard for respondents.

, 1907. *Denied.*

OF PRESIDIO, TEXAS, *Petitioner*, *v.* OUNG BOND & STOCK COMPANY. ıl.]

ı for a Writ of Certiorari to the ıates Circuit Court of Appeals for Circuit.

J. Beall for petitioner.

llard Patterson for respondent.

5, 1907. *Granted.*

ı OIL COMPANY, *Petitioner*, *v.* ı ANDERSON. [No. 691.]

ı for a Writ of Certiorari to the ıates Circuit Court of Appeals for ıd Circuit.

arles W. Fuller for petitioner.

ıearance for respondent.

5, 1907. *Granted.*

ID CLIFFS IRON COMPANY, *Peti-* *v.* EAST ITASCA MINING COM- [No. 603.]

ı for a Writ of Certiorari to the ıates Circuit Court of Appeals for ıh Circuit.

ıe case below, 76 C. C. A. 598, 146

P. Belden for petitioner.

L. Washburn for respondent.

.5, 1907. *Denied.*

SCHOOL DISTRICT No. 11, DAKOTA COUNTY, NEBRASKA, *Petitioner*, *v.* EDWARD H. CHAPMAN *et al.*, Administrators, etc. [No. 658.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 152 Fed. 887.

Mr. Elbert H. Hubbard for petitioner.

No appearance for respondents.

April 15, 1907. *Denied.*

BAY PRAIRIE IRRIGATION COMPANY, *Petitioner*, *v.* RICHARD WOOD *et al.* [No. 659.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for *the Fifth Circuit. [546]

Messrs. Hannis Taylor, A. L. Jackson, and *H. M. Garwood* for petitioner.

Mr. Richard Wood in propria persona.

April 15, 1907. *Denied.*

DEUTSCHE LEVANTE LINIE, *etc.*, *Petitioner*, *v.* J. SAMUEL STEPHENSON *et al.* [No. 673]; DEUTSCHE LEVANTE LINIE, *etc.*, *Petitioner*, *v.* CONSTANTINE S. GALANOPULO [No. 674]; DEUTSCHE LEVANTE LINIE, etc., *Petitioner*, *v.* HILLS BROTHERS COMPANY [No. 675]; DEUTSCHE LEVANTE LINIE, etc., *Petitioner*, *v.* NATIONAL BOARD OF MARINE UNDERWRITERS [No. 676]; DEUTSCHE LEVANTE LINIE, etc., *Petitioner*, *v.* WILLIAM H. HARRIS [No. 677].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 151 Fed. 1022.

Mr. Harrington Putnam for petitioner.

Mr. Lawrence Kneeland for respondents.

April 15, 1907. *Denied.*

CATHARINE J. WHITE, Executrix, etc., *Petitioner*, *v.* PENNSYLVANIA RAILROAD COMPANY [No. 689]; CATHARINE J. WHITE, Executrix, etc., *Petitioner*, *v.* STEAM FERRY BOAT PHILADELPHIA, etc. [No. 690].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 152 Fed. 385.

Messrs. LaRoy S. Gove and *J. J. Macklin* for petitioner.

Mr. Henry Galbraith Ward for respondents.

April 15, 1907. *Denied.*

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1906,

Vol. 206.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1906,

AND REPORTED HEREIN.

VOLUME 206,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION,

Off. Rep. 206 U. S.	Title.	Here in.	Off. Rep. 206 U. S.	Title.	Here in.
1	Atlantic Coast Line R. Co. v. North Carolina Corp. Com.	933	110–114	Kansas v. Colorado	980
6	" "	936	111–112	" "	981
8–9	" "	936	114–116	" "	982
7	" "	937	116–118	" "	983
9–12	" "	938	118	United States v. William Cramp & Sons Ship & E. B. Co.	
12–14	" "	939		William Cramp & Sons Ship & E. B. Co. v. United States	983
14–16	" "	940			
16–19	" "	941			
19–21	" "	942			
21–23	" "	943	119–121	" "	984
23–25	" "	944	121–124	" "	985
25–27	" "	945	126	" "	985
28	Hiscock v. Varick Bank	945	126–128	" "	986
28–29	" "	946	128	" "	987
29–32	" "	947	129–130	Adams Express Co. v. Kentucky	987
32–33	" "	948			
36–37	" "	951	130–131	" "	988
37–39	" "	952	135–136	" "	991
39–41	" "	953	136–138	" "	992
41	Chapman & Dewey Land Co. v. Bigelow	953	138–139	Adams Express Co. v. Kentucky	992
42–43	" "	955	139	" "	993
43–45	" "	956	139	Adams Express Co. v. Kentucky	993
46	Kansas v. Colorado	956			
47–49	" "	958	140–141	" "	994
49–52	" "	959	141	" "	995
52–54	" "	960	142	Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission	995
54–57	" "	961			
57	" "	962			
80	" "	967	142–145	" "	996
80–83	" "	968	145–147	" "	997
83–85	" "	969	147–149	" "	998
85–88	" "	970	149–152	" "	999
88–89	" "	971	152–154	" "	1000
90–92	" "	972	154–157	" "	1001
92–95	" "	973	157	" "	1002
95–97	" "	974	158	Yates v. Jones Nat. Bank	1002
97–100	" "	975	162–165	" "	1008
100–102	" "	976	165–167	" "	1009
102–105	" "	977	167–170	" "	1010
105–107	" "	978	170–172	" "	1011
107–109	" "	979	172–176	" "	1012
109–110	" "	980	175–177	" "	1013

194–197	Goat & Sheepskin Imp. Co. v. United States			307–308	" "
			1002	315–316	" "
198–199	" "		1003	316–318	" "
199	" "		1004	318–320	" "
202–203	" "		1005	320–322	" "
203–205	" "		1006	322	Public Rs
206	Lowrey v. Hawaii		1006	323–326	" "
206–208	" "		1007	326–331	" "
208–209	" "		1008	331–335	" "
210–212	" "		1009	335	Grafton v. United States
212–213	" "		1010	340–342	" "
214–216	" "		1011	342–346	" "
216–220	" "		1012	346–347	" "
220–222	" "		1013	347–350	" "
222–224	" "		1014	350–352	" "
224	Henry E. Frankenberg Co. v. United States			352–354	" "
			1015	354–355	" "
224–227	" "		1016	356–357	Love v. Tickle
227–230	" "		1016	357	" "
230–237	United States v. Fossatt		1016	358	Ramon v. Todd
237–239	" "		1017	361–362	" "
239	Georgia v. Tennessee Copper Co.			362–365	" "
			1018	365–367	" "
239–244	" "		1019	367–370	" "
239–240	" "		1020	370	" "
240	United States v. Brown Brown v. United States			370	United States v. Hallowell
			1020	372–378	" "
243–244	" "		1021	378–381	" "
244–245	" "		1022	381–385	" "
246	Ellis v. United States Eastern Dredging Co. v. United States Same v. Same Same v. Same Bay State Dredging Co. v. United States Same v. Same Same v. Same			385–387	" "
				387–389	" "
				389–390	" "
				390–392	" "
				392	Dock v. Bates
				398–399	" "
				399	" "
				399–401	" "
			1023	401–404	" "
254–256	" "		1023	404–406	" "
256–258	" "		1024	406–409	" "
258–260	" "		1025	409–411	" "
261–263	" "		1026	411–412	" "
263–265	" "		1027	412–413	" "
265–267	" "		1027	413	Connolly v. Woodbury Granite Co.
267	Stone v. Southern Illinois & M. Bridge Co.				

Off. Rep. No. U. S.	Title	Here in
[illegible]	Illinois C. R. Co. v. Interstate Commerce Commission	1129
[illegible]	" "	1130
[illegible]	" "	1131
[illegible]	" "	1132
[illegible]	" "	1133
[illegible]	" "	1134
[illegible]	" "	1135
[illegible]	" "	1136
[illegible]	" "	1137
[illegible]	" "	1138
[illegible]	" "	1139
467	United States v. Paine Lumber Co.	1140
[illegible]	" "	1140
[illegible]	" "	1141
[illegible]	" "	1142
474	Copper Queen Consol. Min. Co. v. Arizona	1143
[illegible]	" "	1146
[illegible]	" "	1147
[illegible]	" "	1148
[illegible]	Iowa R. Land Co. v. Blumer	1148
[illegible]	" "	1149
[illegible]	" "	1150
[illegible]	" "	1153
[illegible]	" "	1154
[illegible]	" "	1155
496–497	Vicksburg v. Vicksburg Waterworks Co.	1156
497–499	" "	1156
500–501	" "	1157
501	Vicksburg v. Vicksburg Waterworks Co.	1158
502	" "	1159
502–509	" "	1160
509–511	" "	1161
511–514	" "	1162
514–516	" "	1163
516	Bernheimer v. Converse; Dreyfus v. Converse	1163
517	" "	1164
519–520	" "	1165
524–526	" "	1172
526–528	" "	1173
528–531	" "	1174
531–533	" "	1175
533–535	" "	1176
536	Maine v. New York	1176
536–537	" "	1177
537–538	" "	1178
541	" "	1179
541–544	" "	1180
544–546	" "	1181
546–549	" "	1182
549–551	" "	1183
551–553	" "	1184
553–556	" "	1185
556–558	" "	1186
558–560	" "	1187
	American R. Co. v. Cardona de Castro	1187
561–566	Memorandum Cases	1189–1191

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM 1906.

COMPANY, Plff. in Err.,
ATLANTIC COAST LINE RAILROAD
v.
NORTH CAROLINA CORPORATION COMMISSION.

(See S. C. Reporter's ed. 1-27.)

Error to state court—questions reviewable.

1. Whether an order of the North Carolina Corporation Commission regulating the train service of connecting carriers was arbitrary and unreasonable, as being beyond the scope of the authority delegated to the commission by the state laws, is a local, and not a Federal, question, and cannot be reviewed on writ of error to a state court.

Carriers—state regulation—train service of connecting carriers.

2. The power of the state to regulate railroads extends to securing to the public reasonable facilities for making connections between different carriers.

Constitutional law—due process of law—equal protection of the laws—state regulation of connecting carriers.

3. An order of the North Carolina Corporation Commission requiring the Atlantic Coast Line Railroad Company to restore the connection at Selma with a train of the Southern Railway Company which afforded the principal means of travel between the eastern and western parts of the state is not so arbitrary and unreasonable as to amount to a denial of due process of law, or to a deprivation of the equal protection of the laws, if other connections are inadequate for the public convenience, although compliance with the order may necessitate operating an extra train at a loss, or extending, with like result, the run of a local train, so long as the income of the railroad company, from its business in the state, affords adequate remuneration after allowing for any possible loss resulting from operating either of such trains.

[No. 15.]

Argued February 28 and March 1, 1906.
Decided April 29, 1907.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which, reversing a judgment of the Superior Court of Wake County, in that state, sustained an order of the state corporation commission requiring the Atlantic Coast Line Railroad Company to restore a connection at Selma with a train of the Southern Railway Company. Affirmed.

See same case below, 137 N. C. 1, 49 S. E. 191.

The facts are stated in the opinion.

Mr. John G. Johnson argued the cause, and, with Messrs. Warren G. Elliott and Frank P. Prichard, filed a brief for plaintiff in error:

So far as they can be stated in general terms, the power of the state to regulate railroads and the constitutional limitations upon the exercise of such power, are well established.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115.

In determining whether the power has been duly exercised in the present case, some previous decisions of this court as to what are unreasonable regulations may aid.

Smyth v. Ames, 169 U. S. 466-526, 42 L. ed. 819-842, 18 Sup. Ct. Rep. 418; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Cotting v.

NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to State ex rel. Hill v. Dockery, 63 L.R.A. 571.

On compulsory service by common carriers—see notes to Rushville v. Rushville Natural Gas Co. 15 L.R.A. 321; and Harp v. Choctaw, O. & G. R. Co. 61 C. C. A. 414.

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM 1906.

COMPANY, Plff. in Err.,
]*ATLANTIC COAST LINE RAILROAD
v.
NORTH CAROLINA CORPORATION COMMISSION.

(See S. C. Reporter's ed. 1-27.)

Error to state court—questions reviewable.

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Carriers—state regulation—train service of connecting carriers.

2. The power of the state to regulate railroads extends to securing to the public reasonable facilities for making connections between different carriers.

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Argued February 28 and March 1, 1906.
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Off. Rep. 200 U. S.	Title.	Here in.	Off. Rep. 200 U. S.	Title.	[illegible]
177–179	Yates v. Jones Nat. Bank	1014	285	Kessler v. Eldred	[illegible]
179–181	" "	1015	285–287	" "	[illegible]
181	Yates v. Utica Bank Yates v. Bailey Yates v. Staplehurst	1015	287–288	" "	[illegible]
			288–290	" "	[illegible]
			290	Virginia v. West Virginia	[illegible]
183–184	" "	1016	291–292	" "	[illegible]
184–185	" "	1017	292–294	" "	[illegible]
185	Stewart v. United States	1017	294–297	" "	[illegible]
185–188	" "	1018	297–299	" "	[illegible]
188–189	" "	1019	299–302	" "	[illegible]
191–192	" "	1020	302–304	" "	[illegible]
192–194	" "	1021	304–307	" "	[illegible]
194–196	Goat & Sheepskin Imp. Co. v. United States	1022	307–308	" "	[illegible]
196–199	" "	1023	315–316	" "	[illegible]
199	" "	1024	316–318	" "	[illegible]
202–203	" "	1025	318–320	" "	[illegible]
203–205	" "	1026	320–322	" "	[illegible]
206	Lowrey v. Hawaii	1026	323	Pollitz, Re	[illegible]
206–208	" "	1027	323–325	" "	[illegible]
208–209	" "	1028	330–331	" "	[illegible]
210–212	" "	1029	331–333	" "	[illegible]
212–214	" "	1030	333	Frafton v. United States	[illegible]
214–215	" "	1031	340–342	" "	[illegible]
218–220	" "	1032	342–345	" "	[illegible]
220–222	" "	1033	345–347	" "	[illegible]
222–224	" "	1034	347–350	" "	[illegible]
224	Henry E. Frankenberg Co. v. United States	1034	350–352	" "	[illegible]
			352–354	" "	[illegible]
			354–355	" "	[illegible]
224–225	" "	1035	356–357	Love v. Flahive	[illegible]
225–226	" "	1036	357	" "	[illegible]
226–227	United States v. Farenholt	1036	358	Rosen v. Todd	[illegible]
227–230	" "	1037	361–362	" "	[illegible]
230	Georgia v. Tennessee Copper Co.	1038	362–365	" "	[illegible]
			365–367	" "	[illegible]
236–238	" "	1044	367–370	" "	[illegible]
238–240	" "	1045	370	" "	[illegible]
240	United States v. Brown Brown v. United States	1046	370	United States v. Heinszen	[illegible]
			377–378	" "	[illegible]
243–244	" "	1046	378–381	" "	[illegible]
244–245	" "	1047	381–383	" "	[illegible]
246	Ellis v. United States Eastern Dredging Co. v. United States Same v. Same Same v. Same Bay State Dredging Co. v. United States Same v. Same Same v. Same		383–385	" "	[illegible]
			385–388	" "	[illegible]
			388–390	" "	[illegible]
			390–392	" "	[illegible]
			392	Buck v. Beach	[illegible]
			392–395	" "	[illegible]
			395	" "	[illegible]
			399–401	" "	[illegible]
		1047	401–404	" "	[illegible]
254–256	" "	1052	404–406	" "	[illegible]
256–258	" "	1053	406–408	" "	[illegible]
258–260	" "	1054	408–411	" "	[illegible]
261–263	" "	1055	411–413	" "	[illegible]
263–265	" "	1056	413–415	" "	[illegible]
265–267	" "	1057	415	Security Warehousing Co. v. Hand	[illegible]
267	Stone v. Southern Illinois & M. Bridge Co.	1057	415–417	" "	[illegible]
269–271	" "	1059	420–421	" "	[illegible]
271–273	" "	1060	421–423	" "	[illegible]
273–275	" "	1061	423–425	" "	[illegible]
276	Smith v. Jennings	1061	425–427	" "	[illegible]
276–277	" "	1062	428	Southern R. Co. v. Tift	[illegible]
277–278	" "	1063	433–435	" "	[illegible]
278	Wyoming ex rel. Wyoming Agri. College v. Irvine	1063	435–437	" "	[illegible]
			437–440	" "	[illegible]
281	" "	1063	440	" "	[illegible]
281–284	" "	1064	441–443	Illinois C. R. Co. v. Interstate Commerce Commission	[illegible]
284	" "	1065			

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM 1906.

COMPANY, Plff. in Err.,
]*ATLANTIC COAST LINE RAILROAD
v.
NORTH CAROLINA CORPORATION COMMISSION.

(See S. C. Reporter's ed. 1-27.)

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Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336.

The order complained of was not an exercise of the police power of the state. It was not made to protect the health, the morals, or the safety of the citizens. It was the exercise of a governmental power to regulate, for public convenience, the facilities afforded to the public by a corporation. This distinction is important, because the interference of the state even with what Mr. Justice Brown, in Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900, calls the "internal economy" of a railroad, may be justified where it is exercised for the public safety, just as a similar interference with the business of a private individual may be justified on the same grounds. An order which is reasonable when necessary for the protection of the health or lives of the public may be very unreasonable if made simply for public convenience.

None of the authorities cited by the court, or by counsel in the court below, show any attempt by a state legislature or a commission to increase the number of trains on a railroad. The nearest approach to one which the industry of counsel and court could find was the case of People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co. 176 Ill. 512, 35 L.R.A. 656, 45 N. E. 824, 52 N. E. 292.

There may, it is true, be general regulations prescribing a minimum number of daily trains. An example of such legislation is found in Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; but it is believed that the cases show no attempted exercise, by any state or commission, of a power to order a particular railroad to put on an additional train between certain points for the sake of affording additional convenience of transportation. Such a power would, it is submitted, partake more of the nature of an operation of such particular road than of a general regulation of all roads for the public convenience.

The effect of the order was practically the same as if the legislature or the commission had said to the railroad, "you are supplying enough trains to meet the general requirements of public traffic, and you have arranged your schedule in the best manner practicable. For the convenience of passengers coming from certain points on your branch lines, who wish to take a certain train on a connecting road, we will take possession of your road and run an additional train to meet such connecting train, and charge you with the loss." What is this but the appropriation of property without compensation? There can be no just distinction between taking possession of and using a company's property at its expense, and forcing the company to use the property for the benefit of the public, at a loss to itself.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167–173, 44 L. ed. 417–420, 20 Sup. Ct. Rep. 336.

"Public convenience," as used in the cases justifying regulations of corporations, does not mean any accommodation which the legislature may think desirable.

Lake Shore & M. S. R. Co. v. Smith, supra.

Messrs. Robert D. Gilmer and F. A. Woodard argued the cause and filed a brief for defendant in error:

The only appellate jurisdiction conferred by Congress upon this court to review the judgments or decrees at law or in equity of the highest court of a state is by writ of error; and on writ of error nothing is removed for re-examination but questions of law arising upon the record. The findings of fact made in the supreme court of the state will be the basis of the decision of this court.

Quimby v. Boyd, 128 U. S. 488, 489, 32 L. ed. 502, 503, 9 Sup. Ct. Rep. 147; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; Baldwin v. Kansas, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Thayer v. Spratt, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; Adams v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Chrisman v. Miller, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468; Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; Turner v. New York, 168 U. S. 90, 95, 42 L. ed. 392, 394, 18 Sup. Ct. Rep. 38; Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396.

The duty of the Atlantic Coast Line Railroad Company as a common carrier is not discharged simply by transporting a passenger to a point at which its line connects with the line of another railroad, but it is under obligation to transport its passengers over its line of railroad in such way and at such time as to enable them to make convenient connections to their points of destination.

Chicago, M. & St. P. R. Co. v. Minnesota,

134 U. S. 461, 33 L. ed. 983, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 302, 43 L. ed. 702, 708, 19 Sup. Ct. Rep. 465.

The North Carolina Corporation Commission found as a fact that its order could be carried into effect by the extension of either the Springhope or the Plymouth run, and this finding was affirmed by the supreme court of North Carolina. The highest court of the state having, therefore, decided against the plaintiff in error upon an independent ground not involving a Federal question, and broad enough to maintain the judgment, it is submitted that the judgment of the supreme court of North Carolina should be affirmed, or the writ of error dismissed, without considering the Federal question,—assuming that one is presented in the record.

Kennebec & P. R. Co. v. Portland & K. R. Co. 14 Wall. 23, 20 L. ed. 850; Hammond v. Johnston, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141; Northern P. R. Co. v. Ellis, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 35 L. ed. 193, 11 Sup. Ct. Rep. 528; Henderson Bridge Co. v. Henderson, 141 U. S. 679, 35 L. ed. 900, 12 Sup. Ct. Rep. 114; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; California Powder Works v. Davis, 151 U. S. 389, 393, 38 L. ed. 206, 207, 14 Sup. Ct. Rep. 350; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; McLaughlin v. Fowler, 154 U. S. 663, and 26 L. ed. 176, 14 Sup. Ct. Rep. 1192.

The presumption of law is always in favor of the maintenance of the order of a railroad commission; and the same will not be set aside unless flagrantly in violation of the rights of the railroad company.

Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 395, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 173, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336; Brannon, 14th Amendment, p. 197.

The public safety, interest, and convenience are clearly embraced within the legislative power of the state; and the exercise of this power does not deprive the plaintiff in error of its property without due process of law, under the Constitution of North Carolina or of the United States.

Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Jacobson v. Wisconsin, M. & P. R. Co. 71 Minn. 519, 40 L. R.A. 389, 70 Am. St. Rep. 358, 74 N. W. 893; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; Wisconsin, M. & P. R. Co. v. Jacobson, 170 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396; Morgans' L. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 247, 33 So. 214.

The courts of the United States will not treat as a judicial question a law of a state legislature or an order of a body created by it, requiring a railroad company to perform a certain service necessary for the convenience of the public and connected with its duty as a common carrier, unless the order is so unreasonable as practically to destroy the value of the property of the company. And unless this is so, this court cannot declare that such an order is in conflict with the Constitution of the United States as depriving the company of its property without due process of law.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 344, 36 L. ed. 176, 179, 12 Sup. Ct. Rep. 400; St. John v. Erie R. Co. 22 Wall. 136, 149, 22 L. ed. 743, 746; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 261, 46 L. ed. 1155, 22 Sup. Ct. Rep. 900.

The doctrine that, if a railroad as an entirety does a business which is compensatory, it has no legal right to complain that an order of a railroad commission may deprive it of revenue over a portion of its line, has been affirmed by the highest courts of several states.

Missouri P. R. Co. v. Smith, 60 Ark. 221, 2 Inters. Com. Rep. 348, 29 S. W. 752; Re Auburn & W. R. Co. 37 App. Div. 162, 55 N. Y. Supp. 895; Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, supra; Pensacola & A. R. Co. v. State, 25 Fla. 310, 3 L.R.A. 661, 2 Inters. Com. Rep. 522, 5 So. 833; People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co. 176 Ill. 512, 35 L.R.A. 656, 45 N. E. 824, 52 N. E. 292; Chicago Union Traction Co. v. Chicago, 199 Ill. 579, 65 N. E. 470.

The power of the state to require facilities for the convenience of the public is as broad and ample as is the police power.

Wisconsin, M. & P. R. Co. v. Jacobson,

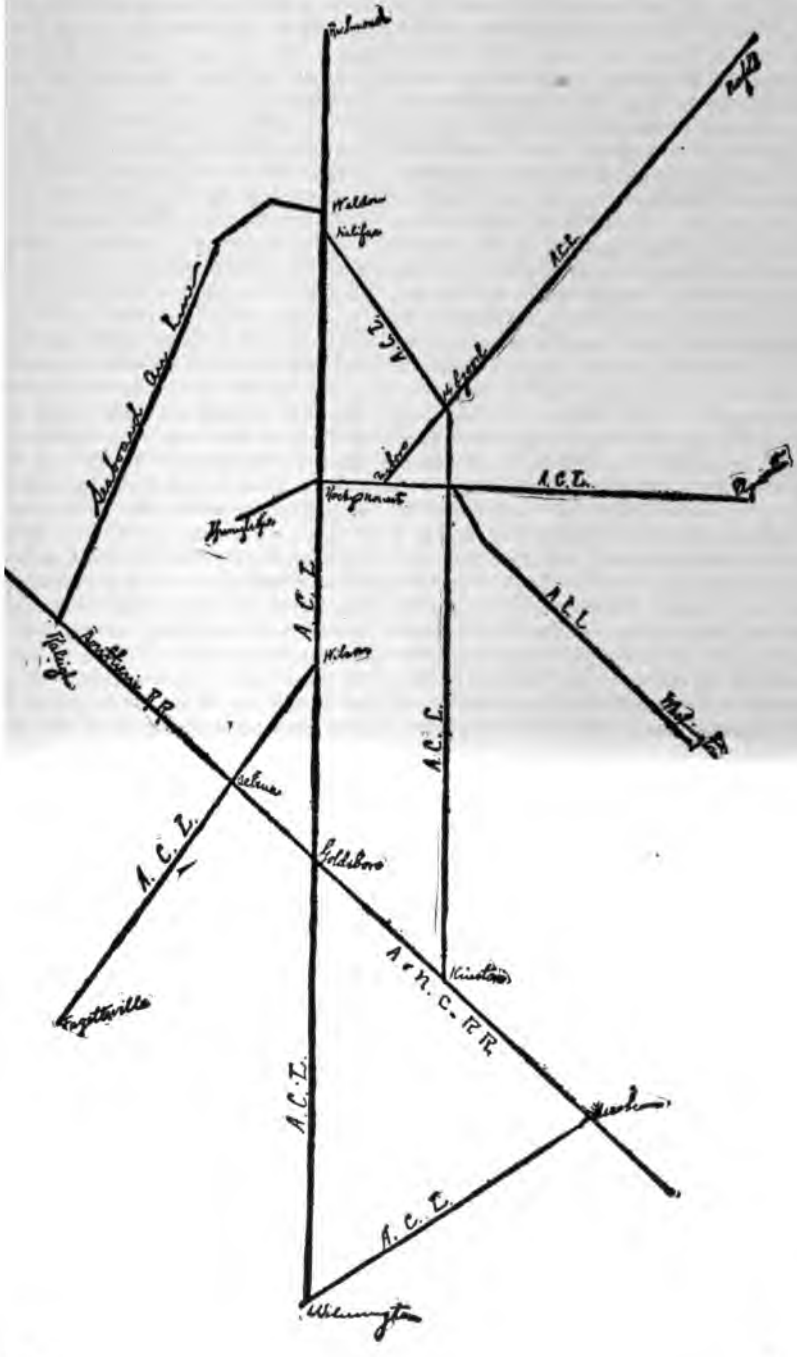
179 U. S. 296, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Gladson v. Minnesota, 166 U. S. 430, 41 L. ed. 1065, 17 Sup. Ct. Rep. 627.

Mr. Justice White delivered the opinion of the court:

Did the order of the North Carolina Corporation Commission, the enforcement of which was directed by the court below, invade constitutional rights of the Atlantic Coast Line Railroad Company, hereafter spoken of as the Coast Line, is the question which arises on this record for decision. A sketch showing the situation of the railway tracks at and relating to the place with which the controversy is concerned was annexed by the court below to its opinion, and that sketch is reproduced to aid in clearness of statement. [See next page.]

For years prior to October, 1903, the Coast Line operated daily an interstate train from Richmond, Virginia, through North Carolina to Florida. This train, known as No. 39, moved over the main track from Richmond to Wilson, North Carolina, thence by the track designated as the cut-off *via* Selma and Fayetteville to Florida. The train (No. 39) was scheduled to reach Selma at 2:50 in the afternoon and to leave at 2:55. The Southern Railway owned or controlled a road in North Carolina which crossed the Coast Line main track at Goldsboro and the cut-off track at Selma. On this road there was operated daily a train from Goldsboro *via* Raleigh to Greensboro, North Carolina, at which point connection was made with the main track of [8]the Southern road. This Southern *train, known as No. 135, left Goldsboro at 2:05 in the afternoon and Selma at 3 o'clock. Thus at Selma it connected with No. 39 of the Coast Line. The Coast Line also operated in North Carolina the branch lines shown on the sketch, which radiated easterly, and served a considerable area of territory. These branches connected with the main track at Rocky Mount, a station 42 miles nearer Richmond than Selma. At Rocky Mount there also was a connection with a Coast Line road running from Pinner's Point, near Norfolk, Virginia. Over this road also the Coast Line operated a train, which left Pinner's Point in the morning and connected with the Coast Line train No. 39 at Rocky Mount. The departure of the train in question from Pinner's Point was so arranged as to enable boats timed to arrive at Norfolk during the night or early morning to make, by ferry to Pinner's Point, a morning connection with the train. On the 3d of October, 1903, the Southern Railway notified the North Carolina Corporation Commission of a contemplated change of schedule on its line from Goldsboro *via* Raleigh to Greensboro. By the change, which was to go into effect on the 11th of October, Southern train No. 135, instead of leaving Goldsboro at 2:05, would leave at 1:35 in the afternoon, and would leave Selma at 2:25 instead of 3. As a result, the connection at Selma between the Coast Line train No. 39 and the Southern train would be broken. The North Carolina Corporation Commission, by letter, on the 6th of October, called the attention of the general manager of the Coast Line to the contemplated change of time by the Southern, and requested that line to advance the time of No. 39 to enable that train to reach Selma at 2:25, thus continuing the connection with the Southern. On the 12th of October the superintendent of transportation of the Coast Line answered. He stated that the schedule of train No. 39 from Richmond to Selma was already so fast that it was very difficult to make the connection at Selma, and that it would be impossible to advance the time of arrival at Selma as requested. It was besides represented that to do so would require a breaking of *the connection made with the[9] Norfolk train at Rocky Mount, and would disarrange the running time of the train south of Selma, and disturb connections which that train made with other roads south of that point. However, it was pointed out that as train No. 39 did not originate at Richmond, but was a through train, made up at New York, carried from thence to Washington by the Pennsylvania, and from Washington to Richmond by the Richmond, Fredericksburg, & Potomac, that negotiations would be put on foot with those roads with an endeavor to secure an acceleration of the time of the departure of the train from New York and Washington, so as thereby to enable an earlier departure from Richmond. On the 11th of October the change of time became operative and the connection at Selma was broken.

A complaint having been lodged with the corporation commission because of the inconvenience to the public thereby occasioned, both the Southern and Coast Line were notified that a hearing would be had concerning the subject on the 28th. On that day the railways, through their officials, appeared. The Southern represented that its change in time was because it was absolutely dangerous to operate its train at the speed required by the previous schedule, and, indeed, that the lengthened schedule w[illegible] yet f[illegible]r than desired. The Coast L[illegible]r rates[illegible] he impossibility of chan[illegible] the [illegible] of train No. 39 from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Richmond to Selma unless there was a change between New York and Richmond. It stated that there was to be a meeting in Washington on November 6 of the representatives of various roads in the South, and that it hoped, as the result of that meeting, to so arrange that No. 39 would be scheduled for delivery at Richmond at an earlier hour, thus enabling its time to Selma to be advanced. The commission continued the subject for further consideration. On November 9 the superintendent of the Coast Line advised the corporation commission that at the meeting in Washington it had been impossible to obtain an earlier departure of the train from New York and [10] Washington, but that the Pennsylvania *still had the matter under consideration. Finally, in answer to urgent requests from the commission, by a letter of November 13 and telegram of November 14, the Coast Line informed the corporation commission that it regretted it could make no change in its schedule of train No. 39 because the Pennsylvania railroad had definitely expressed its inability to make any change in the hour of departure of the train from New York, as to do so would be incompatible with the duties which the Pennsylvania railroad owed to the public, to other roads, and to its contracts concerning the transportation of the mail and express matter. Thereupon the corporation commission entered the following order:

"Whereas, the convenience of the traveling public requires that close connection be made between the passenger trains on the Atlantic Coast Line Railroad and the Southern Railway at Selma daily in the afternoon of each day;

"And whereas, it appears that such close connection is practicable:

"It is ordered that the Atlantic Coast Line Railroad arrange its schedule so that the train will arive at Selma at 2:25 P. M. each day instead of 2:50 P. M., as the schedule now stands.

"It is further ordered that if the Atlantic Coast Line trains have passengers *en route* for the Southern Railway, and are delayed, notice shall be given to the Southern Railway, and that the Southern Railway shall wait fifteen minutes for such delayed trains upon receipt of such notice.

"This order shall take effect December 20, 1903."

The Southern, on receipt of the order, expressed its intention to comply. The Coast Line addressed to the commission a letter protesting against the order, and requesting its withdrawal, and asking for a further hearing. The letter making this request reviewed the previous correspondence. It pointed out that the connection at Selma had been a very old one and that its breaking was solely caused by the act of the Southern in changing the time of its train. It declared that the Coast Line at once, on hearing of the intention of the Southern to make *the change urgently requested that [11] road not to do so. On this subject the letter said:

"On October 6th, I further advised the Southern Railway that if their train was scheduled to leave Selma at 2:25 P. M. this would break the connection with our No. 39, and stated to them that the connection was a most important one, being the principal outlet for passengers *en route* from eastern Carolina to Raleigh and other points on their line, and that we hoped that they could see their way clear not to disturb the connection, as it was impossible for us to get No. 39 to Selma at an earlier hour than the present schedule, owing to the inability of northern connections to deliver the train to us at Richmond any sooner."

Proceeding to point out the failure of the negotiations with the Pennsylvania, and recapitulating the previous statements concerning the rapidity of the schedule of No. 39 between Richmond and Selma, the exacting nature of its work and connections, the absolute impossibility of making it faster was insisted upon. Indeed, there was annexed to the letter a report of the time of No. 39 at Selma for a period of nearly five months, showing that the train had rarely made its connection at Selma.

The commission, after a hearing afforded officials of the Coast Line, suspended its prior order and fixed a day for a rehearing of the whole subject, both roads being notified to that effect. Upon the new hearing the matter was taken under advisement. On January 16 the commission stated the facts and its conclusions deduced therefrom. As to the operation of the two trains, their connection at Selma, the importance of this connection to the public, and the breaking of the connection by the change of schedule, the facts found were identical with those above previously recited. In addition it was found that the Coast Line train No. 39 from Richmond to Selma was not only a through train, but also operated as a local train between Richmond and Selma, making all local stops, and daily handling in consequence, one or two extra express cars. It was found in accordance with the official time sheets of the running of the *train that it had arrived at Selma on schedule time only twice between August 1, 1903, and January 11, 1904. Considering the branch lines as marked on the sheets and the trains operated thereon and connecting with the main track at Rocky Mount, it was f[illegible]

a. That a train was operated from Plyouth to Rocky Mount, which left in the orning at 7:30 and arrived at Rocky ount at 10:35, where it remained until 55 in the afternoon, when it returned to lymouth.

b. That the road also operated a train om Spring Hope on the westerly side of e main track to Rocky Mount, leaving pring Hope at 11:20 in the morning, arving at Rocky Mount at 12:10 in the fternoon, and leaving there at 4, arriving t Spring Hope at 4:45. The commission oncluded as follows:

"Assuming that the statements made by he Atlantic Coast Line Railroad Company re true,—that it was, for the past five nonths, impossible for them to bring No. 39 to Selma by schedule time, to wit, 2:50 P. M., more than twice, and that this train was more than ten minutes late every day except twenty-four,—we must conclude that it is impracticable to require them to make a faster schedule and place this train at Selma at 2:25 P. M. instead of 2:50 P. M.; and therefore this much of the former order is revoked and annulled; but the commission is of the opinion that it is practicable, and that the convenience of the traveling public requires, that the Atlantic Coast Line Railroad Company furnish transportation for passengers from Rocky Mount to Selma after 12:50 P. M. and by or before 2:25 P. M. each day; that this can be done by extending the run of the Plymouth train to Selma instead of having it lie over at Rocky Mount as now, or by extending the run of the Spring Hope train to Selma instead of having it lie over at Rocky Mount as now. The distance from Plymouth to Rocky Mount is 69 miles, nd from Spring Hope to Rocky Mount is 9 miles, and from Rocky Mount to Selma 2 miles; or by providing a separate train r the service.

"And it is therefore ordered that the Atntic Coast Line *Railroad Company furnish ansportation for passengers from Rocky ount to Selma after 12:50 P. M. and by or fore 2:25 P. M. each day.

"It is further ordered that the Southern ilway hold its train No. 135 at Selma teen minutes if, for any reason, the Atntic Coast Line train connecting at that int is delayed.

"It is further ordered that this order take ect on and after the 26th day of Januy, 1904."

Before the date fixed for the taking ef-t of this order the Coast Line filed five ounds of exception to its validity and yed another hearing. The first assert-the impossibility of making the connection from Rocky Mount to Selma between the hours fixed by the commission by an extension of the run of either of the branch trains referred to in the order which the commission had rendered. The reasons principally relied upon to sustain the first exception were the inadequate character of the motive power of the branch road trains for operation on the main track, the speed at which the train would be obliged to travel, and the congested condition of the business on the main track during the hours when the train from either of the branch roads would be obliged to use the main track for the purpose of making the connection. The second exception denied the possibility of making the connection by a special train from Rocky Mount to Selma within the time indicated, and besides asserted that such a train could not be operated without an actual loss. The power of the commission to compel the performance of "services without compensation to the company" was denied, and it was alleged that a taking of property without due process of law, in violation of the state Constitution and the 14th Amendment to the Constitution of the United States would result from enforcing the order. The third exception denied the power of the commission, under the state law, to order the company to put on an extra train between Rocky Mount and Selma, and the fourth in effect reiterated the same ground. The fifth exception challenged the validity of the order as unreasonable, unjust, and arbitrary, and *beyond the power of the com- [14] mission to render, because ample and sufficient accommodations for passengers desiring to connect at Selma with the Southern road were afforded by the Coast Line, entirely irrespective of the connection which had formerly existed between train No. 39 of the Coast Line and train No. 135 of the Southern. The trains thus relied upon as showing a wholly adequate service for the purposes stated were eight in number, and, as enumerated in the exception, are stated in the margin.†

After a new hearing at which further testimony was taken, the corporation commission in substance adhered to its former

†1. The train from Rocky Mount, southbound, in the early morning makes a close connection at Goldsboro at 6: 50 o'clock with the Southern for Raleigh and all points west.

2. The trains from Norfolk and Richmond make close connection at Goldsboro and Selma with the night train on the Southern for Raleigh and all points west.

3. The train from Weldon to Kinston makes close connection at Kinston with the Atlantic & North Carolina train for Golds-

view and reiterated its previous ruling. In its findings of fact it pointed out the importance of the connection at Selma, the admissions to that effect made by the [15]railroad, and the fact that *that connection afforded the principal means of travel between the eastern and western parts of the state. The grounds relied upon in the exception to show that an extension of the run of either of the local trains from Rocky Mount to Selma, as previously ordered, was impracticable, were reviewed and found to be without foundation. The trains which it was alleged afforded adequate means for connection between the western and eastern part of the state, irrespective of the connection formerly existing at Selma by train No. 39, were analyzed, and as a matter of fact the service afforded by these trains was held to be wholly inadequate. Thus, for example, whilst it was found that the first train relied upon—the one from Rocky Mount to Goldsboro, arriving there at 6:50 in the morning—made a connection with a Southern Railway train moving from Selma *via* Raleigh to Greensboro, it was pointed out that it was inadequate because the train had no connection at its point of departure, Rocky Mount, with any incoming train over the large area covered by the branch roads, which area, it was stated, embraced a population of four hundred thousand people. Hence it was found that, to use that train, any person in the territory covered by the branch roads would be obliged to leave home the day before and pass the night at Rocky Mount. The fourth train relied upon, that is, a connection made by Coast Line No. 39 at Selma under the new schedule with a later train over the Southern road for Raleigh, was found to be but a connection with a Southern freight train, having no passenger car, but only a caboose. The trains under the second, third, and sixth headings, connecting at Goldsboro or Selma in the afternoon and night, were found to make a connection only with a slow train over the Southern road, doing a mixed passenger and freight business, and which made no adequate connection beyond Raleigh to the west. The objection to suggested route No. 8, that is, *via* Weldon, and thence by the Seaboard Air Line to Raleigh and points further west, was decided to be that it was a longer route, more costly, and uncertain as to connections. The remaining suggested *routes[16] were in effect disposed of upon similar considerations to those above adverted to.

Considering the operation of an extra train from Rocky Mount to Selma or the extension of the run of one of the branch trains as directed in the previous order, and the objection that a loss would be entailed in the operating expenses for such train or trains, the commission treated that fact as immaterial, because it found as a matter of fact that the total receipts of the Coast Line in North Carolina, taken from business in that state, were sufficiently remunerative, and therefore that even if the train was operated at a loss, as that loss would not reduce the total earnings below what was an adequate remuneration for the whole business, the order would not take the property of the road without due process of law. Summing up its conclusions, the commission said:

"The commission is of the opinion that the facilities given heretofore by the Atlantic Coast Line Company to the traveling public should not be lessened; that the connection furnished passengers from the Washington branch, the Norfolk & Carolina branch, the Plymouth branch, and the Nashville branch with No. 135, Southern Railway passenger train at Selma, and also for all points between Rocky Mount and Selma, for nearly ten years, should be restored; that if this cannot be done by the Atlantic Coast Line train No. 39, as formerly, on account of this train being heavier, containing usually one or more extra express cars, and in all usually ten or more cars, and on account of increase in business between Richmond and Selma, which now

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boro, which train in turn makes close connection with the Southern at Goldsboro at 9:40 P. M. for Raleigh and all points west.

4. The train No. 39, from Washington to Jacksonville, is due at Selma at 2:50 P. M. and the accommodation train No. 183, on the Southern, from Selma to Raleigh and all points west, is scheduled to leave Selma at 3:25 P. M.

5. Train No. —, from Jacksonville to Washington, is due to arrive at Selma at 2:10 o'clock, and makes close connection there with the Southern, which leaves Selma at 2:25 P. M. for Raleigh and all points west.

6. Two trains leave Wilmington for the north, the first at 9:30 A. M., No. 48, and the other, No. 42, at 6:50 P. M. Both of these trains make close connections at Goldsboro with the Southern trains for Raleigh and all points west.

7. No. 34, leaving Smithfield at 7:00 A. M., makes close connection at Selma with the Southern going west for Raleigh and all points beyond, and the same train makes close connection at Weldon with the Seaboard train for Raleigh, and for Southern points south and west.

8. No. 102 lea[illegible] Goldsboro for Norfolk at 7:30 A. M., and [illegible] close connection at Hobgood w[illegible] the train from Kinston to W[illegible] and [illegible]ere with the Seaboard for Ra[illegible] west.

longer stops, then other facilities be furnished by the Atlantic Coast mpany; that this connection, which principal outlet for passengers from Carolina to Selma and other South- lway points for the last ten years, of being abandoned should be made ent and certain; and that this re- accomplished by carrying out the eretofore made in this court. It red, therefore, that the exceptions they are hereby, overruled."

Coast Line, as authorized by stat- pealed to the superior court of ounty, city of Raleigh, and the case re tried *de novo* before a court and The jury, under the instructions of rt, considered and responded to the uestions, which follow:

s it practicable for train No. 39 of lantic Coast Line Railroad, due to at Selma at 2:50 P. M., to make con- at Selma with train No. 135, west- of the Southern Railway, due to elma at 2:25 P. M.?

wer. No.

it practicable to make said connec- extending the run of the Plymouth aily from Plymouth to Selma and and, if so, what would be the addi- expense?

wer. No.

s it practicable to make said con- by the use of the Spring Hope train, so, what would be the additional ex-

wer. No.

n order to make such connection defendant company have to run an nal train on its main line from Mount to Selma?

wer. Yes.

s it practicable for said train to run the schedule prescribed in plain- der, having due regard to the num- trains and number of stops, on de- 's main line from Rocky Mount to

wer. Yes.

What would be the daily cost of ng such train from Rocky Mount to and return?

wer. $40.00.

What would be the probable daily s from such train?

wer. $25.00.

s it reasonable and proper that, for ience of the traveling public, the de- t company should be required to such connection?

swer. Yes."

answers to the first four questions he result of peremptory instructions by the court, and the responses to the last four were deduced by the jury from the testimony submitted to its consideration.

The court granted the prayer of the Atlantic Coast Line to that effect, and rendered judgment on the verdict in its favor. The corporation commission was held to be without power "to interfere with the right of railway companies to regulate for themselves the time and manner in which passengers and property should be transported," provided only such companies complied with the existing statutory direction "to run one passenger train at least each way over its line every week day." On appeal the supreme court of North Carolina reversed the judgment. The facts found by the corporation commission were reiterated and it was held that error had been committed by the court below in instructing the jury to give a negative response to the first three propositions. Indeed, it was declared that the only essential proposition submitted to the jury was the eighth, which required it to be determined whether the connection at Selma was necessary for the public convenience. Treating the facts found by the commission as sustaining the conclusion reached by that body, it was decided that the commission had power to make the order, and that the exercise of the authority was not repugnant either to the Constitution of the United States or of the state. Notwithstanding the finding of facts made concerning the means by which the connection at Selma was to be performed, the court construed the order of the commission as not having been solely based upon the means of performance referred to in the findings, and as embracing not only a choice of the methods referred to therein, but any other which the Coast Line might choose to adopt, provided only it accomplished the purpose of the order. But whilst thus, from one point of view, treating the order of the commission so as to render it unnecessary to pass upon the particular methods for making *the con- [19] nection at Selma referred to in the findings, the court yet reviewed the means of performance therein stated. In doing so it was decided that although to execute the order of the commission it might be imperative for the Coast Line to operate at a pecuniary loss a new train from Rocky Mount to Selma, or the extension, with like result, of the movement of one or the other of the branch trains from Rocky Mount to Selma, no violation of any right of the Coast Line protected by the Constitution of the United States or of the state would arise. This was based upon the finding by the court that the average net earn-

ing of the railroad from its business in North Carolina was of such a character that an adequate remuneration would remain after allowing for any possible loss which might arise from operating either of the trains in question. 137 N. C. 14, 49 S. E. 191.

All the assignments of error challenge the correctness of the decision below on the ground of its repugnancy to the due process or equal protection clauses of the 14th Amendment. The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that [20]doctrine.† Accepting this *general rule, the assignments of error rest upon the hypothesis that the order which the court below enforced was so arbitrary and unreasonable in its character as to transcend the limits of regulation, and to be in effect a denial of due process of law, or a deprivation of the equal protection of the laws.

As the public power to regulate railways and the private right of ownership of such property coexist and do not the one destroy the other, it has been settled that the right of ownership of railway property, like other property rights, finds protection in constitutional guaranties, and, therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation, but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the 14th Amendment.‡ The result, therefore, is that the proposition relied upon is well founded if it be that the order which the court below enforced was of the arbitrary and unreasonable character asserted.

In coming to consider the question just stated it must be borne in mind that a court may not, under the guise of protecting private property, extend its authority to a subject of regulation not within its competency, but is confined to ascertaining whether the particular assertion of the legislative power to regulate has been exercised to so unwarranted a degree as, in substance and effect, to exceed regulation, and to be equivalent to a taking of property without due process of law, or a denial of the equal protection of the laws. We shall not, in analyzing the case, undertake to review in their order the *ten propositions[21] of error found in the record and reproduced in the briefs of counsel, as each proposition, although numbered separately, but reiter-

†Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; Peik v Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97; Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179, 24 L. ed. 99; Winona & St. P. R. Co. v. Blake, 94 U. S. 180, 24 L. ed. 99; Stone v. Wisconsin, 94 U. S. 181, 24 L. ed. 102; Ruggles v. Illinois, 108 U. S. 536, 27 L. ed. 816, 2 Sup. Ct. Rep. 832; Illinois C. R. Co. v. Illinois, 108 U. S. 541, 27 L. ed. 818, 2 Sup. Ct. Rep. 839; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Stone v. Illinois C. R. Co. 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. Rep. 348; Stone v. New Orleans & N. E. R. Co. 116 U. S. 352, 29 L. ed. 651, 6 Sup. Ct. Rep. 349, 391; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 1 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Pearsall v. Great Northern R. Co. 161 U. S. 646, 665, 40 L. ed. 838, 844, 16 Sup. Ct. Rep. 705; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 695, 40 L. ed. 849, 857, 16 Sup. Ct. Rep. 714; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 584, 50 L. ed. 596, 605, 26 Sup. Ct. Rep. 341; Atlantic Coast Line R. Co. v. Florida, 203 U. S. 256, ante, 174, 27 Sup. Ct. Rep. 108; Seaboard Air Line R. Co. v. Florida, 203 U. S. 261, ante, 175, 27 Ct. Rep. 109.

‡Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 331, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 455, 33 L. ed. 970, 979, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 344, 36 L. ed. 176, 179, 12 Sup. Ct. Rep. 400; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 399, 38 L. ed. 1014, 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 657, 39 L. ed. 567, 570, 15 Sup. Ct. Rep. 484; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 241, 41 L. ed. 979, 986, 17 Sup. Ct. Rep. 581; Smyth v. Ames, 169 U. S. 466, 512, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 172, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341.

es grounds of error to be found in the hers. In other words, the various grounds error are so interblended in the several opositions as to render it impossible to eat one as distinct from the other. All e grounds, however, which the proposi- ons assert as establishing the arbitrary d unreasonable character of the order mplained of may be embraced under four neral headings, which we proceed to dis- se of.

1. *That the order was arbitrary and unasonable, because beyond the scope of the thority delegated to the corporation commission by the state law.*

As this proposition involves no Federal estion, and is concluded by the judgment tered below, we put the subject out of ew. And, although not cognate to this oposition, to clear the way for the conderation of the substantial issues, we also t aside the suggestion made in argument, at, as the Southern Railway, by its ange of schedule, originally rendered the nnection at Selma impossible, therefore at road should have been compelled to reore the connection by a modification of e schedule or schedules of the trains by operated. We put this suggestion aside cause it does not seem to have been riously urged in the court below, and bedes is so directly refuted by the findings at we think it requires no further notice.

2. *The order was arbitrary and unreasonle, because, when properly considered, it posed upon the Coast Line a duty foreign its obligation to furnish adequate facilies for those traveling upon its road.*

This rests upon the assumption that, as e order was based not upon the neglect of e Coast Line to afford facilities for travel er its own road, but because of the faile to furnish facilities to those traveling the Coast Line who desired also to conct with and travel on the Southern road, erefore the order was in no just sense a gulation of the business *of the Coast ne. This reduces itself to the contention at, although the governmental power to gulate exists in the interest of the public, t it does not extend to securing to the blic reasonable facilities for making conction between different carriers. But e proposition destroys itself, since at one d the same time it admits the plenary wer to regulate, and yet virtually denies e efficiency of that authority. That wer, as we have seen, takes its origin m the quasi public nature of the busiss in which the carrier is engaged, and braces that business in its entirety; ich, of course, includes the duty to reire carriers to make reasonable connecns with other roads, so as to promote the convenience of the traveling public. In considering the facts found below as to the connection in question, that is, the population contained in the large territory whose convenience was subserved by the connection, and the admission of the railroad as to the importance of the connection, we conclude that the order in question, considered from the point of view of the requirements of the public interest, was one coming clearly within the scope of the power to enforce just and reasonable regulations.

3. *That the facilities afforded the public by the railroad were of such a character as to demonstrate that the extra burden which would result from the compliance with the order was wholly arbitrary and unreasonable.*

This rests upon the assumption that as there were several existing daily connections between trains of the Coast Line and those of the Southern at Selma, which might be availed of by those desiring to travel from eastern to western North Carolina and beyond, and as, besides, the proof established that another connection operating the same result was afforded by way of Weldon and the Seaboard Air Line to Raleigh and thence further west, therefore it was both arbitrary and unreasonable to superadd an unnecessary connection. Conceding, as must be done, that the nature and extent of the existing facilities furnished by a carrier for the public convenience are *essential to be considered in de- [23] termining whether an order directing an increase of such facilities is just and reasonable, and that the deficiency of facilities must clearly appear to justify an order directing the furnishing of new and additional facilities, we think the proposition here relied on to be without merit. Its error arises from assuming that adequate facilities were afforded at Selma or *via* Weldon and the Seaboard without reference to the order complained of. In view of the facts as to the connections at Selma and the Weldon route, found by the commission and reiterated by the court, which we have previously stated, and which we accept, we cannot escape drawing for ourselves the conclusion deduced both by the commission and the court below that the connections relied on were wholly inadequate for the public convenience, and, therefore, a state of things existed justifying the order.

4. *That, however otherwise just and reasonable the order may have been, it is inherently unjust and unreasonable because of the nature of the burden which it necessarily imposes.*

This proposition is based on the hypothesis that the order, by necessary intendment, directed the Coast Line to operate an additional train, although such train could not be operated without a daily pecuniary loss. The premise upon which this proposition rests would seem to be irrelevant, since the court below, in one aspect of its opinion, treated the order of the commission as not requiring the operation of an extra train from Rocky Mount to Selma. Yet, as the facts found by the commission and which were affirmed by the court would indicate that it was considered that the operation of such train was the most direct and efficient means for making the ordered connection, and as the court considered and passed upon the duty of the railroad to comply with the order, even if to do so it became necessary to operate the extra train at a loss, we think the proposition relied upon is open and must be decided. The contention is that the fact that some loss would result from the requirement that the extra train be operated, in and of itself, conclusively establishes the [24] unreasonableness *of the order, and demonstrates that to give it effect would constitute a taking of property without due process of law, in violation of the 14th Amendment. Conclusive support for this contention, it is insisted, is afforded by the doctrine upheld in Smyth v. Ames, 169 U. S. 466, 42 L. ed 819, 18 Sup. Ct. Rep. 418, and the cases which preceded that decision. The cases relied upon, however, only involved whether a general scheme of maximum rates imposed by state authority prevented the railroads from earning a reasonable compensation, taking into view all proper considerations as to the value of the property and the cost of operation, and, if so, whether the enforcement of rates so unreasonably low would be unjust and unreasonable, and, therefore, be confiscation,—that is, a taking of property without due process of law, in violation of the Constitution of the United States. The principle upon which the cases in question proceeded was thus summed up by Mr. Justice Harlan, delivering the opinion of the court in Smyth v. Ames, 169 U. S. 526, 42 L. ed. 842, 18 Sup. Ct. Rep. 426:

"A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would, therefore, be repugnant to the 14th Amendment of the Constitution of the United States."

But this case does not involve the enforcement by a state of a general scheme of maximum rates, but only whether an exercise of state authority to compel a carrier to perform a particular and specified duty is so inherently unjust and unreasonable as to amount to the deprivation of property without due process of law or a denial of the equal protection of the laws. In a case involving the validity of an order enforcing a scheme of maximum rates, of course the finding that the enforcement of such scheme will not produce an adequate return for the operation of the railroad, in and of itself, demonstrates *the unreasonable- [25] ness of the order. Such, however, is not the case when the question is as to the validity of an order to do a particular act, the doing of which does not involve the question of the profitableness of the operation of the railroad as an entirety. The difference between the two cases is illustrated in St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484, and Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900. But even if the rule applicable to an entire rate scheme were to be here applied, as the findings made below as to the net earnings constrain us to conclude that adequate remuneration would result from the general operation of the rates in force, even allowing for any loss occasioned by the running of the extra train in question, it follows that the order would not be unreasonable, even if tested by the doctrine announced in Smyth v. Ames and kindred cases.

It is insisted that, although the case is not controlled by the doctrine of Smyth v. Ames, nevertheless the arbitrary and unreasonable character of the order results from the fact that to execute it would require the operation of a train at a loss, even if the result of the loss so occasioned would not have the effect of reducing the aggregate net earnings below a reasonable profit. The power to fix rates, it is urged, in the nature of things, is restricted to providing for a reasonable and just rate, and not to compelling the performance of a service for such a rate as would mean the sustaining of an actual loss in doing a particular service. To hold to the contrary, it is argued, would be to admit that a regulation might extend to directing the rendering of a service grat[illegible] r the performance of first one service [illegible] on another and still another, at a loss, [illegible] h could be continued in favor of selected [illegible] rests until the point

was reached where, by compliance with the last of such multiplied orders, the sum total of the revenues of a railroad would be reduced below the point of producing a reasonable and adequate return. But these extreme suggestions have no relation to the case in hand. Let it be conceded that if a scheme of maximum rates was imposed by state authority, *as a whole adequately remunerative, and yet that some of such rates were so unequal as to exceed the flexible limit of judgment which belongs to the power to fix rates, that is, transcended the limits of just classification, and amounted to the creation of favored class or classes whom the carrier was compelled to serve at a loss, to the detriment of other class or classes upon whom the burden of such loss would fall, that such legislation would be so inherently unreasonable as to constitute a violation of the due process and equal protection clauses of the 14th Amendment. Let it also be conceded that a like repugnancy to the Constitution of the United States would arise from an order made in the exercise of the power to fix a rate when the result of the enforcement of such order would be to compel a carrier to serve, for a wholly inadequate compensation, a class or classes selected for legislative favor, even if, considering rates as a whole, a reasonable return from the operation of its road might be received by the carrier. Neither of these concessions, however, can control the case in hand, since it does not directly involve any question whatever of the power to fix rates and the constitutional limitations controlling the exercise of that power, but is concerned solely with an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience. The distinction between an order relating to such a subject and an order fixing rates coming within either of the hypotheses which we have stated is apparent. This is so because, as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although, by doing so, as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not, in and of itself, necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable, under the doctrine of Smyth v. Ames, or under the concessions made in the two propositions we have stated. Of course, the fact that the furnishing of a necessary *facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance. A similar contention to the one we are considering was adversely passed upon in Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115. That case involved the enforcement of an order of a state railroad commission directing a railroad company to acquire the necessary land and make a track connection for the purpose of affording facilities for the interchange of business with another road. The court, after holding that the order was not so unjust and unreasonable as to be repugnant to the Constitution of the United States, disposed of the contention that the order was void because compliance with it would necessitate the incurring of expense, by saying (179 U. S. 302, 45 L. ed. 201, 21 Sup. Ct. Rep. 120):

"Although to carry out the judgment may require the exercise by the plaintiff in error of the power of eminent domain, and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of defendant in error. Worcester v. Norwich & W. R. Co. 109 Mass. 112; People ex rel. Green v. Dutchess & C. R. Co. 58 N. Y. 152, 163; People ex rel. Kimball v. Boston & A. R. Co. 70 N. Y. 569; People v. New York, L. E. & W. R. Co. 104 N. Y. 58, 67, 58 Am. Rep. 484, 9 N.E. 856."

Affirmed.

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*ALBERT K. HISCOCK, Trustee in Bankruptcy of Jacob M. Mertens et al., Bankrupts, Appt., [28]

v.

VARICK BANK OF NEW YORK.

(See S. C. Reporter's ed. 28-41.)

Appeal—in bankruptcy cases—rejection of claim.

1. The claims of a creditor against a

NOTE.—On appeal and review in bankruptcy cases—see note to Re Eggert, 43 C. C. A. 9.

On the rights of pledgeor and pledgee in respect to sale of collateral bonds and commercial paper—see note to Moses v. Grainger, 53 L.R.A. 857.

On pledgee's conversion of pledged property by invalid sale—see note to Glidden v. Mechanics' Nat. Bank, 43 L.R.A. 737.

bankrupt estate have been rejected so as to give the right to appeal where he insisted that his claims were for a definite amount *viz.*, the amount stated in the proofs of debt, less the sum derived from the sale of collateral, and the referee declined to allow the claims as established as the proof stood, and the bankruptcy court approved and affirmed the ruling of the referee as a disallowance of the claims, and entered an order accordingly.

Bankruptcy—assets of partnership estate—insurance on life of partner.

2. Policies insuring the life of one member of a bankrupt partnership, payable, one to him or his legal representatives, and the other to his wife or children or to him, in the event of their death before his, which have been individually pledged by him, do not belong to the partnership estate, although the partnership may have pledged the policies in connection with his separate individual pledge.

Pledge—application of proceeds of collateral.

3. A creditor of a bankrupt partnership may apply the proceeds of the sale of collateral in his hands, the property of one of the partners, to the extinction of the individual indebtedness of such partner.

Pledge—sale without notice—purchase by pledgee.

4. A sale of collateral security at public auction, without notice, and the purchase thereof by the pledgee, are not void as against the trustee in bankruptcy of the pledgeor, in the absence of fraud, where the contract of pledge permits such action, and is valid under the law of the state where such contract was made and executed and was to be performed.

Evidence—burden of proof.

5. The burden of proving that a sale by a pledgee of the property of a bankrupt, made conformably to the contract of pledge, was unfair, is on the trustee in bankruptcy of the pledgeor, who seeks to avoid the sale.

Bankruptcy—secured creditors—valuation and disposition of security.

6. Only when the collateral held by secured creditors of the bankrupt has not been disposed of by the creditor in accordance with the contract of pledge can a court of bankruptcy exercise its power, under the bankrupt act of July 1, 1898 (30 Stat. at L. 560, chap. 541, U. S. Comp. Stat. 1901, p. 3443), § 57h, to determine the value of such securities, and to direct their disposition.

Bankruptcy—secured creditors—effect of filing petition on right to sell collateral.

7. The power of sale may be exercised by a pledgee conformably to the contract of pledge during the time between the filing of the petition in bankruptcy against his pledgeor and the adjudication in bankruptcy, since the title of the bankrupt is, by the act of July 1, 1898, § 70a, e, vested in the trustee by operation of law only as of the date of the adjudication.

[No. 244.]

Argued March 15, 1907. Decided May 13, 1907.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed a decree of the District Court for the Northern District of New York, disallowing claims of a secured creditor against the bankrupt estate. Affirmed.

See same case below, 75 C. C. A. 548, 144 Fed. 818.

Statement by Mr. Chief Justice Fuller:

General order in bankruptcy, No. 36, relates to "Appeals," and subdivision 3 thereof provides: "In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

The circuit court of appeals, in pursuance thereof, made and filed its finding of the facts and its conclusions of law thereon.

August 18, 1903, a petition in bankruptcy was filed against the firm of Jacob M. Mertens & Company and the individual members thereof. They were adjudicated bankrupts September 15, *and on the following 14th of [29] October plaintiff in error was elected trustee in bankruptcy of both the copartnership and the individual estates. At the time the petition was filed the firm was indebted to the Varick Bank to the amount of $27,893.85, evidenced by notes made or indorsed or guaranteed by Mertens & Company, five of which, aggregating $22,500,—four for $5,000 each, and one for $2,500,—were collateral notes. These notes were alike in form and contained the following provision:

"On the nonperformance of this promise or upon the nonpayment of any of the liabilities above mentioned, or upon the failure of the undersigned forthwith, with or without notice, to furnish satisfactory additional securities in case of decline as aforesaid, — then, and in either such case, this note shall forthwith become due and payable, without demand or notice, and full power and authority are hereby given to said holder to sell, assign, and deliver the whole of the said securities, or any part thereof, or any substitutes therefor, or any additions thereto, or any other securities or property given unto or left in the possession of the holder by the undersigned, for safe-

keeping or otherwise, at any broker's board or at public or private sale, at the option of the said holder, without either demand, advertisement, or notice of any kind, which are hereby expressly waived. At any such sale the said holder may purchase the whole or any part of the property sold, free from any right of redemption on the part of the undersigned, which is hereby waived and released. In case of sale for any cause, after deducting all costs or expenses of every kind for collection, sale, or delivery, the said holder may apply the residue of the proceeds of the sale or sales so made, to pay one or more or all of the said liabilities to it or him as to it or him shall seem proper, whether then due or not due, making proper rebate for interest on liabilities not then due, and returning the overplus, if any, to the undersigned, who agree to be and remain liable to the said holder for any deficiency arising upon such sale or sales. The undersigned do hereby *authorize and empower the said bank (but no other holder) at its option, at any time, to appropriate and apply to the payment and extinguishment of any obligations or liabilities of the undersigned to it, whether now existing or hereafter contracted, any and all moneys now or hereafter in the hands of the said bank, on deposit or otherwise, to the credit of or belonging to the undersigned, whether the said obligations or liabilities are then due or not due."

Indorsed upon the back of each of these notes and signed by J. M. Mertens & Company and J. M. Mertens appeared the following:

"In consideration of $1 paid to the undersigned, and of the making, at the request of the undersigned, of the loan evidenced by the within note, the undersigned hereby jointly and severally guarantee to the Varick Bank of New York, N. Y., its successors, indorsers, or assigns the punctual payment, at maturity, of the said loan, and hereby assent to all the terms and conditions of the said note, and consent that the securities for the said loan may be exchanged or surrendered from time to time, or the time of payment of the said loan extended without notice to or further assent from the undersigned, who will remain bound upon this guaranty, notwithstanding such changes, surrender, or extension."

On the day the petition was filed, Mertens individually was indebted to the bank in the sum of $25,489.62. This indebtedness was upon his guaranty of the five collateral notes, of one of which he was also the maker, the balance being based upon his indorsement of sundry notes of third parties amounting to about $3,000. Mertens individually, to secure the payment of the indebtedness to the bank, pledged to it two policies of insurance upon his life, one for $50,000, No. 417,171, and the other for $10,000, No. 252,314. The $50,000 policy was a free tontine policy, issued February 15, 1889, payable to Mertens or his estate, the yearly premium was $1,750, and the tontine dividend period expired February *15, 1909.[31] The $10,000 policy was issued December 21, 1882, payable to Jennie Mertens, wife of the insured, but, in the event of her prior death, to the children of the insured, and the annual premium was $272.50. It was a tontine savings policy, and the tontine period was completed December 21, 1902, at which time Mertens, as the insured, withdrew in cash the share of the surplus apportioned to the policy, and continued it in force on the ordinary plan. On March 16, 1901, Jennie Mertens and the children of Jacob and Jennie executed an assignment of the $10,000 policy to the bank. On March 25, 1901, J. M. Mertens joined with his wife in executing a further assignment of the same policy to the bank. March 21, 1901, Mertens individually executed an assignment of the $50,000 policy to the bank. These assignments contained no power of sale. In addition the policies were pledged to the bank under the terms of the collateral notes and agreements of pledge. It appeared from the proofs that the claim against Mertens individually was secured by an individual deposit of Mertens of the sum of $6,000 as collateral, in addition to the policies.

Obligations aggregating $1,691.93, indorsed by Mertens, had matured and remained unpaid on August 18, and on September 15 obligations aggregating $13,570.47 had matured and remained unpaid, and in the latter amount were included two of the collateral notes for $5,000 each and some $3,000 of the notes of third persons, indorsed by Mertens individually.

On or before September 14, 1903, the two policies were delivered to a duly licensed auctioneer by the attorneys of the bank with instructions to sell the same at public auction at the New York Real Estate Office sales rooms, to the highest bidder, and they were offered for sale and sold to the highest bidder, an agent of the bank, on September 14, the $50,000 policy for the sum of $7,000 and the $10,000 policy for the sum of $3,250. No notice of the sale was given to anyone except the bank. In due time the bank filed with the referee *in bankruptcy two proofs[32] of claim, one against the copartnership estate aggregating $27,893.85, and another against Mertens for the sum of $9,118.37. Thereafter the claims were amended. Objections to both were filed by the trustee, alleging in substance that the sales of the policies were illegal; that the value of the se-

curities held by the bank had not been ascertained according to the provisions of the bankruptcy act, and that the trustee still owned the equity.

No other evidence than appearing above was offered by the trustee on the hearing before the referee under the objections. The referee held, in substance, that the sale of the policies was null and void, and that the value of the securities had not been ascertained according to the provisions of § 57h of the bankruptcy act, and refused to allow either claim against the estate or estates. Counsel for the trustee moved for the referee to direct a method by which the security held by the bank should be liquidated, and that in so doing he direct the bank to resell the policies on notice to the trustee. The motion was objected to, but was granted by the referee. The bank petitioned for a review, and the district court of the United States for the northern district of New York on such review approved the referee's rulings. 134 Fed. 101. From the order of the district court the bank appealed to the United States circuit court of appeals for the second circuit. That court, as previously stated, filed its finding of the facts and its conclusions of law, which conclusions of law were as follows:

"1. That the order made by the referee and by the district court was a rejection of the claims of the Varick Bank.

"2. That the policies in question did not belong to the partnership estate, and that the claim against the partnership should have been allowed in full.

"3. That the sale of the policies, under the facts as stipulated, was a good and valid sale, and passed a good and valid title to said policies to the Varick Bank.

"4. That the value of said policies was [33] properly liquidated *by said sale under the terms of § 57h of the bankruptcy act, and that, under said section, the referee had no power to make the order directing a resale thereof.

"5. That said bankruptcy act did not suspend or enjoin the exercise of said power of sale during the time between the filing of the petition and the adjudication in bankruptcy.

"6. That the claim against the individual estate of Jacob M. Mertens should be allowed in full.

"7. That the burden of proving that said sale was unfair was upon the trustee."

The order of the district court was reversed and the case remanded with instructions to proceed conformably with the opinion of the circuit court of appeals. 75 C. C. A. 548, 144 Fed. 818. The case was then brought to this court on appeal.

Mr. Will B. Crowley argued the case, and, with Mr. Ceylon H. Lewis, filed a brief for appellant:

A sale of or interference with a bankrupt's property during the interim between the filing of the petition and the adjudication in bankruptcy is void.

International Bank v. Sherman, 161 U. S. 406, 25 L. ed. 867; Whitney v. Wenman, 188 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778; Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; Re Rosenberg, 3 Ben. 366, Fed. Cas. No. 12,055; Phelps v. Sellick, 8 Nat. Bankr. Reg. 390, Fed. Cas. No. 11,079; Lee v. Franklin Ave. German Sav. Inst. 3 Nat. Bankr. Reg. 218, Fed. Cas. No. 8,188; Cuner v. Long, 104 U. S. 229, 244, 26 L. ed. 724, 729; McHenry v. La Societe Francaise D'Epargnes, 95 U. S. 60, 24 L. ed. 371; Wiswall v. Sampson, 14 How. 66, 14 L. ed. 328; State Bank v. Cox, 74 C. C. A. 285, 143 Fed. 93; Re Reynolds, 127 Fed. 762; Re Brooks, 81 Fed. 509; Re Antigo Screen Door Co. 89 C. C. A. 248, 123 Fed. 254; Re Gutman, 114 Fed. 1010; Re Krinsky, 112 Fed. 975.

It is the law that a pledgee cannot become the purchaser of pledged securities except by the express permission of the pledgeor; and it is also the law that a pledgee is a trustee for the benefit of the pledgeor.

Pauly v. State Loan & T. Co. 165 U. S. 620, 41 L. ed. 849, 17 Sup. Ct. Rep. 465; Easton v. German-American Bank, 127 U. S. 537, 32 L. ed. 212, 8 Sup. Ct. Rep. 1287; Perry, Tr. 4th ed. § 602, o. x.; Laclede Nat. Bank v. Richardson, 156 Mo. 275, 79 Am. St. Rep. 528, 56 S. W. 1117; Jones, Pledges, §§ 635a, 648; Dana v. Buckeye Coal & Coke Co. 38 Ill. App. 371.

Clauses inserted in the contracts of pledge, providing that if the terms of the contract are not strictly fulfilled the pledge shall not be redeemable, have always been held of no avail; for the common law terms such a stipulation unconscionable and void upon the ground of public policy, as tending to the oppression of the debtor.

Story, Bailments, § 318-345.

If the bank waived the terms of the notes, and relied upon its legal rights to offset the deposit, then the time when the offset was required to be made was the time of the filing of the petition.

Collier, Bankr. 4th ed. 496; Re City Bank of Sav. L. & Discount, 6 Nat. Bankr. Reg. 71, Fed. Cas. No. 2,742; Drake v. Rollo, 3 Biss. 273, Fed. Cas. No. 4,068.

If the Va[illegible] did not rely upon the terms of the [illegible] the making of the [illegible] moneys, bo[illegible] it of $2,000 and the proceeds of the p[illegible] was a payment by [illegible]

voluntarily made by the debtor. The bank therefore could make no application of the proceeds, but it was left for the law to make the application.

Blackstone Bank v. Hill, 10 Pick. 129; Page v. Iler, 5 Smedes & M. 410, 43 Am. Dec. 521; United States v. Kirkpatrick, 9 Wheat. 720, 6 L. ed. 199; Cowperthwaite v. Sheffield, 1 Sandf. 453; Larrabee v. Lumbert, 32 Me. 97.

If the law is to make the application, then it will make it upon those obligations first becoming due, and will therefore completely extinguish and wipe out the notes first due, which in this case means it will extinguish all except the last three notes of the partnership claim.

Farwell v. Importers & T. Nat. Bank, 90 N. Y. 490; Gass v. Stinson, 3 Sumn. 112, Fed. Cas. No. 5,262; Thompson v. St. Nicholas Nat. Bank, 113 N. Y. 333, 21 N. E. 57; Truscott v. King, 6 N. Y. 147; United States v. Kirkpatrick, supra; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 11 Am. St. Rep. 612, 20 N. E. 632; Pond v. Harwood, 139 N. Y. 125, 34 N. E. 768; Larrabee v. Lumbert, supra.

No liquidation of securities which is binding upon the bankruptcy court can be made by a creditor except as directed by the court.

Whitney v. Wenman, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778; McHenry v. La Societe Francaise D'Epargnes, supra; Whitney v. Dresser, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. Rep. 316.

The claims should not have been allowed by the circuit court of appeals. At most, they should have been sent back to the referee to hear any evidence the trustee wished to submit.

Re John H. Livingston Co. 75 C. C. A. 282, 144 Fed. 971.

In any event, equity should direct a resale.

Whitney v. Wenman, supra.

Mr. Frederick M. Czaki argued the cause, and, with Mr. Louis Marshall, filed a brief for appellee:

The bank was not a secured creditor within the meaning of the term "secured creditor," as defined by the bankrupt act.

Re Anderson, 7 Biss. 233, Fed. Cas. No. 350; Re Cram, 1 Haskell, 89, Fed. Cas. No. 3,343; Re Howard, 4 Nat. Bankr. Reg. 571, Fed. Cas. No. 6,750; Re Thomas, 8 Biss. 139, Fed. Cas. No. 13,886; Re Whiting, 2 Low. Dec. 472, Fed. Cas. No. 17,573; Re Foot, 8 Ben. 228, Fed. Cas. No. 4,906; Re Ellerhorst, 5 Nat. Bankr. Reg. 144, Fed. Cas. No. 4,381; Ex parte Talcott, 2 Low. Dec. 320, Fed. Cas. No. 13,184; Re Hollister, 3 Fed. 452; Downing v. Traders' Bank, 2 Dill. 136, Fed. Cas. No. 4,046; Re Dunkerson, 4 Biss. 253, Fed. Cas. No. 4,157; Jervis v. Smith, 9 Nat. Bankr. Reg. 594; Re Babcock, 3 Story 393, Fed. Cas. No. 696; Re Plummer, 1 Phill Ch. 56; Wilder v. Keeler, 3 Paige, 167, 22 Am. Dec. 781.

The copartnership estate is entirely distinct from that of the individual. The assets must be separately administered, and can in no way be so commingled as to deprive a creditor holding security upon the individual estate of a partner from proving the full amount of his debt against the copartnership estate, irrespective of whether he has or has not filed a claim against the individual estate.

Re Noyes Bros. 62 C. C. A. 218, 127 Fed. 286; Gorman v. Wright, 69 C. C. A. 76, 136 Fed. 164; Swarts v. Fourth Nat. Bank, 54 C. C. A. 387, 117 Fed. 1; Re Swift, 106 Fed. 65; Re Heyman, 95 Fed. 800; Re Bingham, 94 Fed. 796; Re Headley, 97 Fed. 771; Re Coe, 1 Am. Bankr. Rep. 275; Collier, Bankr. 3d ed. 321; Madison Square Bank v. Pierce, 137 N. Y. 444, 20 L.R.A. 335, 33 Am. St. Rep. 751, 33 N. E. 557.

The filing of the verified proof of debt established the appellee's prima facie case, and entitled it, in the absence of proof under the objections, to the allowance of the claim.

Whitney v. Dresser, 200 U. S. 532, 50 L. ed. 584, 26 Sup. Ct. Rep. 316; Re Castle Braid Co. 145 Fed. 228; Re Dresser, 68 C. C. A. 207, 135 Fed. 495; Re Carter, 138 Fed. 846; Re Cannon, 133 Fed. 837; Re Shaw, 109 Fed. 782; Re Doty, 5 Am. Bankr. Rep. 58; Re Sumner, 101 Fed. 224.

The bank had the right to apply the deposit to the payment of the individual debt, irrespective of any agreement or right by which it was held as collateral security.

New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep 199; Moch v. Market Street Nat. Bank, 47 C. C. A. 49, 107 Fed. 897; Frank v. Mercantile Nat. Bank, 182 N. Y. 264, 108 Am. St Rep. 805, 74 N. E. 841; Re Philip Semmer Glass Co. 67 C. C. A. 551, 135 Fed. 77; Conboy v. First Nat. Bank, 203 U. S. 141, ante 128, 27 Sup. Ct. Rep. 50.

The bankrupt act makes all the debts of the bankrupt due as of the date of bankruptcy.

Re Philip Semmer Glass Co.; Frank v. Mercantile Nat. Bank; New York County Nat. Bank v. Massey; and Mock v. Market Street Nat. Bank,—supra.

Fraud must be alleged. It must be proved by him who asserts it, by evidence which is clear and satisfactory, and which is susceptible of no other construction. It will never be surmised or presumed; and where the intent of an act is as consistent with

the inference of good faith as otherwise, the courts will never presume bad faith.

Patton v. Taylor, 7 How. 132, 12 L. ed. 637; Voorhees v. Bonesteel, 16 Wall. 16, 21 L. ed. 268; Gregg v. Sayre, 8 Pet. 244, 8 L. ed. 932; Clarke v. White, 12 Pet. 178, 9 L. ed. 1046; Lalone v. United States, 164 U. S. 255, 41 L. ed. 425, 17 Sup. Ct. Rep. 74; Hyde v. McFaddin, 72 C. C. A. 655, 140 Fed. 443; Eastern Paper Bag Co. v. Continental Paper Bag Co. 142 Fed. 501; Maxwell Land-Grant Case (United States v. Maxwell Land-Grant Co.) 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015.

Even assuming, without warrant, that the policies did not realize full value, still, in the absence of fraud the court was not justified in setting aside the sale.

Franklin Nat. Bank v. Newcombe, 1 App. Div. 294, 37 N. Y. Supp. 271, Affirmed in 157 N. Y. 699, 51 N. E. 1090; Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co. 56 Fed. 164; Guinzburg v. H. W. Downs Co. 165 Mass. 467, 52 Am. St. Rep. 525, 43 N. E. 195; Learned v. Geer, 139 Mass. 31, 29 N. E. 215; Manning v. Shriver, 79 Md. 47, 28 Atl. 899.

The appellant's failure to offer any evidence of the facts and circumstances attending the sale, or of the value of the policies, affords a presumption that such evidence, if adduced, would operate to the prejudice of his contentions that the sale was fraudulent and the prices paid inadequate.

Kirby v. Tallmadge, 160 U. S. 379, 40 L. ed. 463, 16 Sup. Ct. Rep. 349; Runkle v. Burnham, 153 U. S. 216-225, 38 L. ed. 694-697, 14 Sup. Ct. Rep. 837; Graves v. United States, 150 U. S. 118-120, 37 L. ed. 1021, 1022, 14 Sup. Ct. Rep. 40; Clifton v. United States, 4 How. 242-244, 11 L. ed. 957, 958; Choctaw & M. R. Co. v. Newton, 71 C. C. A. 655, 140 Fed. 238; Gulf, C. & S. F. R. Co. v. Ellis, 4 C. C. A. 454, 10 U. S. App. 640, 54 Fed. 483.

The validity of the contracts of pledge is governed by the law of the state of New York.

York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Thompson v. Fairbanks, 196 U. S. 516-522, 49 L. ed. 577-584, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; Dooley v. Pease, 180 U. S. 126-128, 45 L. ed. 457-459, 21 Sup. Ct. Rep. 308.

The contract of pledge expressly granted to the pledgee an absolute power of sale, coupled with an interest, which would have survived the death, and did survive the insolvency, of the pledgeor.

Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589; Dixon v. Ewart, 3 Meriv. 322; Corder v. Morgan, 18 Ves. Jr. 344; Knapp v. Alvord, 10 Paige, 205, 40 Am. Dec. 241; Houghtaling v. Marvin, 7 Barb. 412; Hutchins v. Hebbard, 34 N. Y. 27; Weber v. Bridgman, 113 N. Y. 600, 21 N. E. 985; Terwilliger v. Ontario, C. & S. R. Co. 149 N. Y. 90, 43 N. E. 432; Conners v. Holland, 113 Mass. 50; Bell v. Mills, 59 C. C. A. 104, 123 Fed. 24; Ex parte Whiting, 2 Low. Dec. 472, Fed. Cas. No. 17,573.

The contracts of pledge are not unconscionable or fraudulent.

Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307; Wheeler v. Newbould, 16 N. Y. 392; Milliken v. Dehon, 27 N. Y. 369; Stenton v. Jerome, 54 N. Y. 480; Baker v. Drake, 66 N. Y. 518, 23 Am. Rep. 80; Williams v. United States Trust Co. 133 N. Y. 660, 31 N. E. 29; Gillet v. Bank of America, 160 N. Y. 549, 55 N. E. 292; Toplitz v. Bauer, 161 N. Y. 325, 55 N. E. 1059; Bailey v. American Deposit & Loan Co. 52 App. Div. 462, 65 N. Y. Supp. 330; Palmer v. Mutual L. Ins. Co. 38 Misc. 318, 77 N. Y. Supp. 869; Genet v. Howland, 45 Barb. 560; Franklin Nat. Bank v. Newcombe, supra; Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co. 81 Fed. 439; Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co. supra; McDougall v. Hazelton Tripod-Boiler Co. 31 C. C. A. 487, 60 U. S. App. 209, 88 Fed. 217; Smith v. Lee, 84 Fed. 557; Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co. 86 Fed. 975; Farmers Nat. Bank v. Venner, 192 Mass. 531, 78 N. E. 540; Guinzburg v. H. W. Downs Co. 165 Mass. 470, 52 Am. St. Rep. 525, 43 N. E. 195; Learned v. Geer, supra; Appleton v. Turnbull, 84 Me. 72, 24 Atl. 802; Manning v. Shriver, 79 Md. 41, 28 Atl. 899; Iron City Nat. Bank v. Rafferty, 207 Pa. 238, 56 Atl. 445; Jeanes's Appeal, 116 Pa. 573, 2 Am. St. Rep. 624, 11 Atl. 862; McManus v. Sweatman, 22 W. N. C. 54; National Bank v. Baker, 128 Ill. 533, 4 L.R.A. 586, 21 N. E. 510; McDowell v. Chicago Steel Works, 124 Ill. 497, 7 Am. St. Rep. 381, 16 N. E. 854; Harris v. Thomas, 37 Ill. App. 517; Cole v. Dalziel, 13 Ill. App. 23; Glidden v. Mechanics' Nat. Bank, 53 Ohio St. 588, 43 L.R.A. 737, 42 N. E. 996; Chouteau v. Allen, 70 Mo. 290; Carson v. Iowa City Gaslight Co. 80 Iowa, 638, 45 N. W. 1068; Dullnig v. Weekes, 16 Tex. Civ. App. 1, 40 S. W. 178; Barry Bros. v. American White Lead & Color Works, 107 La. 238, 31 So. 733, 735.

The act of 1867 did not provide for a valuation of securities held by a secured creditor in accordance with the terms of the agreement under which the securities were pledged. Under that act a creditor seeking to prove a claim t[illegible] secured could liquidate his security only under the direction of the court. Failing to do so, he was pr-

cluded from proving his claim or participating in the distribution of the estate.

McHenry v. La Societe Francaise D' Epargnes, 95 U. S. 58, 24 L. ed. 370; Davis v. Anderson, 6 Nat. Bankr. Reg. 146, Fed. Cas. No. 3,623; Re California, P. R. Co. 3 Sawy. 240, 11 Nat. Bankr. Reg. 193, Fed. Cas. No. 2,315; Smith v. Kehr, 2 Dill. 50, 7 Nat. Bankr. Reg. 97, Fed. Cas. No. 13,071; Re Morrison, 10 Nat. Bankr. Reg. 105, Fed. Cas. No. 9,839.

Notwithstanding, it was uniformly held that, even where there was no express stipulation in the contracts of pledge, the pledgee might sell on default of the pledgor, such right being presumable from the nature of the transaction, and that nothing in that act took away any right from the pledgee secured to him by his contract.

Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136.

The bankrupt act does not attempt by any of its provisions to deprive a lienor of any right or remedy which the contract, valid under the law of the state where made, vested him with. In fact, the lien thus created is expressly exempted from the operation of any of its provisions.

Re New York Economical Printing Co. 49 C. C. A. 133, 110 Fed. 514; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Re Garcewich, 53 C. C. A. 510, 115 Fed. 89; Re Kellogg, 56 C. C. A. 383, 118 Fed. 1017; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481.

When the purpose of a prior law is continued, usually its words are; and an omission of the words implies an omission of the purpose.

Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; Pirie v. Chicago Title & T. Co. 182 U. S. 438–448, 45 L. ed. 1171–1177, 21 Sup. Ct. Rep. 906.

The intention of Congress to depart from the provisions of the prior act and the decisions under it is plainly shown by § 70, e, which provides that the trustee may avoid any transfer which any creditor might have avoided, unless the person to whom the transfer was made was a bona fide holder for value "prior to the date of the adjudication,"—thus unmistakably indicating that the bankrupt, notwithstanding the filing of the petition, might, in good faith and for value, sell or encumber his property at any time prior to adjudication.

Hewit v. Berlin Mach. Works, 194 U. S. 296–302, 48 L. ed. 986–988, 24 Sup. Ct. Rep. 690.

The filing of the petition did not suspend or enjoin the exercise of the power of sale conferred by the contracts of pledge.

Jerome v. McCarter, supra; Cook v. Tullis, 18 Wall. 332, 21 L. ed. 933; Gibson v. Warden, 14 Wall. 244, 20 L. ed. 797; Marshall v. Knox, 16 Wall. 551, 21 L. ed. 481; Avery v. Hackley, 20 Wall. 407, 22 L. ed. 385; Clark v. Iselin, 21 Wall. 360, 22 L. ed. 568; Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; Sawyer v. Turpin, 91 U. S. 114, 23 L. ed. 235; Yeatman v. New Orleans Sav. Inst. 95 U. S. 764, 24 L. ed. 589; Stewart v. Platt, 101 U. S. 731, 25 L. ed. 816; Davis v. Friedlander, 104 U. S. 570, 26 L. ed. 818; Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075; Adams v. Collier, 122 U. S. 382–390, 30 L. ed. 1207–1209, 7 Sup. Ct. Rep. 1208; Bacon v. International Bank, 131 U. S. cxvi., Appx. and 26 L. ed. 439; Re Irving, 8 Ben. 463, Fed. Cas. No. 7,073; Sedgwick v. Grinnell, 9 Ben. 429, Fed. Cas. No. 12,612; Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673; Re Grinnell, 9 Nat. Bankr. Reg. 137, Fed. Cas. No. 5,829; McGready v. Harris, 9 Nat. Bankr. Reg. 135; Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co. 81 Fed. 439; Laughlin v. Calumet & C. Canal & Dock Co. 13 C. C. A. 1, 24 U. S. App. 573, 65 Fed. 441; Fisher v. Lewis, 69 Mo. 629; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481.

Mr. Chief Justice Fuller delivered the opinion of the court:

The errors assigned question the conclusions of law.

We need spend no time on the objection that the referee's order did not amount to the rejection of the claims. What the referee said was: "As the proof now stands, I shall, therefore, decline to allow either claim as established against the estate or estates."

The district judge recited the action of the referee as disallowing both claims, and entering "an order prescribing the method for ascertaining the value of such policies," and concluded: "The orders of the referee disallowing the claims are approved and affirmed." 134 Fed. 102, 104. And entered an order accordingly.

The circuit court of appeals held "that the order appealed from was, in substance and effect, a rejection of the claims," and said: "The bank insisted that its claims were for a definite *amount, the amount stat- [37] ed in its proofs of debt, less the sum which it had already derived from the sale of the securities. The decision not only disallowed these claims, but left the bank remediless, unless it should consent to allow a different reduction."

We think it perfectly clear that the policies did not belong to the partnership estate. They insured the life of J. M. Mer-

tens, and were payable, one to him or his legal representatives, and the other to his wife or children, or to him in the event of their death before his. And they had been assigned to the bank by him individually and the members of his family, as early as March, 1901, as collateral security, as well as by the collateral notes before mentioned. The fact that Mertens individually was the owner was in effect conceded, and the objections to the claims raised no issue in regard to it. That the partnership on some occasion may have pledged the policies in conjunction with Merten's separate individual pledge had no special significance.

The notes provided that the holder might apply the proceeds of a sale to "pay one or more or all of the liabilities due it, as it shall deem proper, whether due or not." And it had the right, according to the settled rule in equity and in courts of bankruptcy, to apply the proceeds of the collateral in extinction of the individual debts. If the sale was a good and valid sale and the value of the policies was properly liquidated thereby, and applied on the individual indebtedness, it follows that the claim against the partnership should have been allowed in full.

And also the claim against the individual estate of Mertens, for the balance, after deducting the $10,250 and the $6,000.

The contracts of pledge were made, executed, and to be performed in the state of New York, and the rights of the parties were governed by the law of that state. No preference under the bankruptcy act was alleged or proved, nor was there any allegation or proof that the pledge of the securities was in fraud of the rights of the [88] creditors or trustee. The *questions of the extent and validity of the pledge were local questions, and the decisions of the courts of New York are to be followed by this court. York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Thompson v. Fairbanks, 196 U. S. 516, 522, 49 L. ed. 577, 584, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567. Here there was an absolute power of sale coupled with an interest. The bank had had both title and possession of the policies for a period of more than two years before the filing of the petition. It had a valid debt against both the copartnership and individual estates, which is not questioned. It could, therefore, make a sale under the power granted, and transfer title in its own name. Numerous decisions of the court of appeals of the state of New York sustain contracts of pledge waiving the right of the pledgeor to exact strict performance of the common-law duties of a pledgee. In the absence of fraud, the pledgee may buy at his own sale held without notice or demand or advertisement, when power so to do is expressly granted by the pledgeor. Baker v. Drake, 66 N. Y. 518, 23 Am. Rep. 80; Williams v. United States Trust Co. 133 N. Y. [illegible], 31 N. E. 29; Toplitz v. Bauer, 161 N. Y. [illegible], 55 N. E. 1059. And see National Bank v. Baker, 128 Ill. 533, 4 L.R.A. 586, 21 N. E. 510; McDowell v. Chicago Steel Works, 124 Ill. 491, 7 Am. St. Rep. 381, 16 N. E. 854; Farmers' Nat. Bank v. Venner, 192 Mass. 531, 78 N. E. 540.

It must be remembered that the circuit court of appeals found that there was no fraud in fact in the sale. In respect of that Judge Wallace, delivering the opinion, said:

"The court below regarded the sale made by the bank as a fraudulent sale. There was no evidence of fraud, unless the facts which have been referred to justify the inference of fraud. We are at a loss to understand how fraudulent conduct can justly be imputed to a pledgee when it appears that whatever was done in executing the power of sale was done in full compliance with the terms of the pledge, and when there is no evidence that any unconscionable advantage was taken of the pledgeor or his creditors. Doubtless the pledgee cannot avail himself of his authority, however unlimited, to sacrifice the property wantonly, or to purchase *it himself at a valuation so inadequate as to suggest a fraudulent purpose. If the valuation in this case was unfair, the burden was on the trustee to prove the fact."

The trustee did not offer to prove that others were prepared to purchase and might have done so but for want of information, or that the policies had a greater value than was realized at the sale, or that he was prepared to redeem the pledge for the benefit of the estate, nor did he offer to do so. There was nothing in the evidence tending to show a wanton sacrifice or an intention to buy in at so inadequate a price as to justify the inference of a fraudulent purpose.

Counsel for the trustee contends that the policies were worth more than was obtained at the sale, because the bank's agent, after having borrowed on the strength of the policies the exact amount of his bid immediately after the sale, subsequently borrowed thereon $2,622.75; and also that from the terms of the $50,000 policy it appeared that on the completion of the tontine dividend period, February 15, 1909, the assured had the privilege to withdraw in cash $[illegible], and in addition the [illegible] which might then be apportioned. And [illegible] called attention in his brief [illegible], February [illegible], to the case [illegible] v. Mertens [illegible] U. S. [illegible]

ante, 771 ,27 Sup. Ct. Rep. 488], then
; in this court, as demonstrating that
,000 policy was worth more than was
l at the sale. But the $2,622.75 loan
the next ensuing premiums on the
with interest; and the $7,000 paid
$50,000 policy with interest and the
ms of February, 1904, 1905, 1906,
nd 1908, with interest, and the last
m, would appear to have aggregated
cost of $21,346.50; while, if resort
e properly had to the record in an-
ase to piece out the evidence in this,
nion in Hiscock v. Mertens, decided
25, 205 U. S. 202, ante, 771, 27 Sup.
p. 488, states that the evidence
that this particular policy had a
er value of $6,574. And as to the
policy no suggestion was made that
!50 was not a full price or even more,
ld there be in reason, for as Ray, J.,
e Mertens, 131 Fed. 972, *it "had be-
simple life policy, payable to the
the assured, if living at his death;
living, to his children, if any; and,
ult of child or children, to the per-
epresentatives of the assured. This
concededly is so conditioned and en-
ed, and the interest of the trustee
if any, is so remote and uncertain,
is of no practical value to the es-
Clearly, there is nothing on the face
ecord to justify a charge of fraud on
of inadequacy.

on 57h provides: "The value of se-
held by secured creditors shall be
ned by converting the same into mon-
rding to the terms of the agreement
t to which such securities were de-
to such creditors or by such creditors
trustee, by agreement, arbitration,
nise, or litigation, as the court may
and the amount of such value shall
ted upon such claims, and a dividend
paid only on the unpaid balance.
t. at L. 560, chap. 541, U. S. Comp.
01, p. 3443.]

ourt was by this subdivision empow-
direct a disposition of the pledge, or
ertainment of its value, where the
had failed to do so by their own
nt. It is only when the securities
t been disposed of by the creditor in
ice with his contract that the court
ect what shall be done in the prem-
f course, where there is fraud or a
ng contrary to the contract, the in-
ion of the court might properly be

ding to the terms of the bankrupt
title of the bankrupt is vested in
stee by operation of law as of the
the adjudication. Act of 1898, §
By the act of 1867 [14 Stat. at L.
. S.

522, chap. 176] it was provided that as soon as an assignee was appointed and qualified the judge or register should, by instrument, assign or convey to him all of the property of the bankrupt, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and, by operation of law, shall vest the title to such estate, both real and personal, in the assignee. But § 70a of the act of 1898 omits the provision that the trustee's title "shall relate back to the commencement *of the pro-[41] ceedings in bankruptcy," and explicitly states that it shall vest "as of the date he was adjudged a bankrupt." When the petition in the present case was filed the bank had a valid lien upon these policies for the payment of its debt. The contracts under which they were pledged were valid and enforceable under the laws of New York, where the debt was incurred and the lien created. The bankruptcy act did not attempt, by any of its provisions, to deprive a lienor of any remedy which the law of the state vested him with; on the other hand, it provided, § 67 d: "Liens given or accepted in good faith, and not in contemplation of, or in fraud upon, this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269, is not to the contrary, as explained in York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481.

Judgment affirmed.

CHAPMAN & DEWEY LAND COMPANY, Plff. in Err.,
v.
CHARLES H. BIGELOW, N. P. Bigelow, L. P. Walker, and F. H. Hartshorn.

(See S. C. Reporter's ed. 41-45.)

Error to state court—Federal question—riparian rights.

1. A decision of a state court, in a suit to quiet title, that the grantee from the United States, through the state of Arkansas and other grantors, took no title by virtue of riparian rights to lands lying be-

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ

tween the government meander line and the main channel of a river, which lands the court finds to be swampy, checked by bayous, subject to inundation, but reclaimable to some extent for agricultural purposes, is not reviewable in the Supreme Court of the United States.

Error to state court—Federal question—questions of fact.

2. The decisions of state courts upon questions of fact are not reviewable by writ of error to those courts from the Supreme Court of the United States.

Error to state court—Federal question—rulings on evidence.

3. The exclusion from evidence in a suit to quiet title of a letter written by the Secretary of the Interior to the Commissioner of the General Land Office, which is clearly *res inter alios acta*, can present no Federal question which will sustain a writ of error from the Supreme Court of the United States to a state court.

[No. 262.]

Argued April 12, 15, 1907. Decided May 13, 1907.

IN ERROR to the Supreme Court of the state of Arkansas to review a decree which affirmed a decree of the Chancery Court of Poinsett County, in that state, dismissing the bill in a suit to quiet title. Dismissed for want of jurisdiction.

See same case below, 77 Ark. 338, 92 S. W. 534.

The facts are stated in the opinion.

Mr. Henry D. Ashley argued the cause, and, with Messrs. Sanford B. Ladd, William S. Gilbert, Denton Dunn, and Robert S. Rodgers, filed a brief for plaintiff in error:

A Federal question is presented by the record.

Lytle v. Arkansas, 22 How. 193, 16 L. ed. 306; French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563; French v. Fyan, 93 U. S. 169, 23 L. ed. 812; De Cambra v. Rogers, 189 U. S. 119, 47 L. ed. 734, 23 Sup. Ct. Rep. 519; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; First Nat. Bank v. Stewart, 114 U. S. 224, 29 L. ed. 101, 5 Sup. Ct. Rep. 845; United States v. Ross, 92 U. S. 281, 23 L. ed. 707; Thompson v. Bowie, 4 Wall. 463, 18 L. ed. 423; Connors v. Meservey, 76 Iowa, 691, 39 N. W. 388; United States v. Low, 16 Pet. 162, 10 L. ed. 923; Kirby v. Lewis, 39 Fed. 66.

Messrs. Henry D. Ashley, William S. Gilbert, Denton Dunn, and Robert S. Rodgers, filed a brief in reply for plaintiff in error:

The grounds on which the contentions of either party were based in the state courts, as shown by the record, cannot be shifted in this court for the purpose of either injecting into or eliminating from the case a Federal question.

Iowa v. Rood, 187 U. S. 87, 92, 47 L. ed. 86, 89, 23 Sup. Ct. Rep. 49.

Mr. N. W. Norton argued the cause and filed a brief for defendants in error:

Both parties to this litigation claim under the state of Arkansas,—the patentee,—and it follows that the existence of a Federal question is impossible.

Mace v. Merrill, 119 U. S. 581, 30 L. ed. 503, 7 Sup. Ct. Rep. 330; California ex rel. Hastings v. Jackson, 112 U. S. 233, 28 L. ed. 712, 5 Sup. Ct. Rep. 113.

Riparian rights are matters of local law.

Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Shively v. Bowlby, 152 U. S. 45, 38 L. ed. 347, 14 Sup. Ct. Rep. 548; Lowndes v. Huntington, 153 U. S. 19, 38 L. ed. 618, 14 Sup. Ct. Rep. 758; Hardin v. Shedd, 190 U. S. 518, 47 L. ed. 1157, 23 Sup. Ct. Rep. 685; Mobile Transp. Co. v. Mobile, 187 U. S. 485, 47 L. ed. 270, 23 Sup. Ct. Rep. 170.

A decision of a state court adverse to a claim of title to a lake bed presents no Federal question which will sustain a writ of error from the Supreme Court of the United States.

Iowa v. Rood, 187 U. S. 87, 47 L. ed. 86, 23 Sup. Ct. Rep. 49.

That the chief justice of the state allowed the writ does not help out (Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617); nor can the assignments of error or the petition for the writ be looked to for a determination of the existence of a Federal question.

Montana ex rel. Haire v. Rice, 204 U. S. 291, ante, 490, 27 Sup. Ct. Rep. 281.

Findings of fact by the trial court, affirmed by the supreme court of the state, are conclusive on this court.

Minneapolis & St. L. R. Co. v. Minnesota,

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of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On writ of error to state court in cases involving land titles—see note to O'Conor v. Texas, 50 L. ed. U. S. 1120.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to State ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to review of questions of fact on writ of error to a state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396.

A contention about boundaries raises no Federal question.

Lanfear v. Hunley, 4 Wall. 204, 18 L. ed. 25; Moreland v. Page, 20 How. 522, 15 L. ed. 1009; Doe ex dem. Barbarie v. Mobile, 9 How. 451, 13 L. ed. 212; Almonester v. Kenton, 9 How. 1, 13 L. ed. 21.

A decision of the state court adverse to the claim that, under Mexican and Spanish grants confirmed and patented under the act of Congress of March 3d, 1851, the owners of the land were entitled to riparian rights and subterranean waters, involves no Federal question reviewable in the Supreme Court of the United States, where the validity of such act was not drawn in question.

Hooker v. Los Angeles, 188 U. S. 314, 47 L. ed. 487, 63 L.R.A. 471, 23 Sup. Ct. Rep. 95.

This court is not called on to revise the views of the principles of general law considered applicable to the case in hand.

Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

On writ of error to a state court a common source of title has always been fatal to the jurisdiction of this court.

Shaffer v. Scudday, 19 How. 16, 15 L. ed. 592; Romie v. Casanova, 91 U. S. 379, 23 L. ed. 374; California ex rel. Hastings v. Jackson, 112 U. S. 233, 28 L. ed. 712, 5 Sup. Ct. Rep. 113; McStay v. Friedman, 92 U. S. 723, 23 L. ed. 767; Mace v. Merrill, 119 U. S. 581, 30 L. ed. 504, 7 Sup. Ct. Rep. 330.

The fact that a decision was rendered by the Secretary of the Interior upon the validity of location by one of two claimants in the state court does not raise a Federal question so as to give this court jurisdiction.

Shaffer v. Scudday, 19 How. 16, 15 L. ed. 592.

The action of the government surveyors in segregating and setting apart a lake by a meander line from the public land is not such an adjudication by the authorized officers and agents of the government that such lake is the property of the state as will create a Federal question reviewable on writ of error to the supreme court of the state.

Iowa v. Rood, supra.

Mr. Chief Justice Fuller delivered the opinion of the court:

This was a bill to remove a cloud from plaintiff in error's alleged title to certain lands described in the complaint, and to that end to have the conveyances under which defendants in error claimed declared void, filed by plaintiff in error in the chancery court of Poinsett county, Arkansas, January 29, 1903. The chancery court rendered a decree dismissing the bill, and the case was carried to the supreme court of the state, where the decree was affirmed. 77 Ark. 338, 92 S. W. 534. Thereupon this writ of error was allowed.

The supreme court of the state stated the case in brief thus:

"Plaintiff claims title under an act of Congress entitled 'An Act to Enable the State of Arkansas and Other States to Reclaim the "Swamp Lands" within Their Limits,' approved September 28, 1850. [9 Stat. at L. 519, chap. 84, U. S. Comp. Stat. 1901, p. 1591.] It alleges that, in pursuance of the provisions of this act, surveyed sections and parts of fractional sections in fractional township 12 north of the base line, in range 6 east of the fifth principal meridian, and in township 12 north of the base line, in range 7 east of the fifth principal meridian, and in Poinsett county, in this state, were duly selected, approved, and patented to the state of Arkansas, as a part of the swamp land grant; that certain of these lands were conveyed by the state of Arkansas, on the 12th day of June, 1871, to Moses S. Beach; that plaintiff acquired and is the owner of these lands so conveyed to Beach as well as certain other of the lands which were deeded to the state of Arkansas by the United States; that many of the legal subdivisions of sections so acquired by plaintiff were bounded by a large body of non-navigable water called in the official surveys of the United *States and field notes thereof as the 'sunk [43] lands,' 'St. Francis river sunk lands,' the 'Hatchie coon sunk lands,' and the 'Cut-Off lake;' that the legal subdivisions so bounding were fractional, and in the survey were meandered along such body of water. The plaintiff thereupon claims the lands lying under this body of water; and these are the lands in controversy in this suit to which it (plaintiff) seeks a decree to quiet its title as against the defendants.

"Plaintiff alleges that these lands are wild, unimproved, and unoccupied; and that the defendants are claiming them under certain deeds; and asks that these be declared void, invalid, and of no force whatever.

"The defendants answered and denied that the so-called 'sunk land' was a body of water, or that it is shown to be by the surveys of the United States or the field notes; but that it was sometimes temporarily flooded with water, and was land bearing 'trees and vegetables, willow and cypress;' and that the meandered lines run as alleged by plaintiff were run as boundaries, and not for the purpose of finding the number of acres in the sections or legal subdivisions 'for which purchasers would have to pay when the government might dispose of the land.' "

Defendants' answer and cross bill asserted

that, in the year 1893, the state of Arkansas, by an act of its legislature, "created the board of directors of the St. Francis Levee District, the purpose being to erect a levee against the waters of the Mississippi river and protect what is known as the St. Francis basin from overflow by the Mississippi river; that the lands concerning which plaintiffs bring this suit, and cross complainants file this cross bill, are a portion of the said St. Francis basin, and are originally and naturally subject to overflow from the Mississippi river. That after creating the board of directors of the St. Francis Levee District, the state of Arkansas, by its legislature, to aid in the erection of said levee, granted to the board of directors of the St. Francis Levee District lands within said district, the title to which was in [44]*the state of Arkansas; that this act of donation by the legislature of the state of Arkansas went into effect on the 29th day of March, 1893, and thereby the legal title to the unsurveyed lands in township 12 north, range 6 east, and township 12 north, range 7 east, became vested in the board of directors of the St. Francis Levee District;" and that thereafter the said board of directors conveyed to defendants' predecessors in title.

The supreme court, among other things, said that appellant claimed "the land in controversy by virtue of the contiguity of certain lands, acquired by it from the United States, through the state of Arkansas and other grantors, to what is called 'sunk lands' and 'Cut-Off lake.' This 'sunk land,' from appellant's land on one side to the St. Francis river, a navigable stream, on the other, is there 4 and 6 miles wide. In this area there are over 10,000 acres." That "the official maps show that Cut-Off lake was the water boundary of fractional sections 35 and 36," which, with sundry other fractional sections, formed "the western boundary of what is called 'sunk lands,' in controversy."

The patents to the state of Arkansas conveyed "the whole of fractional township" 12 north, range 6 east; and "the whole of the township except section sixteen," T. 12 N., R. 7 east.

The supreme court referred to and quoted from Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563; and Niles v. Cedar Point Club, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124, and ruled that in an action to quiet title to wild and unoccupied lands, which the court found these were, plaintiff must succeed, if at all, on the strength of his own title, and not on the weakness of his adversary's; that swampy lands, checked by bayous, subject to inundation, but reclaimable to some extent for agricultural purposes, lying between the government meander line and the main channel of a river, were not lands the title to which would pass to the grantee by virtue of riparian rights; that such was the character of the lands in controversy, and that plaintiff had failed to show such [45] condition in respect of them as would support its claim to riparian rights; that the evidence showed that the elevation of the swampy land between the meander line of plaintiff's land and the main course of the St. Francis river had not changed since the running of the meander line; and that the meander lines were boundaries.

In view of the decisions of this court in Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; Niles v. Cedar Point Club, supra; Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651; Iowa v. Rood, 187 U. S. 87, 47 L. ed. 86, 23 Sup. Ct. Rep. 49; and other cases, and of the findings of the court below, we are of opinion that the jurisdiction of this court to revise the conclusions of that court cannot be maintained. Moreland v. Page, 20 How. 522, 15 L. ed. 1000; Lanfear v. Hunley, 4 Wall. 204, 18 L. ed. 325; Dower v. Richards, 151 U. S. 306, 38 L. ed. 305, 14 Sup. Ct. Rep. 462; Eagan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Israel v. Arthur, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 603; Hardin v. Shedd, 190 U. S. 508, 47 L. ed. 1156, 23 Sup. Ct. Rep. 685; Rourke v. Cananova, 91 U. S. 379, 23 L. ed. 374.

The result is unaffected by the conclusion from the evidence of a letter written by the Secretary of the Interior to the Commissioner of the General Land Office, November 12, 1902. It was clearly *res inter alios*, and properly rejected, and the ruling presented no Federal question.

Writ of error dismissed.

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*STATE OF KANSAS, Complainant,

v.

STATE OF COLORADO et al., Defendants.
The United States of America, Intervener.

(See S. C. Reporter's ed. 46-132.)

Courts—power of Federal courts.

1. The entire judicial power of the nation granted to the Federal courts by U. S. Const. art. 3, § 1, is not limited by the declaration in § 2 that "the judicial power

NOTE.— [illegible] inst a state [illegible] notes to [illegible] r Grate Co. v. [illegible] 8 L.R.A. [illegible] v. [illegible] tate, 11 L.R.A. [illegible] Beers v. [illegible] L. ed. U. S. [illegible] 206 U. S.

shall extend to all cases in law and equity arising under this Constitution, the laws of the United States," etc.

Courts—power of Federal courts.

2. The judicial power of the United States, vested by U. S. Const. art. 3, § 1, in the Federal courts, embraces all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto, except so far as there are limitations expressed in the Constitution on the general grant of judicial power.

Supreme Court—original jurisdiction.

3. The original jurisdiction of the Supreme Court of the United States extends to a controversy between the states of Kansas and Colorado and the United States, presenting the questions whether Kansas has a right to the continuous flow of the waters of the Arkansas river as that flow existed before any human interference therewith, or whether Colorado has the right to appropriate the waters of that stream so as to prevent that continuous flow, or whether the amount of the flow is subject to the superior authority and supervisory control of the United States.

Waters—diversion of Arkansas river—respective rights of Kansas, Colorado, and the United States.

4. The respective rights of the states of Kansas and Colorado in regard to the flow of water in the Arkansas river is not subordinate to any supposed superior right on the part of the national government to control the whole system of the reclamation of arid lands, since the reclamation of arid lands is not one of the powers granted to the general government.

Congress—power over arid lands.

5. The reclamation of arid lands not the property of the United States, nor situated within the limits of a territory, was not comprehended in the grant to Congress by U. S. Const. art. 4, § 3, of the power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States.

Congress — power over territories — arid lands.

6. Congress has full power to legislate in respect to the arid lands in the territories by virtue either of the provision of U. S. Const. art. 4, § 3, that Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States, or by virtue of the power vested in the national government to acquire territory by treaty; and is subject to no other restrictions than those expressly named in the Constitution.

Congress—power over arid lands.

7. State laws in respect of the general reclamation of arid lands cannot be overridden by Congress in the exercise of its power under U. S. Const. art. 4, § 3, to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States.

Injunction—diversion of Arkansas river by Colorado to injury of Kansas.

8. Kansas, having recognized the right to appropriate the waters of a stream for irrigation purposes, subject to the condition of an equitable division between riparian proprietors, is not entitled to enjoin Colorado from diminishing the flow of the Arkansas river by appropriating its waters for purposes of irrigation, which has resulted in reclaiming large areas of arid lands in Colorado, while the influence of such diminution, though of perceptible injury to some portions of the Arkansas valley in Kansas, has worked little, if any, detriment to the great body of the valley.

Subsurface waters—subterranean stream.

9. The presence of water beneath the bed of the Arkansas river as it passes through the state of Kansas, though in places of considerable amount and running in the same direction, does not show the existence of an independent subsurface river, flowing continuously from the Colorado line through the state of Kansas.

Diversion of Arkansas river—respective rights of Kansas and Colorado.

10. The determination of the respective rights of the states of Kansas and Colorado to the benefit of the water in the Arkansas river cannot be affected by any theory that, because at times and in some places the entire bed of the channel is dry, there are two rivers, one commencing in the mountains of Colorado and terminating at or near the state line, and the other commencing at or near the place where the former ends, and, from springs and branches, starting as a new stream, to flow onward through Kansas and Oklahoma toward the Gulf of Mexico.

[No. 3, Original.]

Argued December 17, 18, 19, 20, 1906. Decided May 13, 1907.

ORIGINAL BILL by the State of Kansas against the State of Colorado to enjoin the diversion by the latter state of

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Hans v. Louisiana, 33 L. ed. U. S. 842; and Tindall v. Wesley, 13 C. C. A. 165.

As to the power of Congress over the territories—see note to First Nat. Bank v. Yankton, 25 L. ed. U. S. 1046.

As to state and Federal ownership of waters—see note to Smith v. Deniff, 50 L.R.A. 737.

On the correlative rights of upper and lower proprietors as to use and flow of water in stream—see note to Barnard v. Shirley, 41 L.R.A. 737.

As to the right of prior appropriation of water—see note to Isaacs v. Barber, 30 L. R.A. 665.

On rights in subterranean waters—see note to Southern P. R. Co. v. Dufour, 19 L.R.A. 92.

the water of the Arkansas river. The United States, on leave, filed a petition of intervention, asserting that the amount of the flow of the river was subject to the superior authority and supervisory control of the United States. Petition in intervention dismissed without prejudice to the rights of the United States to take any action necessary to preserve or improve the navigability of the river. Bill dismissed without prejudice to institute new proceedings.

Statement by Mr. Justice Brewer:

On May 20, 1901, pursuant to a resolution passed by the legislature of Kansas (Kan. Laws 1901, chap. 425), and upon leave obtained, the state of Kansas filed its bill in equity in this court against the state of Colorado. To this bill the defendant demurred. After argument on the demurrer this court held that the case ought not to be disposed of on the mere averments of the bill, and, therefore, overruled the demurrer without prejudice to any question defendant might present. Leave was also given to answer. 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552. In delivering the opinion of the court the Chief Justice disclosed in the following words the general character of the controversy, and the conclusions arrived at (p. 145, L. ed. p. 846, Sup. Ct. Rep. p. 559):

"The gravamen of the bill is that the state of Colorado, acting directly herself as well as through private persons thereto licensed, is depriving and threatening to deprive the state of Kansas and its inhabitants of all the water heretofore accustomed to flow in the Arkansas river through its channel on the surface, and through a subterranean course across the state of Kansas; that this is threatened not only by the impounding and the use of the water at the [48] river's source, but as it flows *after reaching the river. Injury, it is averred, is being, and would be, thereby inflicted on the state of Kansas as an individual owner, and on all the inhabitants of the state, and especially on the inhabitants of that part of the state lying in the Arkansas valley. The injury is asserted to be threatened, and as being wrought, in respect of lands located on the banks of the river; lands lying on the line of a subterranean flow; and lands lying some distance from the river, either above or below ground, but dependent on the river for a supply of water. And it is insisted that Colorado, in doing this, is violating the fundamental principle that one must use his own so as not to destroy the legal rights of another.

"The state of Kansas appeals to the rule of the common law that owners of lands on the banks of a river are entitled to the continual flow of the stream; and while she concedes that this rule has been modified in the Western states so that flowing water may be appropriated to mining purposes and for the reclamation of arid lands, and the doctrine of prior appropriation obtains, yet she says that that modification has not gone so far as to justify the destruction of the rights of other states and their inhabitants altogether; and that the acts of Congress of 1866 and subsequently, while recognizing the prior appropriation of water as in contravention of the common-law rule as to a continuous flow, have not attempted to recognize it as rightful to that extent. In other words, Kansas contends that Colorado cannot absolutely destroy her rights, and seeks some mode of accommodation as between them, while she further insists that she occupies, for reasons given, the position of a prior appropriator herself, if put to that contention as between her and Colorado.

"Sitting, as it were, as an international as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand, and we are unwilling, in this case, to proceed on the mere technical admissions made by the demurrer. Nor do we regard it as necessary, whatever imperfections a close analysis of the pending bill may disclose, to compel its amendment at this stage of the litigation. We think proof should be made as to whether Colorado is herself actually threatening to wholly exhaust the flow of the Arkansas river in Kansas; whether what is described in the bill as the 'underflow' is a subterranean stream flowing in a known and defined channel, and not merely water percolating through the strata below; whether certain persons, firms, and corporations in Colorado must be made parties hereto; what lands in Kansas are actually situated on the banks of the river, and what, either in Colorado or Kansas, are absolutely dependent on water therefrom; the extent of the watershed or the drainage area of the Arkansas river; the possibilities of the maintenance of a sustained flow through the control of flood waters,—in short, the circumstances, a variation in which might induce the court to either grant, modify, or deny the relief sought or any part thereof."

On August 17, 1903, Kansas filed an amended bill, naming as defendants Colorado and quite a number of corporations, who were charged to be engaged in depleting the flow of water in the Arkansas river. Colorado and several of the corporations answered. For reasons which will be apparent from the opinion the defenses of these corporations will not be considered apart from those of Colorado.

March 21, 1904, the

United States, upon leave, filed its petition of intervention. The issue between these several parties having been perfected by replications, a commissioner was appointed to take evidence, and, after that had been taken and abstracts prepared, counsel for the respective parties were heard in argument, and upon the pleadings and testimony the case was submitted.

In order that the issue between the three principal parties, Kansas, Colorado, and the United States, may be fully disclosed,—although by so doing we prolong considerably this opinion,—we quote abstracts of the pleadings and statements thereof made by the respective counsel. Counsel for Kansas say:

*"The bill of complaint alleges that the state of Kansas was admitted into the Union on January 29, 1861, that the state of Colorado was admitted on August 1, 1876, and that the other defendants are corporations organized, chartered, and doing business in the state of Colorado; that the Arkansas river rises in the Rocky mountains, in the state of Colorado, and, flowing in a southeasterly direction for a distance of about 280 miles, crosses the boundary into the state of Kansas; that the river then flows in an easterly and southeasterly direction through the state of Kansas for a distance of about 300 miles, then through Oklahoma, Indian territory, and Arkansas, on its way to the sea. Through the state of Kansas the Arkansas valley is a level plain but a few feet above the normal level of the river, and is from 2 to 25 miles in width. Back to the foothills on either side there are bottom lands which are saturated and subirrigated by the underflow from the river, and are fertile and productive almost beyond comparison. The Arkansas river is a meandered stream through the state of Kansas, and under the laws and departmental rules and regulations of the United States it is a navigable river through the state of Kansas, and was, in fact, navigable and navigated from the city of Wichita south to its mouth; and that the complainant is the owner of the bed of the stream between the meandered lines in trust for the people of the state; that the complainant is the owner of two tracts of land bordering upon the river, one at Hutchinson and one at Dodge City, upon which state institutions are maintained,—one as a reform school and the other as a soldiers' home. That when the state of Kansas was admitted into the Union it became the owner, for school purposes, of sections 16 and 36 of each congressional township, of which the complainant still owns many thousand acres, much of which borders on the Arkansas river. That by act of Congress of March 3, 1863 [12 Stat. at L. 772, chap. 98], the complainant became the owner of each odd-numbered section of land in the Arkansas valley and has since conveyed the whole of this land for the purposes specified. That by the year 1868 *the [51] land in the Arkansas valley began to be taken by actual settlers, and by the year 1875 practically all the bottom lands in the east or lower half of the valley were entered and settled, and title obtained from the United States or the state of Kansas; and by the year 1882 the west or upper half of the valley was so entered and settled and like titles obtained. By the year 1873 a railroad was built through the entire length of the valley, and immediately after their settlement these bottom lands were extensively cultivated, large crops of agricultural products were raised, towns and cities sprang up, population rapidly increased, and by the year 1883 practically all the bottom lands of the Arkansas valley were in a state of successful and prosperous cultivation; that the waters of the Arkansas river furnished the foundation for this prosperity. These waters furnished a wholesome and ample supply for domestic purposes, for the watering of stock, for power for operating mills and factories, for saturating and subirrigating the bottom lands back to the uplands on either side of the river, so that crops thereon were not only bounteous but practically certain, and in the western portion of the valley these waters were appropriated and used for surface irrigation, to supplant the scanty rainfall in that region. That by reason of these uses of the waters of the Arkansas river, and the almost unvarying water level beneath these bottom lands being near the surface, the lands in the Arkansas valley in the state of Kansas were of great and permanent value to the owners and settlers thereon, and those upon the tax rolls of the state of Kansas yielded a large and increasing revenue to the complainant for state purposes.

"That after the lands in the Arkansas valley had been settled and raised to a high state of cultivation, all the bottom lands in the valley being riparian lands and directly affected by the presence and flow of the river, and after parts of the flow of the river had been used for manufacturing and milling purposes, and after the riparian lands had been largely and extensively irrigated in the valley of the river in the western portion of *Kansas, and after por- [52] tions of the land so belonging to the complainant had been sold and conveyed, the state of Colorado and other defendants began systematically appropriating and diverting the waters of the Arkansas river, in the state of Colorado, between Cañon City and the Kansas state line, for the pur-

pose of irrigating dry, barren, arid, nonriparian, and nonsaturated lands lying on either side of the river, and often many miles therefore, and by the year 1891 all the natural and normal waters and a large portion of the flood waters of the Arkansas river were so appropriated and diverted and actually applied to these dry, barren, arid, nonriparian, and nonsaturated lands in the state of Colorado, said diversions increasing from year to year, as their means of diversion became more complete and perfect, so the average flow of the river was greatly and permanently diminished and the normal flow of the river, exclusive of floods, was wholly and permanently destroyed, the navigability of the river where navigable before has been ruined, the power for manufacturing purposes greatly diminished, the surface of the underflow beneath the bottom lands has been lowered about 5 feet, and the water for the irrigation ditches in the western part of Kansas has been entirely cut off. The loss sustained by the complainant and its citizens has been great and incalculable. The benefits of river navigation are gone; the cheap water power has been replaced by the costly steam power; the productiveness and value of the bottom lands have been greatly diminished; the irrigation ditches are left dry and the lands uncultivated; and the revenues of the state of Kansas and its municipalities have been materially decreased. Against this loss and injury the complainant prays the assistance of this court."

In the brief of counsel for Colorado it is said:

"The contention of the defendant, state of Colorado, as to the facts, may be concisely stated as follows: The Arkansas river, popularly so called, is substantially two rivers, —one a perennial stream rising in the mountains of Colorado and flowing down to the plains, and this *Colorado* Arkansas, [53]when the *river was permitted to run as it was accustomed to run, prior to the period of irrigation, poured into the sands of western Kansas, and at times of low water the river as a stream entirely disappeared. Its waters were to some extent evaporated, and, as to the residue, were absorbed and swallowed up in the sands. So that from the vicinity of the state line between Kansas and Colorado on eastwardly, as far, at least, as Great Bend, if not farther, at such times of low water there was no flowing Arkansas river. Farther east, however, a new river arose, even at such times of low water, and partly from springs, partly from the drainage of the water table of the country supplied by rainfall. and partly from the surface drainage of an extensive territory, this river gradually again became a perennial stream, so that south of Wichita, and from there on to the mouth of the river the *Kansas* Arkansas, as a new and separate stream, had a constant flow. Such, as the river was accustomed to flow, was the Arkansas of the period prior to irrigation. It was a 'broken river.' It is true that at all times in early years, and now, the Arkansas river at times of flood, or of what might be called high water, has a continuous flow from its source to its mouth; but a flow, even in times of flood or high water, which diminishes through the sandy waste east of the Colorado state line above described, so that oftentimes even a flood in Colorado would be completely lost before it had passed over this arid stretch of sandy channel, and high water would always be diminished in flow through the same stretch of country. This river is as if it were a current of water passing over a sieve; if the current be slow and the volume not excessive all of it sinks through the sieve and none passes on beyond; when the current is rapid and the volume is large, still a large amount sinks in the sieve, and the residue passes on beyond.

"Now, the irrigators of Colorado have confined their actions to the *Colorado* Arkansas above described. They have taken the waters of the perennial stream before it reaches this sieve, through which it wasted; they have lifted that stream out of *the[54] sandy channel in which it had flowed, and applied it to beneficial uses upon the land; carried the body of it along at a higher level than where it was accustomed to run, and they finally restore it, practically undiminished in volume, so far as regards practical use, at points in the ancient channel farther east than the river at low water was accustomed to flow before the period of irrigation. The effect of the diversion of this water in Colorado, the carrying of it forward on a higher level, the return of waters, partly through seepage and partly through direct delivery at waste gates, and the effect of this process in extending eastward the perennial flow, will be fully discussed in the course of the argument to follow. It is sufficient in this preliminary statement to say that it is admitted by the complainant that in the course of a twelvemonth there is a vast amount of high and flood waters of the Arkansas that are never captured by man, that are of no use, but are rather of injury to Kansas riparian proprietors, and, so far as any beneficial use is concerned, are absolutely wasted and lost. Kansas does not claim that she has not abundance of water in times of flood or in times of high water; her complaint is based upon the alleged fact that she does not have what she was accustomed to have in

periods of low water, whereas, in fact, as contended by the state of Colorado, the diversion of water in Colorado into ditches and reservoirs, continuing, as it does, throughout the year, in times of flood and in times of high water, has the effect, through seepage and return waters, to give perennial vitality to portions of this stream during what would otherwise be periods of depression or suspension of flow."

The substance of the petition in intervention is thus stated by counsel for the government:

"The first paragraph of the said petition describes the Arkansas river from its source to its mouth, and alleges that it is not navigable in the states of Colorado and Kansas nor the territory of Oklahoma, but is navigable in the state of Arkansas and the Indian territory.

"In the second paragraph it is alleged that the lands located *within the watershed of the river west of the 99th degree of longitude are arid lands.

"The third paragraph alleges that within said watershed there are 1,000,000 acres of public lands that are uninhabitable and unsalable.

"The fourth paragraph alleges that said lands can only be made habitable, productive, and salable by impounding and storing flood and other waters in said watershed to the end that the said waters may be used to reclaim said land.

"The fifth paragraph alleges that there is not sufficient moisture from rainfall to render the soil capable of producing crops in paying quantities in the watershed so described, and that they can only be made to produce crops by irrigation; that the common-law doctrine of riparian rights is not applicable to conditions in the arid region and has been abolished by statute and by usage and custom; that there has been established in its stead in said region a doctrine to the effect that the waters of natural streams and the flood and other waters may be impounded, appropriated, diverted, and used for the purpose of reclaiming and irrigating the arid land, therein, and that the prior appropriation of such waters for such purpose gives a prior and superior right to the water of the stream.

"The sixth paragraph alleges that legislation of Congress, decisions of courts, and acts of the executive department have sanctioned and approved the use of water for irrigation purposes in the arid region, and that he who is prior in time is prior in right, and that it is recognized that the common-law doctrine of riparian rights is not applicable to the public land owned by the United States in the arid region.

"The seventh paragraph alleges that, in accordance with and in reliance upon the doctrine of the use of water for irrigation purposes, the inhabitants of the arid portion of the United States have appropriated and used the waters of streams therein to reclaim and make productive and profitable about 10,000,000 acres of land, which now support a population of many millions, and that the inhabitants of Colorado and Kansas *within the watershed of the Arkan- [56] sas river have, by irrigation from said river, made productive and profitable about 200,000 acres of land, which provide homes for and support a population of many thousands.

"The eighth paragraph alleges that the common-law doctrine of riparian rights is not applicable to riparian lands within the arid region, and that only by the use of waters of natural streams and flood waters for irrigation and other beneficial purposes can the lands in the arid region be made productive, and only by such use can additional areas be reclaimed and rendered productive and salable.

"The ninth paragraph recites the passage of the so-called reclamation act of June 17, 1902. [32 Stat. at L. 388, chap. 1093, U. S. Comp. Stat. Supp. 1905, p. 349.]

"The tenth paragraph alleges that about 60,000,000 acres of land belonging to the United States within the arid region can be reclaimed under the provisions of the so-called reclamation act.

"The eleventh paragraph alleges that the amount of land that can be so reclaimed will support a population of many millions.

"The twelfth paragraph alleges that, under the operation of the said reclamation act, 100,000 acres of public land can be reclaimed within the watershed of the Arkansas river west of the 99th degree west.

"The thirteenth paragraph alleges that the lands, when so reclaimed, will support a population of not less that 50,000.

"The fourteenth paragraph alleges that, under the operation of the so-called reclamation act, about $1,000,000 has been expended in exploring, procuring, and setting apart sites upon which reservoirs and dams contemplated by the act can be constructed and maintained; that contracts have been let for the construction of reservoirs which, when completed, will cost over two millions and will have a storage capacity to reclaim 500,000 acres of arid land, which land when reclaimed will sustain a population of not less than 250,000; that plans are contemplated for the expenditure of $20,000,000 under *said act, to irrigate about 1,000,000 acres of [57] arid public lands.

"The fifteenth paragraph recites that there are $16,000,000 available under the so-called reclamation act.

"The sixteenth paragraph sets forth the contention of Kansas as seen in its amended bill of complaint, *viz.*, that it is entitled to have the waters of the Arkansas river, which rises in Colorado, flow uninterrupted and unimpeded into Kansas.

"The seventeenth paragraph sets forth the contention of Colorado in respect to its claim of ownership, *viz.*, that under the provisions of its Constitution it is the owner of all waters within that state.

"The eighteenth paragraph is as follows:

" 'That neither the contention of the state of Colorado nor the contention of the state of Kansas is correct; nor does either contention accord with the doctrine prevailing in the arid region in respect to the waters of natural streams and of flood and other waters. That either contention, if sustained, would defeat the object, intent, and purpose of the reclamation act, prevent the settlement and sale of the arid lands belonging to the United States, and especially those within the watershed of the Arkansas river west of the 99th degree west longitude, and would otherwise work great damage to the interests of the United States.' "

Messrs. S. S. Ashbaugh, N. H. Loomis, C. C. Coleman, and F. Dumont Smith argued the cause and filed a brief for complainant:

When the state of Kansas was admitted into the Union, the bed of the Arkansas river passed to the state of Kansas.

La Plaisance Bay Harbor Co. v. Monroe, 1 Walk. Ch. (Mich.) 161; Cox v. State, 3 Blackf. 193; Mobile v. Eslava, 9 Port. (Ala.) 604, 33 Am. Dec. 325.

When the government meanders a stream, and sells the adjoining land, and treats the stream as if it were navigable, the title to the soil between the meandered lines vests in the state.

Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330; Rossmiller v. State, 114 Wis. 169, 58 L.R.A. 93, 91 Am. St. Rep. 910, 89 N. W. 839; Richardson v. United States, 100 Fed. 714; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Martin v. Waddell, 16 Pet. 367, 10 L. ed. 997; Packer v. Bird, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

The state of Kansas in this case is more pre-eminently the proper party complainant than was the state of Missouri in the case of Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331, or the state of Pennsylvania in the case of Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 519, 14 L. ed. 249.

Kansas is a common-law state so far as the doctrine of riparian rights is concerned; but, like the states of California, Oregon, Washington, North and South Dakota, Nebraska, and Texas, Kansas has adopted a rule that will allow the largest development of its territory consistent with the rights of all its citizens.

Clark v. Allaman, 71 Kan. 206, 70 L.R.A. 971, 80 Pac. 571; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Gould v. Eaton, 117 Cal. 539, 38 L.R.A. 181, 49 Pac. 577; Benton v. Johncox, 17 Wash. 277, 39 L.R.A. 107, 61 Am. St. Rep. 912, 49 Pac. 495; Low v. Schaffer, 24 Or. 239, 33 Pac. 678; Lone Tree Ditch Co. v. Cyclone Ditch Co. 15 S. D. 519, 91 N. W. 352; Crawford Co. v. Hathaway (Crawford v. Hall) 67 Neb. 325, 60 L.R.A. 889, 108 Am. St. Rep. 647, 93 N. W. 781; McGhee Irrig. Ditch Co. v. Hudson, 85 Tex. 587, 22 S. W. 398, 967; Shamleffer v. Council Grove Peerless Mill Co. 18 Kan. 24; Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330; Lake Koen Nav. Reservoir & Irrig. Co. v. Klein, 63 Kan. 484, 65 Pac. 684; Sturr v. Beck, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350, 3 Kent, Com. 439; Smith v. Rochester, 92 N. Y. 473, 44 Am. Rep. 393; 3 Farnham, Waters, 1903.

Even though it were considered that a limited amount and a reasonable use of water for irrigation are recognized by the common law, that use is strictly limited to riparian lands and to a reasonable use.

Heilbron v. Fowler Switch Canal Co. 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; Crawford Co. v. Hathaway, supra; Cline v. Stock, 71 Neb. 70, 98 N. W. 454, 102 N. W. 265.

An adjoining landowner may not drain percolating water from the lands of his neighbors, make merchandise of the water, and sell it; and equity will enjoin such drainage of adjoining lands.

Katz v. Walkinshaw, 141 Cal. 116, 64 L. R.A. 236, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766; Smith v. Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141; Forbell v. New York, 164 N. Y. 522, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644.

The right of a riparian owner on a stream to its flow as it was accustomed to run does not depend upon his use of the water, but special damage caused by diversion furnishes additional ground for relief.

Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Hargrave v. Cook, 108 Cal. 72, 30 L.R.A. 390, 41 Pac. 18; Whitney v. Wheeler Cotton Mills, 151 Mass. 396, 7 L.R.A. 613, 24 N. E. 774; Reeves v. Backus-Brooks Co. 33 Minn. 339, 86 N. W. 337.

The underflow of the Arkansas river in Kansas is a well-defined subterranean stream, distinct from underground or percolating waters, the right to which vests in

the owner of the surface, and its unlawful diversion, deprivation, or diminution is a substantial wrong, for which equity will grant relief.

Farnham, Waters, § 944, p. 2726; Buckers Irrig. Mill. & Improv. Co. v. Farmers' Independent Ditch Co. 31 Colo. 71, 72 Pac. 49; Platte Valley Irrig. Co. v. Buckers Irrig. Mill. & Improv. Co. 25 Colo. 82, 53 Pac. 334; Vineland Irrig. District v. Azusa Irrigating Co. 126 Cal. 486, 46 L.R.A. 820, 58 Pac. 1057; Los Angeles v. Pomeroy, 124 Cal. 323, 57 Pac. 585; Kinney, Irrigation, § 78, p. 123; Case v. Hoffman, 84 Wis. 438, 20 L.R.A. 40, 36 Am. St. Rep. 937, 54 N. W. 793.

The right to use water of a river for furnishing power, without diminution of its flow, is a riparian right which attaches to the land. It vests in the ownership of the land, and as such it cannot be injuriously affected by the proper riparian owner, as has been done in this case by the diversion of the water in Colorado.

Kimberly & C. Co. v. Hewitt, 75 Wis. 374, 44 N. W. 303; Union Water Power Co. v. Auburn, 90 Me. 65, 37 L.R.A. 651, 60 Am. St. Rep. 240, 37 Atl. 331.

Vested rights are not affected by state lines.

1 Farnham, Waters, p. 29; Pine v. New York, 50 C. C. A. 145, 112 Fed. 98; Holyoke Water Power Co. v. Connecticut River Co. 52 Conn. 570, 22 Blatchf. 131, 20 Fed. 71; Rutz v. St. Louis, 2 McCrary, 344, 7 Fed. 438; 8 Harvard Law Rev. p. 138; Howell v. Johnson, 89 Fed. 556; Hoge v. Eaton, 135 Fed. 411; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770; Conant v. Deep Creek & C. Valley Irrig. Co. 23 Utah, 627, 90 Am. St. Rep. 721, 66 Pac. 188; Opinion of Atty. Gen. 4 Am. L. Reg. 385; Slack v. Walcott, 3 Mason, 517, Fed. Cas. No. 12,932; Anderson v. Bassman, 140 Fed. 14.

The defendants in this case can claim no protection in appropriating and monopolizing the whole flow of the Arkansas river in Colorado, by virtue of any Federal enactment or Federal decision.

Atchison v. Peterson, 20 Wall. 507, 22 L. ed. 414; Basey v. Gallagher, 20 Wall. 671, 22 L. ed. 452; Jennison v. Kirk, 98 U. S. 456, 25 L. ed. 241; Sturr v. Beck, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770; Schwab v. Beam, 86 Fed. 41; Howell v. Johnson, 89 Fed. 556; Pine v. New York, 103 Fed. 337; Benton v. Johncox, 17 Wash. 277, 39 L.R.A. 107, 61 Am. St. Rep. 912, 49 Pac. 495; Gould v. Eaton, 117 Cal. 539, 38 L.R.A. 181, 49 Pac. 577; New Whatcom v. Fairhaven Land Co. 24 Wash. 493, 54 L.R.A. 190, 64 Pac. 735.

Treating Kansas and Colorado in all respects as separate nations, and ignoring the vested rights of Kansas under the common law, the contention of Colorado with respect to its right to divert all the waters of the Arkansas river is untenable, and Kansas is entitled to relief.

1 Farnham, Waters, 29; 1 Wharton, International Law Digest, § 20, pp. 62, 63; 7 Messages & Papers of the Presidents, p. 104; Wheaton, International Law, 3d ed. 242, 244, 247, 252; Show's Cas. International Law, § 8, p. 32; Opinion of Atty. Gen. 4 Am. L. Reg. 385.

The necessities of one man, or of any number of men, cannot justify the taking of another's property without his consent and without compensation.

Benton v. Johncox, 17 Wash. 277, 39 L.R.A. 107, 61 Am. St. Rep. 912, 49 Pac. 497.

Messrs. Clyde C. Dawson, Platt Rogers, N. C. Miller, and Joel F. Vaile argued the cause, and, with Messrs. Charles D. Hayt, C. W. Waterman, F. E. Gregg, W. R. Ramsey, and I. B. Melville, filed a brief for defendant the state of Colorado:

Kansas has no riparian rights derived from the so-called underflow.

Case v. Hoffman, 84 Wis. 438, 20 L.R.A. 40, 36 Am. St. Rep. 937, 54 N. W. 793; Earl v. DeHart, 12 N. J. Eq. 280, 72 Am. Dec. 395; Dickinson v. Grand Junction Canal Co. 7 Exch. 282; Chasemore v. Richards, 7 H. L. Cas. 369; Emporia v. Soden, 25 Kan. 610, 37 Am. Rep. 265; Farnham, Waters, § 944.

Even if Kansas possesses riparian rights to the full extent claimed by her, yet she has no right of action in the absence of injury, inflicted or threatened.

Clark v. Allaman, 71 Kan. 206, 70 L.R.A. 971, 80 Pac. 571; Reeves v. Backus-Brooks Co. 83 Minn. 339, 86 N. W. 337; Kansas v. Colorado, 185 U. S. 125, 147, 46 L. ed. 838, 846, 22 Sup. Ct. Rep. 552; Missouri v. Illinois, 200 U. S. 496, 50 L. ed. 572, 26 Sup. Ct. Rep. 268.

Kansas is precluded from claiming that her riparian rights should take precedence of the beneficial use of the waters of the Arkansas on arid lands in Colorado.

Indiana v. Milk, 11 Biss. 197, 11 Fed. 397; Missouri v. Illinois, supra.

One who owns to the middle of the stream has a property interest in the flow of the water over the land he so owns, but there is certainly no corresponding interest in the flow of the river by one who has no title to the underlying land. It would seem that the property interest in the nature of a riparian right to the flow of the stream is by most authorities (with some occasional difference of opinion) held to result from

this ownership of the soil over which the water flows.

Angell, Watercourses, 7th ed. § 5; Tyler v. Wilkinson, 4 Mason, 400, Fed. Cas. No. 14,312; La Plaisance Bay Harbor Co. v. Monroe, 1 Walk. Ch. (Mich.) 155; St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 289, 19 L. ed. 74, 78; Tomlin v. Dubuque, B. & M. R. Co. 32 Iowa, 109, 7 Am. Rep. 176; People ex rel. Loomis v. Canal Appraisers, 33 N. Y. 461; People v. Tibbetts, 19 N. Y. 528; Wood v. Fowler, 26 Kan. 690, 40 Am. Rep. 330; Crawford Co. v. Hathaway (Crawford Co. v. Hall) 67 Neb. 325, 60 L.R.A. 901, 108 Am. St. Rep. 647, 93 N. W. 789.

Riparian rights at common law include the right to irrigate riparian lands.

3 Farnham, Waters, 1895; 17 Am. & Eng. Enc. Law, 2d ed. p. 487; Clark v. Allaman and Crawford Co. v. Hathaway, supra.

In humid countries, where no question of the necessities of the people growing out of aridity of the soil could arise, this riparian right of irrigation has been recognized.

Weston v. Alden, 8 Mass. 136; Anthony v. Lapham, 5 Pick. 175; Elliot v. Fitchburg R. Co. 10 Cush. 194, 57 Am. Dec. 85; Embrey v. Owen, 6 Exch. 371.

The common law, however, recognizes, even in a humid country, that there are certain necessary uses to which the riparian proprietor has a natural right to apply the waters of the stream without regard to the effect of such use upon proprietors below.

Miner v. Gilmour, 12 Moore, P. C. 156; Atty. Gen. v. Great Eastern R. Co. 23 L. T. N. S. 344; Stein v. Burden, 29 Ala. 133, 65 Am. Dec. 394; Anderson v. Cincinnati Southern R. Co. 86 Ky. 49, 9 Am. St. Rep. 263, 5 S. W. 49; Hazeltine v. Case, 46 Wis. 394, 32 Am. Rep. 715, 1 N. W. 66; Evans v. Merriweather, 4 Ill. 496, 38 Am. Dec. 106; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Rep. 391; Rhodes v. Whitehead, 27 Tex. 310, 84 Am. Dec. 631; 30 Am. & Eng. Enc. Law, 2d ed. pp. 358, 359 (b).

In construing the common law as to its application, we should, within the reasonable limits of the general principles involved, be guided by the conditions and wants of the people.

Van Ness v. Pacard, 2 Pet. 137, 144, 145, 7 L. ed. 374, 377; Wheaton v. Peters, 8 Pet. 591, 659, 8 L. ed. 1055, 1080; Re Pennock, 20 Pa. 274, 59 Am. Dec. 718; People ex rel. Loomis v. Canal Appraisers, 33 N. Y. 468; Dawson v. Coffman, 28 Ind. 224; Penny v. Little, 4 Ill. 305.

In view of the condition and wants of the people of the arid section of the United States, the use of water in the irrigation of lands takes the rank of a necessary use, affected by the same rules as apply to other necessary uses of humanity as recognized by the common law.

Evans v. Merriweather, 4 Ill. 495, 38 Am. Dec. 106; Yunker v. Nichols, 1 Colo. 551; Rhodes v. Whitehead, 27 Tex. 310, 84 Am. Dec. 631; Mud Creek Irrig. Agri. & Mfg. Co. v. Vivian, 74 Tex. 174, 11 S. W. 1078; Clark v. Nash, 198 U. S. 361, 370, 49 L. ed. 1085, 1088, 25 Sup. Ct. Rep. 676; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770; Gutierres v. Albuquerque Land & Irrig. Co. 188 U. S. 545, 47 L. ed. 588, 23 Sup. Ct. Rep. 338.

Within the permitted limits of use, the upper proprietor, by virtue of his position on the stream, has the first right to the use of its waters.

Chasemore v. Richards, 7 H. L. Cas. 382; Roberts v. Richards, 50 L. J. Ch. N. S. 237; Barrett v. Metcalfe, 12 Tex. Civ. App. 267, 33 S. W. 759; Mud Creek Irrig. Agri. & Mfg. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1071; Merrifield v. Worcester, 110 Mass. 219, 14 Am. Rep. 592; Pennsylvania Coal Co. v. Sanderson, 113 Pa. 145, 57 Am. Rep. 445, 6 Atl. 453.

The only limit which, under the rules of the common law, can, in a case such as this, between such parties as are now before the court, be imposed as the lateral extent of the riparian right, is this limit of beneficial use within the area which is naturally drained by the stream.

Chauvet v. Hill, 93 Cal. 410, 28 Pac. 1066; Bathgate v. Irvine, 126 Cal. 142, 77 Am. St. Rep. 158, 58 Pac. 442; Southern California Invest. Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767; Clark v. Allaman, 71 Kan. 294, 70 L.R.A. 971, 80 Pac. 585.

Under the common law as it exists in Kansas, the riparian rights along the Arkansas river in Kansas are subordinate to like riparian rights in Colorado.

Clark v. Allaman, supra.

Mr. David C. Beaman argued the cause, and, with Messrs. Cass E. Herrington and Fred Herrington, filed a brief for defendant the Colorado Fuel & Iron Company:

A state, when admitted to the Union, stands upon the same footing in all respects as the thirteen original states; and that statement is made in every enabling act.

Texas v. White, 7 Wall. 700, 725, 19 L. ed. 227, 237; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127.

There is no rule of international law giving a lower nation any right of control over the water within the boundaries of an upper one, or imposing on the latter any duty or obligation to any lower nation in respect thereto.

State control of water is not restricted by any of the provisions of the Federal Constitution.

Manchester v. Massachusetts, 139 U. S. 240, 266, 35 L. ed. 159, 167, 11 Sup. Ct. Rep. 559; Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076.

The riparian doctrine does not prevail throughout Kansas.

Campbell v. Grimes, 62 Kan. 503, 64 Pac. 62; Lake Koen Nav. Reservoir & Irrig. Co. v. Klein, 63 Kan. 484, 65 Pac. 684.

Colorado is an independent nation in respect to the control of its waters.

United States v. E. C. Knight Co. 156 U. S. 11-14, 39 L. ed. 328, 329, 15 Sup. Ct. Rep. 249; Perkins County v. Graff, 52 C. C. A. 243, 114 Fed. 441; 21 Ops. Atty. Gen. 274.

Mr. Platt Rogers argued the cause, and, with Messrs. John F. Shafroth and Frank E. Gregg, filed a brief for defendant the Arkansas Valley Sugar Beet & Irrigated Land Company.

Mr. C. C. Goodale filed a brief for defendant the Graham Ditch Company.

Messrs. Platt Rogers, John F. Shafroth, Frank E. Gregg, C. C. Goodale, D. C. Beaman, C. E. Gast, and F. A. Sabin also filed a brief, on behalf of individual defendants, in support of their motion to dismiss the bill.

Solicitor General Hoyt argued the cause for the United States:

Assuming that there is power somewhere outside the two states to adjust the dispute, the principle of law to be found and applied will inaugurate a new law of waters on interstate streams; that is, on main streams which actually cross state lines. The strict common-law rule of riparian rights cannot control this new law for the arid region. The common law would not be the pervading and permanent institution which it is if it had not contained the seeds of growth and free development,—not to break down constitutions and laws, but to adapt them to new times, places, and conditions.

Hurtado v. California, 110 U. S. 531, 28 L. ed. 237, 4 Sup. Ct. Rep. 111, 292; Woodman v. Pitman, 79 Me. 458, 1 Am. St. Rep. 342, 10 Atl. 321.

Irrigation was always a common-law use, and a new combination of the common law is taking shape here, because the doctrine of reasonable use is qualifying the unrelieved common-law rule.

Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676.

The very fact that the controversy is justiciable here is proof that Colorado cannot do as she sees fit without accountability. She is a sovereign state of this Union, but not a sovereign nation. There is a higher sovereignty. All the states have transferred the decision of their controversies to this court.

Rhode Island v. Massachusetts, 12 Pet. 743, 9 L. ed. 1268.

Commerce is intercourse, and it may well be, under the famous definition of Marshall (Gibbons v. Ogden, 9 Wheat. 189, 190, 6 L. ed. 68, 69), and the principles of constitutional expansion which he laid down, that the word imports intercourse in the broadest sense.

The word is not restricted to trade and traffic, or navigation, or transportation; no one can now say definitely what movements and interactions across state lines may not be embraced within its meaning. When to the power over interstate commerce, so regarded, the powers necessary to carry that power into effect are added, it may well be that conflicting irrigation rights between two states, on the waters of a stream passing from one state to another, involve the power over interstate commerce.

Implied power becomes appropriate and legitimate here by reason of the Federal relation. Just because it is a controversy between two states, the sovereignty between them and above them both must harmonize. The power in Congress to make necessary and proper laws is given not only for carrying into execution the foregoing powers, but also all other powers vested by this Constitution in the government of the United States. The other powers are especially needed to adjust and preserve the Federal relations between states.

There is no sharp line between implied powers and inherent powers. The expansion of implied powers and the existence of inherent powers lie close together.

M'Culloch v. Maryland, 4 Wheat. 405, 4 L. ed. 601; Martin v. Hunter, 1 Wheat. 326, 4 L. ed. 102; United States v. Harris, 106 U. S. 635, 27 L. ed. 292, 1 Sup. Ct. Rep. 601; Gibbons v. Ogden, 9 Wheat. 195, 6 L. ed. 69.

Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.

1 Wilson's Works, p. 533.

Whenever an object occurs, to the direction of which no particular state is competent, the management of it must of necessity belong to the United States in Con-

gress assembled. There are many objects of this extended nature.

1 Wilson's Works, p. 558.

Nonenumerated powers are included in the authority expressly given to make all necessary and proper laws "for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287, Affirmed in 110 U. S. 421, 38 L. ed. 204, 4 Sup. Ct. Rep. 122; Re Debs, 158 U. S. 579, 39 L. ed. 1100, 15 Sup. Ct. Rep. 900.

Since the Constitution says "all other powers vested," that means more than powers enumerated or powers expressly delegated. This is emphasized by the fact that Chief Justice Marshall speaks of this grant as "the last of the enumerated powers" (Gibbons v. Ogden, 9 Wheat. 187, 6 L. ed. 68). Then, other powers being granted besides the "foregoing," to which the power of making necessary laws is superadded, these other powers exist and are vested, although not enumerated or expressly delegated.

There is a gap and vacancy of sovereignty somewhere, if the sovereign and inherent power of one state is restricted to its own territory (which, of course, it is), and there is no sovereign and inherent power in the nation to regulate where the powers of two or more states overlap, and so clash, and injure each other and the aggregate interests. This entails no loss of powers reserved to the states; if it does, we are in a vise,—both the states and the nation powerless at the very point where competent power is most essential.

Assistant Attorney General Campbell and Mr. A. C. Campbell argued the cause, and, with Solicitor General Hoyt, filed a brief for the United States, intervener:

The reclamation and cultivation of the arid lands belonging to the government is indispensable to the future growth and prosperity of the nation.

3 Farnham, Waters, p. 1895a.

The policy of the government recognizes and demands that the public lands shall be reclaimed, settled, and cultivated.

Atchison v. Peterson, 20 Wall. 507, 513, 22 L. ed. 414, 416; Basey v. Gallagher, 20 Wall. 670, 681, 682, 22 L. ed. 452, 454; Tartar v. Spring Creek Water & Min. Co. 5 Cal. 397; Jennison v. Kirk, 98 U. S. 453, 23 L. ed. 240; Broder v. Natoma Water & Min. Co. 101 U. S. 274, 276, 25 L. ed. 790, 791; Fallbrook Irrig. District v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770; Gutierres v. Albuquerque Land & Irrig. Co. 188 U. S. 545, 47 L. ed. 588, 23 Sup. Ct. Rep. 338; Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676.

The public arid lands cannot be reclaimed, nor can the policy of the government be carried out, under the application of the common-law doctrine of riparian rights, nor under the application of that doctrine as the same has been modified by the legislative and declared by the judicial departments of some of the western states.

Stowell v. Johnson, 7 Utah, 215, 26 Pac. 291; Clough v. Wing, 2 Ariz. 371, 17 Pac. 456.

A custom proceeding from certain reasonable use supersedes the common law.

Wharton, Legal Maxims, 152.

However, there is no common law in the United States separate and distinct from the common law in the states, and it can be made a part of our Federal system only by legislative adoption (Wheaton v. Peters, 8 Pet. 591, 658, 8 L. ed. 1055, 1079), although the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment.

Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 102, 45 L. ed. 765, 770, 21 Sup. Ct. Rep. 561.

Even though it be conceded that the subject-matter of this action is an "interstate commercial transaction," the rule of the common law should not be applied, for the reason that Congress, by legislation, and especially by the reclamation act, has modified, if not entirely abrogated, the principles of the common law with regard to riparian rights along interstate streams.

But this court has held, in United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690–703, 43 L. ed. 1136–1141, 19 Sup. Ct. Rep. 770, that the state had the power to change the common-law rule as to streams within its dominions, subject to the limitations therein stated. And the people of the state of Colorado, by their Constitution, have not only changed that rule, but its highest court has held that such rule never applied within its boundaries (Coffin v. Left Hand Ditch Co. 6 Colo. 447). Upon what principle, then, may this court force upon the state of Colorado and its people what of the common law which the courts there in and the people have repudiated?

The doctrine of riparian rights, either in its strict or in its modified form, and the doctrine which is essential to the reclamation and cultiv[illegible] of the arid land[illegible] *viz.*, the a[illegible]n of the water of streams for [illegible] purposes,—are [illegible]sistent and i[illegible]ble with each other.

and cannot exist in the same state or on the same stream at the same time.

Stowell v. Johnson, supra; Works, Irrigating Laws, p. 17.

The state of Colorado does not have the status of an independent nation.

New Hampshire v. Louisiana, 108 U. S. 76, 90, 27 L. ed. 656, 661, 2 Sup. Ct. Rep. 176.

Colorado as a state has the same power and control over the waters within its borders as an independent nation over the waters within its borders.

Hoge v. Eaton, 135 Fed. 411; Howell v. Johnson, 89 Fed. 556; Perkins County v. Graff, 52 C. C. A. 243, 114 Fed. 441; Morris v. Bean, 123 Fed. 618; Miller v. Rickey, 127 Fed. 573; Anderson v. Bassman, 140 Fed. 10; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

While neither Kansas nor Colorado ever was sovereign, even in the sense that each of the original states was sovereign, yet both came into the Union on an equal footing with each of the original states; and it would appear to be unquestionable that each of them, by assenting to the Federal Constitution and becoming a member of the Union, agreed not to adopt any law the enforcement of which would work injury to the rights of any other state or its people, or to the citizens of any other state, or to the United States as a nation, or its property (South Carolina v. Georgia, 93 U. S. 4, 23 L. ed. 782). Each state, however, is sovereign to the extent that it may adopt any law necessary to the development of its resources and for the protection of its citizens in their personal and property rights; and this court has held (United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 703, 43 L. ed. 1136, 1141, 19 Sup. Ct. Rep. 770) that, to this end, a state may, by legislation, permit the diversion and use of the waters of streams within its borders for irrigation purposes, subject, however, to the following limitations: First. That, in the absence of specific authority from Congress, a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far, at least, as may be necessary for the beneficial uses of the government property. Second. That it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

When the Constitution was framed it was anticipated "that a state administering its affairs with prime regard to its own interests should sometimes displease and even damage a neighbor."

2 Columbia Law Rev. p. 299.

Between states dwelling in peace and concord, as are the states of our Union, the equal right of the inhabitants of each state to the waters of intersecting streams must always be recognized.

Hoge v. Eaton, 135 Fed. 414.

Considerations of comity would seem to estop Colorado from denying to the citizens of Kansas the same right to the waters of the Arkansas river which it claims for its own citizens, which is that, under the Constitution and the laws of the state, water may be taken from the Arkansas river for irrigation purposes, and that he who is prior in time is prior in right.

Willey v. Decker, supra; Rossmiller v. State, 114 Wis. 169, 58 L.R.A. 93, 91 Am. St. Rep. 910, 89 N. W. 839.

The judgment of the court should be exercised in favor of that rule which will produce the greatest good, and at the same time occasion the least injury.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 372, 37 L. ed. 772, 775, 13 Sup. Ct. Rep. 914; Katz v. Walkinshaw, 141 Cal. 116, 64 L.R.A. 248, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766; Morgan v. King, 30 Barb. 16; Beardsley v. Hartford, 50 Conn. 542, 47 Am. Rep. 677.

Mr. Justice Brewer delivered the opinion of the court:

While we said in overruling the demurrer that "this court, speaking broadly, has jurisdiction," we contemplated further consideration of both the fact and the extent of our jurisdiction, to be fully determined after the facts were presented. We therefore commence with this inquiry. And first, of our jurisdiction of the controversy between Kansas and Colorado.

This suit involves no question of boundary or of the limits of territorial jurisdiction. Other and incorporeal rights are claimed by the respective litigants. Controversies between the states are becoming frequent, and, in the rapidly changing conditions of life and business, are likely to become still more so. Involving, as they do, the rights of political communities which in many respects are sovereign and independent, they present not infrequently questions of far-reaching import and of exceeding difficulty.

It is well, therefore, to consider the foundations of our jurisdiction over controversies between states. It is no longer open to question that by the Constitution a nation was brought into being, and that that instrument was not merely operative to establish a closer union or league of states. Whatever powers of government were granted to the nation or reserved to the states (and for the description and limitation of

those powers we must always accept the Constitution as alone and absolutely controlling), there was created a nation, to be known as the United States of America, and as such then assumed its place among the nations of the world.

The first resolution passed by the convention that framed the Constitution, sitting as a committee of the whole, was "Resolved, That it is the opinion of this committee that a national government ought to [81] be established, consisting of a *supreme legislative, judiciary, and executive." 1 Elliot, Debates, p. 151.

In M'Culloch v. Maryland, 4 Wheat. 316, 405, 4 L. ed. 579, 601, Chief Justice Marshall said:

"The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

See also Martin v. Hunter, 1 Wheat. 304, 324, 4 L. ed. 97, 102, opinion by Mr. Justice Story.

In Scott v. Sandford, 19 How. 393, 441, 15 L. ed. 691, 715, Chief Justice Taney observed:

"The new government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations, of the preceding one. But, when the present United States came into existence under the new government, it was a new political body, a new nation, then for the first time taking its place in the family of nations."

And in Miller on the Constitution of the United States, p. 83, referring to the adoption of the Constitution, that learned jurist said: "It was then that a nation was born."

In the Constitution are provisions in separate articles for the three great departments of government,—legislative, executive, and judicial. But there is this significant difference in the grants of powers to these departments: The first article, treating of legislative powers, does not make a general grant of legislative power. It reads: "Article 1, § 1. All legislative powers herein granted shall be vested in a Congress," etc.; and then, in article 8, mentions and defines the legislative powers that are granted. By reason of the fact that there is no general grant of legislative power it has become an accepted constitutional rule that this is a government of enumerated powers.

*In McCulloch v. Maryland, 4 Wheat. 405, [82] 4 L. ed. 601, Chief Justice Marshall said:

"This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

On the other hand, in article 3, which treats of the judicial department,—and this is important for our present consideration, —we find that § 1 reads that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." By this is granted the entire judicial power of the nation. Section 2, which provides that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States," etc., is not a limitation nor an enumeration. It is a definite declaration,—a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations on that grant of power, but, if there are any, they must be expressed; for otherwise the general grant would vest in the courts all the judicial power which the new nation was capable of exercising. Construing this article in the early case of Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 440, the court held that the judicial power of the Supreme Court extended to a suit brought against a state by a citizen of another state. In announcing his opinion in the case, Mr. Justice Wilson said (p. 453, L. ed. p. 454):

"This question, important in itself, will depend on others more important still; and may, perhaps, be ultimately resolved into one no less radical than this,—Do the people of the United States form a *nation?*"

In reference to this question attention may, however, properly be called to Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504.

*The decision in Chisholm v. Georgia led [83] to the adoption of the 11th Amendment to the Constitution, withdrawing from the judicial power of the United States every suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or citizens or subjects of a foreign state. This amendment refers only to suits and actions by individuals, leaving undisturbed the jurisdiction over suits or actions by one state against another. As said by Chief Justice Marshall in

Cohen v. Virginia, 6 Wheat. 264, 407, 5 L. ed. 257, 291: "The Amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states." See also South Dakota v. North Carolina, 192 U. S. 286, 48 L. ed. 448, 24 Sup. Ct. Rep. 269.

Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, and the parties to which or the property involved in which may be reached by judicial process, and, when the judicial power of the United States was vested in the Supreme and other courts, all the judicial power which the nation was capable of exercising was vested in those tribunals; and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto. This general truth is not inconsistent with the decisions that no suit or action can be maintained against the nation in any of its courts without its consent, for they only recognize the obvious truth that a nation is not, without its consent, subject to the controlling action of any of its instrumentalities or agencies. The creature cannot rule the creator. Kawananakoa v. Polyblank, 205 U. S. 349, ante, 834, 27 Sup. Ct. Rep. 526. Nor is it inconsistent with the ruling in Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370, that an original action cannot be maintained in this court by one state to enforce its penal laws against a citizen of another state. That was no denial of the jurisdiction of the court, but a decision upon the merits of the claim of the state.

These considerations lead to the propositions that when a *legislative power is claimed for the national government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication; whereas, in respect to judicial functions, the question is whether there be any limitations expressed in the Constitution on the general grant of national power.

We may also notice a matter in respect thereto referred to at length in Missouri v. Illinois, 180 U. S. 208, 220, 45 L. ed. 497, 504, 21 Sup. Ct. Rep. 331, 336. The 9th article of the Articles of Confederation provided that "the United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other cause whatever." In the early drafts of the Constitution provision was made giving to the Supreme Court "jurisdiction of controversies between two or more states, except such as shall regard territory or jurisdiction," and also that the Senate should have exclusive power to regulate the manner of deciding the disputes and controversies between the states respecting jurisdiction or territory. As finally adopted, the Constitution omits all provisions for the Senate taking cognizance of disputes between the states, and leaves out the exception referred to in the jurisdiction granted to the Supreme Court. That carries with it a very direct recognition of the fact that to the Supreme Court is granted jurisdiction of all controversies between the states which are justiciable in their nature. "All the states have transferred the decision of their controversies to this court; each had a right to demand of it the exercise of the power which they had made judicial by the Confederation of 1781 and 1788; that we should do that which neither states nor Congress could do,—settle the controversies between them." Rhode Islands v. Massachusetts, 12 Pet. 657, 743, 9 L. ed. 1233, 1268.

Under the same general grant of judicial power jurisdiction over suits brought by the United States has been sustained. United States v. Texas, 143 U. S. 621, 36 L. ed. 285, 12 Sup. Ct. Rep. 488, 162 U. S. 1, 40 L. ed. 867, 16 Sup. Ct. Rep. 725; United States v. Michigan, 190 U. S. 379, 47 L. ed. 1103, 23 Sup. Ct. Rep. 742.

*The exemption of the United States to [85] suit in one of its own courts without its consent has been repeatedly recognized. Kansas v. United States, 204 U. S. 331, 341, ante, 510, 27 Sup. Ct. Rep. 388, and cases cited.

Turning now to the controversy as here presented, it is whether Kansas has a right to the continuous flow of the waters of the Arkansas river, as that flow existed before any human interference therewith, or Colorado the right to appropriate the waters of that stream so as to prevent that continuous flow, or that the amount of the flow is subject to the superior authority and supervisory control of the United States. While several of the defendant corporations have answered, it is unnecessary to specially consider their defenses, for, if the case against Colorado fails, it fails also as against them. Colorado denies that it is in any substantial manner diminishing the flow of the Arkansas river into Kansas. If that be true, then it is in no way infringing upon the rights of Kansas. If it is diminishing that flow, has it an absolute right to determine for itself the extent to which it will diminish it, even to the entire appropriation of the water? And if it has not that absolute right, is the amount of appropriation that

it is now making such an infringment upon the rights of Kansas as to call for judicial interference? Is the question one solely between the states, or is the matter subject to national legislative regulation? and, if the latter, to what extent has that regulation been carried? Clearly this controversy is one of a justiciable nature. The right to the flow of a stream was one recognized at common law, for a trespass upon which a cause of action existed.

The primary question is, of course, of national control. For, if the nation has the right to regulate the flow of the waters, we must inquire what it has done in the way of regulation. If it has done nothing the further question will then arise, What are the respective rights of the two states, in the absence of national regulation? Congress has, by virtue of the grant to it of power to regulate commerce "among the several states," extensive control over the highways, natural or artificial, upon which such commerce may be carried. It may prevent or [86] remove *obstructions in the natural water ways and preserve the navigability of those ways. In United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770, in which was considered the validity of the appropriation of the water of a stream by virtue of local legislation, so far as such appropriation affected the navigability of the stream, we said (p. 703, L. ed. p. 1141, Sup. Ct. Rep. p. 775):

"Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs to each state, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a state cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far, at least, as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable water courses of the country, even against any state action."

It follows from this that if, in the present case, the national government was asserting, as against either Kansas or Colorado, that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge. But the government makes no such contention. On the contrary, it distinctly asserts that the Arkansas river is not now and never was practically navigable beyond Fort Gibson in the Indian territory, and nowhere claims that any appropriation of the waters by Kansas or Colorado affects its navigability.

It rests its petition of intervention upon its alleged duty of legislating for the reclamation of arid lands; alleges that in or near the Arkansas river, as it runs through Kansas and Colorado, *are large tracts of [87] those lands; that the national government is itself the owner of many thousands of acres; that it has the right to make such legislative provision as, in its judgment, is needful for the reclamation of all these arid lands, and, for that purpose, to appropriate the accessible waters.

In support of the main proposition it is stated in the brief of its counsel:

"That the doctrine of riparian rights is inapplicable to conditions prevailing in the arid region; that such doctrine, if applicable in said region, would prevent the sale, reclamation, and cultivation of the public arid lands, and defeat the policy of the government in respect thereto; that the doctrine which is applicable to conditions in said arid region, and which prevails therein, is that the waters of natural streams may be used to irrigate and cultivate arid lands, whether riparian or nonriparian, and that the priority of appropriation of such waters and the application of the same for beneficial purposes establishes a prior and superior right."

In other words, the determination of the rights of the two states *inter sese* in regard to the flow of waters in the Arkansas river is subordinate to a superior right on the part of the national government to control the whole system of the reclamation of arid lands. That involves the question whether the reclamation of arid lands is one of the powers granted to the general government. As heretofore stated, the constant declaration of this court from the beginning is that this government is one of enumerated powers. "The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication." Story, J., in Martin v. Hunter, 1 Wheat. 304, 326, 4 L. ed. 97, 102. "The government of the United States is one of delegated, limited, and enumerated powers." United States v. Harris, 106 U. S. [illegible], 27 L. ed. 290, 292, 1 Sup. Ct. Rep. [illegible].

Turning to the enumeration of the powers granted to [illegible] by the 8th section of the [illegible] Constitution, "it [illegible] en[illegible] to [illegible] one of them, by any implicatio[illegible] refers [illegible] the reclamation of [illegible]

arid lands. The last paragraph of the section which authorizes Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof, is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned. The construction of that paragraph was precisely stated by Chief Justice Marshall in these words [4 Wheat. 421, 4 L. ed. 605]: "We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional,"—a statement which has become the settled rule of construction. From this and other declarations it is clear that the Constitution is not to be construed technically and narrowly, as an indictment, or even as a grant presumably against the interest of the grantor, and passing only that which is clearly included within its language, but as creating a system of government whose provisions are designed to make effective and operative all the governmental powers granted. Yet, while so construed, it still is true that no independent and unmentioned power passes to the national government or can rightfully be exercised by the Congress.

We must look beyond § 8 for congressional authority over arid lands, and it is said to be found in the second paragraph of § 3 of article 4, reading: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging *to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words "territory or other property." It is true it has been referred to in some decisions as granting political and legislative control over the territories as distinguished from the states of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. But clearly it does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits. Appreciating the force of this, counsel for the government relies upon "the doctrine of sovereign and inherent power;" adding, "I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference." His argument runs substantially along this line: All legislative power must be vested in either the state or the national government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that state; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain *by the 10th Amendment. This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. It reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The argument of counsel ignores the principal factor in this article, to wit, "the people." Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it,—"we, the people of the United States," not the people of one state, but the people of all the states; and

[90]

article 10 reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This article 10 is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and [91] *liberally so as to give effect to its scope and meaning. As we said, construing an express limitation on the powers of Congress, in Fairbank v. United States, 181 U. S. 283, 288, 45 L. ed. 862, 865, 21 Sup. Ct. Rep. 648, 650:

"We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that, where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed. Especially is this true when, in respect to grants of powers, there is, as heretofore noticed, the help found in the last clause of the 8th section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

This very matter of the reclamation of arid lands illustrates this: At the time of the adoption of the Constitution, within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the state in which any particular tract of such land was to be found; and the Constitution, therefore, makes no provision for a national control of the arid regions or their reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands *which ought to be [92] reclaimed, and it may well be that no power is adequate for their reclamation other than that of the national government. But, if no such power has been granted, none can be exercised.

It does not follow from this that the national government is entirely powerless in respect to this matter. These arid lands are largely within the territories, and over them, by virtue of the second paragraph of § 3 of article 4, heretofore quoted, or by virtue of the power vested in the national government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the states, at least of the Western states, the national government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found mainly, if not only, in the Western and newer states, yet the powers of the national government within the limits of those states are the same (no greater and no less) than those within the limits of the original thirteen; and it would be strange if, in the absence of a definite grant of power, the national government could enter the territory of the states along the Atlantic and legislate in respect to improving, by irrigation or otherwise, the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation. As said by Mr. Justice White, delivering the opinion of the court in Gutierres v. Albuquerque Land & Irrig. Co. 188 U. S. 545, 554, 47 L. ed. 588, 593, 23 Sup. Ct. Rep. 338, 341, after referring to previous legislation:

"It may be observed that the purport of the previous acts is reflexively illustrated by the act of June 17, 1902 (32 Stat. at L. 388, chap. 1093, U. S. Comp. Stat. Supp. 1905, p. 349). That act appropriated the receipts from the sale and disposal of the

public lands in certain states and territories]*to the construction of irrigation works for the reclamation of arid lands. The 8th section of the act is as follows:

" 'Sec. 8. That nothing in this act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any state, or of the Federal government, or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of the water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.' "

But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters. Martin v. Waddell, 16 Pet. 367, 10 L. ed. 997; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Goodtitle ex dem. Pollard v. Kibbe, 9 How. 471, 13 L. ed. 220; Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224; St. Louis v. Myers, 113 U. S. 566, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640; Packer v. Bird, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651. In Barney v. Keokuk, supra, Mr. Justice Bradley said (p. 338, L. ed. p. 228):

"And since this court, in the case of The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reasons for adhering to the old rule as to the proprietor-]ship of the beds and shores of such *waters It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

In Hardin v. Jordan, supra, the same justice, after stating that the title to the shore and lands under water is in the state, added (pp. 381, 382, L. ed. p. 433, Sup. Ct. Rep. p. 812):

"Such title being in the state, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. . . . Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. . . . This right of the states to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised."

It may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any state. It is undoubtedly true that the early settlers brought to this country the common law of England, and that that common law throws light on the meaning and scope of the Constitution of the United States, and is also in many states expressly recognized as of controlling force in the absence of express statute. As said by *Mr. Justice Grey in United[95] States v. Wong Kim Ark, 169 U. S. 649, 654, 42 L. ed. 890, 893, 18 Sup. Ct. Rep. 456, 459:

"In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627; Ex parte Wilson, 114 U. S. 417, 422, 29 L. ed. 89, 91, 5 Sup. Ct. Rep. 935; Boyd v. United States, 116 U. S. 616, 624, 625, 29 L. ed. 746, 748, 749, 6 Sup. Ct. Rep. 524; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564. The language of the

Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent, Com. 336; Bradley, J., in Moore v. United States, 91 U. S. 270, 274, 23 L. ed. 346, 347."

In the argument on the demurrer counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into states. See also the opinion of the Supreme Court of Kansas in Clark v. Allaman, 71 Kan. 206, 70 L.R.A. 971, 80 Pac. 571. But when the states of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other states (Pollard v. Hagan and Shively v. Bowlby, supra; Hardin v. Shedd, 190 U. S. 508, 519, 47 L. ed. 1156, 1157, 23 Sup. Ct. Rep. 685), and Colorado, by its legislation, has recognized the right of appropriating the flowing waters to the purposes of irrigation. Now the question arises between two states, one recognizing generally the common-law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither state can legislate for, or impose its own policy upon the other. A stream flows through the two and a controversy is presented as to the flow of that stream. It does not follow, however, that because Congress cannot determine the rule which shall control between the two states, or because neither state can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two states. Indeed, the disagreement, coupled with its effect upon a stream passing through the two states, makes a matter for investigation and [96]*determination by this court. It has been said that there is no common law of the United States as distinguished from the common law of the several states. This contention was made in Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561, in which it was asserted that, as Congress, having sole jurisdiction over interstate commerce, had prescribed no rates for interstate telegraphic communications, there was no limit on the power of a telegraph company in respect thereto. After referring to the general contention, we paid (pp. 101, 102, L. ed. pp. 770, 771, Sup. Ct. Rep. pp. 564, 565):

"Properly understood, no exceptions can be taken to declarations of this kind. There is no body of Federal common law separate and distinct from the common law existing in the several states in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress. . . . Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment."

What is the common law? Kent says (vol. 1, p. 471):

"The common law includes those principles, usages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature."

As it does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of courts, and the[97] first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes. As Congress cannot make compacts between the states, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force, under our system of government, is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute. Nor is our jurisdiction ousted, even if, because Kansas and Colorado are states sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal. In The Paquete Habana, 175 U. S. 677, 700, 44 L. ed. [illegible] 328, 20 Sup. Ct. [illegible] 290, 298, Mr. Justice Gray declared:

"International [illegible] is part of our law, and must be as[illegible]ed and administered [illegible]

by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."

And in delivering the opinion in the demurrer in this case Chief Justice Fuller said (p. 146, L. ed. p. 846, Sup. Ct. Rep. p. 560):

"Sitting, as it were, as an international, as well as a domestic, tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand."

One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of Missouri v. Illinois, supra, the action of one state reaches, through the agency of natural laws, into the territory of another state, *the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. This very case presents a significant illustration. Before either Kansas or Colorado was settled the Arkansas river was a stream running through the territory which now composes these two states. Arid lands abound in Colorado. Reclamation is possible only by the application of water, and the extreme contention of Colorado is that it has a right to appropriate all the waters of this stream for the purposes of irrigating its soil and making more valuable its own territory. But the appropriation of the entire flow of the river would naturally tend to make the lands along the stream in Kansas less arable. It would be taking from the adjacent territory that which had been the customary natural means of preserving its arable character. On the other hand, the possible contention of Kansas, that the flowing water in the Arkansas must, in accordance with the extreme doctrine of the common law of England, be left to flow as it was wont to flow, no portion of it being appropriated in Colorado for the purposes of irrigation, would have the effect to perpetuate a desert condition in portions of Colorado beyond the power of reclamation. Surely here is a dispute of a justiciable nature which might and ought to be tried and determined. If the two states were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court.

It will be perceived that Kansas asserts a pecuniary interest as the owner of certain tracts along the banks of the Arkansas and as the owner of the bed of the stream. We need not stop to consider what rights such private ownership of property might give.

*In deciding this case on demurrer we said, [99] referring to the opinion in Missouri v. Illinois (p. 142, L. ed. p. 844, Sup. Ct. Rep. p. 558):

"As will be perceived, the court there ruled that the mere fact that a state had no pecuniary interest in the controversy would not defeat the original jurisdiction of this court, which might be invoked by the state as *parens patriæ*, trustee, guardian, or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between states, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution.

"In the case before us, the state of Kansas files her bill as representing and on behalf of her citizens, as well as in vindication of her alleged rights as an individual owner, and seeks relief in respect of being deprived of the waters of the river accustomed to flow through and across the state, and the consequent destruction of the property of herself and of her citizens and injury to their health and comfort. The action complained of is state action, and not the action of state officers in abuse or excess of their powers."

It is the state of Kansas which invokes the action of this court, charging that, through the action of Colorado, a large portion of its territory is threatened with disaster. In this respect it is in no manner evading the provisions of the 11th Amendment to the Federal Constitution. It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a state in this large tract of land bordering on the Arkansas river. Its prosperity affects the general welfare of the state. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint. Georgia v. Tennessee Copper Co. 206 U. S. 230, post, 1038, 27 Sup. Ct. Rep. 618.

This changes in some respects the scope of our inquiry. It is not limited to the simple matter of whether any portion of the *waters of the Arkansas is withheld by Colorado. We must consider the effect of what [100]

has been done upon the conditions in the respective states, and so adjust the dispute upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream. A little reflection will make this clear. Suppose the controversy was between two individuals, upper and lower riparian owners on a little stream with rocky bank and rocky bottom. The question properly might be limited to the single one of the diminution of the flow by the upper riparian proprietor. The lower riparian proprietor might insist that he was entitled to the full, undiminished, and unpolluted flow of the water of the stream as it had been wont to run. It would not be a defense on the part of the upper riparian proprietor that, by the use to which he had appropriated the water, he had benefited the lower proprietor, or that the latter had received in any other respects an equivalent. The question would be one of legal right, narrowed to place, amount of flow, and freedom from pollution.

We do not intimate that entirely different considerations obtain in a controversy between two states. Colorado could not be upheld in appropriating the entire flow of the Arkansas river, on the ground that it is willing to give, and does give, to Kansas, something else which may be considered of equal value. That would be equivalent to this court's making a contract between the two states, and that it is not authorized to do. But we are justified in looking at the question not narrowly and solely as to the amount of the flow in the channel of the Arkansas river, inquiring merely whether any portion thereof is appropriated by Colorado, but we may properly consider what, in case a portion of that flow is appropriated by Colorado, are the effects of such appropriation upon Kansas territory. For instance, if there be many thousands of acres in Colorado destitute of vegetation, which, by the taking of water from the Arkansas [101] river, and in no other way, can be *made valuable as arable lands producing an abundance of vegetable growth, and this transformation of desert land has the effect, through percolation of water in the soil, or in any other way, of giving to Kansas territory, although not in the Arkansas valley, a benefit from water as great as that which would inure from keeping the flow of the Arkansas in its channel undiminished, then we may rightfully regard the usefulness to Colorado as justifying its action, although the locality of the benefit from the flow of the Arkansas through Kansas has territorially changed. Science may not as yet be able to give positive information as to the process by which the distribution of water over certain territory has operation beyond the mere limits of the area in which the water is distributed, but they who have dwelt in the West know that there are constant changes in the productiveness of different portions of the territory, owing, apparently, to a wider and more constant distribution of water. To illustrate, the early settlers of Kansas territory found that farming was unsuccessful unless confined to its eastern 100 or 120 miles. West of that crops were almost always a failure; but now that region is the home of a large population, with crops as certain as those elsewhere, and yet this change has not been brought about by irrigation. A common belief is that the original sod was largely impervious to water; that when the spring rains came the water, instead of sinking into the ground, filled the water courses to overflowing and ran off to the Gulf of Mexico. There was no water in the soil to go up in vapor and come down in showers, and the constant heat of summer destroyed the crops; but after the sod had once been turned the water from those rains largely sank into the ground, and then, as the summer came on, went up in vapor and came down in showers, and so, by continued watering, prevented the burning up of the growing crops. We do not mean to say that science has demonstrated this to be the operating cause, or that other theories are not propounded, but the fact is that, instead of stopping at a distance of 120 miles from the Missouri river, the area of cultivated and *profitably cultivated land has ex- [102] tended from 150 to 200 miles further west, and seems to be steadily moving towards the western boundary of the state. Now, if there is this change gradually moving westward from the Missouri river, is it altogether an unreasonable expectation that, as the arid lands of Colorado are irrigated and become from year to year covered with vegetation, there will move eastward from Colorado an extension of the area of arable lands until, between the Missouri river and the mountains of Colorado, there shall be no land which is not as fully subject to cultivation as lands elsewhere in the country? Will not the productiveness of Kansas as a whole, its capacity to support an increasing population, be increased by the use of the water in Colorado for irrigation? May we not consider some appropriation by Colorado of the waters of the Arkansas to the irrigation and reclamation of its arid lands as a reasonable exercise of its sovereignty, and as not unrea——bly trespassing upon any rights of K[illegible] And here we must notice the l[illegible] of Kansas as declared by its supreme c[illegible], presuming that the

views expressed in this opinion are to be confined to a case in which the facts and the local law of the two states are as here disclosed. In Clark v. Allaman, 71 Kan. 206, 70 L.R.A. 971, 80 Pac. 571, is an exhaustive discussion of the question, Mr. Justice Burch delivering the unanimous opinion of the court. In the syllabus, which by statute (Kan. Comp. Laws, § 14, p. 317) is prepared by the justice writing the opinion, and states the law of the case, are these paragraphs:

"The use of the water of a running stream for irrigation, after its primary uses for quenching thirst and other domestic requirements have been subserved, is one of the common-law rights of a riparian proprietor.

"The use of water by a riparian proprietor for irrigation purposes must be reasonable under all the circumstances, and the right must be exercised with due regard to the equal right of every other riparian owner along the course of the stream.

"A diminution of the flow of water over riparian land, caused *by its use for irrigation purposes by upper riparian proprietors, occasions no injury for which damages may be allowed unless it results in subtracting from the value of the land by interfering with the reasonable uses of the water which the landowner is able to enjoy.

"In determining the quantity of land tributary to and lying along a stream which a single proprietor may irrigate, the principle of equality of right with others should control, irrespective of the accidental matter of governmental subdivisions of the land."

And in the opinion, on pages 242, 243, L.R.A. pp. 986, 987, Pac. p. 584, are quoted these observations of Chief Justice Shaw in the case of Elliot v. Fitchburg R. Co. 10 Cush. 191, 193, 196, 57 Am. Dec. 85, 87, 88:

"The right to flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris*, of such character that, whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing purposes would cause no sensible or practicable diminution of the benefit, to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook, passing through many farms, would be of great and manifest injury to those below, who need it for domestic supply or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case, and not in the former. It is, therefore, to a considerable extent a question of degree; still, the rule is the same, that each proprietor has a right to a reasonable use of it, for *his own benefit, for domestic use, and for [104] manufacturing and agricultural purposes. . . .

"That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the water course, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably. . . .

"This rule, that no riparian proprietor can wholly abstract or divert a water course, by which it would cease to be a running stream, or use it unreasonably in its passage, and thereby deprive a lower proprietor of a quality of his property deemed in law incidental and beneficial, necessarily flows from the principle that the right to the reasonable and beneficial use of a running stream is common to all the riparian proprietors, and so each is bound so to use his common right as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right by all the proprietors. . . .

"The right to the use of flowing water is *publici juris*, and common to all the riparian proprietors; it is not an absolute and exclusive right to all the water flowing past their land, so that any obstruction would give a cause of action; but it is a right to the flow and enjoyment of the water, subject to a similar right in all the proprietors, to the reasonable enjoyment of the same gift of Providence. It is, therefore, only for an abstraction and deprivation of this common benefit, or for an unreasonable and unauthorized use of it, that an action will lie."

As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the riparian proprietors, she cannot complain if the same rule is administered *between her- [105] self and a sister state. And this is especial-

ly true when the waters are, except for domestic purposes, practically useful only for purposes of irrigation. The Arkansas river, from its source to the eastern end of the Royal gorge, is a mountain torrent, coming down between rocky banks and over a rocky bed. Along this distance it is of comparatively little use for irrigation purposes. After it debouches from the Royal gorge it enters a valley, in which it wanders from one side to the other through eastern Colorado, southwestern Kansas, and into Oklahoma, with but a slight descent, and presenting but little opportunities for the development of water power through falls or by dams. Its length in Kansas is about 350 miles, and the descent is only 2,320 feet, or less than 7 feet to a mile. There are substantially no falls, no narrow passageways in which dams can be readily constructed for the development of water power; and while there are some in eastern Colorado, yet they are of little elevation, and mainly to assist in the storing of water for purposes of irrigation. So that, if the extreme rule of the common law were enforced, Oklahoma, having the same right to insist that there should be no diversion of the stream in Kansas for the purposes of irrigation that Kansas has in respect to Colorado, the result would be that the waters, except for the meager amount required for domestic purposes, would flow through eastern Colorado and Kansas of comparatively little advantage to either state, and both would lose the great benefit which comes from the use of the water for irrigation. The drainage area of the Arkansas river in Colorado is 26,000 suqare miles; in Kansas, 20,000 square miles; and all this area, unless the stream can be used for purposes of irrigation, would be left to the slow development which comes from the cultivation of the soil.

The testimony in this case is voluminous, amounting to 8,559 typewritten pages, with 122 exhibits, and it would be impossible to make a full statement of facts without an extravagant extension of this opinion, which [106] is already too long; *and yet some facts must be stated to indicate the basis for the conclusion to which we have come. It must also be noted that, as might be expected in such a volume of testimony, coming as it does from three hundred and forty-seven witnesses, there is no little contradiction and a good deal of confusion, and this contradiction is to be found, not merely in the testimony of witnesses, but also in the exhibits, among which are reports from the officials of the government and the two states. We have endeavored to deduce from this volume those matters which seem most clearly proved, and must, as to other matters, be content to generalize and state that which seems to be the tendency of the evidence.

Colorado is divided into five irrigating divisions, each of which is in charge of a division engineer. That which includes the drainage area of the Arkansas is District No. 2, divided into eleven districts. Under the laws of Colorado, irrigating ditches have been established in this district and the amount of water which each may take from the river decreed. In addition some reservoirs have been built for storing the surplus waters which come down in times of flood, and this adds largely to the amount available for irrigation. The storage capacity of six of these reservoirs is shown to be 8,527,673,652 cubic feet. The significance and value of these reservoirs can be appreciated when we remember that the Arkansas, like many other streams, has its origin in the mountain districts of Colorado, and that, by the melting of the snows, almost every year there is a flood. The amount of water authorized to be taken by the ditches from the river is, as alleged in the bill, 4,200 cubic feet, and from its affluents and tributaries 4,300 feet. (Whenever this term is used in reference to the flow of water it means the number of cubic feet that pass in a second.) The average flow of the river as it comes out of the Royal gorge at Cañon City is, as shown by official measurements for a series of years, 750 cubic feet. So that it appears that the irrigating ditches are authorized to take from the Arkansas river much more water than passes in the channel into the valley. It is not clear *what surplus water, [107] if any, comes out of the tributaries. There are some twenty-five of them, the average flow from four of which into the Arkansas is 313 cubic feet. Aside from this surplus water some may be returned through overflow of the ditches or from seepage. What either of these amounts may be is not disclosed. Indeed, the extent to which seepage operates in adding to the flow of a stream, or in distributing water through lands adjacent to those upon which water is passed, is something proof of which must necessarily be almost impossible. We may note the fact that a tract bordering upon land which has been flooded shows by the luxuriating vegetation that it has received in some way the benefit of water, and yet the amount of water passing by seepage may never be definitely known. The underground movement of water will always be a problem of uncertainty. We know that when water is turned upon dry and barren soil the barr[illegible] "appears, vegetation is developed, [illegible] which was a desert becomes a garden [illegible] is the magic of transformation; [illegible] mass budding and bloss[illegible] The writer of the

opinion recalls a conversation with Bayard Taylor, the celebrated traveler, in which the latter stated that nothing had contributed so much to secure the steady control of the French in Algiers as the fact that, after taking possession of that territory, they sank artesian wells on the borders of the desert, and thus reclaimed portions of it; for the Arabs believed that people who could reclaim the desert were possessed of a power that could not be withstood.

Further, adjacent barren ground is slowly but surely affected, and itself begins to increase its vegetation. We may not be entirely sure as to the methods by which this change is accomplished, although the result is undoubted. It may be that water percolating under the surface has reached this adjacent ground. Perhaps the vegetation, which we know attracts moisture from the air, may increase the rainfall, and thus affect the adjacent barren regions.

It appears that prior to 1885 there was 8]comparatively little *water taken from the Arkansas for irrigation purposes,—certainly not enough to make any perceptible impression on the flow of the river,—but about that time certain corporations commenced the work of irrigation on a large scale, with ditches some of which might well be called canals. Thus, in 1884, work was commenced on ditches capable of carrying off 450 cubic feet; in 1887 others capable of carrying off 1,481 cubic feet; and in 1890 still others, carrying 1,705 cubic feet. Most of these were completed within two years after the commencement of the several works. By the year 1902, according to the report of the Census Bureau of the United States, there were 300,115 acres, in 4,557 farms, actually irrigated.

The counties in Colorado from Cañon City eastward through which the Arkansas runs are Fremont, Pueblo, Otero, Bent, and Prowers. The following tables prepared by the defendants from various census reports show the population, number of acres cultivated, and total value of farm products in these several counties for the years 1880, 1890, and 1900:

County.	Population.		
	1880.	1890.	1900.
Fremont	4,735	9,156	15,636
Pueblo	7,617	31,491	34,448
Otero	.....	4,192	11,522
Bent	1,654	1,313	3,049
Prowers	.....	1,969	3,766
Making in the aggregate	14,006	48,121	68,421

9]*

County.	No. of acres cultivated.			Value of Farm Products.		
	1880.	1890.	1900.	1880.	1890.	1900.
Fremont	16,160	52,868	109,488	$ 76,900	$ 237,980	$ 472,293
Pueblo	51,894	100,697	478,821	136,184	244,580	691,693
Otero	.....	61,347	244,594	.....	208,860	1,089,344
Bent	30,921	30,058	118,485	105,621	35,070	670,541
Prowers	.....	46,447	217,332	.....	60,500	465,688
	98,975	291,417	1,168,720	$318,705	$786,990	$3,389,559

These tables disclose a very marked development in the population, area of land cultivated, and amount of agricultural products. Whatever has been effective in bringing about this development is certainly entitled to recognition, and should not be wantonly or unnecessarily destroyed or interfered with. That this development is largely owing to irrigation is something of which, from a consideration of the testimony, there can be no reasonable doubt. It has been a prime factor in securing this result, and before, at the instance of a sister state, this effective cause of Colorado's development is destroyed or materially interfered with, it should be clear that such sister state has not merely some technical right, but also a right with a corresponding benefit.

It may be asked why cultivation in Colorado without irrigation may not have the same effect that has attended the cultivation in Kansas west of where it was productive when the territory was first settled. It may

possibly have such effect to some degree, but it must be remembered that the land in Colorado is many hundred feet in elevation above that in Kansas; that large portions of it are absolutely destitute of sod, and that cultivation would have comparatively little effect upon the retention of water. Add further the fact that the rainfall in Colorado is less than that in Kansas, and it would seem almost certain that reliance upon mere cultivation of the soil would not have anything like the effect in Colorado [110] *that it has had in Kansas, and that the barrenness which characterized portions of the territory of Colorado would have continued for an indefinite time unless relieved by irrigation.

Turning to Kansas, the counties along the Arkansas river, commencing from the Colorado line, are: Hamilton, Kearney, Finney, Gray, Ford, Edwards, Pawnee, Barton, Rice, Reno, Sedgwick, Sumner, Cowley. Taking the same years as are given for the Colorado counties, the population is shown to be:

County	Population		
	1880	1890	1900
Hamilton	168	2,027	1,426
Kearney	159	1,571	1,107
Finney	.....	3,350	3,469
Gray	.....	2,415	1,264
Ford	3,122	5,308	5,497
Edwards	2,409	3,600	3,682
Pawnee	5,396	5,204	5,084
Barton	10,318	13,172	13,784
Rice	9,292	14,451	14,745
Reno	12,826	27,079	29,027
Sedgwick	18,753	43,626	44,037
Sumner	20,812	30,271	25,631
Cowley	21,538	34,478	30,156
	104,793	186,552	178,909

We have been furnished by the United States Census Office with statistics of the corn and wheat crops of those counties from the years 1889 to 1904. Corn, wheat, and hay are the leading crops in Kansas. It would unnecessarily prolong this opinion to copy these tables in full, so we give the figures for 1890, 1895, 1900, and 1904: [See opposite page.]

Comparing the tables of population it will be perceived that both the counties in Colorado and Kansas made a considerable increase in the years from 1880 to 1890; that while the Colorado counties continued their increase from 1890 to 1900, the Kansas counties lost. As the withdrawal of water in Colorado for irrigating purposes became substantially effective about the year 1890, it might, if nothing else appeared, not unreasonably be concluded that the diminished flow of the river in Kansas, caused by the action of Colorado, had resulted in making the land more unproductive, and hence induced settlers to leave the state. As against this it should be noted, as a matter of history, that in the years preceding 1890, Kansas passed through a period of depression, with crops largely a failure in different parts of the state. But, more than that, in 1889 Oklahoma, lying directly south of Kansas, was opened for settlement and immediately there was a large immigration into that territory, coming from all parts of the West, and especially from the state of Kansas, induced by glowing reports of its great possibilities. The population of Oklahoma, *as shown by the United States census, was [111] in 1890, 61,834, and in 1900, 348,331.

Turning to the tables of the corn and wheat products, they do not disclose any marked injury which can be attributed to a diminution of the flow of the river. While there is a variance in the amount produced in the different counties from year to year, it is a variance no more than that which will be found in other parts of the Union, and although the population from 1890 to 1900 in fact diminished, the amount of both the corn and wheat product largely increased. Not only was the total product increased, but the productiveness per acre seems to have been materially improved. Take the corn crop, and per acre, it was, in 1890, 12 bushels and a fraction; in 1895, 21 and a fraction; in 1900, 15; and in 1904, 28 bushels. Of wheat, the product per acre in 1890 was nearly 15 bushels; in 1895 it was only about 3 bushels. (For some reason, while that was a good year for corn, it seems to have been a bad year for wheat.) But in 1900 the product per acre rose to 19 bushels, and in 1904 it was 12 bushels.

These are official figures taken from the United States census reports, and they tend strongly to show that the withdrawal of the water in Colorado for purposes of irrigation has not proved a source of serious detriment to the Kansas counties along the Arkansas river. It is not strange that the western counties show the least development, for, being nearest the irrigation in Colorado, they would be most affected thereby. At one time there were some irrigating ditches in these western counties, which promised to be valuable in supplying water, and thus increasing the productiveness of the lands in the vicinity of the stream, and it is true that those ditches have ceased to be of much value, the flow in them having largely diminished.

It cannot be denied, in view of all the testimony (for that which we have quoted is but a sample of much more bearing upon the question), that the diminution of the flow of water in the river by the irrigation of Colorado has worked some *detriment to [112] the southwestern part of Kansas, and yet

*Acreage and Production of Corn and Wheat in Kansas—13 Counties.

YEAR	COUNTY.	CORN.		WHEAT.	
		ACRES.	BUSHELS.	ACRES.	BUSHELS.
1890	Hamilton	80	400	449	6,636
	Kearney	872	8,720	586	10,658
	Finney	2,423	48,460	1,410	24,749
	Gray	493	2,465	3,335	38,724
	Ford	1,558	12,464	7,190	107,295
	Edwards	2,058	20,580	8,876	168,094
	Pawnee	544	2,720	39,464	591,402
	Barton	3,666	25,662	99,738	1,294,639
	Rice	27,460	329,520	52,941	792,345
	Reno	98,972	989,720	35,121	351,210
	Sedgwick	67,685	744,535	52,506	944,804
	Sumner	19,120	267,680	134,352	2,149,116
	Cowley	63,391	887,474	28,073	282,666
	Totals	288,322	3,340,400	464,041	6,762,329
1895	Hamilton	404	3,232	4,360	12,576
	Kearney	914	5,698	2,917	6,430
	Finney	2,058	20,580	27,428	69,801
	Gray	1,115	11,150	12,297	12,309
	Ford	12,145	194,320	36,626	109,914
	Edwards	21,222	212,220	47,479	94,958
	Pawnee	19,076	152,608	113,980	342,075
	Barton	103,831	778,732	179,761	359,284
	Rice	153,256	3,371,632	127,200	254,394
	Reno	205,745	7,406,820	89,973	314,573
	Sedgwick	190,646	5,147,442	93,351	279,711
	Sumner	181,642	2,179,704	248,115	619,884
	Cowley	133,745	2,674,900	89,866	673,822
	Totals	1,025,799	22,159,038	1,073,353	3,149,731
1900	Hamilton	266	3,990	155	1,550
	Kearney	538	11,298	506	5,492
	Finney	1,213	18,195	427	4,234
	Gray	2,001	30,015	4,023	59,605
	Ford	11,215	145,795	23,416	444,904
	Edwards	25,032	325,416	43,525	696,400
	Pawnee	16,257	146,313	115,931	1,969,801
	Barton	32,649	261,192	254,130	5,081,352
	Rice	71,151	355,755	148,597	3,120,537
	Reno	199,150	1,991,500	110,404	2,097,276
	Sedgwick	153,635	2,766,430	123,339	2,589,811
	Sumner	102,057	2,143,197	288,133	5,761,260
	Cowley	121,398	2,792,154	79,948	1,439,064
	Totals	736,562	10,991,250	1,192,534	23,271,286
1904	Hamilton	120	1,800	271	2,297
	Kearney	306	6,120	536	6,244
	Finney	759	7,590	7,012	37,382
	Gray	1,579	25,264	17,268	69,590
	Ford	10,631	170,096	72,917	365,299
	Edwards	23,396	584,900	130,313	1,302,834
	Pawnee	13,272	331,800	162,970	1,629,246
	Barton	26,984	728,568	262,673	3,414,731
	Rice	59,851	1,556,126	160,853	2,251,838
	Reno	138,899	4,028,071	207,002	3,518,752
	Sedgwick	132,374	3,441,724	151,635	1,971,255
	Sumner	79,808	1,995,200	294,489	3,828,192
	Cowley	109,708	2,962,116	68,477	821,652
	Totals	597,687	15,839,375	1,536,416	19,219,312

when we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two states forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.

Many other matters have been presented and discussed. We have examined and fully considered them, but, as heretofore stated, we shall have to content ourselves with merely general observations respecting them. Evidence has been offered of an alleged underflow of the river as it passes through the state of Kansas, and it seems to be the contention on the part of Kansas that beneath the surface there is, as it were, a second river, with the same course as that on the surface, but with a distinct and continuous flow as of a separate stream. We are of the opinion that the testimony does not warrant the finding of such second and subterranean stream. If the bed of a stream is not solid rock, but earth, through which water will percolate, and, as alleged in plaintiff's bill, the "valley of the river in the state of Kansas is composed of sand covered with alluvial soil," undoubtedly water will be found many feet below the surface, and the lighter the soil the more easily will it find its way downward and the more water will be discoverable by wells or other modes of exploring the subsurface. Undoubtedly, too, in many cases there may be, corresponding to the flow on the surface, a current beneath the surface; but the presence of such subsurface water, even though in places of considerable amount and running in the same direction, is something very different from an independent subsurface river flowing continuously from the Colorado line through the state of Kansas. It is not properly denominated a second and subsurface stream. It is rather to be regarded as merely the accumulation of water which will always be found beneath the bed of any stream whose bottom is not solid rock. Naturally, the more abundant the flow of the surface stream and the wider its channel the more of this sub-
[115] surface water there will be. If *the entire volume of water passing down the surface was taken away the subsurface water would gradually disappear, and in that way the amount of the flow in the surface channel coming from Colorado into Kansas may affect the amount of water beneath the subsurface. As subsurface water it percolates on either side as well as moves along the course of the river, and the more abundant the subsurface water the further it will reach in its percolations on either side as well as more distinct will be its movement down the course of the stream. The testimony, therefore, given in reference to this subsurface water, its amount and its flow, bears only upon the question of the diminution of the flow from Colorado into Kansas caused by the appropriation in the former state of the waters for the purposes of irrigation.

Equally untenable is the contention of Colorado that there are really two rivers, one commencing in the mountains of Colorado and terminating at or near the state line, and the other commencing at or near the place where the former ends, and, from springs and branches, starting a new stream to flow onward through Kansas and Oklahoma towards the Gulf of Mexico. From time immemorial the existence of a single continuous river has been recognized by geographers, explorers, and travelers. That there is a great variance in the amount of water flowing down the channel at different seasons of the year and in different years is undoubted; that at times the entire bed of the channel has been in places dry is evident from the testimony. In that way it may be called a broken river. But this is a fact common to all streams having their origin in a mountainous region, and whose volume is largely affected by the melting of the mountain snows. Thus, from one of complainant's exhibits furnished by the United States Geological Survey, the mean monthly flow at Cañon City at the mouth of the Royal gorge for the years 1899, 1900, and 1900 is as follows:

*Arkansas River, Cañon City. Mean Monthly[11] Discharge in Second Feet.

	1899	1900	[illegible]
January	310	314	[illegible]
February	363	361	[illegible]
March	320	471	[illegible]
April	477	800	[illegible]
May	2,090	1,50	[illegible]
June	2,611	1,90	[illegible]
July	1,571	1,41	[illegible]
August	670	1,00	[illegible]
September	519	6[illegible]	[illegible]
October	531	5[illegible]	[illegible]
November	5[illegible]	4[illegible]	[illegible]
December	5[illegible]	4[illegible]	[illegible]

a Approximate.

Doubtless the variance at different seasons of the year is more regular and more pronounced than in those streams whose sources are only slightly elevated and the rise and fall of whose waters is mainly owing to rains. Contrasting, for instance, the Hudson with the Missouri, illustrates this. When the June [illegible] comes down the Missouri river it [illegible] by torrent. [illegible] stand on the [illegible] at Kansas City and see an enormous vol[illegible] of water, extending in width from 2 to [illegible] to the bluffs on the

other side of the river, flowing onward with tremendous velocity and force; and yet at other times the entire flow of the Missouri river passes between two piers of the railroad bridge across the river at that point. No such difference between high and low water appears in the Hudson. In the days when navigation west of the Mississippi was largely by steamboats on the Missouri river, it was familiar experience for the flat-bottomed steamboats, drawing but little water, to be aground on sand bars and detained for hours in efforts to cross them. Gen. Doniphan commanded an expedition which marched from Fort Leavenworth, in 1846, up the Arkansas valley and into the territory of New Mexico. He did not enter the valley again until shortly before his death, in 1887, and, when asked what he recognized, replied that there *were one or two natural objects, like Pawnee rock, that appeared as they did when he marched up the valley; the river was the same, but all else was changed; and the valley, instead of being destitute of human occupation, was filled with farm houses and farms, villages and cities,—something that he had never expected would be seen in his day.

Summing up our conclusions, we are of the opinion that the contention of Colorado of two streams cannot be sustained; that the appropriation of the waters of the Arkansas by Colorado, for purposes of irrigation, has diminished the flow of water into the state of Kansas; that the result of that appropriation has been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields, and rendering possible their occupation and cultivation when otherwise they would have continued barren and unoccupied; that while the influence of such diminution has been of perceptible injury to portions of the Arkansas valley in Kansas, particularly those portions closest to the Colorado line, yet, to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both states, and the right of each to receive benefit through irrigation and in any other manner from the waters of this stream, we are not satisfied that Kansas has made out a case entitling it to a decree. At the same time it is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits, and may rightfully call for relief against the action of Colorado, its corporations and citizens, in appropriating the waters of the Arkansas for irrigation purposes.

The decree which, therefore, will be entered, will be one dismissing the petition of the intervener, without prejudice to the rights of the United States to take such action as it shall deem necessary to preserve or improve the navigability of the Arkansas river. The decree will also dismiss the bill of the state of Kansas as against all the defendants, without prejudice to the right of the plaintiff to institute new proceedings whenever *it shall appear that, [118] through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two states resulting from the flow of the river. Each party will pay its own costs.

In closing, we may say that the parties to this litigation have approached the investigation of the questions in the most honorable spirit, seeking to present fully the facts as they could be ascertained from witnesses, and discussing the evidence and questions of law with marked research and ability.

Mr. Justice White and Mr. Justice McKenna concur in the result.

Mr. Justice Moody took no part in the decision of this case.

UNITED STATES, Appt.,
v.
WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING COMPANY. (No. 263.)

WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING COMPANY, Appt.,
v.
UNITED STATES. (No. 264.)

(See S. C. Reporter's ed. 118-128.)

Release—construction—what claims included.

Claims growing out of a delay caused by the Federal government, as well as those arising from a change in the specifications, were included in a release given to the United States by the builders of a battle ship of all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of the vessel under the contract, where such release was executed in performance of the contract requirement that the last payment should be made only when final release in a form approved by the Secretary of the Navy should be given of all claims of any kind or description under or by virtue of said contract.

[Nos. 263 and 264.]

Argued April 18, 19, 1907. Decided May 13, 1907.

CROSS APPEALS from the Court of Claims to review a judgment awarding to the builders of a battle ship a portion of the claims alleged to grow out of a delay caused by the Federal government. Reversed and remanded with instructions to enter judgment for the United States.

See same case below, 41 Ct. Cl. 164.

Statement by Mr. Justice Brewer:

On November 19, 1890, the William Cramp & Sons Ship & Engine Building Company entered into a contract with the United States to construct what was called "Coast-line Battle Ship No. 1," afterwards known as the battle ship Indiana, for the sum of $3,020,000, the ship to be completed and ready for delivery to the United States within three years from the date of the contract. As a matter of fact the vessel was not completed and delivered until November 19, 1895; but, as the delay was occasioned by the United States, no damages were recoverable from the building company on account thereof. On August 10, 1897, the company commenced this action in the court of claims to recover the sum of $480,231.90. The elements of its claim are thus stated in its petition:

For time of organization and plant lost in waiting for armor, materials, etc., to be furnished by United States	$144,379.50
For special wharfage, 730 days, at 1 cent per ton per day	74,825.00
For general care and maintenance of vessel, including coal, firemen, engineers, watchman, canvas awnings, wooden covers, keeping clean, removing snow, dust, etc., extra painting, tug hire, moving derrick, etc., 730 days, at $135 per day	98,550.00
Additional cost of insurance	34,462.55
Interest on money borrowed caused by delays of United States which prolonged final settlement	60,499.91
Extra trial trip made necessary by construction and completion of vessel being delayed by United States	17,514.94
For loss due to running the official trial of "Indiana" with a foul bottom, as, owing to the delay caused by the completion of the vessel, it was impossible to clean and paint the bottom	50,000.00
Total	$480,231.90

On May 10, 1894, as appears from the findings made by the court of claims, an [120] agreement was made between the parties *by which moneys not then due by the terms of the original contract were paid, the stipulation in this new agreement being:

"But such payment shall not be made until the party of the first part has given bond with approved security conditioned for the return to the party of the second part of the amount so paid, upon demand being made by the Secretary of the Navy therefor, for indemnity of the party of the second part against loss or injury by reason of such payment, and, in consideration of such advance payment, the party of the first part hereby releases the party of the second part from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the party of the second part to comply with its contract, or on account of any delay hitherto occasioned by the action of said party of the second part."

The time intervening between this agreement and the final completion and delivery of the vessel was one year, six months, and nine days; and that time was made the basis for the computation of damages, as will appear hereafter.

On May 18, 1896, after the completion and delivery of the vessel, the balance of the money due on the contract was paid, and a release and receipt executed by the building company in the following terms:

"Whereas, by the eleventh clause of the contract dated November 19, 1890, by and between The William Cramp & Sons Ship & Engine Building Company, a corporation created under the laws of the state of Pennsylvania, and doing business at Philadelphia, in said state, represented by the president of said company, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part, for the construction of a seagoing coast-line battle ship of about 10,000 tons displacement, which, for the purpose of said contract, is designated and known as 'Coast-line Battle Ship No. 1,' it is agreed that a special reserve of sixty thousand dollars ($60,000) shall be *held until the [121] vessel shall have been finally tried; provided that such final trial shall take place within five months from and after the date of the preliminary or the conditional acceptance of the vessel; and

"Whereas, by the sixth paragraph of the nineteenth clause of said contract it is further provided, that when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said special reserve or so much thereof as it may be entitled to on the execution of a final release to the United States in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract; and

"Whereas the final trial of said vessel was completed on the eleventh day of April, 1896; and

"Whereas all the conditions, covenants, and provisions of said contract have been performed and fulfilled by and on the part of the party of the first part;

"Now, therefore, in consideration of the

s, the sum of forty-one thousand one and thirty-two dollars and eighty- s ($41,132.86), the balance of the d special reserve ($60,000), to ie party of the first is entitled, being n hand paid by the United States, ted by the Secretary of the Navy, ipt whereof is hereby acknowledged, lliam Cramp & Sons Ship & Engine g Company, represented by me, H. Cramp, president of said cor- , does hereby, for itself and its suc- and assigns, and its legal representa- emise, release, and forever discharge ted States of and from all and all of debts, dues, sum and sums of accounts, reckonings, claims, and de- whatsoever, in law or in equity, for eason of or on account of the con- n of said vessel under the contract d.

vitness whereof I have hereunto set d and *affixed the seal of The William & Sons Ship & Engine Building Com- is eighteenth day of May, A. D. 1896. .] Chas. H. Cramp, President. test: John Dougherty, Secretary."

ourt of claims found for the claim- the following items and amounts:

onable value for the use of the nt's yard, machinery, and tools, r superintendence in the con- on of the vessel, including the l upkeep of the yard chargeable Indiana, $3,000 per month, g	$54,887.67
sonable cost of the proper care otection of the vessel during the ars' delay, including expense of g the bottom, furnishing mate- d painting, temporary awnings nts over caps left for the intro- n of turrets, additional scaling ove rust before painting, electric g, keeping up steam to prevent g of valves, wetting down decks, over machinery, and keeping free from snow, dust, ice, and from May 10, 1894	36,591.78
ge from May 10, 1894, including edging of a basin to accommo- he vessel	17,808.00
portionate expense, for the pe- rom May 10, 1894, of the cost of nce during the two years' delay	26,272.55
	$135,560.00

ndered judgment against the govern- for $135,560. From this judgment arties appealed.

rney General Bonaparte and Assist- orney General Van Orsdel argued the and, with Mr. Charles C. Binney, brief for the United States:

final release of May 18, 1896, released ited States from every kind of lia- to the contractor which could arise nection with the building of The In- including liability (if any such ex- for damages on account of delay in ing the armour.

Coulter v. Board of Education, 63 N. Y. 365; Phelan v. New York, 119 N. Y. 86, 23 N. E. 175.

Messrs. John C. Fay and Holmes Conrad argued the cause, and, with Mr. Eppa Hunton, filed a brief for the Cramp Company:

It would have been idle to present a claim for damages for delay to the Secretary for adjustment. He was not clothed with authority to act upon it; nor was he supplied with any appropriation of public money with which to liquidate it.

Brannen v. United States, 20 Ct. Cl. 223; McKee v. United States, 12 Ct. Cl. 555; Power v. United States, 18 Ct. Cl. 275; Dunbar v. United States, 19 Ct. Cl. 493; McClure v. United States, 19 Ct. Cl. 179; Dennis v. United States, 20 Ct. Cl. 121; Pneumatic Gun-Carriage & Power Co. v. United States, 36 Ct. Cl. 71; 4 Ops. Atty. Gen. 327; 6 Ops. Atty. Gen. 516; Decision of 2d Comptroller, A. D. 1860, §§ 458–464.

Coulter v. Board of Education, 63 N. Y. 365, distinctly holds that a receipt as comprehensive as this does not release such damages as are here claimed; and the general words, upon established principles, would be limited to the items specified.

See also McIntyre v. Williamson, 1 Edw. Ch. 34; Jackson ex dem. Rosevelt v. Stackhouse, 1 Cow. 122, 13 Am. Dec. 514.

Where the facts clearly show a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue, and recover the residue.

Fire Ins. Asso. v. Wickham, 141 U. S. 577, 35 L. ed. 866, 12 Sup. Ct. Rep. 84; United States v. Bostwick, 94 U. S. 53, 67, 24 L. ed. 65, 66.

In Pneumatic Gun-Carriage & Power Co. v. United States, 36 Ct. Cl. 71, this identical question was before the court, upon a receipt in the exact form, and upon a claim arising from delays on the part of the government in supplying material; and the court there held that it was no bar to the suit.

See also McLaughlin v. United States, 36 Ct. Cl. 138.

Messrs. John C. Fay, Holmes Conrad, Eaton Creecy, and Eppa Hunton filed a brief in reply for the Cramp Company.

*Mr. Justice Brewer delivered the opinion [126] of the court:

This case turns on the release executed by the building company on May 18, 1896. It is contended by the claimant that it applies simply to claims springing out of the construction of the vessel, and therefore has no application to the matters for which the

judgment was rendered against the government. The word "construction," the company says, is limited to the mere matter of building; that is, the furnishing of materials, the doing of work, and does not include delays or other matters outside the building of the vessel.

To rightly understand the scope of this release we must consider the conditions of the contract, and especially the clause in it which calls for a release. The contract was a large one, the price to be paid for the work and material being over $3,000,000, and the contract was evidently designed to cover all contingencies. Provision was made for changes in the specifications, for penalties on account of delays of the contractor, deductions in price on certain conditions, approval of the work by the Secretary of the Navy, forfeiture of the contract, with authority to the Secretary to complete the vessel. The nineteenth clause contains the stipulations as to the amounts and times of payment with authority for increase of the gross amount upon certain conditions. The sixth paragraph of this clause makes special provision for the last payment, to be made "when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part" and "on the execution of a final release to the United States in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract." Evidently the parties contemplated and specially provided by this stipulation that the whole matter of the contract should be ended at the time of the final release and the last payment. That [127] which was to be *released was "all claims of any kind or description under or by virtue of said contract." Manifestly, included within this was every claim arising not merely from a change in the specifications, but also growing out of delay caused by the government. The language is not alone "claims under," but "claims by virtue" of the contract,—"claims of any kind or description." All the claims for which allowances were made in the judgment of the court of claims come within one or the other of these clauses. It may be that, strictly speaking, they were not claims under the contract, but they were clearly claims by virtue of the contract. Without it no such claims could have arisen. Now, it having been provided in advance that the contract should be closed up by the execution of a release of this kind, it cannot be that the company, when it signed the release, understood that some different kind of release was contemplated. It must have understood that it was the release required by the contract,—a release intended to be of all claims of any kind or description under or by virtue of the contract,—and that the form of words which the Secretary had approved was used to express that purpose. With that release stipulated for in the contract the company signed the instrument of May 18, 1896, which in terms purported to "remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims and demands whatsoever, in law or in equity, for or by reason of or on account of the construction of said vessel under the contract aforesaid." Now, whatever limitation may be placed upon the words "for" or "on account of" the construction, the provision for the release of all claims and demands whatsoever, "by reason of the construction of the vessel under the contract aforesaid," is a recognition of the contract, and includes claims which arise by reason of the construction of the vessel under it. "By reason of" may well be considered as equivalent to "by virtue of." It is only by reason of the performance of the contract in the construction of the vessel *that these claims arise. But [128] for the contract, and the construction of the vessel under it, there would be no such claims. No payment of moneys not due is necessary to sustain this release. It is under seal, and the contract is itself full consideration. As of significance it must be borne in mind that the release referred specifically to the provisions in the sixth paragraph of the nineteenth clause of the contract, which provided for the character of the release. Indeed, the general language of the release itself and the number of words of description in it show that it was the intent of the Secretary of the Navy to have a final closing of all matters arising under or by virtue of the contract.

Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical, and close construction. The general language "all and all manner of debts," etc. indicates an intent to make an ending of every matter arising under or by virtue of the contract. If parties intend to leave some things open and unsettled, their intent so to do should be made manifest. Here was a contract involving three millions of dollars, and after the work was done, the vessel delivered and accepted, and the release entered, claims are presented amounting to over $500,000. Surely the parties never intended to leave such a bulk of unsettled matters. As bearing upon this matter it may be noticed that while the release was signed and [illegible] contract between the building comp[illegible] the government closed on May 18, [illegible] his action was not

rought until August 10, 1897,—nearly a ear and a quarter thereafter.

We are of opinion that the parties, by he release of May 18, 1896, which was ex-:uted in performance of the requirements f the original contract, settled all disputes etween the parties as to the claims sued pon.

The judgment of the Court of Claims is ›versed and the case remanded, with in-:ructions to enter a judgment on the find-ıgs for the defendant.

Mr. Justice McKenna and Mr. Justice loody took no part in the decision of this ıse.

ADAMS EXPRESS COMPANY, Plff. in Err.,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 129-138.)

ommerce—in intoxicating liquors—state regulation.

1. The agreement of the local agent of n express company to hold for a few days C. O. D. interstate shipment of intoxicating quors, to suit the convenience of the con-gnee in paying for such liquor and taking away, does not destroy the character of ıe transaction as interstate commerce, so as › render the express company amenable to rosecution for violating a state local option ıw.

vidence—materiality under averments of indictment.

2. Evidence that the express company new that a C. O. D. interstate shipment of ıtoxicating liquors was not ordered by the ›nsignee is immaterial on a criminal prose-ıtion of the express company for violating state local option law, where the indict-ıent avers that the express company was ngaged in the business of a common car-ıer of packages, and that the shipment nd delivery were made and done in the sual course of its business.

[No. 331.]

ırgued April 17, 18, 1907. Decided May 13, 1907.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a conviction in the Circuit Court of Laurel County, in that state, under an indictment charging an express company with violating the state local option law by carrying and delivering a C. O. D. interstate shipment of intoxicating liquors. Reversed.

See same case below, 27 Ky. L. Rep. 1096, 87 S. W. 1111.

Statement by Mr. Justice Brewer:

On February 17, 1904, a grand jury returned into the circuit court of Laurel county, Kentucky, an indictment against Joe Newland and the Adams Express Company, charging that "the said Joe Newland and the Adams Express Company, the latter being a partnership engaged in and carrying on the business of a common carrier of packages, goods, wares, and merchandise, by the method known as express . . . did, in Laurel county, Kentucky, on the 17th day of February, 1904, unlawfully and wilfully carry for and deliver to George Meece a parcel, package, shipment, and quantity of intoxicating, spirituous, vinous, and malt liquors . . . to be and which was paid for on delivery at East Bernstadt in said Laurel county, same being at the time a shipment commonly known and called C. O. D. shipments, . . . said shipment and delivery being made and done at the time by said Joe Newland and said Adams Express Company in the usual course of business of said Adams Express Company."

*Subsequently the action was dismissed as [130] to Newland, and, on a plea of not guilty, the case was tried before a jury and resulted in a verdict finding the company guilty and fixing the fine at $60. The instructions of the court were as follows:

"Gentlemen of the Jury: 1. If you shall believe from the evidence beyond a reasonable doubt, that the defendant, Adams Express Company, is a copartnership, formed of persons whose names and number were unknown to the grand jury that found this indictment, and who lived out of the state

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NOTE.—On state regulation of interstate r foreign commerce—see notes to Norfolk W. R. Co. v. Com. 13 L.R.A. 107; McCanna F. Co. v. Citizens' Trust & Surety Co. 24 . C. A. 13; and Gloucester Ferry Co. v. ennsylvania, 29 L. ed. U. S. 158.

State licenses or taxes as affecting inter-:ate commerce—see notes to Rothermel v. [eyerle, 9 L.R.A. 366; American Fertilizing o. v. Board of Agriculture, 11 L.R.A. 179; ibbons v. Ogden, 6 L. ed. U. S. 23; Brown . Maryland, 6 L. ed. U. S. 678; Ratterman . Western U. Teleg. Co. 32 L. ed. U. S. 229; [armon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On commerce in intoxicating liquors—see notes to State v. Creeden, 7 L.R.A. 296; State ex rel. Cochran v. Winters, 10 L.R.A. 616; and Rhodes v. Iowa, 42 L. ed. U. S. 1089.

On shipping liquor from one state into another C. O. D., without previous order, as interstate commerce—see note to Adams Exp. Co. v. Com. 5 L.R.A. (N.S.) 630.

of Kentucky, but are doing business in the state of Kentucky and in Laurel county, Kentucky, and under the firm name and style of 'Adams Express Company,' and that the said Adams Express Company, in this county and within twelve months next before the finding of the indictment herein, knowingly delivered to the witness, George Meece, spirituous, vinous, or malt liquors in quantities of less than 5 gallons at the time mentioned by the witness, and received the pay therefor, and that said company received any pay whatever for its service in that behalf, then you should find the defendant guilty and fix its punishment at any fine not less than $60.00 nor more than $100.00, in your discretion, according to proof.

"2. The court says to the jury that if they shall believe from the evidence, beyond a reasonable doubt, that the agent or agents of the defendant's company that accepted, received, transported, or delivered the package mentioned in evidence by the witness Meece, knew, or might, by the exercise of such care as persons of ordinary prudence are accustomed to use in the ordinary transactions of life, have known the contents of the package delivered to the witness, then the defendant company is chargeable with such knowledge, and should be held to know the contents of such package."

Judgment was entered on the verdict, which was affirmed by the court of appeals of the state, 27 Ky. L. Rep. 1096, 87 S. W. 1111. and from that court the case was [131]*brought here on writ of error. The act under which the prosecution was had is subsec. 4 of § 2557b, Kentucky Statutes, 1903, commonly called the "C. O. D." law, which is part of the general local option law as amended in 1902, and which reads:

"All the shipments of spirituous, vinous, or malt liquors, to be paid for on delivery, commonly called 'C. O. D. shipments' into any county, city, town, district, or precinct where said act is in force, shall be unlawful and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof."

Mr. Lawrence Maxwell, Jr., argued the cause, and, with Mr. Joseph S. Graydon, filed a brief for plaintiff in error:

The statute makes it an offense to deliver any C. O. D. shipment of liquor, whether ordered by the consignee or not; and its constitutionality must be determined on that basis.

Trade Mark Cases, 100 U. S. 82, 98, 25 L. ed. 550, 553; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; James v. Bowman, 190 U. S. 127, 142, 47 L. ed. 979, 983, 23 Sup. Ct. Rep. 678; Illinois C. R. Co. v. McKendree, 203 U. S. 514, ante, 298, 27 Sup. Ct. Rep. 153; Allen v. Louisiana, 103 U. S. 80, 26 L. ed. 318; United States v. Harris, 106 U. S. 629, 641, 27 L. ed. 290, 294, 1 Sup. Ct. Rep. 601; Poindexter v. Greenhow, 114 U. S. 270, 288, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Spraigue v. Thompson, 118 U. S. 90, 94, 30 L. ed. 115, 116, 6 Sup. Ct. Rep. 988; Baldwin v. Franks, 120 U. S. 678, 685, 30 L. ed. 768, 768, 7 Sup. Ct. Rep. 656, 763; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 565, 46 L. ed. 679, 692, 22 Sup. Ct. Rep. 431; United States v. Ju Toy, 198 U. S. 253, 262, 49 L. ed. 1040, 1043, 25 Sup. Ct. Rep. 644; Wynehamer v. People, 13 N. Y. 441.

The plaintiff in error, in making and performing the contract of shipment, in good faith and in the regular course of business, was engaged in interstate commerce, whether there was an antecedent contract of purchase and sale between the shipper and the consignee, or not.

Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 619, 47 L. ed. 333, 335, 23 Sup. Ct. Rep. 214; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, 29 L. ed. 158, 161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Lottery Case (Champion v. Ames) 188 U. S. 321, 362, 47 L. ed. 492, 499, 23 Sup. Ct. Rep. 321; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 312, 41 L. ed. 1007, 1017, 17 Sup. Ct. Rep. 540; Leisy v. Hardin, 135 U. S. 100, 110, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

The transaction did not cease to be interstate commerce because the plaintiff in error, at the request of the consignee, held the whisky at East Bernstadt for a week before delivering it.

Heyman v. Southern R. Co. 203 U. S. 270, ante, 178, 27 Sup. Ct. Rep. 104.

As applied to interstate traffic, the statute is an unconstitutional regulation of the business, even if it be limited to cases in which the liquor has not been ordered by the consignee.

Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 102, 45 L. ed. 765, 770, 21 Sup. Ct. Rep. 561; Hall v. DeCuir, 95 U. S. 485, 490, 24 L. ed. 547, 548; Brennan v. Titusville, 153 U. S. 289, 302, 38 L. ed. 719, 723, 4 Inters. Com. Rep. 698, 14 Sup. Ct. Rep. 829; Bowman v. Chicago & N. W. R. Co. 125 U. S. [illegible] 479, 21 L. ed. 709, 704, 1 Inters. Com. Rep. [illegible], 8 [illegible] Ct. Rep. [illegible]; Mobile [illegible] v. [illegible] all, 102 U. S. [illegible] L. ed. [illegible] v. Iowa, 170 U. S. [illegible] 206 U. S.

5, 42 L. ed. 1088, 1092, 18 Sup. Ct. Rep. 4; Vance v. W. A. Vandercook Co. 170 U. 438, 444, 42 L. ed. 1100, 1103, 18 Sup. Ct. ep. 674; Heyman v. Southern R. Co. supra; merican Exp. Co. v. Iowa, 196 U. S. 133, L. ed. 417, 25 Sup. Ct. Rep. 182; Adams cp. Co. v. Iowa, 196 U. S. 147, 49 L. ed. 4, 25 Sup. Ct. Rep. 185; Central R. Co. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 ıp. Ct. Rep. 218; Houston & T. C. R. Co. v. ayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. . Rep. 491; McNeill v. Southern R. Co. 202 S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 2; Western U. Teleg. Co. v. Pendleton, 2 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. ep. 306, 7 Sup. Ct. Rep. 1126; Wabash, St. & P. R. Co. v. Illinois, 118 U. S. 557, 30 ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. ep. 4; State v. Swett, 87 Me. 113, 29 L.R.A. 4, 47 Am. St. Rep. 306, 32 Atl. 806; Hutchson, Carr. § 439; Crouch v. London & N. . R. Co. 14 C. B. 291; Nitro-glycerine Case 'arrott v. Wells) 15 Wall. 524, 21 L. ed. 6; Ellington v. State (Tex. Crim. App.) S. W. 331.

If the decision of the court of appeals n be construed as limiting the application the statute to cases in which the carrier ıows that the liquor has not been ordered, e judgments should nevertheless be rersed, because no such issue was submitted the jury or decided by it, and there was evidence that plaintiff in error knew that e consignee had not ordered the whisky. ith v. Clark, 97 U. S. 454, 456, 24 L. ed. 71, 1072; Rector v. City Deposit Bank Co.) U. S. 405, 412, 50 L. ed. 527, 529, 26 p. Ct. Rep. 289; Terre Haute & I. R. Co. Indiana, 194 U. S. 579, 48 L. ed. 1124, 24 p. Ct. Rep. 767.

Messrs. Lawrence Maxwell, Jr., Edmund Trabue, and Joseph S. Graydon also filed ɔrief for plaintiff in error:

The Wilson act does not authorize state ɟulation of the operations of the carrier all, either in receiving the liquor in the ıte of origin, or in transporting it to the .te of destination, or in delivering it ıre; for the state statute can come into ıy only after delivery, as the court has ɔeatedly held. The business of an inter-.te carrier cannot be subjected, at any .ge, to state regulation, under the Wilson .

Rhodes v. Iowa, 170 U. S. 412, 415, 426, L. ed. 1088, 1091, 1096, 18 Sup. Ct. Rep. L.

The business or operation of an interstate rier involves interstate commerce in its ıdamental aspect, and imports, in its very ence, a relation which necessarily must governed by laws apart from the laws of ; several states.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 486, 31 L. ed. 700, 707, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238.

In Crescent Liquor Co. v. Platt, 148 Fed. 894, Circuit Judge Goff granted an injunction to compel an express company to carry liquor C. O. D.

This court necessarily held in effect, in Adams Exp. Co. v. Iowa, 196 U. S. 147, 49 L. ed. 424, 25 Sup. Ct. Rep. 185, that it could not be said that an express company which carried liquor C. O. D. into Iowa made a sale of it in that state in violation of the local law; and that is precisely what we ask the court to rule in the cases at bar.

See also State v. Cairns, 64 Kan. 782, 58 L.R.A. 55, 68 Pac. 621.

Mr. N. B. Hays argued the cause, and, with Mr. Charles H. Morris, filed a brief for defendant in error:

The transportation of whisky from a point without to a point within Kentucky, where the local option law is in force; or from one point within the state where the sale is permitted to another point therein where the sale is prohibited,—is no offense under the local option law of Kentucky.

James v. Com. 102 Ky. 108, 42 S. W. 1107; Doores v. Com. 28 Ky. L. Rep. 192, 89 S. W. 162; McDermott v. Com. 29 Ky. L. Rep. 750, 96 S. W. 474; Adams Exp. Co. v. Com. 29 Ky. L. Rep. 904, 96 S. W. 593; Crigler v. Com. 27 Ky. L. Rep. 918, 87 S. W. 276.

United States Revised Statutes, § 5258, U. S. Comp. Stat. 1901, p. 3564, which authorizes railroads to carry freight and property from one state to another, does not authorize them to carry into a state, in violation of state law, cattle known, or which by due diligence may be known, to be in such condition as to impart disease to the domestic cattle of such state.

Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

Under the above authority, the plaintiff in error should be held liable for knowingly holding and delivering said liquor, and accepting the charges therefor, which constitutes a sale under the laws of Kentucky.

The plaintiff in error acted as the agent of the consignor in the delivery and acceptance of the C. O. D. packages, and is subject to the same liability which such consignor would have been subject to if he had in person brought these packages from Ohio into the local option districts of Kentucky, and then sold them.

Vance v. W. A. Vandercook Co. 170 U. S. 440, 42 L. ed. 1101, 18 Sup. Ct. Rep. 674.

When nothing remains to be done by the carrier to complete its contract of transportation but to deliver the goods to the owner

or consignee, then, after a reasonable time to remove the goods in the usual course of business has expired, the goods are constructively delivered and the transportation is ended; and, the transportation having ended, they cease to be under the protection of interstate commerce. If the carrier still holds them, it is as a warehouseman.

Gregg v. Illinois C. R. Co. 147 Ill. 550, 37 Am. St. Rep. 238, 35 N. E. 343.

When no designated place of delivery is shown, then the carrier's office, or the station where the transportation reaches its destination, is the place of delivery.

Ibid.; Marshall v. Wells, 7 Wis. 1, 73 Am. Dec. 386; Cavallaro v. Texas & P. R. Co. 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918; Bullard v. American Exp. Co. 107 Mich. 695, 33 L.R.A. 66, 61 Am. St. Rep. 358, 65 N. W. 551; Hutchinson, Carr. § 379.

The course of business in the cases at bar shows that the express company was not required by its contract of transportation to deliver said packages; but it instructed its agents, if the packages were not called for in two or three days, to notify the supposed consignee, and, if he did not then call for them, to still hold them from thirty to sixty days; and, if he did not call for them, to return them to the consignor. This shows an arrangement between the plaintiff in error and the consignor, which is unusual, and that the plaintiff in error was acting as the agent of the consignor, and that it considered the consignor the owner of said packages.

Marshall v. Wells, supra; American Exp. Co. v. Hockett, 30 Ind. 250, 95 Am. Dec. 691; Southern Exp. Co. v. Dickson, 94 U. S. 549, 24 L. ed. 285.

When the packages have reached their destination, and there has been reasonable time for the delivery thereof in the usual course of business, it then becomes a part of the mass of the property of the state, and subject to its laws.

Hutchinson, Carr. 2d ed. § 356; Wald v. Louisville, E. & St. L. R. Co. 92 Ky. 645, 18 S. W. 850; Ray, Negligence of Imposed Duties, Freight Carr. p. 981; State v. Creeden, 78 Iowa, 556, 7 L.R.A. 295, 43 N. W. 673; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367.

The state has power to prohibit the sale of intoxicating liquors altogether, if it see fit; and, that being so, it has power to prohibit it conditionally. The state has absolute power over the subject.

Rippey v. Texas, 193 U. S. 504, 48 L. ed. 767, 24 Sup. Ct. Rep. 516.

The power of the state legislature of Kentucky to enact this law, and to prohibit the acceptance of the pay for such packages, as appears by the terms of said statute, or as it is made to read by the construction placed upon it by the supreme court of Kentucky, is not in conflict with the commerce clause of the Federal Constitution.

Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; Miller v. Cornwall R. Co. 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; Carstairs v. Cochran, 193 U. S. 11, 48 L. ed. 596, 24 Sup. Ct. Rep. 318.

The construction and interpretation of this statute by the supreme court of Kentucky is that it neither prohibits a bona fide shipment and delivery, in a local option district, of an interstate commerce package of whisky shipped C. O. D. or otherwise, nor a shipment and delivery, in a local option district, of a package of whisky ordered from a point within the state where the sale is not prohibited, and shipped into a local option district otherwise than as a C. O. D. package.

McDermott v. Com. and Adams Exp. Co. v. Com. supra.

The legislature has the power to determine whether or not the sale of whisky is detrimental to the peace, morals, and welfare of the people.

Mugler v. Kansas, 123 U. S. 678, 31 L. ed. 216, 8 Sup. Ct. Rep. 273; Reymann Brewing Co. v. Brister, 179 U. S. 450, 45 L. ed. 272, 21 Sup. Ct. Rep. 201.

The collection of C. O. D. charges is not necessary to the freedom of transportation and delivery of such packages, and does not form a part thereof. It does not incidentally affect such transportation.

12 Am. & Eng. Enc. Law, p. 553; Cox v. Columbus & W. R. Co. 91 Ala. 392, 8 So. 8[illegible]; McNichol v. Pacific Exp. Co. 12 Mo. App. 401.

The statute in question is a legitimate exercise of the police power of the state, not inconsistent with the regulation of commerce by Congress.

Schollenberger v. Pennsylvania (Paul v. Pennsylvania) 171 U. S. 15, 43 L. ed. 3[illegible], 18 Sup. Ct. Rep. 757; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Sherlock v. Alling, 93 U. S. 108, 23 L. ed. [illegible]; Crossman v. Lurman, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 214.

The sufficiency of the indictment here was a question for the decision of the state court alone; and the ruling of the state court in overruling the appellant's demurrer thereto presents no Federal question.

Caldwell v. Texas, [illegible] U. S. 699, 34 L. ed. 818, 11 Sup. Ct. Rep. [illegible]24; Davis v. Texas, 139 U. S. 657, 35 L. [illegible]03, 11 Sup. Ct. Rep. 675; Bergemann v. [illegible]ker, 157 U. S. [illegible], 206 U. S.

39 L. ed. 846, 15 Sup. Ct. Rep. 727; Howard v. Fleming, 191 U. S. 127, 48 L. ed. 122, 24 Sup. Ct. Rep. 49.

The facts must be taken as found.

Missouri, K. & T. R. Co. v. Haber, 169 U. S. 629, 42 L. ed. 884, 18 Sup. Ct. Rep. 488; Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561; Telluride Power Transmission Co. v. Rio Grande Western R. Co. 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 222, 48 L. ed. 948, 24 Sup. Ct. Rep. 632; Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396; Eastern Bldg. & L. Asso. v. Ebaugh, 185 U. S. 119, 46 L. ed. 833, 22 Sup. Ct. Rep. 566; Jenkins v. Neff, 186 U. S. 230, 46 L. ed. 1140, 22 Sup. Ct. Rep. 905; Thayer v. Spratt, 189 U. S. 350, 47 L. ed. 848, 23 Sup. Ct. Rep. 576.

There is no Federal question presented for review, and this court is without jurisdiction.

Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Dower v. Richards, 151 U. S. 661, 38 L. ed. 307, 14 Sup. Ct. Rep. 452.

*Mr. Justice Brewer delivered the opinion of the court:

The testimony showed that the package, containing a gallon of whisky, was shipped from Cincinnati, Ohio, to George Meece, at East Bernstadt, Kentucky. The transaction was therefore one of interstate commerce, and within the exclusive jurisdiction of Congress. The Kentucky statute is obviously an attempt to regulate such interstate commerce. This is hardly questioned by the court of appeals, and is beyond dispute under the decisions of this court.

In Vance v. W. A. Vandercook Co. 170 U. S. 438, 444, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674, 676, Mr. Justice White, delivering the opinion of the court, said:

"Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States."

In Rhodes v. Iowa, 170 U. S. 412, 426, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664, 669, it was held that the Wilson act [26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177] "was not intended to and did not cause the power of the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

The court of appeals sustained the judgment upon these facts: Meece testified that he had not ordered the whisky; that he was not expecting any from Cincinnati, but, on going with his brother to the company's office at East Bernstadt, was told that it was there awaiting him; that he requested the agent to hold it until the succeeding Saturday, when he would come, pay for and take it away; and that on that day he did so, paying $3.85 for the whisky, the express charges *having been prepaid at Cin- [136] cinnati. The court held that, by reason of the retention of the package by the agent, the company ceased to hold it as carrier, and had become a mere bailee or warehouseman; that, therefore, the statute, as applied to the transaction, was not a regulation of commerce; and, further, that, as Meece had not ordered the whisky, there was no contract for the sale of it in Cincinnati, but only by the company at East Bernstadt, in Kentucky; that while there was no testimony showing that the company's agent at Cincinnati knew that the whisky had not been ordered by Meece, yet its agent in Kentucky was so informed, and, therefore, the company was possessed, through its agent, of knowledge that there was no interstate transaction, and, with that knowledge, sold the whisky to Meece. But that the agent consented to hold the whisky until Saturday did not destroy the character of the transaction as one of interstate commerce is settled by the recent case of Heymann v. Southern R. Co. 203 U. S. 270, ante, 178, 27 Sup. Ct. Rep. 104. In that case whisky had been forwarded to a party in Charleston, South Carolina, and after its arrival at Charleston was placed in the warehouse of the railroad company by its agent, and there seized by constables, asserting their right so to do under the dispensary law of South Carolina. The point was made and sustained by the supreme court of the state of Georgia, in which state an action had been brought against the company for the value of the goods, that when the goods were placed in the warehouse the carrier was thenceforward liable only as a warehouseman. In passing upon this contention we said (p. 276, ante, p. 181, 27 Sup. Ct. Rep. p. 107):

"As the general principle is that goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package, and as the settled rule is that the Wilson law was not an abdication of the power of Congress to regu-

late interstate commerce, since that law simply affects an incident of such commerce by allowing the state power to attach after delivery and before sale, we are not concerned with whether, under the law of any [137] particular state, the *liability of a railroad company as carrier ceases and becomes that of a warehouseman on the goods reaching their ultimate destination, before notice and before the expiration of a reasonable time for the consignee to receive the goods from the carrier. For, whatever may be the divergent legal rules in the several states concerning the precise time when the liability of a carrier as such in respect to the carriage of goods ends, they cannot affect the general principle as to when an interstate shipment ceases to be under the protection of the commerce clause of the Constitution, and thereby comes under the control of the state authority."

With reference to the testimony as to the knowledge by the company of the fact that the whisky had not been ordered by the consignee, it is sufficient to say that the averment in the indictment is that the express company was engaged in the business of a common carrier of packages, etc., and that the shipment and delivery were made and done in the usual course of its business. This excludes necessarily the assumption that the transaction was one of sale by the express company at East Bernstadt, and of course the company was under no obligation to offer testimony in support of that which the state admitted to be the fact.

We do not mean to intimate that an express company may not also be engaged in selling liquor in a state, contrary to its laws, or that the fact that the consignee did not order a shipment might not be evidence for a jury to consider upon the question whether the company was not, in addition to its express business, also selling liquor contrary to the statutes. It is enough to hold, as we do, that under the averments of this indictment such testimony is immaterial. It is, of course, a question of fact whether a carrier is confining itself strictly to its business as a carrier, or participating in illegal sales. The consignor alone may be trying to evade the statute. He may forward the liquors in the expectation that the consignee will, when informed of their arrival, take and pay for them. So the fact that there is no previous order [138] by the consignee *may not be conclusive of the carrier's wrongdoing, but still it is entitled to consideration in determining that question.

Much as we may sympathize with the efforts to put a stop to the sales of intoxicating liquors in defiance of the policy of a state, we are not at liberty to recognize any rule which will nullify or tend to weaken the power vested by the Constitution in Congress over interstate commerce.

The judgment of the Court of Appeals of Kentucky is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Harlan dissents.

ADAMS EXPRESS COMPANY, Plff. in Err.,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 138, 139.)

This case is governed by the decision in Adams Express Company v. Kentucky, ante, 987.

[No. 332.]

Argued April 17, 18, 1907. Decided May 13, 1907.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a conviction in the Circuit Court of Knox County, in that state, under an indictment charging an express company with violating the state local option law by carrying and delivering a C. O. D. interstate shipment of intoxicating liquors. Reversed.

See same case below, 29 Ky. L. Rep. 2[illegible], 5 L.R.A.(N.S.) 630, 92 S. W. 932.

Mr. Lawrence Maxwell, Jr., argued the cause, and, with Mr. Joseph S. Graydon, filed a brief for plaintiff in error.

Mr. N. B. Hays argued the cause, and, with Mr. Charles H. Morris, filed a brief for defendant in error.

For their contentions see their briefs as reported in Adams Exp. Co. v. Kentucky, ante, 987.

Mr. Justice Brewer delivered the opinion of the court:

This case differs from the preceding in the fact that it was tried by the court without a jury. In all other respects it is *substantially the same. There was the same averment in the indictment; and, more than that, there was an express stipulation made between counsel, pending the trial, in these words:

"It is further agreed at this point that the whisky about which the witness testified was delivered by the Adams Express Company and re[illegible] by it in its office in Cincinnati in [illegible]al course of business as a common carr[illegible] and carried by it to

Barbourville, Kentucky, by the method commonly known as C. O. D."

There is nothing, therefore, to distinguish this case in principle from the preceding, and the same judgment will be entered in this as in that.

Mr. Justice Harlan dissents.

AMERICAN EXPRESS COMPANY OF NEW YORK, Plff. in Err.,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 139–141.)

This case is governed by the decision in Adams Express Company v. Kentucky, ante, 987.

[No. 583.]

Argued April 17, 18, 1907. Decided May 13, 1907.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Larue County, in that state, convicting an express company of violating the state local option law by carrying and delivering a C. O. D. interstate shipment of intoxicating liquors. Reversed.

See same case below, 30 Ky. L. Rep. 207, 97 S. W. 807.

The facts are stated in the opinion.

Mr. Edmund F. Trabue argued the cause, and, with Messrs. John C. Doolan and Attilla Cox, Jr., filed a brief for plaintiff in error:

Commerce is not confined to traffic or to buying and selling or the interchange of commodities, but, in addition thereto, it includes intercourse.

Passenger Cases, 7 How. 283, 12 L. ed. 702; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 589, 33 L. ed. 785, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Plessy v. Ferguson, 163 U. S. 546, 41 L. ed. 259, 16 Sup. Ct. Rep. 1138; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; American Exp. Co. v. Iowa, 196 U. S. 144, 49 L. ed. 422, 25 Sup. Ct. Rep. 182.

Interstate transportation constitutes interstate commerce, independently of the transactions between consignor and consignee.

Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321.

Upon principle, interstate transportation is interstate commerce, irrespective of the transaction between consignor and consignee, for this is the basis of the Act to Regulate Commerce, and that act has been upheld by this court's decision in Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; and Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

If transportation be interstate commerce only when an incident to a bargain and sale or to an exchange of commodities, then the Act to Regulate Commerce can apply only to such transportation from one state to another as may be incidental to such bargain and sale or exchange of commodities. The 1st section of the act must therefore be unconstitutional so far as it affects all other transportation, or else be void *in toto*, because it expressly regulates all interstate transportation, whether incidental to such bargain and sale or exchange of commodities, or not.

Trade Mark Cases, 100 U. S. 82, 25 L. ed. 550; Illinois C. R. Co. v. McKendree, 203 U. S. 514, ante, 298, 27 Sup. Ct. Rep. 153.

If the carrier's knowledge of the relations, if any, between consignor and consignee, be assumed material, under the state statute, to the present Federal inquiry, then the state law making it so material is a serious obstruction to interstate commerce.

Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.

Although the unpopular transportation in this case be of obnoxious intoxicants, in another case it might be of indispensable food or clothing produced by a rival state, and the exigency presented be exactly the emergency which begot the commerce clause, *viz.*, to untrammel intercourse and prevent obstruction to commerce.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213.

So long as state legislation continues to recognize wines, beer, and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles.

Scott v. Donald, 165 U. S. 91, 41 L. ed. 640, 17 Sup. Ct. Rep. 265.

No question can here arise as to the degree of state regulation of interstate commerce permissible, or as to the extent to which the state legislation affects the commerce; for, first, the state statute absolutely forbids the transportation, and, secondly, this court has held, in almost numberless cases, that similar statutes forbidding or regulating the importation of intoxicants are void as attempts to regulate interstate commerce.

License Cases, 5 How. 504, 12 L. ed. 256; Peirce v. New Hampshire, 5 How. 576, 12 L. ed. 288; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; Adams Exp. Co. v. Iowa, 196 U. S. 147, 49 L. ed. 424, 25 Sup. Ct. Rep. 185; Heyman v. Southern R. Co. 203 U. S. 270, ante, 178, 27 Sup. Ct. Rep. 104.

The carrier has no right to demand an inspection of goods offered for shipment.

Nitro-glycerine Case (Parrott v. Wells) 15 Wall. 524, 21 L. ed. 206. See also Hutchinson, Carr. § 439; 7 Rose's Notes, 929.

What may be "reasonable grounds to believe" is a mixed question of law and fact for the jury under the judge's charge, and what its resolution in any case may be cannot be known in advance of the jury's verdict. This uncertainty is so great as to render a statute punishing a carrier for charging more than "a just and reasonable rate" unconstitutional.

Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; McChord v. Louisville & N. R. Co. 183 U. S. 483, 46 L. ed. 289, 22 Sup. Ct. Rep. 165.

A state statute offends the commerce clause of the Federal Constitution in imposing upon a common carrier the burden of ascertaining the nature of the contents of an interstate shipment when having reasonable ground of belief as to such contents.

Bowman v. Chicago & N. W. R. Co. supra; Vance v. W. A. Vandercook Co. 170 U. S. 438, 444, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674; Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 102, 45 L. ed. 765, 770, 21 Sup. Ct. Rep. 561.

Mr. N. B. Hays argued the cause, and, with Mr. Charles H. Morris, filed a brief for defendant in error.

For contentions of these counsel see their brief as reported in Adams Exp. Co. v. Kentucky, ante, 987.

*Mr. Justice Brewer delivered the opinion [illegible] of the court:

This case, like the two preceding, was a prosecution of the express company for a violation of the Kentucky statute in respect to "C. O. D." shipments. It was tried in the circuit court before a jury, which returned a verdict of guilty, and fixed the penalty at $100 fine, which verdict was sustained and judgment entered thereon by the circuit court. The company appealed to the court of appeals, which affirmed the judgment (30 Ky. L. Rep. 207, 97 S. W. 807), and thereupon the case was brought here on writ of error.

The consignee testified that he did not give an order for the shipment, while there was testimony on behalf of the consignor that such an order was filed with it in the name of the consignee, and the shipment made upon that order. The brief of the attorney general in the court of appeals, after referring to the testimony of a witness on behalf of the company, said:

"It will appear from his evidence that he resides in Cincinnati, Ohio, and is manager for a wholesale liquor firm located in said city; that on March 21st, 1905, he received an order filed as an Exhibit 'X' from Richard Graham of Hodgensville, Kentucky, for an order of whisky to be sent C. O. D. for the delivery of which the warrant herein was issued against the appellant company; that upon this order the whisky in question was shipped to said Graham at Hodgensville, Kentucky, and delivered to him and the charges therefor paid to the appellant company, who returned the same to the said house or firm in Cincinnati, Ohio. There is no proof to show that the express company had any knowledge or information as to the contents of said package so delivered, and there is nothing to show any notice to it whatever of the contents of said package.

. . . . . .

"We, however, desire the court to pass upon the question, 'In order that the many complications growing out of transactions similar to this may be simplified, and the multitude of litigations growing out of the same lessened, whether or not a company similar to the appellant can legally accept the price for whisky shipped into a local option district contrary to law, thus constitute itself a collecting agency for one who is, under the shield of interstate commerce, protected and permitted to ship whisky into [illegible] districts. We are of opinion that an exp[illegible] company has no inherent right under [illegible] laws of this state or under the prot[illegible] of interstate com-

o assume a duty not required of it, mmon carrier, and to do that which iolation of the laws of this state. we believe that this record in its shape does not show that the ap- om the police court to the circuit f Larue county was properly and taken, and for the further reason e express company has no right, in n of law, to accept the price in a tion district of whisky shipped C. we ask that the judgment be af-

ew of the concession and contention ttorney general we are of the opin- t there is nothing to substantially ish this case from the preceding. me judgment, therefore, will be l in this case as in those.

ustice Harlan, dissenting:
not think that these are cases of te interstate commerce. They show vices or tricks by the express com- evade or defeat the laws of Ken- relating to the sale of spirituous, or malt liquors. I dissent from the and judgment in each case.

NNATI, HAMILTON, & DAYTON LWAY COMPANY et al., Appts.,
v.
STATE COMMERCE COMMISSION.

e S. C. Reporter's ed. 142–158.)

te Commerce Commission—powers.
The Interstate Commerce Commission, ing an investigation of a complaint soap manufacturers as to the freight r common soap promulgated in a ation adopted to govern in official ation territory, had the power, in the nterest, unembarrassed by any sup- lmissions contained in the complaint, der the whole subject, and the op- of the classification in the entire y, and also how far its going into ould be just and reasonable, would references, or would engender dis- tion.

te Commerce Commission—judicial ement of order.
Any supposed admissions in a com- led by soap manufacturers with the te Commerce Commission as to the freight rate for common soap promulgated in a classification adopted to govern in official classification territory are ineffectual to deprive a Federal circuit court, in a proceeding to enforce an order of the Commission directing the carriers to desist from enforcing this classification as to soap in less than car-load lots, of the power to test the validity of such order by the scope of the act to regulate commerce.

Carriers—rates—classification.
3. The disturbance in the relations between freight rates for soap in car-load and less than car-load lots created by advancing the former from class 6 to class 5, and the latter from class 4 to class 3 in a new classification adopted to govern in official classification territory, was not cured by classifying soap in less than car-load lots at 20 per cent less than third class, but not less than fourth class, where the result of applying this modified percentage classification to the varying rates is to leave soap in less than car-load lots in the fourth class in portions of the territory and in a higher class in other portions.

Appeal—review of facts.
4. Findings of the Interstate Commerce Commission that a classification of freight rates adopted to govern in official classification territory produces preferences and discriminations will not be interfered with on appeal when concurred in by a Federal circuit court unless the record establishes that clear and unmistakable error has been committed.

Carriers—rates—classification—preferences.
5. Unlawful preferences and discriminations are created by fixing the freight rate for common soap in less than car-load lots in a new classification adopted to govern in official classification territory at 20 per cent less than third class, but not less than fourth class, at which that commodity had previously been rated, where the result of applying this classification to the varying rates is to leave soap in less than car-load lots in the fourth class to a considerable extent in one of the subdivisions of such classification territory, and in a higher class in the other subdivision.

Interstate Commerce Commission—powers.
6. The Interstate Commerce Commission is acting within its powers under the act to regulate commerce in ordering carriers to desist from further enforcing a classification by percentage of common soap in less than car-load lots, operating throughout official classification territory, which it finds has brought about a general disturbance in relations previously existing in that territory, and has created discriminations and preferences among manufacturers and shippers of the commodity, and between localities in such territory.

[No. 201.]

Argued January 31, February 1, 1907. Decided May 13, 1907.

—On the jurisdiction and powers of erstate Commerce Commission—see United States v. Tozer, 2 L.R.A. 446. scriminations by carriers in fixing ee notes to Pensacola & A. R. Co. v. L.R.A. 662; Root v. Long Island R. R.A. 331; and Cleveland, C. C. & I. . Closser, 9 L.R.A. 757.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio to review a decree enforcing an order of the Interstate Commerce Commission directing carriers to cease and desist from further charging the freight rate for common soap in less than car-load lots promulgated in a classification adopted to govern in official classification territory. Affirmed.

See same case below, 146 Fed. 559.

The facts are stated in the opinion.

Messrs. Edward Colston and Lawrence Maxwell, Jr., argued the cause and filed a brief for appellants.

Messrs. L. A. Shaver and P. J. Farrell argued the cause and filed a brief for appellee.

Mr. Justice White delivered the opinion of the court:

Official classification territory embraces that portion of the United States lying between Canada on the north, the Atlantic [143] *ocean on the east, the Potomac and Ohio rivers on the south, and the Mississippi river on the west. This territory includes what is known as Central Freight Association territory and Trunk Line territory, both being governed by the official classification. The Central Freight Association territory comprises the area west of Pittsburg and Buffalo, including the lower peninsula of Michigan and east of a line from Chicago to St. Louis, the Mississippi river from St. Louis to Cairo, and north of the Ohio river. Trunk Line territory lies north of the Potomac river and east of Pittsburg and Buffalo. Whilst official classification governed throughout the whole of official classification territory, the rates throughout the whole of the official classification territory were not uniform, because of a difference of rates prevailing in the subdivision; that is, in the Central Freight and Trunk Line territory. Thus, although on shipments from points in the Central Freight Association territory to points in the Trunk Line territory or *vice versa* rates were the same for similar distances, yet, on shipments between termini wholly within one or the other of these territories, the rates varied because of the different rules governing rates which prevailed as to traffic exclusively moving in that particular territory.

The first classification adopted by the railroads to control in the territory above described as official classification territory was made contemporaneously with the going into effect of the act to regulate commerce, presumably to comply with that act, and took effect on April 1, 1887. From that date until January 1, 1900, nineteen general classifications of freight, numbered from 1 to 19, were, at various times, adopted to govern in official classification territory. The articles embraced in these classifications were divided into classes, numbered from 1 to 6, the rate increasing as the number of the class decreased. From the beginning, until June 1, 1891, common soap in boxes in car loads was rated as fifth class, and fourth class for less than car loads. On the last-named date, in consequence of an order entered by the Commission on a complaint as to the *classification [144] of common soap in car loads, made by Procter & Gamble, soap manufacturers, of Cincinnati, Ohio, soap in car loads was reduced to sixth class. This classification continued to govern until January 1, 1900, when a new classification, known as official classification No. 20, went into effect, by virtue of which soap in car loads was advanced from sixth to fifth class, and soap in less than car loads was advanced from fourth to third class.

After the going into effect of classification No. 20, the Procter & Gamble Company, successor to the firm of Procter & Gamble, complained to the Interstate Commerce Commission in respect to the alterations made in the classification of common soap. The petition recited the prior complaint by the firm of Procter & Gamble, and the making, in 1890, of the order which led to the reduction from fifth to sixth class, heretofore referred to.

It was charged in the petition that, in official classification No. 20, there had been an inequitable selection of particular articles and an increase in the rates upon such articles alone by the device of changing them from a lower to a higher class, for the sole purpose of increasing revenues to cover an alleged increase of cost of operation of the railroads; and that, "by such course defendants have subjected and do thereby subject the said traffic in the articles changed, including common soap in car loads and less than car-load lots, to an undue and unreasonable prejudice and disadvantage with respect to the traffic in all of the articles whose classification was not changed in official classification No. 20." It was further alleged as follows:

"If there are any qualities and conditions which, though not considered by defendants at the time of the adoption of said classification No. 20, justify, nevertheless, the making of any or part of said changes, the same, at any rate, do not apply to common soap in car loads or less than car-load lots. The same should, at least, have remained in sixth class in car-load lots, as ordered by this Con[illegible]n as aforesaid, and in fourth class *in[illegible] than car-load lots, so as to maintain [illegible] proper relation and

fference of rates between car-load and less an car-load lots. The changing of par-cular articles as aforesaid from lower to gher classes for the sole purpose of in-easing the revenues of the railroads in-rested therein is not a condition or cir-mstance justifying the said change of assification in common soap."

It was prayed that an order might be en-red requiring the Cincinnati, Hamilton, Dayton Railroad Company and seven her named railroad companies, forming rious connecting and joint lines of rail-ad in the territory governed by official assification No. 20, to "cease and desist om refusing to carry common soap in r-load lots at sixth-class rates, and from fusing to carry common soap in less than r-load lots at fourth-class rates." After e filing of the petition, and before answer, ficial classification No. 20 was, in part, anged by making a new class, intermedi-e classes three and four for soap in less an car-load lots and on some other ar-cles, this class being determined by giv-g the articles in question the benefit of a duction on the third-class rate of 20 per nt, provided the application of the 20 per nt reduction did not reduce the charge low the fourth-class rate, in which event e 20 per cent reduction should not be lly applied, but would only be applied to e extent necessary to make the rate not ss than fourth class. The classification us operating is spoken of as 20 per cent ss than third class, but not less than urth class, and we shall speak of it here-ter in this way.

In the answers filed the defendants in bstance denied that common soap was nproperly classified in official classification o. 20, originally or as modified, or that a unreasonable or unlawful rate was ex-ted for the carriage of soap, or that the efendants subjected the soap traffic to any ndue or unreasonable prejudice, disadvan-ge, or discrimination.

The taking of testimony was ended on eptember 26, 1900, and the report and pinion of the Commission was filed about two and a half years thereafter; *viz.*, on pril 10, 1903. 9 Inters. Com. Rep. 440. s respects putting car-load soap in the fth class, the Commission refrained both om deciding that the classification was un-asonable *per se* or that its reasonableness ad been affirmatively established. It said:

"We regard the primary and controlling uestion in this case as a question of clas-fication; that is, of *relative rates*, and dis-ose of it accordingly. In that view it sufficient to hold that car-load soap is ot improperly placed in the fifth class, and at fifth-class rates therefore are not shown to be unlawful. So long as most articles entitled to as low rates as car-load soap are put in the fifth class and required to pay fifth-class rates, we are not war-ranted, on the evidence before us, in con-demning the same rating for that com-modity. This disposition of the case, how-ever, will not authorize the retention of car-load soap in fifth class if the classification of other articles with which soap is com-pared should be reduced, nor will anything now decided preclude the Commission from holding, in an appropriate proceeding, that fifth-class rates in this territory are ex-cessive."

In regard to the less than car-load clas-sification of common soap, after directing at-tention to the fact that such traffic had always been fourth class until January 1, 1900, the Commission said:

"A presumption that such rates are rea-sonable arises from the voluntary action of the carriers in keeping those rates in effect during such a long period, and that presumption has not been overcome, in our judgment, by the evidence presented in this case."

It was also found that certain rules set out in the findings governing car loads of mixed freight, permitting the carriage of the same at car-load rates, coupled with the increase in the long-standing less than car-load rates on soap, operated a strong dis-crimination in favor of meat packers who manufactured soap, against manufacturers who were mainly engaged in manufacturing and selling soap. So, also, the Commission held *that the change as to the classification [147] of soap in less than car-load lots, besides in-volving the payment of higher rates for less than car-load shipments, had brought about rate relations different from those previously existing between shippers of soap in official classification territory. Thus it was found that, as a result of the new method of classification, a shipper located at New York city could ship therefrom to practically all points in New England and a large number of points in New York state without paying higher than fourth-class rates, while a shipper located at Cincinnati could not ship northerly or northwesterly therefrom, more than about 60 miles, with-out paying an advance over fourth-class rates. The Commission expressly declared that "the difference of 15 cents between fifth class and third class, which was in effect as between car-load and less than car-load shipments from January 1, to March 10, 1900," the time during which of-ficial classification No. 20 prevailed, before it was modified by the percentage reduction as to soap in less than car-load lots, "would plainly be excessive," and that the change

operated by the percentage modification in question occasions a difference "which varies according to a given per cent, as applied to different scales of rates, appears to be inequitable and unjust, and the fact is so found."

In the order, as entered, the Commission dismissed so much of the complaint as referred to the classification of common or laundry soaps in car loads, and the defendants were "notified and required to cease and desist, on or before the 15th day of June, 1903, from charging, demanding, collecting, or receiving for the transportation of common or laundry soap in less than car-load quantities charges or rates per one hundred pounds, equal to 20 per cent less than rates fixed by them for the transportation of articles, designated as third class in their established freight classification, called and known as the 'official classification,' which said 20 per cent less than third-class rates for the transportation of common or laundry soap in less than car loads are found and [148] determined in and *by said report and opinion of the Commission to be in violation of the act to regulate commerce."

The railway companies not having complied with the order, this proceeding was commenced by the Commission in the circuit court of the United States for the southern district of Ohio, under the direction of the Attorney General of the United States, to enforce compliance therewith. As respects the alleged unlawful character of the change in the classification of soap in less than car-load quantities, it was charged in the petition as follows:

"And the petitioner charges that the action of the defendants in raising the classification of common or laundry soap in less than car-load quantities, on December 29, 1899, from fourth class to third class, and subsequently on March 10, 1900, changing the classification of common or laundry soap in less than car-load quantities to 20 per cent below third-class rates, the same being more than fourth-class rates, was in violation of the act to regulate commerce; and petitioner further charges that the rates charged by the defendants since December 29, 1899, for the transportation of common or laundry soap in less than car-load quantities are in violation of § 1 of the act to regulate commerce, in that they are unreasonable and unjust; and said rates are and have been in violation of § 3 of said act, in that said rates, based upon the classification aforesaid, give an undue and unreasonable preference or advantage to other descriptions of traffic, and subject common or laundry soap in less than car loads to an undue prejudice and disadvantage. The petitioner further charges that the change in classification by the defendants, made effective about December 29, 1899, whereby common or laundry soap in less than car-load quantities was changed from fourth to third class, and the change in classification by the defendants, made effective March 10, 1900, whereby common or laundry soap in less than carload quantities was charged more than fourth-class rates, to wit, 20 per cent below third-class rates, were in violation of said act to regulate commerce, in *that said changes were unreasonable and [149] unjust, and result in unlawful discrimination and prejudice against common or laundry soap in less than car-load quantities, and against localities in official classification territory, wherein commodities are produced and transported, and against producers, shippers, dealers, and consumers in said territory."

In the various answers filed issue was taken upon these averments without any intimation that any of the issues so tendered were improper to be raised.

The case was heard in the circuit court on the evidence before the Commission and on additional evidence taken by the defendants, principally directed to showing the extra cost incident to handling and transporting freight in general in less than car-load lots. The complainant took no additional testimony. The circuit court decided in favor of the Commission (146 Fed. 559), holding that the evidence not only failed to justify the change of classification complained of, but established that the advance in rates caused by the increase in the classification of soap in less than car-load quantities was not only unreasonable and unjust, but also resulted in an unlawful discrimination and preference between shippers. The case was then appealed to this court.

Before considering the fundamental question upon which the order of the Commission and the decree of the court enforcing it rest, we dispose of certain propositions relied upon by the railway companies because to do so we think will clear the way for an analysis of the final question arising, stripped of confusing and irrelevant considerations. We think the Commission, in making an investigation on the complaint filed by the Procter & Gamble Company, had the power, in the public interest, disembarrassed by any supposed admission contained in the statement of complaint, to consider the whole subject and the question of the new classification in the entire territory, as also now [illegible] ar its going into effect w[illegible] be [illegible] d reasonable, would create pr[illegible] ngender discrimi[illegible] tions; [illegible] ner wo[illegible] in conformity to the

requirements *of the act to regulate commerce. And that such was the view taken as well by the railway companies as by the Commission during the course of the investigation before that body is, we think, beyond doubt. Thus, on the examination of the very first witness called for the complainant before the Commission, counsel for the railway companies stated that, in his opinion, the pending investigation had "no significance except as preliminary to a judicial proceeding." And when, at the threshold, a question was raised in the examination of the same witness as to the competency of evidence on a subject not directly expressed in the complaint, but bearing upon the effect of the new classification, the Commission declared it was competent to show the general effect of such classification in the territory through which it operated. Our assent to this view of the power of the Commission conclusively, of course, also disposes of the contention that the court was without authority to determine the validity of the order of the Commission by the scope of the act to regulate commerce, because of an admission asserted to exist in the complaint originally filed before the Commission. It is needless, moreover, to say that the course of the proceeding before the Commission which we have stated strips the case of any element of surprise or possible prejudice.

The Commission, as we have seen, did not find that the rate promulgated in official classification No. 20, as to soap in car loads, was unreasonable, preferential, or discriminatory. From this it is elaborately argued that the order rendered by the Commission demonstrates its own error. This proceeds upon the following theory: For a number of years prior to 1891 soap in less than car loads was in the fourth class, and soap in car loads in the fifth class. By the order of the Commission, rendered in 1891, as we have seen, soap in car loads was put in the sixth class. By official classification No. 20 soap in car loads was moved up to fifth, and soap in less than car loads from fourth to third class. The change made by the new classification destroyed the previous relation, since the *difference between the rates governing third and fifth classes made by the new was greater than the difference between the fourth and sixth classes as obtaining in the prior classification. And this was one of the complaints made by the Procter & Gamble Company concerning the new classification No. 20. The carriers, it is said, to meet this objection, adopted, after the complaint was filed, the modified classification of 20 per cent less than third class, but not less than fourth class. The effect of this reduction, it is declared, was to cause soap in less than car loads to occupy just the same relative position to soap in car loads as it had occupied in the classification existing prior to the going into effect of official classification No. 20. And as the order of the Commission did not change the classification as applied to soap in car loads, made by official classification No. 20, the proposition is that that body, in holding the modified classification of 20 per cent less than third class, and not less than fourth class, to be illegal, destroyed the relation which the Commission had created by its former order, and which it was the purpose of the complaint of the Procter & Gamble Company to restore. But the argument takes for granted the very question for decision,—that is, whether the modified classification of 20 per cent less than third class, but not less than fourth class, operated to continue the relation between soap in car loads and soap in less than car loads, which prevailed throughout official classification territory before the making of official classification No. 20. That the proposition thus begs the whole question is demonstrated by the mere statement that both the Commission and the court below decided that official classification No. 20, as modified as to soap in less than car loads by the percentage order, was unreasonable, discriminatory, and, by its effect, created preferences among manufacturers and shippers of soap which had not existed prior to the new classification. When the real significance of the proposition is thus seen it amounts to this, that we must assume that both the court below and the Commission erroneously decided the controversy, and, upon this mere assumption, *proceed to reverse their action. But our [152] duty not to assume, but to decide the case, cannot be thus obscured.

Laying aside, however, the questions of unreasonableness of discrimination, and of preference and the consequent destruction, if these effects exist, by the new classification, of the prior relation between soap in car loads and less than car-load quantities, let us briefly consider the intrinsic merit of the proposition relied upon. It is that prior to official classification No. 20 there was a just relation between soap in car loads in class 6 and soap in less than car loads in class 4. Of course, this admits that such just relation was destroyed by official classification No. 20 as originally put in force, since thereby soap in car-load lots was placed in class 5 and soap in less than car-loads in class 3, between which classes there was a greater difference relatively in rates than theretofore existed between the two commodities in the prior classification. This inequality the carriers declare was obviated after the complaint was filed by the modified classification as to soap in less than

car-load lots of 20 per cent less than third class, but not less than fourth class. By this means, it is insisted, the relation previously existing was recreated, and any disturbance engendered by official classification No. 20 was cured. Now, on the surface of things, the contradiction of the position is manifest. The modified rate on its face did not propose to put soap in less than car loads throughout the whole territory in a uniform class, but in the class which might result from the operation of a percentage basis, controlled by whether or not the application of the percentage might or might not take soap out of one class and into another. In other words, it clearly contemplated that, by the varying rates to which the percentage would be applied, soap in less than car loads would be left in portions of the territory in fourth class and in a higher class in other portions. How, in view of this, it can be in reason conceived that the admitted uniform classification prevailing prior to the percentage rule could possibly continue under a classification inherently wanting in uniformity, we fail to understand.

[153] *But put the foregoing considerations aside. The complaint as to the order of the Commission is that it disturbed the previous relations between soap in car loads and less than car loads. What was the order? In effect it condemned, and directed the carrier to desist from enforcing, the modified percentage classification. At the worst view for the carrier the order complained of can only be taken as persuasively indicating—and such was the view intimated in the opinion of the Commission—the duty of the carriers to return soap in less than car loads to class 4, in which it had been uniformly placed prior to the going into effect of official classification No. 20. The real grievance which the railway companies must have reduces itself to this,—that the order may lead to the putting of soap in less than car loads in class 4. But the very percentage basis which the carriers adopted contemplated that, in some portions of the territory and somewhere, the effect of the modification by a percentage reduction might be to put soap in less than car loads in the fourth class; else, why the limitation, "but not less than fourth class," contained in the modified classification.

We are thus brought to the fundamental question, which is, Did the percentage classification lead to rates which were unreasonable, unjustly discriminatory, or unduly preferential? If either was the result, the order directing the carriers to desist from enforcing the classification in question was proper.

We take up the related questions of discrimination and preference because the arising of such consequence is from the classification more saliently appear, and because the demonstration of such results is, in a measure, elucidated by what we have previously said. Concerning the discrimination the Commission said:

"Whatever the effect of a percentage less than third class for less than car-load shipments of other commodities, taking that rating under the classification, may be, it plainly works discrimination against complainant and other western shippers "of soap[illegible] in less than car-load lots, in favor of their competitors in the East, when the present situation is compared with that which existed under the old fourth-class rating."

And this finding was expressly concurred in by the circuit court. In pointing out the mode by which the modified classification operated the result in question, the Commission said:

"These differences are due to variations in the scales of rates prevailing in the different sections. The 20 per cent less than third-class rating for less than car-loads applies to all shippers of less than car-load lots of soap throughout the entire territory, but it increases some rates more than others, and leaves some as they were before it was adopted. When, for example, under the application of that rule, the rate from Cincinnati to Boston is increased 4 cents, and the rate from New York to Boston remains the same, as compared with the fourth-class rates formerly in effect, it is plain that this method of determining rates upon a percentage basis operates unequally upon the different shippers of less than car-load quantities in that territory."

The statute gives prima facie effect to the findings of the Commission, and, when these findings are concurred in by the circuit court, we think they should not be interfered with unless the record establishes that clear and unmistakable error has been committed. See Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 194, 40 L. ed. 935, 938, 5 Interst. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 672, 44 L. ed. 309, 318, 20 Sup. Ct. Rep. 299.

It is insisted that this is a case of that character. How, in reason, it is urged, can it be said that discrimination or preference which did not before exist, was or could be produced from the mere application to the prior rates of a uniform percentage reduction? This, however, obscures the fact that the 20 per cent reduction was not uniform, but was that percentage less than third class, with the qualification "but not less than fourth class." In other words, the

modified percentage reduction was not a fixed percentage, but was one which might *vary, depending upon the result which would be brought about by applying the rule. Putting, however, entirely aside this view, let us consider only the result of the working of the rule on the basis of 20 per cent less than third class. The factors to be considered are these: a, the relation existing prior to the going into effect of official classification No. 20; b, the operation of that classification over the whole of official classification territory; c, the percentage modification of 20 per cent less than third class as to soap in less than car loads, and also its operation over the whole territory; and, d, the varying rates of charges in the separate spheres into which the official classification territory was divided, *viz.*, Central Freight Association territory and the Trunk Line territory. Now, testing the matter by these criteria, does it appear, as contended, that the findings of the Commission and the court, as to resulting preferences and discrimination, are so contradictory and erroneous that we should disregard them? The proposition that they were must rest upon the assumption that the application of a fixed percentage reduction to existing rates, whilst it might vary them, could not possibly change their relation. But this assumes that the variation which existed between rates in the different spheres of official classification territory was only a difference in the sum of the rate prevailing in one territory from that which prevailed in the other as to the same class. But this is a mistake, since there was also a difference in the two separate spheres of territory as to the margin of difference between the different classes of rates governing in the two territories. Thus, there was in Central Freight Association territory not only a higher rate for commodities in the third class than prevailed in Trunk Line territory for the same class, but there was also in the Central Freight Association territory a wider difference between the rates governing commodities in the third class and those controlling commodities in the fourth class. It follows from this that where, in any given case, the 20 per cent reduction was applied to the increased rate which had arisen from having placed less than *car-load soap in the third class, if the application of the full 20 per cent reduction was not sufficient to reduce the amount to the fourth class, the commodity would pay more than fourth class. In other words, although the commodity in the case stated would get the full benefit of the 20 per cent reduction from the third-class rate, as giving it that benefit did not reduce to the fourth-class rate the commodity would yet pay higher than fourth-class rate. It also follows that if, in any case where the 20 per cent reduction was applied the result of applying it, because of the narrowness of the difference between third and fourth class in that territory, operated to reduce the same to the fourth class, the commodity would be left exactly in the class in which it stood before,—that is, fourth class. By this it indubitably resulted that in a large degree in one of the subdivisions of the same classification territory soap in less than car loads remained in fourth class, and in the other took a higher class. And this illustrates the correctness of the findings of the Commission and of the court as to the preference resulting from applying to a territory governed by one classification a rule of percentage which, while assuming unity, produced diversity, and which, while asserting equality of class, engendered inequality. Of course, we confine our decision to the case before us.

And the views heretofore expressed serve also to dispose of the contention that, although it be conceded that discrimination and preference was created, yet the carrier should not have been ordered to desist from enforcing the modified percentage classification, because the discrimination and preference, if any, were not the result of the operation of that classification, and, moreover, were not repugnant to the act to regulate commerce, because they were simply the consequence of natural competitive advantages enjoyed by shippers in the sphere of the Trunk Line territory, which were not possessed by shippers in that other portion of official classification territory, known as Central Freight Association territory. But this simply involves a restatement of the misconception which we have *already point- [157] ed out. The discriminations and preferences which the Commission and the court below found to exist were results arising from the application to the conditions prevailing in official classification territory of the modified percentage classification. In other words, the order forbidding the enforcement of the modified percentage classification was based on the finding that that classification disturbed the rate relations theretofore existing in official classification territory, and created preferences and discriminations which would disappear if the further enforcement of the changed classification was prevented.

This brings us to the final contention made on behalf of the railway companies, *viz.*, that the order of the Commission was not lawful, because not within the power conferred by the act of Congress. This is, we think, largely disposed of by what we

have previously said as to the nature and scope of the investigation which the Commission was authorized to make and the redress which it was empowered to give irrespective of the particular character of the complaint by which its power may have been previously invoked. Whatever might be the rule by which to determine whether an order of the Commission was too general where the case with which the order dealt involved simply a discrimination as against an individual, or a discrimination or preference in favor of or against an individual or a specific commodity or commodities or localities, or as applied to territory subject to different classifications, we think it is clear that the order made in this case was within the competency of the Commission, in view of the nature and character of the wrong found to have been committed and the redress which that wrong necessitated. Finding, as the Commission did, that the classification by percentage of common soap in less than car-load lots operating throughout official classification territory, brought about a general disturbance of the relations previously existing in that territory, and created discriminations and preferences among manufacturers and shippers of the commodity and between localities in such *territory, we think the Commission was clearly within the authority conferred by the act to regulate commerce in directing the carriers to cease and desist from further enforcing the classification operating such results.

[158]

Affirmed.

CHARLES E. YATES et al., Plffs. in Err.,
v.
JONES NATIONAL BANK.

(See S. C. Reporter's ed. 158–181.)

Appeal—abandonment.

1. The prosecution of a writ of error sued out apparently on behalf of all the defendants below will be deemed abandoned by those who have furnished no bond for costs and are not represented by counsel, especially where the bill of exceptions does not contain the answers of those defendants nor the pertinent evidence relating to their case.

Error to state court—Federal question.

2. The express denial of an immunity claimed in both the trial and appellate courts, under U. S. Rev. Stat. § 5239, U. S. Comp. Stat. 1901, p. 3515, by officers and directors of a national bank in respect to the rule of liability applied for making false official reports as to the bank's financial condition, is sufficient to sustain the exercise by the Supreme Court of the United States of its appellate jurisdiction over state courts.

National banks—liability of directors—false official reports.

3. Directors of a national bank who merely negligently participated in or assented to the false representations as to the bank's financial condition contained in the official report to the Comptroller of the Currency, made and published conformably to U. S. Rev. Stat. § 5211, U. S. Comp. Stat. 1901, p. 3498, cannot be held civilly liable to anyone deceived to his injury by such report, since the exclusive test of such liability is furnished by U. S. Rev. Stat. § 5239, which makes a knowing violation of the provisions of the title relating to national banks a prerequisite to such liability.

Courts—state or Federal jurisdiction—enforcing civil liability of national bank directors.

4. State courts may enforce, against directors of a national bank who have made false representations as to the bank's financial condition in the official report to the Comptroller of the Currency, the civil liability prescribed by U. S. Rev. Stat. § [illegible], which provides for the forfeiture of the charter of a national bank as the result of violations of the national bank act by the directors, such violations to be determined only by the Federal courts, and make every director who participated in or assented to the same civilly liable to persons who have suffered damage in consequence thereof.

[No. 230.]

Argued March 8, 11, 1907. Decided May 13, 1907.

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, [illegible] L.R.A. 33.

On writ of error to state court in cases involving questions under the national banking law—see note to Rankin v. Barton, [illegible] L. ed. U. S. 163.

On the administration of Federal law in state courts—see note to Loughin v. McCauley, 48 L.R.A. 33.

On the care required of bank directors—see notes to Swe[illegible] v. Penn Bank, [illegible] R.A. 305; Robi[illegible]on v. [illegible]all, 12 C. C. A. [illegible] and Warner v. [illegible] 33 C. C. A. [illegible]

ROR to the Supreme Court of the
of Nebraska to review a judgment
ffirmed a judgment of the District
Seward County, in that state, in
plaintiff in an action to charge the
and directors of a national bank
bility for false representations as to
k's financial condition. Dismissed
t of prosecution as to some of the
s in error, and reversed as to the
and remanded for further proceed-

ame case below (Neb.) 105 N. W.

acts are stated in the opinion.

W. Deweese argued the cause, and,
. Frank E. Bishop, filed a brief for
s in error:

irectors of a national bank cannot
by a state court responsible for acts
their official capacity, so as to en-
lifferent liability from that imposed
em by the national banking act.
were permitted, it would be possible
ol or nullify a United States law,
vent the enforcement of its provi-

aite, 81 Fed. 371; Cook County Nat.
United States, 107 U. S. 448, 27 L.
2 Sup. Ct. Rep. 561; Leisy v. Har-
U. S. 100, 34 L. ed. 128, 3 Inters.
p. 36, 10 Sup. Ct. Rep. 681; Farm-
. Nat. Bank v. Dearing, 91 U. S. 29,
196; Easton v. Iowa, 188 U. S. 220-
L. ed. 452-460, 23 Sup. Ct. Rep. 288;
Baxter, 65 Ohio St. 341, 62 N. E.
Culloch v. Maryland, 4 Wheat. 424,
605.

rotection of the law governing the
of the defendants for acts done in
icial capacity is a substantial right,
"courts should be astute not to per-
ices to become successful which are
the very purpose of destroying that

hoe County v. Kansas P. R. Co. 4
, Fed. Cas. No. 502.

been held that a director who did
est a report relied upon for cause
n cannot be held personally liable
thing stated in such report.

. Hanmore, 86 N. Y. 95; Gerner v.
58 Neb. 145, 46 L.R.A. 244, 78 N.

irectors of a bank are not held, as
r of law, to know all its affairs, or
s books and papers would show;
h knowledge cannot be imputed to
r the purpose of charging them with

v. Moore, 73 Ohio St. 275, 4 L.R.A.
597, 76 N. E. 932.

olding of the state court that the
nt directors were liable to the plaintiffs, who had deposited their money in the bank, for alleged false statements in the reports to the Comptroller, without knowing or having knowledge of the falsity of such reports, is in direct conflict with the personal liability imposed upon the directors by U. S. Rev. Stat. § 5239, U. S. Comp. Stat. 1901, p. 3515.

But the state courts are as firmly bound by the laws of Congress as are the Federal courts.

Farmers' & M. Nat. Bank v. Dearing, supra; Robb v. Connolly, 111 U. S. 637, 28 L. ed. 546, 4 Sup. Ct. Rep. 544.

The proposition that the directors could be guilty of fraud and deceit, without knowing of any fraud, and while innocent of any purpose to deceive, is so subversive of the fundamental principles of law and justice between men as to challenge at once the correctness of the court's decision. No principle of law is better established, recognized, and enforced than that all men are presumed to be innocent until proven guilty.

Derry v. Peek, L. R. 14 App. Cas. 337; Kountze v. Kennedy, 147 N. Y. 124, 29 L.R.A. 360, 49 Am. St. Rep. 651, 41 N. E. 414; 2 Pom. Eq. Jur. § 884; Lord v. Goddard, 13 How. 211, 14 L. ed. 116; Warfield v. Clark, 118 Iowa, 69, 91 N. W. 834; Runge v. Brown, 23 Neb. 817, 37 N. W. 660.

The jurisdiction of this court is not defeated by an arbitrary statement by the state court, in its decision, that no Federal question is involved, and that its decision is based upon the common law, independent of the Federal statutes. As we understand the law, in determining the jurisdiction of this court it will look to the issues joined between the parties, and the trial of the questions at issue in the case, to determine whether any Federal right or immunity specially set up or claimed has been denied, and will not be governed by the assertion of the state court that no Federal question is involved in the decision, nor by the assumed intentions of the pleader in alleging his cause of action.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 562, 580, 50 L. ed. 601, 604, 26 Sup. Ct. Rep. 341; Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 533, 46 L. ed. 674, 22 Sup. Ct. Rep. 446.

Whatever cause of action the plaintiff Bailey had in the first petition, he alleged and presented in the second. The questions of mismanagement, fraud, and deceit were all jumbled together; and, the allegation of facts being the same, or substantially the same, as in the latter cases, every point which properly belonged to the subject of the allegations would be covered by the adjudication, without regard to the conclusions alleged by the pleader.

Gould v. Evansville & C. R. Co. 91 U. S. 533, 23 L. ed. 418.

Mr. Halleck F. Rose also argued the cause and filed a brief for plaintiffs in error:

Scienter is, by the common law and by the express terms of U. S. Rev. Stat. § 5239, U. S. Comp. Stat. 1901, p. 3515, a necessary and indispensable element of the cause of action for deceit against national bank directors, founded on official reports made to the Comptroller of the currency.

McDonald v. Williams, 174 U. S. 397–408, 43 L. ed. 1022–1026, 19 Sup. Ct. Rep. 743; Cochran v. United States, 157 U. S. 286, 293, 39 L. ed. 704, 706, 15 Sup. Ct. Rep. 628; Lord v. Goddard, 13 How. 211, 14 L. ed. 116; Ming v. Woolfolk, 116 U. S. 599, 602, 29 L. ed. 740, 741, 6 Sup. Ct. Rep. 489; Gordon v. Butler, 105 U. S. 553, 556, 26 L. ed. 1166, 1168; Young v. Covell, 8 Johns. 23, 5 Am. Dec. 316; Kountze v. Kennedy, 147 N. Y. 124, 29 L.R.A. 360, 49 Am. St. Rep. 651, 41 N. E. 414; Powell v. F. C. Linde Co. 171 N. Y. 675, 64 N. E. 1125; Daly v. Wise, 132 N. Y. 306, 16 L.R.A. 236, 30 N. E. 837; Lamb v. Kelsey, 54 N. Y. 645; Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Hubbell v. Meigs, 50 N. Y. 480; Oberlander v. Spiess, 45 N. Y. 175; Marsh v. Falker, 40 N. Y. 562; 20 Cyc. Law & Proc. "Fraud," p. 24.

The specific regulations adopted by Congress to safeguard the interests of depositors and to insure faithful administration by directors are exclusive. They preclude all local state regulations and interference. Their uniform enforcement throughout the land is essential to the preservation and maintenance, as a public utility, of this national institution.

Cook County Nat. Bank v. United States, 107 U. S. 445, 448, 27 L. ed. 537, 538, 2 Sup. Ct. Rep. 561; Easton v. Iowa, 188 U. S. 220–239, 47 L. ed. 452–460, 23 Sup. Ct. Rep. 288; Davis v. Elmira Sav. Bank, 161 U. S. 275–290, 40 L. ed. 700–703, 16 Sup. Ct. Rep. 502; McDonald v. Williams, 174 U. S. 397, 43 L. ed. 1022, 19 Sup. Ct. Rep. 743.

Most of the states have usury laws, and the state courts have frequently applied the penalties prescribed by state laws to national banking associations. Whenever such judgments have been here for review, this court has held the remedy provided by the act of Congress to be exclusive, and has reversed the judgments of the state courts applying the rule of the local forum.

Barnet v. Muncie Nat. Bank, 98 U. S. 555, 25 L. ed. 212; Stephens v. Monongahela Nat. Bank, 111 U. S. 197, 28 L. ed. 399, 4 Sup. Ct. Rep. 366; Haseltine v. Central Nat. Bank, 183 U. S. 132, 46 L. ed. 118, 22 Sup. Ct. Rep. 50; Schuyler Nat. Bank v. Gadsden, 191 U. S. 451, 48 L. ed. 258, 24 Sup. Ct. Rep. 129; Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29–37, 23 L. ed. 196–200.

The conception of a nationality with supreme authority when acting within its delegated powers, and whose exercise of authority within such powers was so far a restraint upon state sovereignty, led Chief Justice Marshall to the conclusion that the regulations prescribed by Congress for the government of the Bank of the United States were exclusive and precluded local interference by the states, even in the matter of taxation, in the absence of any explicit prohibition in the act itself.

M'Culloch v. Maryland, 4 Wheat. 316–437, 4 L. ed. 579–609; Osborn v. Bank of United States, 9 Wheat. 738–903, 6 L. ed. 204–243; Bank of United States v. Planters' Bank, 9 Wheat. 904, 6 L. ed. 244. See also Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 155, 29 L. ed. 845, 846, 6 Sup. Ct. Rep. 670.

Messrs. J. W. Deweese, Frank E. Bishop, and Halleck F. Rose filed an additional brief for plaintiffs in error:

No particular form of words or phrases has ever been adjudged necessary, in which the claim of Federal rights must be asserted in the state court. It is sufficient if it appears from the record that such rights were either specially set up, or were claimed in such manner as to bring them to the attention of the state court, and refer them to that court for decision.

California Nat. Bank v. Kennedy, 167 U. S. 362–371, 42 L. ed. 198–201, 17 Sup. Ct. Rep. 831; Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530–540, 46 L. ed. 673–679, 22 Sup. Ct. Rep. 446; Sweringen v. St. Louis, 185 U. S. 38–47, 46 L. ed. 795–800, 22 Sup. Ct. Rep. 569; Home for Incurables v. New York, 187 U. S. 155–158, 47 L. ed. 117, 118, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; Mutual L. Ins. Co. v. McGrew, 188 U. S. 308, 309, 47 L. ed. 484, 485, 63 L.R.A. 33, 23 Sup. Ct. Rep. 23; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58–82, 43 L. ed. 364–374, 19 Sup. Ct. Rep. 97; Erie R. Co. v. Purdy, 185 U. S. 153, 46 L. ed. 850, 22 Sup. Ct. Rep. 605; Leigh v. Green, 193 U. S. 85, 48 L. ed. 626, 24 Sup. Ct. Rep. 390; Carter v. Texas, 177 U. S. 445, 44 L. ed. 841, 20 Sup. Ct. Rep. 687; Meyer v. Richmond, 172 U. S. 82–86, 43 L. ed. 374–381, 19 Sup. Ct. Rep. 106; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

The element of scienter was definitely and entirely excluded by the Nebraska supreme court.

Gerner v. Mosher, 58 Neb. 185, 48 L.R.A. 244, 78

To [illegible] or in the association to recover in this [illegible] against the directors, other than [illegible] actually made the

false entries in the reports, the depositor must show that the director did the act knowingly, or knowingly permitted the falsifications to be made. To sustain the judgment, the record should show that the trial court, by appropriate instructions, imposed this burden upon the depositor.

Cochran v. United States, 157 U. S. 293, 39 L. ed. 706, 15 Sup. Ct. Rep. 628; United States v. Britton, 107 U. S. 667, 668, 27 L. ed. 524, 525, 2 Sup. Ct. Rep. 512.

The provisions of the Federal statute are controlling and exclusive.

California Nat. Bank v. Kennedy, 167 U. S. 366, 367, 42 L. ed. 200, 17 Sup. Ct. Rep. 831; McClellan v. Chipman, 164 U. S. 347, 41 L. ed. 461, 17 Sup. Ct. Rep. 85; Davis v. Elmira Sav. Bank, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep. 502; Easton v. Iowa, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. Rep. 288; Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196.

Mr. John J. Thomas argued the cause, and, with Messrs. Richard S. Norval and William B. C. Brown, filed a brief for defendant in error:

The directors of a bank who publish false statements of its condition thereby represent that the matters of fact therein stated are within their personal knowledge; and if they have no such knowledge the statement is knowingly false.

Prescott v. Haughey, 65 Fed. 653; Gerner v. Thompson, 74 Fed. 125; Merchants' Nat. Bank v. Thomas, 11 Ohio Dec. Reprint, 632; Solomon v. Bates, 118 N. C. 312, 54 Am. St. Rep. 725, 24 S. E. 478; Bartholomew v. Bentley, 15 Ohio, 659, 45 Am. Dec. 598; Marshall v. Farmers' & M. Sav. Bank, 85 Va. 676, 2 L.R.A. 534, 17 Am. St. Rep. 90, 8 S. E. 586; Westervelt v. Demarest, 46 N. J. L. 37, 50 Am. Rep. 400; Seale v. Baker, 70 Tex. 283, 8 Am. St. Rep. 592, 7 S. W. 742; Zinn v. Mendel, 9 W. Va. 580; Schley v. Dixon, 24 Ga. 273, 71 Am. Dec. 121; Weir v. Barnett, L. R. 3 Exch. Div. 32; Killen v. Barnes, 106 Wis. 546, 82 N. W. 536; Barnes v. Pogue, 11 Ohio Dec. Reprint, 798; Cassidy v. Uhlmann, 170 N. Y. 528, 63 N. E. 554; United Society v. Underwood, 9 Bush, 609, 15 Am. Rep. 731; Delano v. Case, 121 Ill. 247, 2 Am. St. Rep. 81, 12 N. E. 676; Stuart v. Bank of Staplehurst, 57 Neb. 576, 78 N. W. 298; Gerner v. Mosher, 58 Neb. 135, 46 L.R.A. 244, 78 N. W. 384, Affirmed in 61 Neb. 100, 84 N. W. 596; 1 Morawetz, Priv. Corp. § 573; 3 Thomp. Corp. §§ 4091, 4145; 2 Thomp. Corp. § 1472; 21 Am. & Eng. Enc. Law, 2d ed. p. 880; 3 Am. & Eng. Enc. Law, 2d ed. p. 845; 14 Am. & Eng. Enc. Law, 2d ed. pp. 151, 154; Auten v. United States Nat. Bank, 174 U. S. 147, 43 L. ed. 928, 19 Sup. Ct. Rep. 637; Briggs v. Spaulding, 141 U. S. 141, 35 L. ed. 665, 11 Sup. Ct. Rep. 924; McClure v. People, 27 Colo. 371, 61 Pac. 617; Hall v. Henderson, 126 Ala. 495, 61 L.R.A. 621, 85 Am. St. Rep. 53, 28 So. 544. See also note to Henry v. Dennis, 85 Am. St. Rep. 388.

While it is said that to constitute actionable fraud there must be scienter, it is universally conceded this does not mean actual knowledge; and where the representation is of a fact, made by one in position to know, whose duty it is to know, or where it would constitute gross negligence not to know, such knowledge will be conclusively presumed.

Houston v. Thornton, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827; Taylor v. Commercial Bank, 68 App. Div. 458, 73 N. Y. Supp. 924; Snively v. Meixsell, 97 Ill. App. 365; Beatty v. Bulger, 28 Tex. Civ. App. 117, 66 S. W. 893; Cooper v. Schlesinger, 111 U. S. 148, 28 L. ed. 382, 4 Sup. Ct. Rep. 360; Lehigh Zinc & I. Co. v. Bamford, 150 U. S. 665, 37 L. ed. 1215, 14 Sup. Ct. Rep. 219; Hindman v. First Nat. Bank, 57 L.R.A. 108, 50 C. C. A. 623, 112 Fed. 931; Martin v. Webb, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428; Morse, Banks & Banking, §§ 132, 133; Hadcock v. Osmer, 153 N. Y. 604, 47 N. E. 923; Rothschild v. Mack, 115 N. Y. 7, 21 N. E. 726; Kountze v. Kennedy, 147 N. Y. 124, 29 L.R.A. 360, 49 Am. St. Rep. 651, 41 N. E. 414; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 9 Am. St. Rep. 727, 18 N. E. 168; 20 Cyc. Law & Proc. p. 27.

U. S. Rev. Stat. § 5239, U. S. Comp. Stat. 1901, p. 3515, neither abrogates nor modifies the common-law action of deceit.

Sutherland, Stat. Constr. 1st ed. § 399, 2d ed. § 572; Sedgw. Stat. & Const. Law, p. 323; People v. Craycroft, 2 Cal. 243, 56 Am. Dec. 331; Dygert v. Schenck, 23 Wend. 446, 35 Am. Dec. 575; Swarthout v. New Jersey S. B. Co. 48 N. Y. 209, 8 Am. Rep. 541; Hooker v. New-Haven & N. Co. 14 Conn. 146, 36 Am. Dec. 477; Mapel v. John, 42 W. Va. 30, 32 L.R.A. 800, 57 Am. St. Rep. 839, 24 S. E. 608; Hickman v. Kansas City, 120 Mo. 110, 23 L.R.A. 658, 41 Am. St. Rep. 684, 25 S. W. 225; Dawson v. Miller, 20 Tex. 171, 70 Am. Dec. 380; Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 27 L.R.A. 263, 46 Am. St. Rep. 92, 13 So. 602; North Pacific Lumber Co. v. Lang, 28 Or. 246, 52 Am. St. Rep. 780, 42 Pac. 799; Lang v. Scott, 1 Blackf. 405, 12 Am. Dec. 257; Crittenden v. Wilson, 5 Cow. 165, 15 Am. Dec. 462; Methodist Church v. Remington, 1 Watts, 218, 26 Am. Dec. 61; Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Solomon v. Bates, 118 N. C. 312, 54 Am. St. Rep. 725, 24 S. E. 478; Barnes v. Swift, 3 Ohio N. P. 291; King v. Pomeroy, 58 C. C. A. 209, 121 Fed. 287; Flynn v. Third Nat. Bank, 122 Mich. 642, 81 N. W. 572; Guthrie v. Harkness, 199 U. S.

148, 50 L. ed. 130, 26 Sup. Ct. Rep. 4; Whittemore v. Amoskeag Nat. Bank, 134 U. S. 527, 33 L. ed. 1002, 10 Sup. Ct. Rep. 592; Re Chetwood, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385; Boyd v. Schneider, 65 C. C. A. 209, 131 Fed. 223.

The defendants' liability grew out of the acts of fraud committed by them, and not through the grant of any privilege in the national banking act.

Oregon Short Line & U. N. R. Co. v. Skottowe, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869.

The facts giving the Federal courts jurisdiction must affirmatively appear from the plaintiff's own statement.

Hanford v. Davies, 163 U. S. 279, 41 L. ed. 159, 16 Sup. Ct. Rep. 1051; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654.

And where there is doubt as to the pleader's meaning, the averments will be resolved against, rather than for, the claim of Federal jurisdiction.

Plant v. Harrison, 101 Fed. 307; Fitzgerald v. Missouri P. R. Co. 45 Fed. 812.

Assuming that the petitions do contain a cause of action for negligence, they contain two causes of action, of one of which the state court has exclusive jurisdiction; the other raises a Federal question. If defendants desired to have these causes separately stated and numbered, they should have filed a motion to that effect; and having failed to do so they will be deemed to have waived it.

Exeter Nat. Bank v. Orchard, 43 Neb. 581, 61 N. W. 833.

If a petition states facts sufficient to constitute an action for deceit, and is therein sustained by the evidence, the judgment will be sustained although the petition also contains a Federal question.

Hammond v. Johnston, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141; Delaware City, S. & P. S. B. Nav. Co. v. Reybold, 142 U. S. 636, 35 L. ed. 1141, 12 Sup. Ct. Rep. 290; Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; Hale v. Akers, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; Eustis v. Bolles, 150 U. S. 362, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Kennebec & P. R. Co. v. Portland & K. R. Co. 14 Wall. 23, 20 L. ed. 850; Rector v. Ashley, 6 Wall. 142, 18 L. ed. 733; Gibson v. Chouteau, 8 Wall. 314, 19 L. ed. 317; Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635.

This court will not review the decision of a state court in an action at law upon a pure question of fact, although a Federal question would or would not be presented, according to the way in which the question of fact was decided.

Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452.

This court cannot proceed, in reviewing a state court, upon general ideas of the requirements of natural justice, apart from the provisions of the Constitution supposed to be involved.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.

To constitute a judgment a bar to a future action, it must have been on the merits.

24 Am. & Eng. Enc. Law, 2d ed. pp. 794, 798, 799; 2 Black, Judgm. §§ 693, 694, 695.

A litigant who mistakes his remedy does not thereby lose his cause of action.

State ex rel. Woodruff-Dunlap Printing Co. v. Cornell, 52 Neb. 25, 71 N. W. 961.

Mr. Lionel C. Burr also argued the cause, and, with Mr. Charles L. Burr, filed a brief for defendant in error:

The action having been twice remanded from the Federal to the state court, this court has no jurisdiction to review the several orders to remand, or of the parties to or subject-matter of this action.

Re Pennsylvania Co. 137 U. S. 451, 34 L. ed. 740, 11 Sup. Ct. Rep. 141; Birdseye v. Schaffer, 140 U. S. 117, 35 L. ed. 402, 11 Sup. Ct. Rep. 885; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; Gurnee v. Patrick County, 137 U. S. 141, 34 L. ed. 601, 11 Sup. Ct. Rep. 34; Richmond & D. R. Co. v. Thouron, 134 U. S. 45, 33 L. ed. 871, 10 Sup. Ct. Rep. 517.

Again, it has become the law of this case that no Federal question was set up or alleged in the original petition or in the amended petition in this action.

Bailey v. Mosher, 74 Fed. 16; Jones v. Mosher, 46 C. C. A. 471, 107 Fed. 561.

A suit cannot be one arising under the Constitution or laws of the United States, until it has in some way been made to appear on the face of the record that some title, right, privilege, or immunity upon which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by an opposite construction.

Starin v. New York, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 23; Germania Ins. Co. v. Wisconsin, 119 U. S. 473, 30 L. ed. 461, 7 Sup. Ct. Rep. 260; New Orleans v. Benjamin, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905.

The judicial co[illegible]tion does not depend upon the validity o[illegible] claim set up under the Constitution [illegible] laws of the United States, but u[illegible] fact that the claim

volves a real and substantial dispute or ntroversy in the suit.

Nashville, C. & St. L. R. Co. v. Taylor, 86 ed. 168; St. Paul, M. & M. R. Co. v. St. aul & N. P. R. Co. 15 C. C. A. 167, 32 U. . App. 372, 68 Fed. 2; St. Joseph & G. I. R. o. v. Steele, 167 U. S. 659, 42 L. ed. 315, 7 Sup. Ct. Rep. 925.

A claim which in fact depends upon questions of local or general law is not within ie jurisdiction, even though a reference is ade to a Federal statute.

St. Paul, M. & M. R. Co. v. St. Paul & . P. R. Co. supra.

The existence of a Federal question must e shown upon the face of plaintiff's declaraon or bill, in order to give Federal jurisdicon; and it cannot be established by a petion for a removal, answer, or demurrer.

Indiana use of Delaware County v. Allehany Oil Co. 85 Fed. 870; Tennessee v. nion & Planters' Bank, 152 U. S. 454, 38 . ed. 511, 14 Sup. Ct. Rep. 654; Pacific Gas nprov. Co. v. Ellert, 64 Fed. 421; Florida & P. R. Co. v. Bell, 31 C. C. A. 9, 59 . S. App. 189, 87 Fed. 369.

In order to give this court jurisdiction to view the judgment of a state court against title or right set up or claimed under a atute of, or an authority exercised under, e United States, the title or right must of the plaintiff in error, and not of a ird person only.

Owings v. Norwood, 5 Cranch, 344, 3 L. ed. 0; Montgomery v. Hernandez, 12 Wheat. 9–132, 6 L. ed. 575, 576; Henderson v. nnessee, 10 How. 311, 13 L. ed. 434; Hale Gaines, 22 How. 144–160, 16 L. ed. 264–9; Long v. Converse, 91 U. S. 105, 23 L. . 233; Giles v. Little, 134 U. S. 650, 33 L. . 1063, 10 Sup. Ct. Rep. 623; Ludeling v. affe, 143 U. S. 305, 36 L. ed. 314, 12 Sup. . Rep. 439.

Jurisdiction in such case cannot be inred argumentatively from averments in e pleadings, but the averments must be sitive.

Hanford v. Davies, 163 U. S. 273, 41 L. . 157, 16 Sup. Ct. Rep. 1051.

A question of assessment of a national nk is not a Federal question.

Williams v. Weaver, 100 U. S. 547, 25 L. . 708.

This court is bound by the findings of the al court, which were sustained by the suème court of the state, and they are conisive and binding upon this court.

Egan v. Hart, 165 U. S. 191, 41 L. ed. 681, Sup. Ct. Rep. 300.

In the case at bar the plaintiffs in error s well as defendants in error) did not ecially plead, set up, or claim any right all under any special law or statute of e United States; neither was there an issue raised by or between any allegations in the petition and the answer of plaintiffs in error, or by the reply, as to any Federal right, privilege, or immunity or claim of right by either of the parties to this action.

Zadig v. Baldwin, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639; Levy v. Superior Court, 167 U. S. 175, 42 L. ed. 126, 17 Sup. Ct. Rep. 769; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Muse v. Arlington Hotel Co. 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; Union Mut. L. Ins. Co. v. Kirchoff, 169 U. S. 103, 42 L. ed. 677, 18 Sup. Ct. Rep. 260; Kipley v. Illinois, 170 U. S. 182, 42 L. ed. 998, 18 Sup. Ct. Rep. 550; Western U. Teleg. Co. v. Ann Arbor R. Co. 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; King v. McLean Asylum, 12 C. C. A. 139, 21 U. S. App. 407, 64 Fed. 325; Whittemore v. Amoskeag Nat. Bank, 134 U. S. 527, 33 L. ed. 1002, 10 Sup. Ct. Rep. 592; Schuyler Nat. Bank v. Bollong, 150 U. S. 85, 37 L. ed. 1008, 14 Sup. Ct. Rep. 24; Eustis v. Bolles, 150 U. S. 362, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Baldwin v. Kansas, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; Brown v. Massachusetts, 144 U. S. 573–580, 36 L. ed. 546–550, 12 Sup. Ct. Rep. 757; Chappell v. Bradshaw, 128 U. S. 134, 32 L. ed. 370, 9 Sup. Ct. Rep. 40; Brooks v. Missouri, 124 U. S. 394, 400, 31 L. ed. 454, 458, 8 Sup. Ct. Rep. 443; Morrison v. Watson, 154 U. S. 115, 38 L. ed. 929, 14 Sup. Ct. Rep. 995.

The assignments of error in the case at bar relate only to errors of the supreme court of Nebraska, not to errors relating to some Federal right properly set up or claimed in the trial court.

Miller v. Texas, 153 U. S. 538, 38 L. ed. 813, 14 Sup. Ct. Rep. 874. It is the law of Nebraska, well settled by a long line of decisions, that the supreme court can review only the errors alleged in the motion for a new trial; and if no motion for a new trial is made within three days of the verdict, all errors are waived. And it should be remembered that the only jurisdiction the supreme court of Nebraska had in this action was to review the errors alleged in the motion for a new trial, and in turn alleged in a petition in error filed in the supreme court.

Code Civ. Proc. (Neb.) §§ 314, 315, 584; McDonald v. McAllister, 32 Neb. 514, 49 N. W. 377; Nebraska Nat. Bank v. Pennock, 59 Neb. 61, 80 N. W. 255; Courtnay v. Price, 12 Neb. 188, 10 N. W. 698; Republican Valley R. Co. v. Hayes, 13 Neb. 491, 14 N. W. 521; Singer Mfg. Co. v. Doggett, 16 Neb. 609, 21 N. W. 468; Dunham v. Courtnay, 24 Neb. 629, 39 N. W. 784; Cunningham v. Tonnemaker, 13 Neb. 462, 14 N. W. 397; Weir v. Burlington & M. River R. Co. 19 Neb. 215,

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in various forms of expression, but in none of the averments was it specifically asserted that the acts in question were done in consequence of and in compliance *with the pro- [164] visions of the national bank act, although the exhibits attached to the petition disclosed the character of the written reports, which were in part relied upon. The state court overruled an application to remove, and a transcript of the record having been filed in the circuit court, on motion the action was, by that court, remanded to the state court, upon the ground that the petition was "clearly based, not upon the provisions of the national banking act, but upon the liability claimed to arise under the principles of the common law." See Bailey v. Mosher, 74 Fed. 15.

An amended petition was filed, changing somewhat the averments originally made, and supplementing the same by new allegations. After a considerable lapse of time a second amended petition was filed. This latter enumerated many acts of negligence and mismanagement in the conduct of the affairs of the failed bank charged to have caused its insolvency, in addition to the averments which had been made in the original petition. The defendants demurred on the ground of want of jurisdiction, because the result of the pleading as amended was to demonstrate that the whole cause of action relied upon was based upon the violation by the defendants of provisions of the national bank act, and because, under that act, no cause of action in favor of the plaintiff was stated. The day the demurrer was filed the action was removed by the defendants into the circuit court of the United States. That court overruled a motion to remand (see Bailey v. Mosher, 95 Fed. 223), and subsequently the court sustained the demurrer and dismissed the action. Reviewing the action of the circuit court, however, the circuit court of appeals held that in any event the removal had been made too late, "and that the judgment of the lower court dismissing the plaintiff's case was rendered without lawful jurisdiction over the case." 46 C. C. A. 471, 107 Fed. 561. As a result the case went back to the state court, and in that court the demurrer to the second amended petition was argued and overruled.

There was judgment against Stuart, one of the defendants, *for failure to answer the [165] original petition, and this judgment was affirmed by the supreme court of Nebraska. Stuart v. Bank of Staplehurst, 57 Neb. 570, 78 N. W. 298. A separate answer to the second amended petition was filed on behalf of the defendant Thompson and a joint answer on behalf of the defendants Yates and Hamer. In the answer of Thompson it was [illegible] that, while a stockholder, he was

not a director of the Capital National Bank at the time the plaintiff made its various deposits; it was denied that any of the reports set out and referred to in the petition were signed or attested by Thompson, and specifically for himself he denied "all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank, as charged in the said amended petition."

The following paragraph was also set up in the answer:

"This defendant further says that the cause of action set out in the plaintiff's amended petition, if it have any, is founded upon alleged facts which, if true, constitute a violation by this defendant, as a director or stockholder, of his duties as such director or stockholder, as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management of national banks. And this defendant alleges that if any liability attaches to him as a director or stockholder of said bank for any act done or duty neglected as set forth in said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that, in determining the liability of this defendant, there is necessarily involved the construction of said national banking act relating to the duties of directors and stockholders of national banks. That a Federal question is involved in determining the liability of this defendant by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of this defendant."

Matter alleged to constitute an estoppel against the further prosecution of the action, and to operate as a bar to recovery, [166]*was set up in special defenses, which need not, however, be further noticed.

The answers of Yates and Hamer were similar in effect to that of Thompson, except as to the allegation that Thompson was not a director when the plaintiff made his deposits.

The cause was put at issue. Before the trial three of the defendants—Walsh, Hamer, and Phillips—died, and the action was revived against the administrator of Walsh and Hamer, but was not prosecuted further against the estate of Phillips. The companion actions brought by different plaintiffs were tried with the case at bar by a jury, and there was verdict against all the defendants then before the court, upon which judgment was entered except as to the administrator of Walsh, in whose favor judgment was entered by the court upon special findings as to him made by the jury. After the correction of an error in the amount of the judgment the case was taken to the supreme court of Nebraska, where the judgment was affirmed. 105 N. W. 287. This writ of error was then sued out, apparently on behalf of all the defendants. We assume, however, that Charles W. Mosher and R. C. Outcalt, two of the defendants below, have abandoned the prosecution of the writ. We so assume because no cost bond appears to have been furnished by either; because neither has appeared at the bar by counsel and no brief in their behalf has been filed, and, on the contrary, in the brief of the defendants in error it is stated that the persons named did not prosecute error, which we take to mean that the parties referred to have abandoned in this court the prosecution of the writ of error which was sued out in their names, and because the bill of exceptions does not contain the answers of those defendants nor the evidence relating to their case, which would be pertinent to consider if we were called upon to determine whether prejudicial error was committed as to them. None of the remaining plaintiffs in error were officers of the bank, and they were sued simply for acts done as directors thereof.

*A motion to dismiss first requires atten- [167] tion. The asserted want of jurisdiction in this court is based upon the contention that no Federal question was raised in or decided by the state court. But, as will hereafter appear, the record plainly shows that both in the trial and appellate courts an immunity was claimed under § 5239 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3515), at least in respect to the rule of liability applied below, and such immunity was expressly denied by the state court, and there is, therefore, jurisdiction, even if, in other respects, jurisdiction might not be exercised, as to which we are not called upon to decide. Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, ante, 681, 27 Sup. Ct. Rep. 407; Tullock v. Mulvane, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372; Metropolitan Nat. Bank v. Claggett, 141 U. S. 520, 35 L. ed. 841, 12 Sup. Ct. Rep. 60; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496.

To dispose of the controversy presented by the record before us we need only consider the following assignments of error:

"7. The court has erred in deciding that the fact that those plaintiffs in error who were directors were without knowledge of any falsity of the reports attested by them or some of them, mentioned in the petition, was immaterial, and that such directors or any of them were liable under the proofs showing that they were without knowledge of the falsity of such reports; the said de-

26 N. W. 627; Moore v. McCollum, 43 Neb. 617, 47 Am. St. Rep. 767, 62 N. W. 41.

The fact that a suit is brought to recover the amount of a judgment of a court of the United States does not, of itself, make it a suit arising under the Constitution and laws of the United States.

Metcalf v. Watertown, 128 U. S. 587, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; Russell & Winslow's Syllabus Dig. p. 2620.

Mr. Justice White delivered the opinion of the court:

This writ of error is prosecuted to secure the reversal of a judgment of the supreme [163] court of the state of Nebraska, *affirming one entered by a court of Seward county, in that state, upon a verdict of a jury awarding damages against the defendants below, plaintiffs in error here, because of certain acts charged to have been done by them as officers and directors of the Capital National Bank of Lincoln, Nebraska.

We briefly summarize a statement contained in the opinion of the court below concerning a prior action between the same parties. That action, and three others of like character, brought by different plaintiffs, were begun in a county different from that in which the present one was commenced, and recovery was sought, with one exception, from those who were defendants below in this case, of the sum of a loss occasioned by the insolvency and suspension of the Capital National Bank, a corporation organized under the national bank act. The actions referred to were removed into a circuit court of the United States, and in each a motion to remand was overruled, and in one of the cases (brought by Thomas Bailey) the circuit court sustained a demurrer to the petition and dismissed the cause, and the judgment so doing was affirmed by the circuit court of appeals. 11 C. C. A. 304, 27 U. S. App. 339, 63 Fed. 488. The plaintiffs in the other cases thereupon dismissed their actions and commenced new ones, as also did Bailey, in Seward county, of which the case before us is one. The same persons who were impleaded in the prior actions were made defendants, and in two of the actions one Thompson, a director of the bank, who had not been previously sued, was joined as a defendant. The defendants were sought to be made liable for acts done as officers and directors of the Capital National Bank, although it was not expressly alleged that the bank was organized under the national bank act. Reliance in each action was placed upon alleged untrue written and oral statements and representations of the financial condition of the bank, alleged to have been made and published by the defendants, which were fully set out in various forms of expression, but in none of the averments was it specifically asserted that the acts in question were done in consequence of and in compliance *with the pro- [164] visions of the national bank act, although the exhibits attached to the petition disclosed the character of the written reports, which were in part relied upon. The state court overruled an application to remove, and, a transcript of the record having been filed in the circuit court, on motion the action was, by that court, remanded to the state court, upon the ground that the petition was "clearly based, not upon the provisions of the national banking act, but upon the liability claimed to arise under the principles of the common law." See Bailey v. Mosher, 74 Fed. 15.

An amended petition was filed, changing somewhat the averments originally made, and supplementing the same by new allegations. After a considerable lapse of time a second amended petition was filed. This latter enumerated many acts of negligence and mismanagement in the conduct of the affairs of the failed bank charged to have caused its insolvency, in addition to the averments which had been made in the original petition. The defendants demurred on the ground of want of jurisdiction, because the result of the pleading as amended was to demonstrate that the whole cause of action relied upon was based upon the violation by the defendants of provisions of the national bank act, and because, under that act, no cause of action in favor of the plaintiff was stated. The day the demurrer was filed the action was removed by the defendants into the circuit court of the United States. That court overruled a motion to remand (see Bailey v. Mosher, 95 Fed. 223), and subsequently the court sustained the demurrer and dismissed the action. Reviewing the action of the circuit court, however, the circuit court of appeals held that in any event the removal had been made too late, "and that the judgment of the lower court dismissing the plaintiff's case was rendered without lawful jurisdiction over the case." 46 C. C. A. 471, 107 Fed. 561. As a result the case went back to the state court, and in that court the demurrer to the second amended petition was argued and overruled.

There was judgment against Stuart, one of the defendants, *for failure to answer the [165] original petition, and this judgment was affirmed by the supreme court of Nebraska. Stuart v. Bank of Staplehurst, 57 Neb. 578, 78 N. W. 298. A separate answer to the second amended petition was filed on behalf of the defendant Thompson and a joint answer on behalf of the defendants Yates and Hamer. In the answer of Thompson it was averred that, while a stockholder, he was

ot a director of the Capital National Bank t the time the plaintiff made its various eposits; it was denied that any of the eports set out and referred to in the etition were signed or attested by Thompon, and specifically for himself he denied all alleged misconduct and mismanagement f said bank on his part, and all of the aleged neglect of duty and the causing of the nsolvency of said bank, as charged in the aid amended petition."

The following paragraph was also set up n the answer:

"This defendant further says that the ause of action set out in the plaintiff's mended petition, if it have any, is founded pon alleged facts which, if true, constitute violation by this defendant, as a director r stockholder, of his duties as such diector or stockholder, as laid down and deined in the national banking laws of the Jnited States above referred to, concerning he government and management of national anks. And this defendant alleges that if ny liability attaches to him as a director r stockholder of said bank for any act done r duty neglected as set forth in said amend-d petition or otherwise, that such liability s determined and controlled by the naional banking act concerning the managenent of national banks; and that, in deternining the liability of this defendant, there s necessarily involved the construction of aid national banking act relating to the luties of directors and stockholders of naional banks. That a Federal question is inolved in determining the liability of this lefendant by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of this defendant."

Matter alleged to constitute an estoppel against the further prosecution of the action, and to operate as a bar to recovery, was set up in special defenses, which need not, however, be further noticed.

The answers of Yates and Hamer were similar in effect to that of Thompson, except as to the allegation that Thompson was not a director when the plaintiff made his deposits.

The cause was put at issue. Before the trial three of the defendants—Walsh, Hamer, and Phillips—died, and the action was revived against the administrator of Walsh and Hamer, but was not prosecuted further against the estate of Phillips. The companion actions brought by different plaintiffs were tried with the case at bar by a jury, and there was verdict against all the defendants then before the court, upon which judgment was entered except as to the administrator of Walsh, in whose favor judgment was entered by the court upon special findings as to him made by the jury. After the correction of an error in the amount of the judgment the case was taken to the supreme court of Nebraska, where the judgment was affirmed. 105 N. W. 287. This writ of error was then sued out, apparently on behalf of all the defendants. We assume, however, that Charles W. Mosher and R. C. Outcalt, two of the defendants below, have abandoned the prosecution of the writ. We so assume because no cost bond appears to have been furnished by either; because neither has appeared at the bar by counsel and no brief in their behalf has been filed, and, on the contrary, in the brief of the defendants in error it is stated that the persons named did not prosecute error, which we take to mean that the parties referred to have abandoned in this court the prosecution of the writ of error which was sued out in their names, and because the bill of exceptions does not contain the answers of those defendants nor the evidence relating to their case, which would be pertinent to consider if we were called upon to determine whether prejudicial error was committed as to them. None of the remaining plaintiffs in error were officers of the bank, and they were sued simply for acts done as directors thereof.

*A motion to dismiss first requires atten- [167]
tion. The asserted want of jurisdiction in this court is based upon the contention that no Federal question was raised in or decided by the state court. But, as will hereafter appear, the record plainly shows that both in the trial and appellate courts an immunity was claimed under § 5239 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3515), at least in respect to the rule of liability applied below, and such immunity was expressly denied by the state court, and there is, therefore, jurisdiction, even if, in other respects, jurisdiction might not be exercised, as to which we are not called upon to decide. Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, ante, 681, 27 Sup. Ct. Rep. 407; Tullock v. Mulvane, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372; Metropolitan Nat. Bank v. Claggett, 141 U. S. 520, 35 L. ed. 841, 12 Sup. Ct. Rep. 60; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496.

To dispose of the controversy presented by the record before us we need only consider the following assignments of error:

"7. The court has erred in deciding that the fact that those plaintiffs in error who were directors were without knowledge of any falsity of the reports attested by them or some of them, mentioned in the petition, was immaterial, and that such directors or any of them were liable under the proofs showing that they were without knowledge of the falsity of such reports; the said de-

cision is in violation of the provisions of § 5239 of the Revised Statutes of the United States, which makes liability of the directors dependent upon the fact that they knowingly violated or knowingly permitted the violation of the provisions of the national banking act, and participated in or assented to such violation.

"8. The court has erred in deciding that a common-law action of deceit based upon reports of the Capital National Bank made to the Comptroller of the Currency and attested by the directors of such bank can be maintained against such directors, without knowledge of any false statements in such reports, and without any participation in or assent to any violation of the national [168] banking act as essential elements *of the cause of action as required by § 5239 of the Revised Statutes of the United States."

The basis for these assignments is found not only in instructions given by the trial court, but in refusals to give instructions asked by the defendants. The instructions given, which are pertinent to the assignments, and which were duly excepted to below, read as follows:

"Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors may become liable for damages sustained by one depositing money in such bank in reliance upon the false representation of the condition of the bank contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue.

"The director of a bank who publishes or participates in the publication of a report of its condition, by such act asserts that the statements contained in such report are substantially true, and he cannot rely upon his ignorance of the true condition of the bank as a defense to an action, when he, in such published reports, represents the bank to be solvent, if in truth it is not solvent and its assets are fictitious or worthless or its liabilities so much greater than its assets as to render the bank insolvent.

"A director or executive of a national bank is responsible for the making and publication of a false report of its financial condition, though he did not personally make and publish such statement, if he, in any manner, participated in the making or publication thereof. A director of a national bank is presumed to know its true condition and that the law requires a true statement of its affairs to be made and published by the bank from time to time, and if one has been a director or executive officer of such a bank for a long period of time he is presumed to have knowledge of the making and publishing of the statements of its condition, and the burden is cast upon him to overcome this presumption by competent evidence.

*"The jury are instructed that inasmuch as the law required that all reports made by a national bank to the Comptroller of the Currency shall be published at the expense of the bank, in a newspaper at the place where the bank is established, you have a right to consider such published reports as have been introduced in evidence in this action, purporting to have been signed and whose names appear in such published reports as having been authorized by such defendants so appearing to have signed the same."

Of the instructions refused, to which exceptions was taken, we need only quote the following:

"The jury are instructed that if you find from the evidence introduced in reference to any one of the directors named in any one of the said cases that such director did not knowingly violate any of the requirements of the national banking act under which he was acting as such director, but acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant."

Concerning the cause of action and the proof required to justify a recovery, the supreme court of Nebraska said:

"The petitions show misfeasance and mismanagement on the part of the defendants, as officers of the bank, and that the bank thereby sustained damages, but they show more than that. They show that the defendants made and published false and misleading statements concerning the financial condition of the bank, whereby the plaintiffs were induced to become and remain its creditors, to their damage. In short, whatever other allegation may be contained in the petition, they also contain sufficient to constitute a common-law action for deceit. That the party upon whom the deceit or imposition was practised by the officers of a national bank may maintain an action against them in his own name and behalf for damages resulting to him therefrom, and that his right of *action does not rest on the Federal statutes, but the common law, is no longer an open question.

. . . . . .

"It was incumbent on the plaintiffs to establish, by a preponderance of the evidence: (1) That the d[illegible] [illegible]s published the statements purporti[illegible] [illegible]ow the financial condition of the [illegible]ational Bank or participated [illegible]ication thereof; (2)

That such statements were false; (3) That the plaintiffs severally relied upon such statements and believed them to be true, and were thereby misled, to their injury. As to the first proposition, the evidence shows that none of the statements were actually made by all of the defendants, but that each defendant participated in making some of them. It is urged on behalf of the defendant Thompson that he participated in making but one of them. That is a mistake; the evidence is conclusive that he signed and participated in making at least four of them, the first being that made and published December 28, 1886, the last, that made and published July 9, 1891. The mistake arises, perhaps, from the construction which the defendants seem to place on the petitions. The petitions set out two of the statements at length, but it is also alleged that at divers other times and dates, between the 28th day of December, 1886, and the 21st day of January, 1893, the defendants made and published other false and misleading reports purporting to show the condition of the bank which were relied upon by the plaintiff. The defendants appear to take the position that plaintiffs should be restricted to the two reports set out at length. We do not think so. The allegations of the petitions are sufficiently broad to admit proof of any and all statements made on and between the dates just mentioned. If definiteness and certainty required all such statements to be set out at length, the remedy was by motion."

It is not to be doubted that, although the plaintiff alleged the making of false verbal and written statements, there was no attempt to establish any verbal misrepresentations. It is *also certain, even if it be conceded, *arguendo*, that there was some evidence tending to show the making of alleged written representations other than those contained in the official reports made by the association to the Comptroller of the Currency, and published in conformity to the national bank act, that such latter statements were counted upon in the amended petition, and were, if not exclusively, certainly principally, the grounds of the alleged false representations covered by the proof. Under this state of the record, irrespective of the nature and extent of the proof required to maintain an action of deceit at common law, the question is: Did the supreme court of Nebraska rightfully decide that the plaintiff was entitled to recover against the defendant directors upon proof merely of the following facts: "(1) That the defendants published the statements purporting to show the financial condition of the Capital National Bank or participated in the publication thereof; (2) That such statements were false; (3) That the plaintiffs severally relied upon such statements and believed them to be true, and were thereby misled, to their injury?" And the exact import of the propositions which were thus stated by the court below and were made the test of the right of the plaintiff to recover is plainly shown by an opinion of the Nebraska court cited in its opinion in this case; *viz.*, Gerner v. Mosher, 58 Neb. 135, 46 L.R.A. 244, 78 N. W. 384, which involved the liability of the directors of the very same national bank with whose failure this record is concerned. The court said:

"The defendants in the present suit, who, as directors, attested the reports made by the Capital National Bank to the Comptroller of the Currency, by such act vouched for, or certified to, the absolute truthfulness of the statements therein contained, and not that the report was correct so far as the directors knew or had been advised by the proper performance of their duties as directors. The means of information, this record shows, were accessible to them. It was their duty to know whether the reports were correct or not.

*"In our view, whether the attesting di- [172] rectors possessed knowledge of the falsity of their reports is wholly immaterial. They were in fact false and untrue, and those who deposited money with the bank, or who purchased stock of the corporation, in reliance upon the truthfulness of the contents of those reports, were as much deceived and damaged thereby as though the directors, when they signed the reports, knew them to be false. That they were innocent of the true situation or condition of the affairs of the bank is wholly an unimportant consideration, since proof of a *scienter* is not necessary to a recovery. This court has frequently asserted that, to maintain an action for false representations, it is not essential that it be shown that they were intentionally or knowingly made by the defendant. This is the rule in ordinary causes, and no valid reason can be suggested or pointed out why the same principle should not apply in actions for deceit against the directors of a banking corporation. Certainly no case has come under our observation which has made an exception in their favor."

The proper solution of the question above propounded necessitates a consideration of the legislation of Congress respecting national banks.

By § 24 of the national bank act of February 25, 1863 (chap. 58, 12 Stat. at L. 665, 671), each association was required to make and forward to the Comptroller of the Currency quarterly reports, containing "a true

statement of the condition of the association making such report," in respect to enumerated items, and it was provided that such report "shall be verified by the oath or affirmation of the president and cashier, and all wilful false swearing in respect to such report shall be perjury, and subject to the punishment prescribed by law for such offense." It was made the duty of the Comptroller to publish full abstracts of such reports, as to specified items, in newspapers printed in the cities of Washington and New York, "and a separate report of each association" was required to be published, at the expense of the association, in a news-[173]paper *published in the place where such association was established. Associations located in a number of the leading cities were also required to publish, in a newspaper published where the association was located, a statement, under the oath of the president or cashier, of the condition of the association, showing the average amount of loans and discounts, specie, deposits, and circulation. By § 45 the cashier of each association was required after each dividend to make, under oath, "a full, clear, and accurate statement of the condition of the association," enumerating specified particulars, which statement was to be forthwith transmitted to the Comptroller of the Currency The national bank act of June 3, 1864 (chap. 106, 13 Stat. at L. 109), substantially reenacted, in a much condensed form, the requirements as to quarterly reports of the financial condition of each association. The abstract of such reports was required, however, to be published by the Comptroller only in the city of Washington, and *every* association was required to make a monthly statement of its condition under the oath of the president or cashier. For each day after five days' delay in making a report each bank was made liable to a penalty of $100. The act of 1864 did not contain a requirement for the making and transmittal to the Comptroller of a statement following the declaration of a dividend.

By an act approved March 3, 1869 (chap. 130, 15 Stat. at L. 326, U. S. Comp. Stat. 1901, p. 3498), in lieu of the reports required by the national bank act of 1864, it was made the duty of each association, on the requisition of the Comptroller, to make not less than five reports in each year. These reports were not only required to be verified "by the oath or affirmation of the president or cashier of such association," but to be "attested by the signature of at least three of the directors." Publication of such reports was required to be made in a newspaper published in the place where the association was established, and a penalty of $100 for each day's delay after a specified time in making and transmitting the report was authorized to be retained by the Treasurer of the United States out of interest due the association. *Each association was also[174] required to make a report, attested by the oath of its president or cashier, within ten days after the declaration of a dividend, stating the amount of each dividend and the amount of net earnings in excess of such dividends.

As embodied in the Revised Statutes the provision became § 5211 (U. S. Comp. Stat. 1901, p. 3498), and is copied in the margin.†

By § 39 of the act of 1863, as well as by § 9 of the act of 1864, a director of a national bank was required, *inter alia*, as he is now required by § 5147, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3464), to "take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title." In the acts of 1863 and 1864 the concluding word used was not "title," but "act."

Sections 50 and 52 of the act of 1863 (12 Stat. at L. 679, 680, chap. 58) were practically identical, and §§ 53 and 55 of the act of 1864 (13 Stat. at L. 116, chap. 106, U. S. Comp. Stat. 1901, pp. 3515, 3497) were also substantially alike, and by those sections civil and criminal liabilities were authorized to be assessed against and imposed upon directors of banking associations in certain contingencies. Section 52 of the act of 1863 *and § 55 of the act of 1864—as supplement-[175]

†Sec. 5211. Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail, and under appropriate heads, the resources and liabilities of the [associations] [association] at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and, in the same form in which it is made to the Comptroller, shall be published in a newspaper published in the place where such association is established, or, if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever, in his [illegible]ment, the same are necessary in order [illegible] a full and complete knowledge of its condition.

the act of April 6, 1869 (chap. 11, .. at L. 7), construed in the act of 1870 (chap. 226, 16 Stat. at L. 195, 'omp. Stat. 1901, p. 3497), making it ıse to aid or abet an officer or agent association in doing the acts pro- in § 55 of the act 1864, with intent ıud or deceive—became § 5209 of the l Statutes (U. S. Comp. Stat. 1901,). It is copied in the margin.†

on 50 of the act of 1863 and § 53 of of 1864 became § 5239 of the Revised s, reading as follows:

5239. If the directors of any na- banking association shall knowingly or knowingly permit any of the of- ıgents, or servants of the association ate, any of the provisions of this ll the rights, privileges, and fran- of the association shall be thereby d. Such violation shall, however, be ned and adjudged by a proper cir- istrict, or territorial court of the States, in a suit brought for that by the Comptroller of the Cur- n his own name, before the associa- all be declared dissolved. And in f such violation, every director who ated in or assented to the same shall liable in his personal and individual r for all damages which the associa- s shareholders, or any other person, ıve sustained in consequence of such n."

n the early acts relating to the na- ›anks, so in the sections of the Re- tatutes on the same subject, there ny provisions specifically enjoining ıg or not doing of certain acts by the ion or its officers. Thus, by § 5137, at., U. S. Comp. Stat. 1901, p. 3460 'ly § 28 of the act of 1864), a na- ank is prohibited from acquiring real or purposes other than those speci- he act, and is forbidden to hold real under certain contingencies, more specified length of time; by § 5200, at., U. S. Comp. Stat. 1901, p. 3494 ly § 29 of the act of 1864), it is pro- to loan to any person or corporation s of one tenth of the capital stock k; by § 5201, Rev. Stat., U. S. Comp. Stat. 1901, p. 3494 (formerly § 35 of the act of 1864), banking associations are forbidden to loan or purchase their own stock; by § 5202, Rev. Stat., U. S. Comp. Stat. 1901, p. 3494 (formerly § 36 of the act of 1864), associations are forbidden to become indebted or become in any way liable exceeding the amount of their capital stock except on account of specified demands; by § 5203, Rev. Stat., U. S. Comp. Stat. 1901, p. 3495 (formerly section 37 of the act of 1864), a restriction is imposed upon the use of circulating notes; by § 5204, Rev. Stat., U. S. Comp. Stat. 1901, p. 3495 (formerly § 38 of the act of 1864), the withdrawal of the capital of an association while continuing its operations is forbidden, either in tne form of dividends or otherwise; and § 5206, Rev. Stat., U. S. Comp. Stat. 1901, p. 3496 (formerly § 39 of the act of 1864), embodies a restriction upon the use of notes of other banks. In addition to these sections of course may be considered the various sections enjoining the making and publishing of periodical reports of the association, to which we have heretofore referred.

It thus becomes obvious that the national bank act imposes upon directors duties which would not rest upon them at common law, and that among such duties is the furnishing to the Comptroller of the Currency reports concerning the condition of the bank and the publication thereof. Although the statutory provisions subsequent to the act of 1863, relating to the making and publishing of such reports, do not, as did *the act of [177] 1863, expressly require that the report, when made, should contain a "true" statement of the condition of the association, yet, by necessary implication, such is the character of the statement required to be made, and by the like implication the making and publishing of a false report is prohibited.

Considering the text of the national bank act, as now embodied in the Revised Statutes, including § 5239, we think the latter section affords the exclusive rule by which to measure the right to recover damages from directors, based upon a loss alleged to have resulted solely from the violation by such directors of a duty expressly imposed upon them by a provision of the act. By the

. 5209. Every president, director, teller, clerk, or agent of any asso- who embezzles, abstracts, or wil- isapplies any of the moneys, funds, ts of the association, or who, with- hority from the directors, issues or circulation any of the notes of the ion; or who, without such authority, puts forth any certificate of depos- 's any order or bill of exchange, ıny acceptance, assigns any note, aft, bill of exchange, mortgage, judg- decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association or any agent appointed to examine the affairs of any such association; and every person who, with like intent, aids or abets any officer, clerk, or agent in any violation of this section,—shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

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first sentence of the section mentioned a forfeiture of the charter is entailed "if the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate, any of the provisions of this title." And the last sentence ordains the rule by which civil liability is to be determined, by providing that "every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation." As the section thus comprehends all the express commands to do or not to do, as to directors, contained in the national bank act, and besides specifies the nature of the conduct of directors from which their civil liability for violation of such commands may arise, it results that liability cannot be entailed upon them by exacting a different and higher standard of conduct as regards such commands than that established by the statute without depriving directors of an immunity conferred upon them. That the words "shall knowingly violate, or knowingly permit," etc., found in the first sentence of § 5239, Rev. Stat., were intended to express the rule of conduct which the statute established as a prerequisite to the liability of directors for a violation of the express pro-
[178] visions *of the title relating to national banks, is additionally shown by the oath which a director is required to take, wherein, as already stated, he swears "that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title." Mark the contrast between the general common-law duty to "diligently and honestly administer the affairs of the association" and the distinct emphasis embodied in the promise not to "knowingly violate, or willingly permit to be violated, any of the provisions of this title." In other words, as the statute does not relieve the directors from the common-law duty to be honest and diligent, the oath exacted responds to such requirements. But as, on the other hand, the statute imposes certain express duties and makes a knowing violation of such commands the test of civil liability, the oath in this regard also conforms to the requirements of the statute by the promise not to "knowingly violate, or willingly permit to be violated, any of the provisions of this title."

And general considerations as to the spirit and intent of the national bank act (Easton v. Iowa, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. Rep. 288; Davis v. Elmira Sav. Bank, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep 502) also render necessary the conclusion that the measure of responsibility concerning the violation by directors of express commands of the national bank act is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act. Thus, a contrary conclusion would lead to a varying measure of responsibility in the several states in which the question of liability might arise, depending upon the conceptions of the state courts of last resort as to the meaning of the act of Congress imposing the duty. Hence, it would follow that the same provision of the statute might mean one thing in one state and a different thing in another. The confusion which would result is aptly illustrated by a review made by the supreme court of Ohio in the recent case of Mason v. Moore, 73 Ohio St. 275, 4 L.R.A. (N.S.) 597, 76 N. E. 932, of the conflicting state adjudications as to the *proper rule to [179] be applied to fix the liability of bank directors to third persons in an action of deceit at common law. The frustration of the public policy embodied in the national bank system by the crippling of the usefulness of such institutions, which would result from holding that directors, in performing the duties imposed upon them by the national bank act, might be held liable civilly, not by the standard of conduct which the act provides for a violation of its express commands, but by another and different one, is apparent. Under such a conception it might well be that prudent and responsible persons would decline to assume the discharge of the duties imposed by the statute because of the hazard of an uncertain pecuniary liability which the statute imposing the duty did not contemplate.

The civil liability of national bank directors, then, in respect to the making and publishing of the official reports of the condition of the bank, a duty solely enjoined by the statute, being governed by the national bank act, it is self-evident that the rule expressed by the statute is exclusive, because of the elementary principles that when a statute creates a duty and prescribes a penalty for nonperformance, the rule prescribed in the statute is the exclusive test of liability. Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 35, 23 L. ed. 196, 198, and cases cited. The error in the doctrine below becomes at once apparent when its correctness is tested by the rule that the statute is applicable and prescribes the exclusive test of [illegible]y. The doctrine, as we have s[illegible] which the court below rested its j[illegible] is that directors of a national [illegible] rely negligently per-

ticipated in or assented to the making and publishing of an untrue official report of the condition of the bank were civilly liable to anyone deceived to his injury by such report. Indeed, in one aspect, the ruling below went further than this, since it was, in substance, decided that, despite the exercise of diligence by the director, if he attested an untrue report he was civilly liable, because he did so at his risk, since it was his duty to know or to refrain from acting.]That this imposed a *higher standard of conduct than was required by the statute is obvious, but is clearly also established by previous decisions of this court, pointing out that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required; that is, that the violation must in effect be intentional. McDonald v. Williams, 174 U. S. 397, 43 L. ed. 1022, 19 Sup. Ct. Rep. 743; Potter v. United States, 155 U. S. 438, 446, 39 L. ed. 214, 217, 15 Sup. Ct. Rep. 144, and cases cited. See, also, Utley v. Hill, 155 Mo. 232, 264, et seq. 49 L.R.A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091, and cases cited.

Of course, in what has been said we have confined ourselves to the precise question arising for decision, and therefore must not be understood as expressing an opinion as to whether and to what extent directors of national banks may be civilly liable by the principles of the common law for purely voluntary statements made to individuals or the public, embodying false representations as to the financial condition of the bank, by which one who has rightfully relied upon such representation has been damaged. And because we have applied in this case to the duty expressly imposed by the statute the standard of conduct established therein we must not be considered as expressing an opinion upon the correctness of the views enunciated by the court below concerning the standard which should be applied solely under the principles of the common law, to fix the civil liabilities of directors in an action of deceit. See Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924.

There is a suggestion that the subject-matter of this controversy is so inherently Federal that, although the judgments of the circuit court and of the circuit court of appeals, remanding the cause to the state court, may not be re-examined (25 Stat. at L. 435, chap. 866, U. S. Comp. Stat. 1901, p. 509), nevertheless it should now be decided that the state court was wholly devoid of jurisdiction. This claim is predicated upon the provision of § 5239, Rev. Stat., conferring exclusive jurisdiction on courts of the United States to declare a forfeiture of the charter of a national bank as the result of wrongs committed by the directors, and the contention that a declaration of such forfeiture is a prerequisite to *an action to en- [181] force the civil liability of directors, and that such action could only be brought in the court of the United States after a forfeiture has been adjudged. We content ourselves with saying that we think these contentions are without merit.

It follows from what has been said that, as to Mosher and Outcalt, two of the persons named as plaintiffs in error in the writ and citation, the writ of error is dismissed for want of prosecution; as to the other plaintiffs in error, the judgment below is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

CHARLES E. YATES et al., Plffs. in Err.,
v.
UTICA BANK. (No. 231.)

CHARLES E. YATES et al., Plffs. in Err.,
v.
THOMAS BAILEY. (No. 232.

CHARLES E. YATES et al., Plffs. in Err.,
v.
BANK OF STAPLEHURST. (No. 233.)

(See S. C. Reporter's ed. 181-185.)

Judgments—res judicata.

A judgment sustaining a demurrer to the petition in an action by a creditor of a national bank against the directors, because the court was of the opinion that the petition only stated a right to recover for violations of the national bank act, causing damage to the bank as such, the right to recover for which was an asset of the bank, enforceable only by its receiver, is not a bar to a recovery in another action between the same parties under a petition which sets up a right to recover for the individual loss suffered, as distinct from the right of the bank.

[Nos. 231, 232, 233.]

Argued March 8, 11, 1907. Decided May 13, 1907.

NOTE.—On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

As to consequences of a nonsuit or dismissal of complaint—see note to Homer v. Brown, 14 L. ed. U. S. 970.

IN ERROR to the Supreme Court of the State of Nebraska to review judgments affirming judgments of the District Court of Seward County, in that state, in favor of plaintiffs in actions to charge the directors and officers of a national bank with liability for false representations as to the bank's financial condition. Dismissed for want of prosecution as to some of the plaintiffs in error, and reversed as to the others, and remanded for further proceedings.

See same case below (Neb.) 105 N. W. 287.

The facts are stated in the opinion.

Messrs. J. W. Deweese and Halleck F. Rose argued the cause, and, with Mr. Frank E. Bishop, filed a brief for plaintiffs in error.

Mr. John J. Thomas argued the cause, and, with Messrs. Richard S. Norval and William B. C. Brown, filed a brief for defendants in error.

Mr. Lionel C. Burr also argued the cause, and, with Mr. Charles L. Burr, filed a brief for defendants in error.

For their contentions see their briefs as reported in Yates v. Jones Nat. Bank, ante, 1002.

Mr. Justice White delivered the opinion of the court:

These are the actions referred to in the opinion just announced in No. 230, Yates v. Jones Nat. Bank [206 U. S. 158, ante, 1002, 27 Sup. Ct. Rep. 638], as companion actions with that case and as having been tried with it. The issues raised below and the questions of law which here arise for decision are, therefore, the same as in No. 230, and the reasons given in the opinion in that case require a reversal of the judgments in these.

In the Bailey Case (No. 232), however, there is a question not presented in the others, which, if determined in favor of the plaintiffs in error in that case, will finally settle that particular controversy. Referring, therefore, to the opinion in the Jones Nat. Bank Case for the general grounds of reversal in the three cases, we come to consider the particular ground which is additionally relied upon in the Bailey Case as establishing that the decree of reversal in that case should be made conclusive of the entire controversy.

By a "second defense," the defendants pleaded as *res judicata* a judgment asserted to have been rendered in their favor in an action brought by the same plaintiff in Lancaster county, Nebraska, which was re-
[183] moved into the circuit court *of the United States, where, upon the sustaining of a demurrer to the petition, a judgment of dismissal was entered which was, by the circuit court of appeals, affirmed. 11 C. C. A. 304, 27 U. S. App. 339, 63 Fed. 488.

Despite the introduction in evidence of the judgment roll in the case just referred to, which, for convenience, we term the Lancaster county action, the jury in this case, over the objection and exception of the defendants, were in effect instructed that the judgment in the former action did not operate as a bar to a recovery in the present case. Each defendant, in a motion for a new trial, alleged the commission of error by the court in "failing to give full faith and credit" to the judgment of the circuit court of appeals in the Lancaster county action. The supreme court of Nebraska considered the subject, and as its conclusion was that the judgment of the circuit court of appeals was not *res judicata* of the issues in this cause, it therefore decided that, in refusing to give effect of *res judicata* to such judgment, the trial court had not wrongfully denied the validity of an authority exercised under the United States. The correctness of this conclusion is the particular question to be considered which, as we have said, distinguishes this case from the others.

Whilst the court below found that the Lancaster county action was between the same parties, and, in its opinion, was based substantially upon the same facts, as in the present action, it based its ruling denying the effect of *res judicata* to the prior judgment upon the conclusion that, taking into view both the pleadings and the opinion in the previous action, it must be considered as certain that the case involved a different cause of action from the one presented here. In so concluding we think the court was right.

The judgment relied upon was rendered upon a demurrer. This fact, however, does not affect the cogency of the judgment if otherwise efficacious to bring into play the presumption of the thing adjudged. Northern P. R. Co. v. Slaght, 205 U. S. 122, 128, ante, 738, 27 Sup. Ct. Rep. 442, and authorities there cited. To determine whether the judgment in the former case was conclusive in *this, in view of its uncertainty,[184] we must address ourselves to the pleadings in that case and consider the opinion of the court for the purpose of ascertaining precisely what was concluded by the judgment upon the demurrer. National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 234, 46 L. ed. 157, 169, 22 Sup. Ct. Rep. 111, [illegible] cases cited. Coming to do so, we find [illegible] the demurrer was sustained on the grou[illegible]d that no cause of action in favor of the plaintiff was stated

n the petition, because the circuit court of ppeals was of the opinion that the petition nly stated a right to recover for violations f the national bank act, causing damage o the bank as such, the right to recover or which was an asset of the bank, enorceable only by its receiver. In so deciding the court expressly held that the averments in the petition relative to the fraud nd deceit claimed to have been practised pon the plaintiff through reports to the Comptroller of the Currency were mere matter of inducement or surplusage, and did ot constitute averments of a substantive ause of action. In other words, the previous case was decided exclusively upon the round that, as the plaintiff had not set p any individual wrong suffered by him, ut solely an injury sustained in common with all other creditors of the bank, the esulting damage was only recoverable by he receiver. As, adopting the construction iven in the Jones Nat. Bank Case to a petition like unto the one in this case, we old that the petition in this case sets up right to recover for the individual loss uffered as distinct from the right of the ank, it follows, if we accept the construction given by the circuit court of appeals to he pleadings in the case wherein the judgnent relied upon was rendered, that case nd this involve different causes of action. But it is insisted that if a correct analysis e made of the facts set out in the previous ase the result will be to demonstrate that hat case and this are identical, and, therefore, the judgment in the previous case is ontrolling here. This, however, is but to ssert that the previous judgment was vrong, and, therefore, in determining its ffect as *res judicata* we must treat it as mbracing matters which it did not include. To *give full force and effect to the judgment ve must necessarily exclude those things which the judgment excluded. To hold to he contrary would be to decide that the ormer judgment must be accepted as corect, and yet it must be extended to controversies which are beyond its reach, beause the judgment was wrongfully rendered.

The same judgment must therefore be ordered in each of these cases as was directed o be entered in the Jones Nat. Bank Case, iz., as to Mosher and Outcalt, two of the ersons named as plaintiffs in the writ of rror and citation, the writ of error in each ction is dismissed for want of prosecution; s to the other plaintiffs in error, the judgnent below in each action is reversed and he case is remanded for further proceedings not inconsistent with this opinion.

WATSON STEWART, Appt.,
v.
UNITED STATES and the Osage Nation of Indians.

(See S. C. Reporter's ed. 185–194.)

Public lands—regulations of Land Department—compensation of registers and receivers.

1. The Secretary of the Interior, acting through the Commissioner of the General Land Office, had the right to charge the various registers and receivers with the duty to sell the lands ceded by the Osage Indians to the United States by the treaty of September 29, 1865 (14 Stat. at L. 687), to be sold for their benefit, and to limit the annual compensation of such officers for this and all other services to the existing legal maximum of $2,500.

Officers—compensation of register of land office.

2. No commissions for selling the lands ceded by the Osage Indians to the United States by the treaty of September 29, 1865, to be sold for their benefit, beyond what brings his annual compensation to the legal maximum of $2,500, can be claimed by a register of the land office who received his appointment after the Secretary of the Interior, acting through the Commissioner of the General Land Office, had charged the various registers and receivers with the duty of selling such lands, and had limited their annual compensation for this and all other services to the existing legal maximum.

Claims — against United States — statute permitting presentation as admission of merit.

3. The enactment by Congress of the provision of the Indian appropriation act of March 3, 1903 (32 Stat. at L. 1010, 1011), § 13, for the presentation to, and decision on the merits by, the court of claims of a claim by a register of the land office for commissions for selling the lands ceded by the Osage Indians to the United States by the treaty of September 29, 1865, to be sold for their benefit, does not imply any admission that there is anything due the claimant.

[No. 256.]

Argued April 12, 1907. Decided May 13, 1907.

APPEAL from the Court of Claims to review a judgment dismissing the petition of a register of the land office for commissions for selling the lands ceded by the Osage Indians to the United States, to be sold for their benefit. Affirmed.

See same case below, 39 Ct. Cl. 321.

NOTE.—On fees and compensation of officers—see note to United States v. Jones, 37 L. ed. U. S. 325.

As to what claims constitute valid demands against a state—see note to Northwestern & P. H. Bank v. State, 42 L.R.A. 33.

Statement by Mr. Justice Peckham:

The appellant herein filed his petition in the court of claims to obtain compensation for services performed by him while a register of the United States land office at [186] Humboldt, in *the state of Kansas, during the time from May 12, 1869, until November 20, 1871.

His petition to recover for such services was filed in the court of claims pursuant to the provisions of § 13 of the Indian appropriation act (chapter 994), approved March 3, 1903 (32 Stat. at L. 1010, 1011). The section reads as follows:

"Sec. 13. That any one or more of the registers and receivers of the United States land offices in the state of Kansas upon whom was imposed the responsibility of making sale and disposal of the Osage ceded, Osage trust, and Osage diminished reserve land in said state under the treaty of September twenty-ninth, eighteen hundred and sixty-five [14 Stat. at L. 687], between the United States and the Osage Indians, and the acts of Congress for carrying said treaty into effect, may bring suit in the court of claims against the Osage Nation and the United States to determine the claim of the plaintiff or plaintiffs for commissions or compensation for the sale of said lands or any service or duty connected therewith. And the said court shall have jurisdiction to hear and determine said cause and to render judgment thereon on the merits; and the Attorney General shall appear on behalf of the United States and the Osage Nation, and either party feeling aggrieved at the decision of the court of claims may appeal to the Supreme Court of the United States, and the final judgment in such case shall determine the rights of all such registers and receivers similarly situated. Said Osage Nation may also appear in said suit by an attorney employed with the authority of said nation. The court of claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy."

The petition was dismissed on its merits by the court of claims (39 Ct. Cl. 321), and from such dismissal the appellant was allowed an appeal to this court. The following facts were found by the court:

The United States and the Great and [187] Little Osage Indians *entered into a treaty September 29, 1865, which was proclaimed January 21, 1867. 14 Stat. at L. 687. In the first article it was stated that the tribe of the Great and Little Osage Indians, having more land than was necessary for their occupation, and all payments by the government to them under former treaties having ceased, leaving them greatly impoverished, and being desirous of improving their condition by disposing of their surplus land, they therefore granted and sold to the United States the lands described in that article, and, in consideration of the grant and sale to them of such lands, the United States agreed to pay the Indians the sum of $300,000, which sum was to be placed to the credit of such Indians and interest thereon paid. The lands were to be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, and, after reimbursing the United States for the cost of such survey and sale and the said sum of $300,000 advanced to the Indians, the remaining proceeds of sales were to be placed in the Treasury of the United States to the credit of the "civilization fund," to be used under the direction of the Secretary of the Interior.

By article 2 of the treaty the Indians also ceded to the United States the tract of land therein described, in trust for the Indians, to be surveyed and sold for their benefit by the Secretary of the Interior under such rules and regulations as he might from time to time prescribe, under the direction of the Commissioner of the General Land Office, as other lands are surveyed and sold. Provision was then made in the article for the proceeds arising from the sale.

By article 16 it was provided that, if the Indians should remove from the state of Kansas and settle upon lands to be provided for them by the United States in the Indian territory on terms to be agreed upon, then the diminished reservation should be disposed of by the United States in the same manner and for the same purposes as thereinbefore provided in *relation to said [188] trust lands, with exceptions not material to be noticed. (The Indians did subsequently remove from Kansas.)

It was also provided by the 13th article that, as the Indians had no annuities from which the expenses for carrying the treaty into effect could be taken, the United States should appropriate $20,000, or so much thereof as might be necessary, for the purpose of surveying and selling the land thereby ceded in trust, which amount so expended was to be reimbursed to the Treasury of the United States from the proceeds of the first sales of the lands.

On the 23d of November, and again on the 19th of December, 1867, the Commissioner of the General Land Office, by authority of the Secretary of the Interior, issued instructions to the registers and receivers in the state of Kansas for the rendition of

services in the sale of land ceded to the United States by article 1 of the treaty above mentioned, and the lands agreed to be held in trust by the United States and surveyed and sold for the benefit of the said Indians by article 2 of that treaty. Among other instructions, under date of December 19, 1867, it was provided that the registers and receivers were to be "allowed a commission of 1 per cent each on the proceeds of the sales of these lands, with limitations, as a matter of course, to the legal maximum of $2,500, inclusive of commissions and fees, etc., on the disposal of the public lands, the payment of which is to be made by the receiver, in his capacity of disbursing agent, and to be debited in a special account, together with such other expenses incident to the sale of the lands alluded to as may be authorized by law and instructions."

On the 28th of March, 1871, further instructions were given in regard to the performance of services, in which was the further statement that "nothing, however, shall be herein construed as authorizing the register and receiver to receive more than the maximum of $2,500 per annum, now allowed by law, and the receiver, in adjusting his accounts, will take care to first ascertain how much short of the maximum *the receipt from public lands, including the fees received from declaratory statements on the Osage lands, will bring their fees and commissions, and will then charge to the Indian fund only so much commissions as will bring their compensation to the maximum." In accordance with these instructions claimant performed services in the sale of lands ceded by the Osage Indians under article 1, and of lands held in trust by the United States under article 2 of the treaty, and of lands included within the diminished reservation of the Indians under article 16 of the treaty.

The claimant was paid for each year of his service the full maximum amount due him, in accordance with the instructions from the General Land Office. This full maximum would not, in some cases, have been reached without resort to the sales of land under the treaty. This suit has been brought by claimant to recover a commission of 1 per cent on the amount of the sales of the land, and the filing fees on the lands mentioned in the treaty and now in the Treasury, as a reasonable compensation for his services in the sale of these lands as outside of and in addition to his regular official duties in the sale of public lands.

The total amount received on the sale of Osage ceded lands was $1,055,162.01; and the total amount received on sale of Osage trust and diminished reserve lands was $9,508,156.27; and the total amount of money held in trust by the government for said Osage Indians under said treaty of September 29, 1865, is $8,327,439.07, on which interest at 5 per cent is paid by the United States, amounting annually to $416,371.95.

Mr. George A. King argued the cause, and, with Messrs. William B. King and R. V. Belt, filed a brief for appellant:

The right of registers and receivers to a reasonable compensation for the sale of Indian lands under treaties similar to that of 1865 with the Great and Little Osage Indians has been settled and adjudicated by this court.

United States v. Brindle, 110 U. S. 688, 28 L. ed. 286, 4 Sup. Ct. Rep. 180.

That opinion has been followed both by this court and by other courts in the disposition of similar cases, as well as by special act of Congress for the relief of other officers similarly situated.

United States v. Saunders, 120 U. S. 126, 130, 30 L. ed. 594, 595, 7 Sup. Ct. Rep. 467; Meigs v. United States, 19 Ct. Cl. 504; United States v. Rogers, 27 C. C. A. 14, 48 U. S. App. 477, 81 Fed. 941.

Department ruling is not conclusive.

United States v. Lawson, 101 U. S. 164, 25 L. ed. 860; United States v. Ellsworth, 101 U. S. 170, 25 L. ed. 862; Swift & C. & B. Co. v. United States, 111 U. S. 22, 29, 28 L. ed. 341, 343, 4 Sup. Ct. Rep. 244; Robertson v. Frank Bros. Co. 132 U. S. 17, 23, 33 L. ed. 236, 238, 10 Sup. Ct. Rep. 5; United States v. Mosby, 133 U. S. 273, 279, 33 L. ed. 625, 627, 10 Sup. Ct. Rep. 327; United States v. Post, 148 U. S. 124, 133, 37 L. ed. 392, 395, 13 Sup. Ct. Rep. 567; Glavey v. United States, 182 U. S. 595, 45 L. ed. 1247, 21 Sup. Ct. Rep. 891.

This court has decided a number of cases on appeal from the court of claims, where cases have been referred to that court by special acts, and has always held that the passage of such an act is a waiver of mere technical estoppels.

Roberts v. United States, 92 U. S. 41, 23 L. ed. 646; United States v. Steever, 113 U. S. 747, 28 L. ed. 1133, 5 Sup. Ct. Rep. 765; Briggs v. United States, 143 U. S. 346, 36 L. ed. 180, 12 Sup. Ct. Rep. 391.

The services were outside of statutory duties.

United States v. Macdaniel, 7 Pet. 1, 8 L. ed. 587.

Every presumption must be in favor of the payment of the officers performing this additional work, out of the funds of the Indians for whose benefit the work was performed.

United States v. Bassett, 2 Story, 389, Fed. Cas. No. 14,539; United States v. Morse,

3 Story, 87, Fed. Cas. No. 15,820; United States v. Hill, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510.

Assistant Attorney General **Van Orsdel** argued the cause and filed a brief for the United States:

The ground of a legal implication is that the parties to the contract would have expressed that which the law implies, had they known of it, or had they not supposed it was unnecessary to speak of it because the law provided for it. But where the parties make express provisions, the reason of the implication fails; and the law will never overcome by implications such express provisions made by the parties to the contract.

2 Parsons, Contr. 8th ed. 631; Texas & P. R. Co. v. United States, 28 Ct. Cl. 330; Hawkins v. United States, 96 U. S. 689, 24 L. ed. 607.

Mr. **Lorenzo A. Bailey** argued the cause and filed a brief for the Osage Nation:

An express promise to pay a specified amount cannot be converted into an implied promise to pay any other amount.

Hawkins v. United States, 96 U. S. 689, 24 L. ed. 607.

An insurance agent who has received the company's circular stating his commissions, and who has acted on it and has received and adjusted his compensation by it, is estopped to deny that it was the measure of his compensation.

Stagg v. Connecticut Mut. L. Ins. Co. 10 Wall. 589, 19 L. ed. 1038.

The claimant must confront this alternative: That he undertook the work upon the understanding either that he was bound, or else that he was not bound, by the terms of the instructions of 1867. In the former case he is estopped by that understanding. In the latter case he is estopped by his conduct, which was misleading; for had he then protested or asserted a claim for more than he was allowed and paid, the government should and would have taken proper steps to protect itself and avoid an excessive expense in the execution of the trust.

Coleman v. United States, 81 Fed. 824; Gordon v. United States, 31 Ct. Cl. 254; United States v. Martin, 94 U. S. 400, 24 L. ed. 128.

An implied contract will not be raised contrary to the express declarations of the party sought to be charged, made at the time of the supposed undertaking.

Nutt v. Minor, 14 How. 464, 14 L. ed. 500, 4 Cyc. Law & Proc. pp. 325, 326.

When a special contract has been fully executed according to its terms, and nothing remains to be done but the payment of the price, the plaintiff may sue on the contract, or in *indebitatus assumpsit* and rely upon the common counts; but in either case the contract will determine the rights of the parties. The plaintiff must produce the contract at the trial, and it will be applied as far as it can be traced.

Dermott v. Jones (Ingle v. Jones) 2 Wall. 1, 17 L. ed. 762.

To raise an implied assumpsit, the plaintiff must establish facts from which the duty to pay may reasonably be presumed.

Cary v. Curtis, 3 How. 236, 11 L. ed. 576; Curtis v. Fiedler, 2 Black, 461, 17 L. ed. 273.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

Except for the treaty between the United States and the Osage Indians, relative to the lands in question, and the passage of appropriate legislation by the United States, the lands would never have been sold, as they were not public lands of the United States for the sale of which Congress had already provided under its general legislation. The treaty, however, provided that the lands described in article 1 were to be surveyed and sold under the direction of the Secretary of the Interior on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws; and under article 2 the lands were to be sold for the benefit of the Indians by the Secretary of the Interior, under such rules and regulations as he might, from time to time, prescribe, under the direction of the Commissioner of the General Land Office, as other lands are surveyed and sold; and under article 16, in case of the removal of the Indians, the diminished reserve was to be disposed of by the United States in the same manner and for the same purposes as provided in relation to the so-called trust lands. Thus power was given to the Secretary of the Interior, acting through the Commissioner of Public Lands, to make the same rules and regulations for the sale of the treaty lands as applied to the survey and sale of "public lands," and to that end he had power to provide for their sale by the various receivers and registers of the land office in the *state of Kansas, in [illegible] whose jurisdiction such lands lay. Although the treaty provided the sum of $[illegible] to pay the expense of carrying out its provisions, yet it is evident that the purpose of the treaty was that these lands should be sold at the least expense to the Indians in their sale, and we think that the Secretary of the Interior, acting through the Commissioner of the General Land Office, had the right to provide, as was done in this case, that the various [illegible]sters and receivers should sell the lands and should not receive more than the [illegible] in compensation for

their services per annum otherwise allowed by law. In cases where the maximum amount would not be received without resorting to the treaty fund, such resort was permitted, and the fund was in fact resorted to in this case in order to reach the maximum for the fractional years of claimant's service. The Secretary of the Interior having made this rule, and the instructions of December 19, 1867, being in existence when the claimant herein received his appointment as register, he took it subject to the provision that his maximum compensation for all services rendered should not exceed the sum named by law. See §§ 2237, 2238, 2240, and 2241, U. S. Rev. Stat., U. S. Comp. Stat. 1901, pp. 1366, 1367, 1369, prescribing, among other things, the compensation of registers and receivers. This compensation the claimant was paid thirty years since, without objection or protest from him that he was entitled to any further payment on account of services in the sales of these treaty lands.

The case of United States v. Brindle, 110 U. S. 688, 28 L. ed. 286, 4 Sup. Ct. Rep. 180, does not aid claimant. In that case Brindle was, on the 28th day of October, 1856, " 'duly appointed special receiver and superintendent to assist the special commissioner to dispose of the Delaware Indian trust lands at Fort Leavenworth, in the territory of Kansas, under the treaty with the Delaware tribe of Indians.' On the 18th of February, 1857, he was appointed and commissioned for four years as receiver of public moneys for the district of lands subject to sale at Lecompton, Kansas, and on the 15th day of May, 1857, he was duly *appointed as special receiver and superintendent to assist the special commissioner to dispose of the trust lands of the Kaskaskia and Peoria, Piankeshaw and Wea Indian confederated tribes of Indians at Paoli, Kansas territory." Brindle was thus appointed special receiver and superintendent of the Delaware Indian trust lands before he was made receiver of public money, and while he was receiver of public money he was duly appointed as special receiver of the other Indian tribes, as above stated. The duties of the positions (special receiver, etc., and receiver of the public moneys) were thus kept separate and apart. As receiver he was to receive public moneys for land subject to sale at Lecompton, Kansas, while his duties in regard to the other positions to which he had been specially appointed referred to the disposition of the Indian lands, in one case at Fort Leavenworth and in the other case at Paoli, both in the territory of Kansas. This court held that when, subsequent to his appointment as receiver of the public moneys, Brindle was appointed special receiver and superintendent to assist the special commissioner "in disposing of the trust lands, he was employed to render a service in no way connected with the office he held. He was not appointed to any office known to the law. *No new duty was imposed on him as receiver of the Land Office.* The President was, both by the treaties and the act of 1855 [10 Stat. at L. 700, chap. 204], charged with the duty of selling the lands, and, under his instructions, Brindle was employed to assist in the work. By express provisions in the treaties the expenses incurred by the United States in making the sales were to be paid from the proceeds. This clearly implied the payment of a reasonable compensation for the service of those employed to carry the trust into effect."

In the case at bar the duty had already, prior to claimant's appointment, been imposed on the various receivers and registers, as such, of attending to the sale of these lands within their various districts, and express provision had been made that in no case was their compensation to exceed the maximum sum already provided by law. When such provision had been *made in re- [194] gard to compensation there is no room for any implication of a promise to pay an additional reasonable compensation for the services of such registers and receivers in the sale of those lands. Such implication was specially negatived before the claimant took office. He received his pay under the provision of law already stated, without any protest or claim on his part that he was entitled to anything further or other than the amount he from time to time received. More than thirty years after the last payment, Congress passed the act of March 3, 1903, the 13th section of which is contained in the foregoing statement of facts. The passage of the act did not imply any admission that there was anything due the claimant. It simply provided for the presentation of his claim to the court and for a decision on the merits, without assuming to say that he had any claim of a meritorious nature.

We agree with the Court of Claims that the claimant has failed to make out a case, and the judgment dismissing his petition is affirmed.

Mr. Justice Moody took no part in the decision of this case.

GOAT & SHEEPSKIN IMPORT COMPANY, Petitioner,
v.
UNITED STATES.

(See S. C. Reporter's ed. 194–205.)

Duties—growth on skin of Mocha sheep—free list.

A growth on skins of Mocha sheep imported from Arabia which is commercially known, designated, and dealt in as Mocha hair, having none of the characteristics of wool, and which would not be accepted by dealers therein as a good delivery of wool, is not dutiable under the tariff act of July 24, 1897 (30 Stat. at L. 151, 183, chap. 11, U. S. Comp. Stat. 1901, pp. 1626, 1666), par. 360, as wool on the skin, but is entitled to free entry under par. 664, placing on the free list "skins of all kinds, raw (except sheepskins with the wool on), and hides not specially provided for in this act."

[No. 261.]

Argued April 18, 1907. Decided May 13, 1907.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York, sustaining the ruling of the Board of General Appraisers and the collector in classifying a growth upon skins of Mocha sheep as wool on the skin and dutiable as such. Reversed and remanded for further proceedings.

See same case below, 74 C. C. A. 82, 145 Fed. 1022.

Statement by Mr. Justice Peckham:

This case comes here by virtue of a writ of certiorari issued from this court to the United States circuit court of appeals for the second circuit, for the purpose of reviewing the action of the courts and of the customs authorities in relation to an assessment of duty on certain importations made by the petitioner, appellant, at the port of New York.

The merchandise on which duty was assessed was a growth upon certain skins of the Mocha sheep, imported from Hodeida, Arabia, which growth was classified by the collector as wool on the skin of the third class, and assessed for duty at 3 cents per pound, under the provisions of paragraph 360 of the tariff act of July 24, 1897 (30 Stat. at L. pages 151, 183, chap. 11, U. S. Comp. Stat. 1901, pp. 1626, 1666). The importer duly protested against the classification, and insisted that the merchandise was entitled to entry free of duty under paragraph 571 (30 Stat. at L. supra, page 198, chap. 11, U. S. Comp. Stat. 1901, p. 1666), or under paragraph 664 of such act. Page 201 (U. S. Comp. Stat. 1901, p. 1668). Paragraphs 351, 358, 360, under which the government claims duty, and paragraphs 571 and 664, under which the importer claims free entry, are set forth in the margin.†

*The collector having returned the merchandise in question as wool of the third class, under paragraph 360, the importer appealed to the board of general appraisers, where the ruling of the collector was sustained, and the importer then appealed to the circuit court, and then to the circuit court of appeals, each of which courts sustained the ruling of the board of general appraisers and the collector.

Before the board of general appraisers the importer produced six witnesses, who testified as to the character, use, and commercial designation of the merchandise. On the appeal to the circuit court a referee was then appointed, and the importer offered further evidence to sustain his claim that the merchandise was entitled to free entry.

No testimony was offered by the government. It is not claimed by the government that the merchandise in question comes under paragraph 351 as wool of the third class (except as it may be wool of like character), as it is not Donskoi, native South American, Cordova, Valparaiso, native Smyrna or Russian camel's hair, but it is asserted that the growth on the skins was wool on the skin

†Paragraphs from tariff act of 1897, under which the government claims. 30 Stat. at L. 151, 183, chap. 11, U. S. Comp. Stat. 1901, pp. 1626, 1666.

351. Class three, that is to say, Donskoi, native South American, Cordova, Valparaiso, native Smyrna, Russian camel's hair and all such wools of like character as have been heretofore usually imported into the United States from Turkey, Greece, Syria, and elsewhere, excepting improved wools hereinafter provided for.

358. On wools of the third class and on camel's hair of the third class, the value whereof shall be twelve cents or less per pound, the duty shall be four cents per pound.

360. The duty on wools on the skin shall be one cent less per pound than is imposed in this schedule on other wools of the same class and condition, the quantity and value to be ascertained under such rules as the Secretary of the Treasury may prescribe.

Petitioner claims under following paragraphs:

571. Hair of horse, cattle, and other animals, cleaned or uncleaned, drawn or undrawn, but unmanufactured, not specially provided for i[illegible] [illegible]t, and human hair, raw, uncleaned, [illegible] but drawn.

664. Skins of all [illegible], raw (except sheep-skins with the w[illegible] on), and hides not specially provided [illegible] in this act.

under paragraph 360, or was a wool of like character as that above enumerated in paragraph 351.

The evidence shows that the hair or wool (whichever it is called) grows on the Mocha white sheep, imported from Hodeida, Arabia. The growth to be found on this breed of sheep is not bought or sold in this country as wool, but as hair. It would not be accepted as a delivery of wool of any grade by those dealing in that article. Although there might have been a very small proportion of what might possibly be termed very inferior wool on these skins (not more than 10 per centum in any case, and frequently less), yet there was no substantial use of any portion of the growth on the skins for purposes for *which wool is generally used. To some extent, but very little, it had been tried in mills to spin, and it might be used sometimes by carpet manufacturers in a small way, and efforts had been made to use it, mixed with wool, in spinning, but it was not practically successful, nor was it practicable to use it for other purposes for which wool is used. The chief, or predominant, and almost sole use of the substance is as hair for stuffing, and for the saddlery trade, and by bed manufacturers for stuffing purposes. It is bought and sold all over the country as Mocha hair. The skin upon which the substance grows is the thing that is valuable. A large part of the skins imported into this country is used in the manufacture of glove leather. One witness testified that his firm so used from 75 to 90 per cent of the skins imported, and the growth thereon was bought and sold as Mocha hair. It costs more to remove the growth from the skin than it sells for after its removal. It cannot be used for spinning purposes because it would not hold together. It might be carded, but there would not be much left after carding. The price of the skins on which this growth is found is not influenced by the quantity of the growth on them. The more of a growth there is, the less the skin will bring, or, as is said, the more hair, the poorer the skin. The skins are sold by the importers to tanners of gloves and shoe leather, just as they arrive. After the growth is washed and removed from the skin it may be sold for from 3 to 5 cents per pound, which is less than the cost of removing it. In buying the skins no notice is taken of the growth, the only consideration being the value of the pelt, and the pelts are worth no more with long hair on than short hair. The growth has never been accepted or sold as wool, but, on the contrary, prior to July 24, 1897, when the tariff act was passed, it was uniformly regarded and bought and sold in the United States as hair. "Mocha hair" was the trade nomenclature prior to 1899, and as such the trade name was definite and uniform throughout the United States, and dealers in it never knew it to be called anything else than Mocha hair. It has not the appearance of *wool, does not feel like wool, [198] and has none of the qualities of wool. It is bought from tanners after it has been taken from the skin by them, and it is thus sold and bought as Mocha hair, and the skins are used for leather by the tanners.

One of the witnesses called on behalf of the importers was an examiner of wool fibers and skins at the port of New York, which position he had held for about fifteen years. He said that when he first went into the government employ such skins as those in question were returned free, the hair as well as the skin, but that practice has since been changed. The witness further said that if the growth in question were found on a goat he would return it as hair of a goat, and entitled to free entry; that wool could be run down, or deteriorate, to such a condition as the growth in question, but that it was, in fact, mostly "what they call dead hair or kemp;" that although it could possibly be carded, it was not commercially suitable, and there would not be much left after they got through carding it. On cross-examination the witness said that he would return the article in question as Mocha sheepskin with the wool on. On such a skin as the one in question the witness said there was a substance which he would call wool, which was about 10 per cent only of the growth; that he examines such skins as the ones in question and throws out those he considers dutiable when there is enough wool to call it dutiable, and lets the skins go not dutiable when you could not make anything out of the growth in any way, although some use might possibly be made of it.

The cross-examination of other witnesses was to the effect that this growth had been tried in mills for the purpose of spinning, but very little, being used with other stock to make into yarn, but it has not been successfully used for that purpose; it might be used sometimes by carpet manufacturers in a small way, and, while it could not be used or spun alone, it might be carded. It was also said on cross-examination of one of the witnesses that if such growth ran pretty white it is sometimes used in those low-grade carpet yarns where they put in such stuff as jute packing is made of and some hair like the growth *in question. The [199] evidence is, however, overwhelming and the witnesses substantially unanimous, that this substance is not known as wool, and is neither bought nor sold as such, and is

commercially known as Mocha hair, and is not used as wool.

Mr. Stuart Tompkins argued the cause, and, with Messrs. Edward S. Hatch and Hatch, Keener, & Clute, filed a brief for petitioner:

The growth of the skins must be classified according to its commercial designation.

Hedden v. Richard, 149 U. S. 346, 348, 349, 37 L. ed. 763, 764, 13 Sup. Ct. Rep. 891; American Net & Twine Co. v. Worthington, 141 U. S. 468, 471, 35 L. ed. 821, 822, 12 Sup. Ct. Rep. 55; Arthur v. Morrison, 96 U. S. 108, 24 L. ed. 764; Two Hundred Chests of Tea, 9 Wheat. 430, 438, 6 L. ed. 128, 129; Re Wise, 73 Fed. 188.

General and uniform commercial understanding and usage, excluding this article from the category of merchandise regarded in trade as "wool," and including it in the category of merchandise known as "hair," should be taken into consideration and be given weight in determining whether or not this merchandise was properly classified by the collector, under paragraph 358 of the tariff law of 1897, as "wool."

Chew Hing Lung v. Wise, 176 U. S. 156, 161, 44 L. ed. 412, 414, 20 Sup. Ct. Rep. 320; Arthur v. Morrison, 96 U. S. 108, 110, 24 L. ed. 764, 765; Elliott v. Swartwout, 10 Pet. 137, 151, 9 L. ed. 373, 378; Hedden v. Richard, 149 U. S. 346, 349, 37 L. ed. 763, 764, 13 Sup. Ct. Rep. 891.

An occasional or possible use is not sufficient to effect the classification of an article for tariff purposes.

Chew Hing Lung v. Wise, 176 U. S. 156, 162, 44 L. ed. 412, 415, 20 Sup. Ct. Rep. 320; Magone v. Wiederer, 159 U. S. 555, 40 L. ed. 258, 16 Sup. Ct. Rep. 122; Hartranft v. Langfeld, 125 U. S. 128, 31 L. ed. 672, 8 Sup. Ct. Rep. 732.

This is a clear case, not only for the application of the well-settled rule of commercial designation, but also for the application of the rule laid down in Robertson v. Downing, 127 U. S. 607, 613, 32 L. ed. 269, 271, 8 Sup. Ct. Rep. 1328, that, where the language of various tariff acts has been substantially the same with respect to certain goods, the construction uniformly applied by the Treasury Department for many years will not be disregarded except for most persuasive reasons.

See also United States v. Proctor, 76 C. C. A. 96, 145 Fed. 132; Brennan v. United States, 69 C. C. A. 395, 136 Fed. 749; Schell v. Fauché, 138 U. S. 572, 34 L. ed. 1043, 11 Sup. Ct. Rep. 376; Robertson v. Bradbury, 132 U. S. 493, 33 L. ed. 406, 10 Sup. Ct. Rep. 158; United States v. Dean Linseed Oil Co. 31 C. C. A. 51, 57 U. S. App. 716, 87 Fed. 456; Anglo-California Bank v. Secretary of Treasury. 22 C. C. A. 527, 48 U. S. App. 27, 76 Fed. 750; United States v. Wetton, 50 Fed. 694; United States v. Johnston, 124 U. S. 236, 253, 31 L. ed. 389, 396, 8 Sup. Ct. Rep. 446; United States v. Hill, 120 U. S. 169, 182, 183, 30 L. ed. 627, 632, 7 Sup. Ct. Rep. 510; United States v. Philbrick, 120 U. S. 52, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413; Five Per Cent Cases, 110 U. S. 471, 485, 28 L. ed. 202, 203, 4 Sup. Ct. Rep. 210; Hahn v. United States, 107 U. S. 406, 27 L. ed. 528, 2 Sup. Ct. Rep. 494; Brown v. United States, 113 U. S. 571, 28 L. ed. 1080, 5 Sup. Ct. Rep. 648.

The commercial designation is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws. But if the commercial designation fails to give an article its proper place in the classification of the law, then resort must necessarily be had to the common designation.

Re Herrman, 52 Fed. 944; Swan v. Arthur, 103 U. S. 597, 598, 26 L. ed. 526; Nix v. Hedden, 149 U. S. 304, 306, 37 L. ed. 745, 746, 13 Sup. Ct. Rep. 881; Seeberger v. Cahn, 137 U. S. 95, 34 L. ed. 599, 11 Sup. Ct. Rep. 28; Hedden v. Richard, 149 U. S. 346, 37 L. ed. 763, 13 Sup. Ct. Rep. 891; Lutz v. Magone, 153 U. S. 105, 38 L. ed. 651, 14 Sup. Ct. Rep. 777; Saltonstall v. Wiebusch & Hilger, 156 U. S. 601, 39 L. ed. 549, 15 Sup. Ct. Rep. 476; Sonn v. Magone, 159 U. S. 417, 40 L. ed. 203, 16 Sup. Ct. Rep. 67; Patton v. United States, 159 U. S. 500, 40 L. ed. 233, 16 Sup. Ct. Rep. 89; United States v. Goldenberg, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; United States v. Buffalo Natural Gas Fuel Co. 172 U. S. 339, 43 L. ed. 469, 19 Sup. Ct. Rep. 200; Chew Hing Lung v. Wise, 176 U. S. 156, 44 L. ed. 412, 20 Sup. Ct. Rep. 320; Hempstead v. Thomas, 132 Fed. 538; Robertson v. Salomon, 130 U. S. 412, 415, 32 L. ed. 995, 996, 9 Sup. Ct. Rep. 559.

Assistant Attorney General Sanford argued the cause and filed a brief for respondent:

In construing the wool schedule of the tariff act, the following facts, of which the court will take judicial knowledge, are to be considered; namely: That all wool is, scientifically speaking, a form of hair; that, while the coat of the sheep possesses in greatest degree the characteristic qualities of wool as distinct from those of hair, that of many other animals, such as the alpaca, the Angora goat, and the camel, also possesses many of the technical qualities of wool, some of these other animals in larger degree than the lower grades of sheep; and that in the coat of all of these animals there is a variety of texture ranging from wool to hair, whose degree varies with the

different kinds of animals and with their different species.

Webster's International Dict.; Century Dict.; 24 Encyclopaedia Britannica, 9th ed. 653.

The words "wool" and "hair" are used in the tariff acts in a racial sense, and the products of the animals to which they refer are not to be taken out of their racial classification by proof of their technical quality, or nonadaptability to specific uses or commercial designation.

Lyon v. Marine, 5 C. C. A. 359, 8 U. S. App. 409, 55 Fed. 964; Cooper v. Dobson, 157 U. S. 148, 39 L. ed. 652, 15 Sup. Ct. Rep. 568; United States v. Klumpp, 169 U. S. 209, 42 L. ed. 720, 18 Sup. Ct. Rep. 311.

It is well settled that where it appears from the statute itself that words in a tariff act are not used in a technical sense, as a commercial designation or trade term, their meaning is not to be controlled by their commercial usage.

Maillard v. Lawrence, 16 How. 251, 14 L. ed. 925; Greenleaf v. Goodrich, 101 U. S. 278, 25 L. ed. 845; Barber v. Schell (Cochran v. Schell) 107 U. S. 617, 27 L. ed. 490, 2 Sup. Ct. Rep. 301; Newman v. Arthur, 109 U. S. 132, 27 L. ed. 883, 3 Sup. Ct. Rep. 88; Reimer v. Schell, 4 Blatchf. 328, Fed. Cas. No. 11,676; Carson v. Nixon, 33 C. C. A. 135, 62 U. S. App. 244, 90 Fed. 409; Patton v. United States, 159 U. S. 500, 40 L. ed. 233, 16 Sup. Ct. Rep. 89; Cadwalader v. Zeh, 151 U. S. 171, 38 L. ed. 115, 14 Sup. Ct. Rep. 288; United States v. Klumpp, supra; Roosevelt v. Maxwell, 3 Blatchf. 391, Fed. Cas. No. 12,034.

It is never competent to control the meaning of a phrase used in the tariff act by proof of commercial usage, when either the act itself or previous tariff legislation shows that it was to be used in a different sense.

De Forest v. Lawrence, 13 How. 274, 281, 14 L. ed. 143, 146; Roosevelt v. Maxwell, supra.

General words of similitude, such as "goods of a similar description," are not words of commercial designation, whose meaning can be controlled by proof that goods which are in fact of similar description have a different commercial classification.

Greenleaf v. Goodrich, 101 U. S. 278, 25 L. ed. 845; Schmieder v. Barney, 113 U. S. 645, 647, 648, 28 L. ed. 1130, 1131, 5 Sup. Ct. Rep. 624.

The proof of commercial meaning must not be addressed simply to the commercial designation of the particular article in question, as was done in the case at bar, but to the commercial meaning of the term used in the act.

Greenleaf v. Goodrich, 101 U. S. 278, 25 L. ed. 845; Schmieder v. Barney, 113 U. S. 645, 28 L. ed. 1130, 5 Sup. Ct. Rep. 624; Claflin v. Robertson, 38 Fed. 92; Carson v. Nixon, supra; Field v. United States, 33 C. C. A. 138, 62 U. S. App. 250, 90 Fed. 412.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The evidence in this case, taken before the board of appraisers and also before the circuit court, is uncontradicted. It shows that the substance in question is not wool, has none of its characteristics, and is not put to any of its uses, and does not appear like wool. On the contrary, it is composed mostly of dead hair or kemp and cannot be remuneratively carded, nor is it commercially suited for carding, nor for spinning. Its commercial designation is Mocha hair, and it is not known or regarded or recognized as wool in any of the markets of the country.

It is not denied that the commercial designation of an article, which designation was known at the time of the passage of a tariff act, is the name by which the article should be classified *for the payment of duty, [203] and, as is stated, "without regard to their scientific designation and material of which they may be made, or the use to which they may be applied." Two Hundred Chests of Tea, 9 Wheat. 430, 438, 6 L. ed. 128, 130; Arthur v. Morrison, 96 U. S. 108, 24 L. ed. 764; American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; Hedden v. Richard, 149 U. S. 346, 348, 37 L. ed. 763, 764, 13 Sup. Ct. Rep. 891. As was said by Mr. Justice Story in Two Hundred Chests of Tea, supra, Congress did not "suppose our merchants to be naturalists or geologists or botanists. It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic." And in Hedden v. Richard, supra, it was said: "The language of commerce . . . must be construed, . . . particularly when employed in the denomination of articles, according to the commercial understanding of the terms used." The commercial designation should prevail unless Congress has clearly manifested a contrary intention. Cadwalader v. Zeh, 151 U. S. 171, 176, 38 L. ed. 115, 117, 14 Sup. Ct. Rep. 288.

We are of opinion that the use of the word "wool" in the tariff act excluded a substance which, while it was a growth upon a sheepskin, was nevertheless commercially known, designated, and dealt in as Mocha hair, having none of the characteristics of wool, and which would not be accepted by dealers therein as a good delivery of wool.

In this case the evidence is uncontradicted

that the growth on these skins was commercially known as Mocha hair, and that it was not used in the way wool is used, or as a substitute for wool. It ought not, simply for the reason that the skin upon which it grows is the skin of a sheep, to be classified as wool, under paragraph 360 of the tariff act, and thereby be subjected to a duty as high as the value of the substance itself.

Although it has been so classified, and that classification has been affirmed all through, yet the question is not presented to this court as if it were a question of fact decided upon contradictory evidence, and concluding this court for that reason. There is, in truth, no contradictory evidence in the case. It is one where, in our opinion, the courts below have given undue [204] *weight to the evidence elicited on cross-examination of witnesses called on the part of the importer, which showed that there possibly was, in some cases, a very little inferior wool found on these skins, while the courts ignored the other facts, as testified to by the same witnesses and already mentioned, which showed beyond the possibility of successful contradiction that the substance was erroneously classified as wool.

Upon the facts, the substance ought not to have been so classified. The growth being still on the skin should have been regarded as part of such skin, and classified under paragraph 664, in the free list, and not as a sheepskin with the wool on.

We do not agree that the word "wool" in this act is used in a generic sense so far as this particular point is concerned. The word does not necessarily include all growth upon the coat of a sheep, even though the substance is like that in question here.

Counsel for the government cites from the Encyclopedia Britannica, where, in speaking of the difficulty in determining the dividing line between hair and wool, it is said: "At what point, indeed, it can be said that an animal fiber ceases to be hair and becomes wool it is impossible to determine, because in every characteristic the one class by imperceptible gradations merges into the other, so that a continuous chain can be formed from the finest and softest merino to the rigid bristles of the wild boar."

It may be difficult in some cases to define the line between "wool" and "hair" as a growth upon skins, but we do not regard that difficulty as an argument for the construction contended for by counsel for the government. That argument leads to the classification of a substance like that in question as wool, when in fact it bears no resemblance to it, is not used as wool, and has none of its characteristics, and is known commercially as Mocha hair, and is so bought and sold over the whole country. The case is one of degree; and because, in some few cases, the points may closely approach each other, and there may be, in such cases, some difficulty in telling wool from hair, *yet that fact furnishes no reason [205] for refusing to adopt the general test which, in most cases, is easily applied,—fitness, identity of use, commercial designation. To adopt the claim of counsel eliminates all inquiry as to whether an article is wool or hair, and leaves simply the question whether it is to be found on what may be called the wool-bearing animals or on the alpaca or other like hair-coated animals. Some sheep are wool-bearing animals; therefore the hair on the skin of the Mocha sheep is wool and must be classified as such. We do not agree with this claim. If an article does not, to a dealer, look like wool, cannot be used as wool, is not commercially known as wool, but, on the contrary, is bought and sold throughout the country as Mocha hair, and is so designated commercially by those dealing in it, it ought not to be classified as wool or made to pay duty as such, simply because it grows on a sheep.

We have looked over the various authorities cited by counsel for the government, but we see nothing in any of them tending to the conclusion that, upon the facts in this case, the growth on the skin of the Mocha sheep was properly classified as wool.

Taking all the evidence in this case, uncontradicted as it is, we feel compelled to the conclusion that the classification in this case, adopted by the courts below and by the appraisers and collector, was wrong, and that the merchandise in question was entitled to free entry.

The judgments of the courts below are reversed and the case remanded to the Circuit Court with instructions to take such further proceedings as may be necessary, not inconsistent with this opinion.

Reversed.

Mr. Justice Moody took no part in the decision of this case.

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*FREDERICK J. LOWREY, George P. Castle, and William O. Smith, Trustees, Appts.,

v.

TERRITORY OF HAWAII.

(See S. C. Reporter's ed. 206-224.)

Extrinsic e[illegible] plain writing.

1. Extr[illegible] to of the circumstances pre[illegible] greement by which

the American Board of Commissioners for Foreign Missions transferred to the Hawaiian government a Protestant mission, and of the immediate and long-continued practice under it, is admissible as an aid to the interpretation of the condition on which the transfer was made; *viz.*, that the government should continue the same as an institution for the cultivation of sound literature and solid science, and should teach no religious tenet or doctrine contrary to those theretofore inculcated by the mission, as set forth in a confession of faith.

Real property—condition subsequent.

2. A mere technical school which excludes all religious instruction does not satisfy the condition on which a Protestant mission was transferred by the American Board of Commissioners for Foreign Missions to the Hawaiian government, *viz.*, that the government should continue the same as an institution for the cultivation of sound literature and solid science, and should teach no religious tenet or doctrine contrary to those theretofore inculcated by the mission, as set forth in a confession of faith, where the government knew, when accepting the transfer of the mission to its "fostering care and patronage," that the Mission was founded to convert the Hawaiians to Christianity and to educate young men to be Christian ministers, and for more than than fifty years recognized its obligation under the agreement to afford religious instruction in the doctrines represented by the mission.

[No. 195.]

Argued and submitted March 20, 1907. Decided May 13, 1907.

APPEAL from the Supreme Court of the Territory of Hawaii to review a judgment sustaining a demurrer to a petition to recover from the territory a sum of money as the alternative of the reconveyance of certain property conveyed to the Hawaiian government for the nonfulfilment of the conditions upon which the property was conveyed. Reversed and remanded for further proceedings.

See same case below, 17 Haw. 285.

Statement by Mr. Justice McKenna:

This action was brought in the supreme court of the territory of Hawaii to recover from the territory the sum of $15,000 as the alternative of the reconveyance of certain property conveyed by the American Board of Commissioners of Foreign Missions in 1849 to the Hawaiian government, for the nonfulfilment of the conditions upon which the property was conveyed. *A demurrer was [207] sustained to the petition and thereupon this appeal was taken.

The following is an outline of the principal facts alleged:

The American Board of Commissioners for Foreign Missions, hereinafter called the American Board, for many years prior to 1850 had conducted and maintained a Protestant mission in the Hawaiian Islands, and, as an essential part of its missionary work, carried on many schools. Its most notable educational work was centered in a school established in 1831 at Lahainaluna, on the Island of Maui, where it possessed a large tract of land. This school and the premises occupied by it were set off by the chiefs to the protestant mission in 1835. On the buildings and other improvements many thousands of dollars were expended, and the school had, in 1850, become a most important factor in the life and progress of the Hawaiian people, and was recognized as the leading educational institution in the kingdom.

The course of instruction comprised not only the usual topics belonging to secular learning, but included also direct religious teaching and training in the doctrines represented by the mission.†

*These facts were established before the [208] board of commissioners to quiet land titles, to which the claim of the American Board to Lahainaluna, as an established part of its system, was duly presented and recognized, and the board of commissioners adjudged as follows: "Lahainaluna, part 5, section 2, claim relinquished before the land commission in consequence of an after-arrangement having been entered into with the

NOTE.—On parol and extrinsic evidence to aid construction—see note to General Assembly v. Guthrie, 6 L.R.A. 321.

That parol evidence is not admissible to vary, add to, or alter a written contract—see notes to Durkin v. Cobleigh, 17 L.R.A. 270; Ferguson v. Rafferty, 6 L.R.A. 33; Fire Ins. Asso. v. Wickham, 35 L. ed. U. S. 860; and Bradley v. Washington, A. & G. Steam Packet Co. 10 L. ed. U. S. 72.

As to parol evidence to explain ambiguity in written instrument—see note to Atkinson v. Cummins, 13 L. ed. U. S. 223.

On conditions in deed that land is to be used for a specified charitable public or quasi-public purpose—see note to Greene v. O'Connor, 19 L.R.A. 262.

As to what are conditions subsequent—see note to Taylor v. Mason, 6 L. ed. U. S. 101.

†Laws of the High School, as Amended and Adopted by the Mission, June, 1835.

Chapter I.

Design of the School.

The design of the High School is,

1. To aid the mission in accomplishing the great work for which they were sent hither; that is, to introduce and perpetuate the religion of our Lord and Saviour Jesus with all its accompanying blessings, civil, literary, and religious.

4. Another object, still more definite and

Hawaiian government by the mission. Vol. 3 L. C. Award, pp. 143 et seq., upon the final confirmation which was duly made to the said A. B. C. F. M. all the lands claimed were awarded, 'with the exception of section 2, Lahainaluna, which had been withdrawn.'"

The "after-arrangement" referred to in the records of the land commissioners was as follows:

"Because of financial stress, and also feeling that the school, which had really become a national institution, should be conducted by the government at its own expense, in April, 1849, the mission, at its general mission held in Honolulu, voted as follows: 'To make over this seminary to the government, it being understood that it is to be conducted on the same principles as heretofore.'

"An offer was thereupon made to the government in pursuance to this vote of the mission to make over the school to the government on condition that it should 'be continued at its expense as an institution for the cultivation of sound literature and solid science, and further, that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission, a summary of which will be found in the confession of [209] faith herewith inclosed, *and that, in case of the nonfulfilment or violation of the conditions upon which this transfer is made by the said government, the whole property hereby transferred, hereinbefore specified, together with any additions of improvements, should revert to the said mission.'"

This offer as made was not accepted by the government, but it instead submitted a counter offer to the mission, by which it offered to take over the school on the conditions made in the mission's original offer, but "provided that, in case of the nonfulfilment on the part of this government of the conditions specified in the letter of the above-named gentlemen, it shall be optional with this government to allow the institution, with all additions and improvements which may have been made upon the premises and all rights and privileges connected therewith, to revert to the said mission, to be held in behalf of the American Board of Commissioners for Foreign Missions, or to pay the sum of $15,000; provided also that, in case this government shall find it expedient to divert this establishment to other purposes than those of education, it shall be at liberty to do so, on condition that it maintain an institution of like character and on similar principles in some other place on the island, or pay the sum of $15,000 to said mission in behalf of the Mission Board in Boston."

A more definite form of the "confession of faith" was substituted and accepted by the government, and the whole arrangement ratified by the Hawaiian legislature. Law of 1850 (F. C. 1850) 158, § 1 of Civil Code (1859) § 783, and by the prudential committee of the American Board.

The letter of the mission to the Minister of Public Instruction is inserted in the margin.†

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of equal or greater importance, is, to educate young men of piety and promising talents, with a view to their becoming assistant teachers of religion, or fellow laborers with us in disseminating the gospel of Jesus Christ to their dying fellow men.

Chapter VII.

Of the Studies of the School.

4. The whole school shall meet between daylight and sunrise each week day for prayer, at which one of the instructors shall preside; the roll shall be called, absentees marked and called to an account at least once a week.

6. On the afternoons of Tuesdays and Thursdays each week, or at other times equivalent, the whole school shall meet for biblical instruction, embracing the interpretation of Scripture, evidence of Christianity, archæology, and sacred geography. And Friday afternoon of each week, or time equivalent, shall be spent in exhibiting and correcting compositions in the Hawaiian language and in elocution.

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†Exhibit A.

Honolulu, April 25, 1849.

To His Ex. R. Armstrong, Minister of Public Instruction of the Hawaiian Islands.

Sir: The undersigned, a committee of the general meeting of the mission of the A. B. C. F. M., at the Sandwich Islands, appointed in reference to the Mission Seminary at Lahainaluna, Maui, beg leave, through your Excellency, to offer a few remarks respecting that institution, and make some proposals in reference to it to his Majesty's government for its consideration.

It is well known to his Majesty, and also to most of the members of his government, that, in the year 1831, the mission commenced the establishment of the institution now known as the Mission Seminary of Lahainaluna, Maui, to promote the diffusion of enlightened literature and Christianity throughout the islands.

From that period to the present time this institution has been unceasingly and anxiously watched over, cherished, and cared for by the mission. No expense or pains coming within its appropriate means or power have been spared to promote its usefulness and secure the objects of its establishment.

Three missionaries have, for a large portion of the time, been devoted to its interests, and two at [illegible] ness since the two or three first years [illegible] a existence. About $77,000.00 have b[illegible] ended for its benefit, including the support [illegible] of the teachers and

*The Hawaiian government at once took possession of the Lahainaluna seminary and carried on the school exactly as it had been conducted by the Mission, both in religious instruction and the inculcation of sound literature and solid science.

For many years after the government had taken over the school the principals of the school continued their relations as missionaries of the American Board in their work in the school, and continued to make reports of their educational and religious *work and instruction in the school to the general meetings of the mission.

In 1862 the seminary buildings were burned down. Other buildings were built. The principal, in his report for that year, 1862-63, reviewing the history of the school, says: "The Hawaiian government has always been a liberal friend and benefactor. . . . Never in any way have they interfered with our manner of instruction, or in the course of instructions *pursued. In [212] our work we have had all the freedom which we possibly could have had under the A. B. C. F. M." Also, referring to pupils who, under the religious instruction at the school, became ministers, he says: "While six who were connected with it since it has been under the care of the Hawaiian government have been ordained to the same office."

Prior to the establishment of the Anglican Church in Hawaii the board of education appointed as instructors such persons as were acceptable to the mission, generally selecting those nominated by the mission.

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the dwellings erected for their accommodation.

We need not point you to the fruits of this cherished institution, scattered throughout the islands, filling various posts of honor, responsibility, and usefulness, both in and out of the government. They are well known to his Majesty and the officers of his government, and to none better than yourself.

The institution has been planted and sustained to the present time by the American Board of Commissioners of Foreign Missions, from donations given by the American churches for the spread of the gospel in heathen lands. That board, as we learn by recent intelligence, was, at the close of its last financial year, embarrassed by a debt of $60,000.00, incurred in the prosecution of its labors of benevolence and mercy.

As a consequence of its indebtedness, it has been obliged to curtail its expenditures by diminishing its grants to each one of the missions under its care, and this mission, in common with others, has shared in the general reduction.

For this reason the mission will be unable to carry forward its operations with the vigor to be desired in all of its departments of labor. Some must almost inevitably suffer for want of pecuniary means.

In view of these facts, and believing that, under present circumstances, the transfer of this institution to the fostering care and patronage of government will promote the highest interests of the Hawaiian people, we beg leave, through your Excellency, to submit to his Majesty's government for its consideration the following proposals, *viz:*

That the mission of the A. B. C. F. M. at the Sandwich Islands, acting for and in behalf of the said American Board of Commissioners of Foreign Missions, having its headquarters in Boston, state of Massachusetts, in the United States of America, relinquish all of their right, title, and interest to and in the seminary buildings located at Lahainaluna on the island of Maui, and known as the Mission Seminary, together with all of the dwelling houses at that station erected by the mission at the expense of the said A. B. C. F. M., for the use of the teachers in the said Mission Seminary; also the building erected by the mission as a printing office and bindery; also all lands pertaining to and granted for the use of the Missionary Seminary, and also all philosophical and other apparatus procured for the use of the said seminary, also the public library of the said institution, and to transfer the same to the Hawaiian government for its use, benefit, and behoof, to have and to hold the same forever.

Providing, however, and this transfer is made upon the express condition, that the said Hawaiian government agrees that the said institution shall be continued at its expense, as an institution for the cultivation of sound literature and solid science; and, further, that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission, which we represent, a summary of which will be found in the confession of faith herewith inclosed, and in that in case of the nonfulfilment or violation of the conditions upon which this transfer is made by the said government, the whole property hereby transferred, hereinbefore specified, together with any additions or improvements which may have been made upon the premises, and all the right and privileges hereby conveyed or transferred to the Hawaiian government by the said island mission, shall revert to the said mission, to have and to hold the same for and in behalf of the American Board of Commissioners of Foreign Missions.

These proposals, if accepted, by the Hawaiian government, shall not have binding force until they shall have received the sanction of the prudential committee of the American Board Commissioners of Foreign Missions in Boston; and further, should the said Hawaiian government accept the proposals here presented, and enter forthwith upon the fulfilment of the conditions, and should the said transfer not meet the approbation of the prudential committee, the mission, on its part, pledges itself to refund to the said government any necessary expenses it

When the Anglican mission was established it was proposed that the forms and probably the substance of religious instruction should be changed, and advice was asked of the Attorney General. His reply reviewed the whole arrangement upon which the government received the seminary, and concluded as follows: "Should the government not be willing to keep the conditions as far as I have shown, then the property and improvements must be restored to the A. B. C. F. M."

[213] *In 1865 the Hawaiian Gazette, the official mouthpiece of the government, declared that the government had resolved that its support should be given to schools irrespective of their religious teaching, but pointed out that the board of education might be chargeable with partiality for supporting a state church, inasmuch as it paid large sums to defray the expenses of Lahainaluna, where the principles and theology of one particular sect were exclusively taught, although opposed to the belief of all in communion with Roman Catholic and Episcopal churches.

In the following years, upon the suggestion by the mission of certain instructors, a correspondence arose between the board of education and the mission, in which the board of education said that it was understood that the institution was to be continued so as to aid instead of to defeat the purpose for which it had been founded, and that nothing had been done to justify the intimation that the board had any desire to defeat such purpose, and admitted "that a full compliance with agreement consists in appointing persons teaching in the doctrine and after the manner of the Congregational and Presbyterian churches of the United States." And further: "The board are fully aware that if they do not see fit to carry on the institution according to the terms of the contract, they have to reconvey it, or pay the sum of $15,000."

After 1865 the seminary continued to be conducted on the same lines as prior thereto.

In 1894, in the Constitution of the Republic of Hawaii, it was provided that ". . . No public money shall be appropriated . . . for the support of (or?) benefit of any sectarian, denominational, or private school." This provision is continued and remains in full force as a part of § 55 of the organic act.

Religious instruction ceased to be a part of the curriculum at Lahainaluna, as provided in the agreement, on or about September 1, 1903, at which date the religious tenets and doctrines, in accordance with the creed and articles of faith *of the mis-[214] sion, ceased to be taught, and are no longer taught. The "cultivation of sound literature and solid science" has also ceased, and the institution has become a technical school under the name of "The Lahainaluna Agricultural School."

The territory maintains no other institution of like character and on similar principles in any other place on the island.

The appellants are the successors of the American Board of Commissioners for Foreign Missions.

Upon these facts, it is alleged, that appellants have become entitled to a return of the property conveyed or to the payment of $15,000; that the territory has refused to do either, but has elected to retain the property, which election is evidenced by its refusal to pay the said sum, and the further fact that it is proceeding to erect expensive buildings thereon and expend large sums of money in fitting the property and the school to become a technical school,—namely, an agricultural college.

The petition was demurred to upon the grounds substantially as follows:

1. That the court had no jurisdiction of the subject-matter of the claim. 2. That the United States was a necessary party, the property described in the petition having been transferred and ceded to the United States by the treaty of annexation of July 7, 1898. 3. That the petition did not set out facts sufficient to constitute a cause of action in that, (a) it did not appear that the agreement set forth in the petition was ratified by the legislature; (b) that the

may have incurred in carrying on the institution whilst the parties were awaiting the ratification or rejection of this transfer by the said prudential committee. Provided, however, that moneys shall not have been expended in enlargement or improvements, other than what may have been actually necessary to keep the buildings in repair and carry on the institution.

In case of disagreement of the parties as to the amount proper to be refunded, in case of the nonratification of this conveyance by the prudential committee, the sum shall be determined by two arbitrators, one of which shall be chosen by each of the respective parties, and which arbitrators, in case of disagreement, shall elect a third to decide upon the award.

The foregoing remarks and proposals are respectfully submitted for the consideration of his Majesty's government, and I shall be greatly obliged by an early answer.

We have the honor to be,

Very respectfully, your ex. friends and most obedient servants,

W. P. Alexander,
C. R. Andrews,
S. N. Castle, Gen.
I. N. Castle.

right of action accrued more than two years prior to the commencement of the action; (c) it did not appear that there had been a breach of the conditions of the agreement; (d) or, if so, that it occurred in compliance with law and statutes which rendered the fulfilment of the conditions impossible. 4. That the petition was indefinite and uncertain, in that the allegations as to breach of conditions pleaded were conclusions of law, it nowhere appearing in the petition in what respect the conditions had been broken. The supreme court overruled the first, second, *and fourth grounds, and divisions a and b of the third ground of demurrer.

Mr. **David L. Withington** argued the cause, and, with Messrs. William R. Castle, W. O. Smith, A. Lewis, Jr., and C. H. Olson, filed a brief for appellants:

A term can be read into a contract from the surrounding circumstances.

Bradley v. Washington, A. & G. Steam Packet Co. 13 Pet. 89, 10 L. ed. 72; Reed v. Merchants' Mut. Ins. Co. 95 U. S. 23, 24 L. ed. 348; Field v. Munson, 47 N. Y. 221; Hussey v. Horne-Payne, L. R. 4 App. Cas. 311, 6 English Ruling Cases, 169; Shouse v. Doane, 39 Fla. 95, 21 So. 807; Merchants' & M. Sav. Bank v. Fraze, 9 Ind. App. 161, 53 Am. St. Rep. 341, 36 N. E. 378; Staples v. Edwards & M. Lumber Co. 56 Minn. 16, 57 N. W. 220; O'Dea v. Winona, 41 Minn. 424, 43 N. W. 97; Jennings v. Whitehead & A. Mach. Co. 138 Mass. 594; Erskine v. Adeane, L. R. 8 Ch. 756; Katz v. Bedford, 77 Cal. 319, 1 L.R.A. 826, 19 Pac. 523; Peoples Natural Gas Co. v. Braddock Wire Co. 155 Pa. 22, 25 Atl. 749; Cleburne Water, Ice, & Lighting Co. v. Cleburne, 13 Tex. Civ. App. 141, 35 S. W. 733; Nilson v. Morse, 52 Wis. 240, 9 N. W. 1.

A term can be read in from the construction by the parties.

Chicago G. W. R. Co. v. Northern P. R. Co. 42 C. C. A. 25, 101 Fed. 792; Central Trust Co. v. Wabash, St. L. & P. R. Co. 34 Fed. 256; Union P. R. Co. v. Anderson, 11 Colo. 293, 18 Pac. 24; Conwell v. Pumphrey, 9 Ind. 135, 68 Am. Dec. 611; Merchants' & M. Sav. Bank v. Fraze, supra; Webster v. Clark, 34 Fla. 637, 27 L.R.A. 126, 43 Am. St. Rep. 217, 16 So. 601; Consolidated Coal Co. v. Schneider, 163 Ill. 393, 45 N. E. 126; Hill v. Duluth, 57 Minn. 231, 58 N. W. 992; First Nat. Bank v. Jagger, 41 Minn. 308, 43 N. W. 70; Paxton v. Smith, 41 Neb. 56, 59 N. W. 690; Cincinnati v. Cincinnati Gaslight & Coke Co. 53 Ohio St. 278, 41 N. E. 239; Tullar v. Baxter, 59 Vt. 467, 8 Atl. 493; Hosmer v. McDonald, 80 Wis. 54, 49 N. W. 112; Ganser v. Fireman's Fund Ins. Co. 38 Minn. 74, 35 N. W. 584; Cleburne Water, Ice & Lighting Co. v. Cleburne, supra; Davis v. Ravenna Creamery Co. 48 Neb. 471, 67 N. W. 436; Brooklyn L. Ins. Co. v. Dutcher, 95 U. S. 269, 24 L. ed. 410; District of Columbia v. Gallaher, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585; Topliff v. Topliff, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057; Paige v. Banks, 13 Wall. 608, 20 L. ed. 709; Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. 367, 19 L. ed. 948; Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594; Cavazos v. Trevino, 6 Wall. 773, 18 L. ed. 813; Rockefeller v. Merritt, 35 L.R.A. 633, 22 C. C. A. 608, 40 U. S. App. 666, 76 Fed. 909; Leavitt v. Windsor Land & Invest. Co. 4 C. C. A. 425, 12 U. S. App. 193, 54 Fed. 439; Foster v. Goldschmidt, 21 Fed. 70; Nickerson v. Atchison, T. & S. F. R. Co. 3 McCrary, 455, 17 Fed. 409; White v. Amsden, 67 Vt. 1, 30 Atl. 972.

The instruments construed as a whole make it a necessary inference that the maintenance of religious instruction and training in the doctrines of the mission were a part of the contract; and this term will be read in.

2 Page, Contr. § 1118, p. 1740; Hall v. First Nat. Bank, 133 Ill. 234, 24 N. E. 546; Dwenger v. Geary, 113 Ind. 106, 14 N. E. 903.

Where two phrases are used as meaning the same thing, and one interprets the meaning, such interpretation is to be followed in the interpretation of the contract.

Simpson v. United States, 199 U. S. 399, 50 L. ed. 245, 26 Sup. Ct. Rep. 54.

An academy established for "the purpose of promoting religion and morality, and for the education of youth in such of the liberal arts and sciences as the trustees shall direct," is a literary and scientific institution.

Wesleyan Academy v. Wilbraham, 99 Mass. 599.

If secular learning is exclusively intended, a technical school is not an institution for the inculcation of general learning, but for special and technical education.

Detroit Home & Day School v. Detroit, 76 Mich. 521, 6 L.R.A. 97, 43 N. W. 593; Lichentag v. Tax Collector, 46 La. Ann. 572, 15 So. 176; People v. Gunn, 96 N. Y. 317; Ex parte St. John Law Soc. 30 N. B. 501; 12 Am. & Eng. Enc. Law, 2d ed. pp. 331, 332 note 6; Indianapolis v. Sturdevant, 24 Ind. 391; Inland Revenue Comrs. v. Forrest, L. R. 15 App. Cas. 334; Massachusetts Agri. College v. Marden, 156 Mass. 150, 30 N. E. 555; New England Theosophical Corp. v. Boston, 172 Mass. 60, 42 L.R.A. 281, 51 N. E. 456.

Mr. **Lorrin Andrews** submitted the cause for appellee. Messrs. E. C. Peters and M. F. Prosser were on the brief:

Conditions subsequent are strictly construed as against the grantor, and nothing will be taken by way of intendment in favor of the grantor.

4 Kent, Com. p. 138; Woodworth v. Payne, 74 N. Y. 199, 30 Am. Rep. 298; Mills v. Evansville Seminary, 58 Wis. 139, 15 N. W. 133; Voris v. Renshaw, 49 Ill. 431; 2 Devlin, Deeds, § 973; Rose v. Hawley, 141 N. Y. 378, 36 N. E. 335.

When the performance of conditions subsequent is prevented by the act of God, or becomes contrary to law by reason of the transfer of the territory, or a change of government, failure to fulfil such conditions will not work a forfeiture of the estate.

United States v. Arredondo, 6 Pet. 745, 8 L. ed. 567; Scoville v. McMahon, 62 Conn. 378, 21 L.R.A. 58, 36 Am. St. Rep. 350, 26 Atl. 479; Wheeler v. Moody, 9 Tex. 376.

Mr. Justice McKenna delivered the opinion of the court:

The contentions of the parties are sharply in opposition as to the agreement, and the necessity and competency of extrinsic evidence to explain it. Appellee contends that we are confined to the letter of the agreement, and, so confined, its conditions have been fulfilled. In other words, that "sound literature and solid science" are still cultivated, and that no religious tenet or doctrine contrary to those heretofore inculcated by the mission is taught. Or, to express the contention in language other than that of the agreement, that a school devoted to one subject of secular science, and which excludes all religious teaching, was contemplated by or is permitted by the agreement. Opposing these views, appellants contend that a mere technical school does not fulfil the agreement; that the terms of the agreement require the "inculcation of general learning and knowledge," accompanied with religious instruction in accordance with the confession of faith submitted to the Hawaiian government. And it is in-
[219] sisted that, if there is anything *doubtful in the agreement, it may be interpreted by the circumstances which preceded it and the immediate and long-continued practice under it. If we may resort to those circumstances and that practice there cannot be a shade of doubt as to the intention of the parties. It is insisted, however, by the appellee, that the agreement is clear and unambiguous, and that it does not present a case for the resort to extrinsic evidence. We cannot concur with this view. There is quite a range of meaning in the words "sound literature and solid science." To interpret or specialize them and make definite application of them would certainly receive aid from the practice of the parties. It is contended by appellants that there was a close connection between them and the "definite system of doctrine" which was the "central purpose of the mission." We, however, need not dwell further upon this contention, though a plausible argument has been advanced to sustain it, and we pass to the next controverted contention. The words of the agreement are that the government "shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission, a summary of which will be found in the confession of faith herewith inclosed . . ." Were these words all there was of prohibition and purpose as to religion? May we believe that it became suddenly the purpose to change an institution which had had its impulse and foundation in religious zeal to convert the Hawaiians to Christianity and to educate young men to be "teachers of religion," to one simply literary and scientific and nonsectarian? Had the belief of the mission in its form of Christian faith become so indifferent that it would transfer a seminary instituted for the propagation of that faith with no other condition than that contrary tenets should not be taught? There is not a syllable in this record to justify such assumptions. It must be remembered that we are considering a transaction which occurred in the Hawaiian Islands in 1849, and by the conditions of that time were the acts of the parties induced. Besides, the agreement is not in a formally executed *paper. It is [220] found in a correspondence, and is constituted and explained by the whole of the correspondence. And, taking the whole of it, there is very little aid from extrinsic evidence needed to demonstrate its meaning and purpose.

The mission reminds the Minister of Public Instruction that the seminary was established in 1831, "to promote the diffusion of enlightened literature and Christianity throughout the islands," and that it had been unceasingly watched over, cherished, and cared for by the mission, and that $77,000 had been expended for its benefit. It was stated that, in consequence of debts incurred "in the prosecution of its labors of benevolence and mercy," the American Board of Commissioners of Foreign Missions was compelled to diminish its grants to each of the missions under its care, including the Hawaiian mission, and that the latter, for that reason, would be "unable to carry forward its operations with the vigor to be desired in all of its departments of labor." In view of these facts, it was stated and believed that, under the circumstances, the transfer of the institution "to the fo[illegible] care and patronage

of the government" would "promote the highest interest of the Hawaiian people." An offer was then made to transfer the seminary with the conditions which we have referred to. A confession of faith was inclosed. The government modified the proposal by reserving the right to pay $15,000 as an alternative to the reversion of the property to the mission if the government should not fulfil the conditions of the grant. The modification was accepted, and, in a subsequent communication, a new confession of faith was substituted for that originally proposed. The following are the reasons which were given:

"The reasons for requesting the substitution are, that the previously presented confession, although according in all its specified doctrines with our belief and with that also of the churches by whom that institution has been founded and sustained, is yet not so distinctive as to present a barrier to the introduction there of other deleterious doctrine not specified *in said confession. It will admit, also, of teachings of this mission and of the churches sustaining it, such as we feel to be entirely subversive of evangelical Christianity. Not doubting but that these reasons will commend themselves to the members of his Majesty's government, we beg leave to express, in presenting them, the high consideration with which we remain."

The correspondence concerned the transfer of a school established in 1835, the design of which was to perpetuate the Christian religion, and with an object described to be "still more definite and of equal or greater importance,"—that is, "to educate young men to be Christian ministers." A religious instruction was prescribed. All this the government was informed of when the proposition was made to transfer the school to its "fostering care and patronage." And the government accepted the grant, accepted as it was tendered, and necessarily for the purpose it was tendered.

Even if we stopped here, conviction of the justness of that conclusion is almost indisputable. It becomes indisputable if extrinsic evidence be considered, and we have no doubt that it may be. In Bradley v. Washington, A. & G. Steam Packet Co. 13 Pet. 89, 10 L. ed. 72, a contract expressed in a correspondence between the parties for the hire of a steamboat, an exception was ingrafted which was not expressed, upon evidence that the owner of the boat knew the service for which it was intended, and that when navigation was obstructed by ice another mode of transportation was resorted to. The court said, as to extrinsic evidence, it was applied in some cases "to ascertain the identity of the subject; in others its extent. In some, to ascertain the meaning of a term, where it had acquired by use a particular meaning; in others, to ascertain in what sense it was used where it admitted of several meanings. But in all the purpose was the same. To ascertain by this medium of proof the intention of the parties, where, without the aid of such evidence, that could not be done, so as to give a just interpretation to the contract." And it was expressed "as the just result" of the cases, *"that, in giving effect to a written contract [222] by applying it to its proper subject-matter, extrinsic evidence may be admitted to prove the circumstances under which it was made, whenever, without the aid of such evidence, such application could not be made in the particular case." In Brooklyn L. Ins. Co. v. Dutcher, 95 U. S. 269, 24 L. ed. 410, it was said: "There is no surer way to find out what parties meant than to see what they have done." So obvious and potent a principle hardly needs the repetition it has received. And equally obvious and potent is a resort to the circumstances and conditions which preceded a contract. Necessarily in such circumstances and conditions will be found the inducement to the contract and a test of its purpose. The conventions of parties may change such circumstances and conditions, or continue them, but it cannot be separated from them. And this makes the value of contemporaneous construction. It is valuable to explain a statute where disinterested judgment is alone invoked and exercised. It is of greater value to explain a contract where self-interest is quick to discern the extent of rights or obligations, and never yield more than the written or spoken word requires. See, for further illustration, the following: Reed v. Merchants' Mut. Ins. Co. 95 U. S. 23, 24 L. ed. 348; District of Columbia v. Gallaher, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585; Topliff v. Topliff, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057; Paige v. Banks, 13 Wall. 608, 20 L. ed. 709; Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. 367, 19 L. ed. 948; Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594; Cavazos v. Trevino, 6 Wall. 773, 18 L. ed. 813; Simpson v. United States, 199 U. S. 397, 399, 50 L. ed. 245, 246, 26 Sup. Ct. Rep. 54; Chicago Great Western R. Co. v. Northern P. R. Co. 42 C. C. A. 25, 101 Fed. 792. And many state cases could be cited.

The design of studies for the school we have detailed. The government recognized and continued both without question or change in any way. The seminary buildings were burned down in 1862. The government rebuilt them and continued the school. The petition alleges that the prin-

cipal of the school, in 1862-63, in his report, said: "The Hawaiian government has always been a liberal friend and bene-
[223] factor. . . . *Never, in any way, have they interfered with our manner of instruction or in the course of instruction pursued. In our work we have had all the freedom which we possibly could have had under the A. B. C. F. M." Also, referring to pupils who, under the religious instruction at the school, became ministers, he says: "While six who were connected with it since it has been under the care of the Hawaiian government have been ordained to the same office."

In 1864 new interests appeared and a change in the purpose of the school commenced to be urged. It was met by an adverse opinion of the Attorney General, who pointed out the conditions of the transfer, and the condition of their nonfulfilment to be the restoration of the property to the A. B. C. F. M. And, again, in 1865, the board of education, while denying the right of the mission to nominate instructors, conceded the obligation to continue the institution, "so as to aid, instead of defeating, the purpose for which it was founded," and the alternative to be the surrender of the property or the payment of $15,000. "Religious instruction," it is alleged, "upon the lines formerly pursued by the mission and subsequently by the government, in accordance with the agreement, was continued up to or about September 1, 1903." We hence see that not only the immediate practice of the government construed the agreement as contended for by appellants, but the practice of over fifty years proclaimed the same meaning,—proclaimed it without question and against a suggestion and agitation to reject it. It is somewhat staggering to be told that such continuity of practice is not a legal interpreter of the meaning of the parties, and that the only criterion can be a precise and isolated form of words which, at the end of a half a century of contrary admission and declaration, one of the parties finds it convenient to bring forward.

It is no defense that the government's policy has changed. It cannot so release itself from its engagement. The provision for the teaching of "sound literature and solid science" might be considered of "ex-
[224] pansive character," to use the *description of Lieber, and change with the progress of both. The provision for religious teaching is unchanging. It is as definite and absolute to-day as it was when it was written. The alternative of it the agreement has made the return of the property conveyed, or the payment of $15,000.

Judgment reversed and case remanded, with directions to proceed in conformity with this opinion.

Mr. Justice Brewer took no part in the decision of this case.

HENRY E. FRANKENBERG COMPANY, Petitioner,
v.
UNITED STATES.

(See S. C. Reporter's ed. 224-228.)

Duties—on metal beads.

Metal beads temporarily strung on cotton cords or strings for the purpose of facilitating transportation are not dutiable under the tariff act of July 24, 1897 (30 Stat. at L. 167, 189, chap. 11, U. S. Comp. Stat. 1901, pp. 1645, 1673), par. 402, at 35 per cent ad valorem as loose beads, but are subject to the 45 per cent ad valorem duty prescribed by par. 193 for articles or wares not specially provided for in the act, composed wholly or in part of metal, whether wholly or partly manufactured.

[No. 257.]

Argued April 12, 1907. Decided May 13, 1907.

IN WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York, which had, in turn, affirmed the decision of the Board of General Appraisers, sustaining the collector in assessing a 45 per cent ad valorem duty on metal beads temporarily strung on cotton cords or strings for the purpose of facilitating transportation. Affirmed.

See same case below, 76 C. C. A. 514, 146 Fed. 63.

The facts are stated in the opinion.

Mr. Frederick W. Brooks argued the cause and filed a brief for petitioner:

In cases involving the construction of tariff laws, it is frequently held that the strict letter of the law should not be followed.

Seeberger v. Schlesinger, 152 U. S. 574, 587, 38 L. ed. 560, 562, 14 Sup. Ct. Rep. 739; United States v. Harden, 15 C. C. A. 383, 35 U. S. App. 340, 68 Fed. 182; United States v. Jonas, 27 C. C. A. 500, 55 U. S. App. 64, 83 Fed. 168. See also United States v. Kirby, 7 Wall. 482-486, 19 L. ed. 278-280; Tod Sim v. United States, 54 C. C. A. 184, 116 Fed. 927.

Beads are not [illegible] as composed wholly or in part of beads because they had been strung upon a cord [illegible] read.

Steinhardt v. [illegible] States, 113 Fed. 901, [illegible] 206 U. S.

A string of pearls has been held to be worth more than the aggregate value of the individual pearls composing it.

Tiffany v. United States, 50 C. C. A. 419, 112 Fed. 674. See also Neresheimer v. United States, 68 C. C. A. 654, 136 Fed. 88.

The commercial designation is the result of established usage in commerce and trade; and such usage, to affect a general enactment, must be definite, uniform, and general, and not partial, local, or personal.

Maddock v. Magone, 152 U. S. 368–371, 38 L. ed. 482, 483, 14 Sup. Ct. Rep. 588; Berbecker v. Robertson, 152 U. S. 373, 376, 38 L. ed. 484, 485, 14 Sup. Ct. Rep. 590.

The meaning of the words, as used in the particular statute, must be gathered from the context and from the evident purpose of the act.

The Conqueror, 166 U. S. 110, 115, 41 L. ed. 937, 940, 17 Sup. Ct. Rep. 510.

The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws.

Hartranft v. Wiegmann, 121 U. S. 609, 615, 30 L. ed. 1012, 1014, 7 Sup. Ct. Rep. 1240; United States v. Wilson, Fed. Cas. No. 16,736; Boak v. United States, 60 C. C. A. 335, 125 Fed. 600; Gudewill v. United States, 142 Fed. 214.

Assistant Attorney General Sanford argued the cause and filed a brief for respondent:

The beads in question, being in fact strung on cotton threads, and so assorted and strung not merely for convenience in handling, but in order to change their condition into that of selected beads which shall have a salable value, and being also familiarly known in the trade as "strung beads," are not included, either in ordinary or commercial usage, in the terms of paragraph 408, as beads "not threaded or strung," and must, in accordance with their commercial designation, be excluded from classification under such paragraph.

Two Hundred Chests of Tea, 9 Wheat. 430, 438, 6 L. ed. 128, 129; Hedden v. Richard, 149 U. S. 346, 348, 37 L. ed. 763, 764, 13 Sup. Ct. Rep. 891; American Net & Twine Co. v. Worthington, 141 U. S. 468, 471, 35 L. ed. 821, 822, 12 Sup. Ct. Rep. 55; Cadwalader v. Zeh, 151 U. S. 171, 38 L. ed. 115, 14 Sup. Ct. Rep. 288.

It had been uniformly held, prior to the act of 1897, that beads strung in bunches were not "loose, unthreaded, or unstrung" beads, within the meaning of the tariff act of 1890; and the words "not threaded or strung," in the act of 1897, hence, are to be construed in like manner.

United States v. Falk, 204 U. S. 143, 152, ante, 411, 415, 27 Sup. Ct. Rep. 191; Robertson v. Downing, 127 U. S. 607, 32 L. ed. 269, 8 Sup. Ct. Rep. 1328; United States v. Healey, 160 U. S. 136, 40 L. ed. 369, 16 Sup. Ct. Rep. 247.

The classification of the beads contended for by the government will result in a graduated classification, under which the duties are increased in proportion to the labor expended on them abroad, in accordance with the general policy of the tariff law.

Arnold v. United States, 147 U. S. 494, 37 L. ed. 253, 13 Sup. Ct. Rep. 406; Saltonstall v. Wiebusch & Hilger, 156 U. S. 601, 39 L. ed. 549, 15 Sup. Ct. Rep. 476.

Mr. Justice McKenna delivered the opinion of the court:

The question involved in this case is whether certain importations of metal beads are dutiable under paragraph 408 of the *tariff act of July 24, 1897 [30 Stat. at L. [225] 167, 189, chap. 11, U. S. Comp. Stat. 1901, pp. 1645, 1673], at 35 per cent ad valorem, or at 45 per cent ad valorem under paragraph 193.

The collector assessed them at the latter rate. The petitioner protested. Upon submission of the protest to the board of general appraisers, that board sustained the collector. Its decision was successively affirmed by the circuit court and the circuit court of appeals. 76 C. C. A. 514, 146 Fed. 63.

The applicable paragraphs are respectively as follows: 408, "Beads of all kinds not threaded or strung, thirty-five per centum ad valorem;" 193, "Articles or wares not specially provided for in this act, composed wholly or in part of . . . metal, and whether partly or wholly manufactured, forty-five per centum ad valorem." There is no dispute about the character of the articles. They are metal beads, strung on cotton cords or strings. They cannot, therefore, be said to be beads "not threaded or strung," which paragraph 408 makes dutiable at 35 per cent, if the words of that paragraph be taken literally. But it is contended that the construction of that paragraph is dependent upon the use to which the beads are put and the purpose on account of which they are strung. It is contended, and the contention is supported by the testimony, that the beads are used in the manufacture of purses, for the embroidery of cushions and dresses; never for personal adornment; and that they are strung or threaded in bunches for the purpose of facilitating transportation, and hence, in contemplation of the statute, loose beads. To this argument the circuit court of appeals of the seventh circuit yielded. United States v. Buettner, 66 C. C. A. 289,

133 Fed. 163. It did not prevail, however, with the circuit court of appeals of the second circuit in the case at bar nor in a prior case. Steiner v. United States, 24 C. C. A. 690, 26 U. S. App. 778, 79 Fed. 1003. Notwithstanding this conflict in the circuit court of appeal, the case is in such narrow compass that an extended discussion is not necessary. It may be that the stringing of the beads has but a temporary purpose. We, however, are not at liberty to disregard the condition upon which the law makes the duty depend. Indeed, the considerations expressed by the board of ap-[226] praisers *make it certain that the language of paragraph 408 was deliberately used to apply only to beads actually loose. This view is supported by the testimony as well. It was testified that prior to 1897 that the terms threaded and strung beads were familiar in the importing trade, and that beads strung on "threads for temporary use were commercially known at that time as strung beads." And it was further testified that there was an increase in value over unstrung beads from 15 to 20 per cent on account of the labor attached to stringing.

Judgment affirmed.

Mr. Justice Moody took no part in the decision of this case.

UNITED STATES, Appt.,
v.
AMMEN FARENHOLT.

(See S. C. Reporter's ed. 226–230.)

Navy—pay of passed assistant surgeon—mounted pay.

A passed assistant surgeon in the Navy, with the rank of lieutenant, is entitled to the pay of a captain in the Army, mounted, in view of the respective provisions of U. S. Rev. Stat. § 1466, U. S. Comp. Stat. 1901, p. 1029, assimilating in rank lieutenants in the Navy with captains in the Army, of the Navy personnel act of March 3, 1899 (30 Stat. at L. 1007, chap. 413, U. S. Comp. Stat. 1901, p. 1072), § 13, entitling commissioned officers of the line of the Navy to the same pay and allowance as officers of corresponding rank in the Army, and of the act of June 7, 1900 (31 Stat. at L. 697, chap. 859, U. S. Comp. Stat. 1901, p. 990), declaring that assistant surgeons shall rank with assistant surgeons in the Army, who are mounted, since Congress must have used the words "assistant surgeons" as descriptive of the whole class of assistant surgeons, passed as well as those not passed.

[No. 277.]

Argued April 25, 1907. Decided May 13, 1907.

APPEAL from the Court of Claims to review a judgment awarding a passed assistant surgeon in the Navy with the rank of lieutenant the pay of a captain in the Army, mounted. Affirmed.

See same case below, 41 Ct. Cl. 517.

The facts are stated in the opinion.

Mr. John Q. Thompson argued the cause, and, with Assistant Attorney General Van Orsdel, filed a brief for appellant.

Mr. George A. King argued the cause, and with Mr. William B. King, filed a brief for appellee.

*Mr. Justice McKenna delivered the opin-[227] ion of the court:

The appellee filed a petition in the court of claims to recover from the United States the sum of $282.66 for the difference he alleged he was entitled to as a passed assistant surgeon in the Navy, with the rank of lieutenant, for mounted pay from December 26, 1900, to July 27, 1901, with 10 per cent increase for service outside of the limits of the United States. He was given judgment for $141.33. The 10 per cent increase was not allowed.

A statement of the case is well expressed in the findings and conclusion of the court, as follows:

"The claimant, Ammen Farenholt, entered the naval service as an assistant surgeon May 29, 1894, and was promoted to the grade of passed assistant surgeon May 29, 1897. He attained the rank of lieutenant on December 26, 1900, and was a passed assistant surgeon in the Navy with the rank of lieutenant during all of the time covered by this petition.

"From December 26, 1900, to April 12, 1901, he was on sea duty attached to the U. S. S. 'Concord.' From April 12, 1901, to July 27, 1901, he was on sea duty attached to the U. S. S. 'Oregon.'

"The claimant has already received pay at mounted rates for the periods before December 26, 1900, and after July 27, 1901, under the decisions of the court of claims in Richardson v. United States, 38 Ct. Cl. 182, as applied by the Comptroller of the Treasury in Brownell's Case (9 Comp. Dec. 676), but the Treasury Department declines to allow him mounted pay between these dates only because it considers that it is deprived of jurisdiction over the claim therefor by reason of a prior allowance and settlement of pay for the same period.

"If entitled to Army pay at mounted

rates for this period the amount due would be as follows:

Pay of a lieutenant of the Navy, which corresponds in rank with a captain in the Army, mounted, from December 26, 1900, to July 27, 1901, with increased *pay for length of service, 7 months and 2 days, at $2,400.00 per annum	$1,413.33
Less amount received for same period, at $2,160.00 per annum..	1,272.00
Difference.....	$141.33

"Before the date of the decision of this court in the case of Richardson v. United States, supra, January 5, 1903, assistant surgeons in the Navy received only the pay of an officer of corresponding rank in the Army 'not mounted.' By that decision it was held that they are entitled to the pay of such an officer 'mounted.' This decision was not appealed from and has been accepted as the proper interpretation of the law. It has been applied by ruling of the Comptroller of the Treasury to passed assistant surgeons.

"All officers of the medical corps in grades for which there is in the Army pay table a distinction between 'mounted' and 'not mounted' pay, have ever since been paid at mounted rates of pay for their service from the date the personnel act took effect, July 1, 1899, to the present time.

Conclusion of Law.

"Upon the foregoing findings of fact, the court decides as a conclusion of law, on the authority of Richardson v. United States, supra, that the claimant is entitled to recover against the United States the sum one hundred and forty-one dollars and thirty-three cents ($141.33).

"By a majority of the court."

Section 13 of the act of March 3, 1899 (30 Stat. at L. 1007, chap. 413, U. S. Comp. Stat. 1901, p. 1072), called the Navy personnel act, provides "that after June 30, 1899, commissioned officers of the line of the Navy and of the medical and pay corps shall receive the same pay and allowances except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

Section 1466, Revised Statutes (U. S. Comp. Stat. 1901, p. 1029), assimilates in rank lieutenants in the Navy with captains in the Army. And § 1261 (U. S. Comp. Stat. 1901, p. 893) *fixes the pay of a captain, mounted, at $2,000 a year and a captain not mounted at $1,800 a year. Section 1262 (U. S. Comp. Stat. 1901, p. 896) gives 10 per cent increase for each term of five years' service.

The appellee is a lieutenant in the Navy; he ranks with a captain in the Army, but the question is, Of which class, mounted or not mounted?

The government contends, with captains not mounted. Its argument is that the extra pay that mounted officers receive is not compensation, but reimbursement for expenses incurred; and to give it to a naval officer who does not bear such expenses would produce the inequality that the Navy personnel act was passed to prevent. United States v. Crosley, 196 U. S. 332, 49 L. ed. 499, 25 Sup. Ct. Rep. 261. Counsel, however, concedes that Richardson v. United States, supra, was correctly decided, and that the rule has been extended by the Comptroller of the Treasury to passed assistant surgeons, but attacks the practice of the Comptroller, and rejects the application of the Richardson Case upon the distinction between an *assistant* surgeon, which Richardson was, and a passed assistant surgeon, which appellee is.

The act of June 7, 1900 (31 Stat. at L. 697, chap. 859, U. S. Comp. Stat. 1901, p. 990), provides that "the active list of surgeons shall hereafter consist of fifty-five, and that of passed assistant and assistant surgeons of one hundred and ten. *Assistant* surgeons shall rank with assistant surgeons in the Army." Commenting on this statute the government says: "Assistant surgeons in the Army being mounted, the court very justly granted mounted pay to Richardson, who ranked with assistant surgeons in the Army." In other words, the government contends it was the purpose of Congress to give the inferior officer the better pay. The Assistant Attorney General ventures on no explanation of this anomaly, but insists upon the written word. A court is not always confined to the written word. Construction sometimes is to be exercised as well as interpretation. And "construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text,—conclusions which are in the spirit, though not within *the letter, [230] of the text." Lieber, 56. The application of this rule is clear. Consideration of the provisions relative to the rank and pay of officers of the Army and Navy make it evident that Congress used the words "assistant surgeon" as descriptive of the whole class of assistant surgeons, passed as well as those not passed.

Judgment affirmed.

Mr. Justice Moody took no part in the decision of this case.

STATE OF GEORGIA, by its Attorney General, John C. Hart,
v.
TENNESSEE COPPER COMPANY and Ducktown Sulphur, Copper, & Iron Company (Limited).

(See S. C. Reporter's ed. 230–240.)

Injunction—against pollution of air—suit by state.

1. Foreign corporations will be enjoined at the suit of the state of Georgia from so discharging sulphurous fumes from their works in Tennessee as to pollute the air over large tracts of territory in Georgia, and to cause and threaten wholesale damage to forests and vegetable life therein, if not to health.

Laches—as bar to injunctive relief.

2. The state of Georgia has not been guilty of such laches as bars her right to injunctive relief against the pollution of air over large tracts of her territory, and the destruction of forests and vegetable life therein by sulphurous gases discharged by foreign corporations from their works in Tennessee, where such conditions have not obtained until recent years, and the dismissal, without prejudice, of a similar bill filed in 1904, was due to the mistaken belief that changes in the process of manufacture then in progress would remove the evil.

[No. 5, Original.]

Argued February 25, 26, 1907. Decided May 13, 1907.

ORIGINAL BILL in equity filed by the state of Georgia to enjoin certain foreign corporations from discharging noxious gases from their works in Tennessee over large tracts of territory in Georgia. Injunction decreed.

The facts are stated in the opinion.

Messrs. Ligon Johnson and John C. Hart argued the cause and filed a brief for complainant:

A public nuisance has always been held subject to abatement at the instance of the government.

Re Debs, 158 U. S. 587, 39 L. ed. 1103, 15 Sup. Ct. Rep. 900; Atty. Gen. v. Tudor Ice Co. 104 Mass. 239, 6 Am. Rep. 227; Atty. Gen. v. Jamaica Pond Aqueduct Corp. 133 Mass. 361; State v. Goodnight, 70 Tex. 682, 11 S. W. 119; Mugler v. Kansas, 123 U. S. 672, 673, 31 L. ed. 214, 8 Sup. Ct. Rep. 273; Missouri v. Illinois, 180 U. S. 241, 45 L. ed. 512, 21 Sup. Ct. Rep. 331; Georgetown v. Alexandria Canal Co. 12 Pet. 91, 9 L. ed. 1012; Coosaw Min. Co. v. South Carolina, 144 U. S. 565, 36 L. ed. 543, 12 Sup. Ct. Rep. 689; Atty. Gen. v. Forbes, 2 Myl. & C. 123; Eden, Inj. p. 267; Story, Eq. Jur. § 921; Dan. Ch. Pl. & Pr. 4th ed. p. 1636; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 14 L. ed. 249; Irwin v. Dixion, 9 How. 27, 13 L. ed. 33; Phalen v. Virginia, 8 How. 168, 12 L. ed. 1032; Sweet v. Rechel, 159 U. S. 398, 40 L. ed. 195, 16 Sup. Ct. Rep. 43.

Every state possesses sole and exclusive jurisdiction over her own territory, not only with reference to her soil, but as to acts committed thereon, as well as of the citizens and inhabitants thereof.

Hoyt v. Sprague, 103 U. S. 630, 26 L. ed. 592; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Simpson v. State, 92 Ga. 42, 22 L. R.A. 248, 44 Am. St. Rep. 75, 17 S. E. 984; 1 Bishop, Crim. Proc. 53; Bishop, Crim. Law, § 110; Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89; Rorer, International Law, 2d ed. p. 323; Minor, Confl. L. p. 480; Wilson v. Seligman, 144 U. S. 44, 36 L. ed. 339, 12 Sup. Ct. Rep. 541.

The only mode of suppression of nuisances originally was by indictment, under the common law.

Bl. Com. bk. 4, chap. 13, 167; Pike County Justices v. Griffin & W. P. Pl. Road Co. 15 Ga. 61; Mugler v. Kansas, 123 U. S. 672, 31 L. ed. 214, 8 Sup. Ct. Rep. 273; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; Georgetown v. Alexandria Canal Co. 12 Pet. 97, 9 L. ed. 1015.

But there is no common law applicable to the United States as a whole. No indictment could be had in the Federal courts for any public nuisance,—even a nuisance upon the territory directly within the custody of the general government.

Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 564, 14 L. ed. 268.

That Georgia alone would have jurisdiction of the offense is clear. That she has no jurisdiction of the offender is beyond peradventure.

Huntington v. Altrill, 146 U. S. 657, 36 L. ed. 1128, 13 Sup. Ct. Rep. 224; New York v. Miln, 11 Pet. 137, 138, 9 L. ed. 661, 662.

Unless such a cause as that of the state of Georgia may be maintained as a controversy judicable in this court, how can the means of the Federal government be said to be adequate to its ends, and how may a

NOTE.—On injunction against nuisance—see notes to Bohan v. Port Jervis Gaslight Co. 9 L.R.A. 716; United States v. Jellico Mountain Coke & Coal Co. 12 L.R.A. 753; Ballentine v. Webb, 13 L.R.A. 321; and Irwin v. Dixion, 13 L. ed. U. S. 25.

As to laches as a defense—see notes to Hammond v. Hopkins, 36 L. ed. U. S. 125; Felix v. Patrick, 36 L. ed. U. S. 729; Middletown v. Newport Hospital, 1 L.R.A. 181; Calhoun v. Delhi & M. R. Co. 8 L.R.A. 26; Coffey v. Emigh, 10 L.R.A. 125; Pratt v. Carroll, 3 L. ed. U. S. 627; and Abraham v. Ordway, 39 L. ed. U. S. 1037.

state hope to maintain its sovereignty except through the mere tolerance of her sister states?

M'Culloch v. Maryland, 4 Wheat. 431, 4 L. ed. 607.

The highest and most binding duties of the sovereign are often enforceable only through the police power. So sacred are these duties of the states of the Union that, even where matters are generally confided to the Federal government, or are otherwise within the constitutional inhibition, the police power applies.

Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Holden v. Hardy, 169 U. S. 392, 42 L. ed. 791, 18 Sup. Ct. Rep. 383; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; New York v. Miln, 11 Pet. 103, 9 L. ed. 648.

Georgia has used every friendly office, has sought through every means open to her, to protect her territory and her citizens. She is denied by the Constitution the right of invasion, or other aggressive action, and under such denial is powerless in the premises without the aid of this honorable court, and the enforcement of the constitutional guarantee of protection through this court, substituted in the place of the right of a state to take direct or hostile action in an endeavor to maintain her sovereignty and her rights, and to preserve the life, health, and comfort of her citizens.

Federalist, 80; Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; Re Debs, supra; Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233; Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; Kansas v. Colorado, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552.

Tennessee did not even require the formal notice of the state of Georgia to make it her duty to abate the destruction being wrought by her inhabitants; she knew of the injury; she had declared it to exist, and that it existed without warrant of law.

Ducktown Sulphur, Copper & I. Co. v. Barnes (Tenn.) 60 S. W. 601; Madison v. Ducktown Sulphur, Copper & I. Co. 113 Tenn. 342, 83 S. W. 658.

Not only has the state power to protect her citizens from conditions pauperizing them and making them liable to become charges upon her, but she has power, in the face of the grant of all matters of interstate commerce to the general government, to pass and enforce any and all laws necessary to prevent even the entrance within her territory of paupers or persons likely to become charges upon the state.

New York v. Miln, 11 Pet. 141, 9 L. ed. 663.

If it is the duty of the state to guard its citizens from the mere possibility of persons becoming charges upon the state, how much greater is the duty to prevent an alien, one not even a denizen or a property owner, by acts taking effect within the state, from making its own citizens paupers and charges upon it!

Harbison v. Knoxville Iron Co. 103 Tenn. 441, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 955; Holmes v. Jennison, 14 Pet. 568, 10 L. ed. 593; Moore v. Illinois, 14 How. 18, 14 L. ed. 308.

The state is *parens patriæ*, and as such is the guardian and protector of its citizens and inhabitants.

Wheeler v. Smith, 9 How. 55, 13 L. ed. 44; Fountain v. Ravenel, 17 How. 384, 15 L. ed. 86; Boston Beer Co. v. Massachusetts, 97 U. S. 33, 24 L. ed. 992; Patterson v. Kentucky, 97 U. S. 506, 24 L. ed. 1117; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 670, 24 L. ed. 1040; Caha v. United States, 152 U. S. 215, 38 L. ed. 416, 14 Sup. Ct. Rep. 513; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 297, 43 L. ed. 706, 19 Sup. Ct. Rep. 465; United States v. Cruikshank, 92 U. S. 549, 23 L. ed. 590; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; Louisiana v. Texas, 176 U. S. 1, 19, 44 L. ed. 347, 354, 20 Sup. Ct. Rep. 251; Kansas v. Colorado, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552; Federalist, 80; Phalen v. Virginia, 8 How. 163, 12 L. ed. 1030; Andrews, Am. Corp. p. 77; Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 1, 34 L. ed. 481, 10 Sup. Ct. Rep. 792; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; United States v. American Bell Teleph. Co. 128 U. S. 315, 32 L. ed. 450, 9 Sup. Ct. Rep. 90; Franklin Teleph. Co. v. Harrison, 145 U. S. 459, 36 L. ed. 776, 12 Sup. Ct. Rep. 900; 1 Vattel, Nations, § 16; 2 Vattel, Nations, § 57; Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; 21 Am. & Eng. Enc. Law, 2d ed. p. 705.

That Georgia is the sovereign owner of roads and highways, and, as guardian of the public in its rights therein, for the preservation of sunlight and pure air thereon, and the comfort and convenience of passers thereover, and for the protection of interstate commerce and communication afforded thereby, may maintain any necessary action,—can hardly be seriously disputed.

Jones v. Brim, 165 U. S. 182, 41 L. ed. 678, 17 Sup. Ct. Rep. 282.

Within the police power of a state is the

abatement, by summary proceedings, of any nuisance affecting highways.

Lawton v. Steele, 152 U. S. 136, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Holden v. Hardy, 169 U. S. 392, 42 L. ed. 791, 18 Sup. Ct. Rep. 383.

Although it is ordinarily within the power of Georgia to abate summarily all nuisances upon her hoads and highways, it is, under the peculiar facts of the case at bar, impossible for Georgia to exercise that power without committing acts within the inhibition of the Constitution of the United States; and consequently she applies to this court for the protection of the highways in her keeping, which are injured, made dangerous, and inconvenient by the acts of defendants; the relief sought being directly within the province of this court.

Georgetown v. Alexandria Canal Co. 12 Pet. 91, 9 L. ed. 1012; Eden, Inj. p. 267; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 14 L. ed. 249; Atty. Gen. v. Jamaica Pond Aqueduct Corp. 133 Mass. 361; Atty. Gen. v. Forbes, 2 Myl. & C. 123; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3, 90 Fed. 614.

The state of Georgia is the ultimate owner and proprietor of all lands within its borders, and as such has a right of action to prevent waste thereon or the destruction thereof by an alien and nonresident.

As a matter of fact, the state may even regulate the use of its property by its own inhabitants,—may prescribe a specific policy.

Clark v. Smith, 13 Pet. 203, 10 L. ed. 127.

It must naturally follow that any alien transgressing her regulations, injuring her agriculture, destroying her forests, committing waste upon her territory, and damaging her soil, if beyond the effect of her own power and laws, may be proceeded against in this honorable court.

Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233; Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721; Indiana v. Kentucky, 136 U. S. 510, 34 L. ed. 332, 10 Sup. Ct. Rep. 1051; Clark v. Smith, supra.

By reason of its ownership, actual property rights in this connection are involved.

Georgia v. Stanton, 6 Wall. 73, 18 L. ed. 724.

By reason of the interference with the taxing powers of the state, as well as the tax returns from the territory damaged, the state has a cause of action upon two grounds: The interference with, and, in a measure the destruction of, a sovereign attribute; and because a direct property right is concerned.

North Missouri R. Co. v. Maguire, 20 Wall. 60, 22 L. ed. 293; Bailey v. Magwire, 22 Wall. 226, 22 L. ed. 852; Providence Bank v. Billings, 4 Pet. 562, 7 L. ed. 956; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 559, 560, 14 L. ed. 266; Fowler v. Lindsey, 3 Dall. 411, 1 L. ed. 658; Florida v. Anderson, 91 U. S. 667, 23 L. ed. 290; Texas v. White, 7 Wall. 700, 19 L. ed. 227; Pennsylvania v. Quicksilver Min. Co. 10 Wall. 553, 19 L. ed. 998; Alabama v. Burr, 115 U. S. 413, 29 L. ed. 435, 6 Sup. Ct. Rep. 81.

The test of equity jurisdiction is the absence of a complete and adequate remedy at law as practical and efficient as the equitable remedy, as disclosed by the pleadings.

Missouri v. Illinois, 180 U. S. 244, 45 L. ed. 513, 21 Sup. Ct. Rep. 331; Mugler v. Kansas, 123 U. S. 623, 673, 31 L. ed. 205, 214, 8 Sup. Ct. Rep. 273; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689; Payne v. Hook, 7 Wall. 430, 19 L. ed. 261; Phoenix Mut. L. Ins. Co. v. Bailey, 13 Wall. 621, 20 L. ed. 503; Davis v. Wakelee, 156 U. S. 680, 39 L. ed. 584, 15 Sup. Ct. Rep. 555; Wylie v. Coxe, 15 How. 420, 14 L. ed. 755; Thompson v. Allen County, 115 U. S. 554, 29 L. ed. 473, 6 Sup. Ct. Rep. 140; Rich v. Braxton, 158 U. S. 406, 39 L. ed. 1032, 15 Sup. Ct. Rep. 1008.

The states, while members of the Union, are to each other, with references to their territory, laws, and rights therein, wholly foreign.

Buckner v. Finley, 2 Pet. 591, 7 L. ed. 530; Bank of United States v. Daniel, 12 Pet. 54, 9 L. ed. 997; Bank of Augusta v. Earle, 13 Pet. 590, 10 L. ed. 308; Pennoyer v. Neff, 95 U. S. 722, 24 L. ed. 568.

Not only are the states foreign to each other, but their laws and the judgments and the actions of their courts are foreign. The courts of one state will not even take judicial notice of the laws of another state; nor can the court be charged with knowledge of the laws of another state.

Talbot v. Seeman, 1 Cranch, 38, 2 L. ed. 25; Church v. Hubbart, 2 Cranch, 238, 2 L. ed. 265; Strother v. Lucas, 6 Pet. 763, 8 L. ed. 575; Ennis v. Smith, 14 How. 400, 14 L. ed. 484; Dainese v. Hale, 91 U. S. 21, 23 L. ed. 193; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 445, 32 L. ed. 793, 9 Sup. Ct. Rep. 469.

There is no common law of the United States, and that in force in each state is dependent upon the action of the state. The common law may be qualified or wholly revoked. The common law, like the statute, is separate and distinct in the several states.

Wheeler v. Smith, 9 How. 78, 13 L. ed. 53.

In some of the states the common law has been wholly displaced; in others, modified. In each state, however, its own statutes in this respect are supreme.

Northern P. R. Co. v. Herbert, 116 U. S. 654, 29 L. ed. 760, 6 Sup. Ct. Rep. 590.

The laws of Georgia have no extraterritorial force or effect. If Tennessee enforces them, she does so only through comity and to such extent as it may please her; Georgia's remedy at law,—indictment,—even under comity, she cannot enforce. The remedy of Georgia's citizens she enforces only so far as it does not conflict with Tennessee's rules and remedies, and only to such an extent and for so long a time as she sees fit.

Hoyt v. Sprague, 103 U. S. 630, 26 L. ed. 592.

The pendency of a suit in Tennessee would not even bar a further suit in Georgia.

Mutual L. Ins. Co. v. Brune (Mutual L. Ins. Co. v. Harris) 96 U. S. 592, 593, 24 L. ed. 739, 740.

The damage to property in Georgia is to real, and not personal, property. The remedy for such injuries is afforded by an action for trespass. Under the unusual facts as to the damage, an action for trespass could not be maintained, as the injury is in Georgia, and the defendant is in Tennessee.

McKenna v. Fisk, 1 How. 249, 11 L. ed. 120; Ellenwood v. Marietta Chair Co. 158 U. S. 105, 39 L. ed. 913, 15 Sup. Ct. Rep. 771; Roach v. Damron, 2 Humph. 425.

The mere fact that there may be some statutory permission to appeal to the courts of Tennessee by no means (as this court has repeatedly held) constitutes such a remedy at law as would defeat the equity jurisdiction of the courts of the United States.

Smith v. Reeves, 178 U. S. 444, 44 L. ed. 1144, 20 Sup. Ct. Rep. 919; Boyle v. Zacharie, 6 Pet. 658, 8 L. ed. 536; Robinson v. Campbell, 3 Wheat. 212, 4 L. ed. 372; United States v. Howland, 4 Wheat. 108, 4 L. ed. 526; Dodge v. Woolsey, 18 How. 358, 15 L. ed. 412; Ridings v. Johnson, 128 U. S. 217, 32 L. ed. 402, 9 Sup. Ct. Rep. 72; Mississippi Mills v. Cohn, 150 U. S. 202, 37 L. ed. 1052, 14 Sup. Ct. Rep. 75.

Laches cannot be imputed to the government.

United States v. Kirkpatrick, 9 Wheat. 735, 6 L. ed. 203; Dox v. Postmaster General, 1 Pet. 325, 7 L. ed. 163; Steele v. United States, 113 U. S. 135, 28 L. ed. 954, 5 Sup. Ct. Rep. 396; United States v. Dalles Military Road Co. 140 U. S. 632, 35 L. ed. 571, 11 Sup. Ct. Rep. 988; San Pedro & C. D. A. Co. v. United States, 146 U. S. 135, 36 L. ed. 916, 13 Sup. Ct. Rep. 94; State ex rel. Lott v. Brewer, 64 Ala. 298; Com. v. Baldwin, 1 Watts, 55, 26 Am. Dec. 33; Schuylkill County v. Com. 36 Pa. 536.

The doctrine of laches is inapplicable to public nuisances.

Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 668, 24 L. ed. 1039.

Mr. Howard Cornick argued the cause and, with Messrs. John H. Frantz, James B. Wright, and Martin H. Vogel, filed a brief for the Tennessee Copper Company:

To entitle a state to sue by virtue of its sovereignty and as a representative of its citizens, the injury threatened or being done must be general and to the entire citizenship of the state.

2 Story, Const. §§ 1638, 1685.

The grant of judicial power was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state of such nature that it could not, under principles of public and international law, be entertained by the judiciary of the other state at all.

Wisconsin v. Pelican Ins. Co. 127 U. S. 289, 32 L. ed. 243, 8 Sup. Ct. Rep. 1370.

In no case will a state in its sovereign capacity be permitted to prosecute a suit as *parens patriæ*, trustee, guardian, or representative of her citizens, in this court, when such citizens have a full, adequate, and complete remedy in another forum, and might there prosecute such claims for themselves.

New Hampshire v. Louisiana, 108 U. S. 76, 37 L. ed. 656, 2 Sup. Ct. Rep. 176.

Another prerequisite is that the entire body of the citizens of the complaining state should be affected.

Louisiana v. Texas, 176 U. S. 24, 44 L. ed. 356, 20 Sup. Ct. Rep. 251; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

A state must show just such interest in the controversy in question as an individual must show, in order to maintain a suit in a proper jurisdiction. It is the dignity of the state rather than the character of the controversy, which entitles it to come into this court by original proceeding.

Fowler v. Lindsey, 3 Dall. 411, 1 L. ed 658; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 557, 14 L. ed. 265; New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; Wisconsin v. Pelican Ins. Co. 127 U. S. 289, 32 L. ed. 243, 8 Sup. Ct. Rep. 1370; Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257; Louisiana v. Texas, 176 U. S. 1, 16, 44 L. ed. 347, 353, 20 Sup. Ct. Rep. 251; California v. Southern P. Co. 157 U. S. 261, 39 L. ed. 695, 15 Sup. Ct. Rep. 591.

Private nuisance is one that affects a single individual or a determinate number of

persons in the enjoyment of some private right not common to the public.

Bohan v. Port Jervis Gaslight Co. 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246; 21 Am. & Eng. Enc. Law, 2d ed. p. 683.

A common or public nuisance is one which affects the people at large, and is a violation of a public right, either by a direct encroachment upon public property, or by the doing of some act which tends to the common injury, or by omitting to do, in the discharge of a legal duty, that which the common good requires.

Bohan v. Port Jervis Gaslight Co. 122 N. Y. 32, 9 L.R.A. 711, 25 N. E. 246; State v. Wolf, 112 N. C. 889, 17 S. E. 528.

The question of public or private nuisance does not hinge upon and is not determined by the question of numbers pro or con, but it depends solely upon the character of the right invaded, *i. e.*, whether it be a public right of one or many citizens, or whether it be a private right of one or many citizens.

State v. Wolf, supra; Bishop, Crim. Law, §§ 245, 1266; State v. Purify, 86 N. C. 681.

It is the rule that all private persons, whether one, or a dozen, or any other number, having separate tenements, who are injured by a private nuisance common to all, may join as plaintiffs in a bill filed to abate the nuisance, though they could not join in a common action for damages.

Rowbotham v. Jones, 47 N. J. Eq. 337, 19 L.R.A. 663, 20 Atl. 731; 14 Enc. Pl. & Pr. p. 1138.

A lawful business, having the right to exist somewhere, cannot, in the very nature of things, be a nuisance *per se*.

Bacon v. Walker, 77 Ga. 336.

An injunction to restrain a nuisance will issue only in a case where the fact of the nuisance is made out upon determinate and satisfactory evidence. If the evidence be conflicting and the injury be doubtful, that conflict and doubt will be ground for withholding the injunction. If there is any reasonable doubt as to the existence or cause of the injury the benefit of the doubt will be given to the defendant, if his trade is a lawful one and the injury is not the necessary and natural consequence of the act; as, in all actions of this nature, the burden of proof is upon the plaintiff.

1 Wood, Nuisances, 3d ed. p. 732.

The evidence upon which a court will perpetuate an injunction must clearly establish the essential allegations of the bill, the burden of proof being on the complainant. And where the evidence consists only of the opinion of witnesses, there being great contrariety of opinion, it will not suffice to make an injunction perpetual.

1 High, Inj. 4th ed. § 870.

Before this court ought to intervene, the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations of the other side.

Kansas v. Colorado, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552; Missouri v. Illinois, 200 U. S. 521, 50 L. ed. 579, 26 Sup. Ct. Rep. 268.

The state of Georgia is estopped, both in law and equity, to seek injunctive relief in this cause.

Madison v. Ducktown Sulphur, Copper, & I. Co. 113 Tenn. 338, 83 S. W. 658; Clifton Iron Co. v. Dye, 87 Ala. 471, 6 So. 192; Dulin v. Caldwell, 28 Ga. 120; Fuller v. Melrose, 1 Allen, 166; Binney's Case, 2 Bland, Ch. 99; Tash v. Adams, 10 Cush. 252; Scudder v. Trenton Delaware Falls Co. 1 N. J. Eq. 694, 23 Am. Dec. 756; Galliher v. Cadwell, 145 U. S. 368, 372, 373, 36 L. ed. 738, 740, 12 Sup. Ct. Rep. 873; Speidel v. Henrici, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610; Hammond v. Hopkins, 143 U. S. 224, 250, 36 L. ed. 134, 145, 12 Sup. Ct. Rep. 418; Willard v. Wood, 164 U. S. 502, 524, 41 L. ed. 531, 540, 17 Sup. Ct. Rep. 176; New York v. Pine, 185 U. S. 93, 46 L. ed. 823, 22 Sup. Ct. Rep. 592.

The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but upon whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did.

McKnight v. Taylor, 1 How. 168, 11 L. ed. 88; Badger v. Badger, 2 Wall. 87, 17 L. ed. 836; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 329; Hayward v. Elliot Nat. Bank, 96 U. S. 611, 24 L. ed. 855; Harwood v. Cincinnati & C. Air-Line Co. 17 Wall. 79, 21 L. ed. 558; Speidel v. Henrici, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610; Galliher v. Cadwell, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; Hammond v. Hopkins, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; Willard v. Wood, 164 U. S. 502, 41 L. ed. 531, 17 Sup. Ct. Rep. 176; Sullivan v. Portland & K. R. Co. 94 U. S. 806, 24 L. ed. 324; Landsdale v. Smith, 106 U. S. 391, 27 L. ed. 219, 1 Sup. Ct. Rep. 350; Lane & B. Co. v. Locke, 150 U. S. 193, 37 L. ed. 1049, 14 Sup. Ct. Rep. 78; Mackall v. Casilear, 137 U. S. 556, 34 L. ed. 776, 11 Sup. Ct. Rep. 178; Whitney v. Fox, 166 U. S. 637, 41 L. ed. 1145, 17 Sup. Ct. Rep. 713; Gildersleeve v. New Mexico Min. Co. 161 U. S. 573, 40 L. ed. 812, 16 Sup. Ct. Rep. 663; Ware v. Galveston City Co. 146 U. S. 102, 36 L. ed. 904, 13 Sup. Ct.

Rep. 33; Foster v. Mansfield, C. & L. M. R. Co. 146 U. S. 88, 36 L. ed. 899, 13 Sup. Ct. Rep. 28; Hoyt v. Latham, 143 U. S. 553, 36 L. ed. 259, 12 Sup. Ct. Rep. 568; Hanner v. Moulton, 138 U. S. 486, 34 L. ed. 1032, 11 Sup. Ct. Rep. 408; Richards v. Mackall, 124 U. S. 183, 31 L. ed. 396, 8 Sup. Ct. Rep. 437; Roberts v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756. See also Wilson v. Anthony, 19 Ark. 16; Adams v. Taylor, 14 Ark. 62; Johnson v. Johnson, 5 Ala. 90; Ferson v. Sanger, 2 Ware, 256, Fed. Cas. No. 4,751; Fisher v. Boody, 1 Curt. C. C. 219, Fed. Cas. No. 4,814; Cholmondeley v. Clinton, 2 Jac. & W. 141; Smith v. Clay, Ambl. 645; Johnston v. Standard Min. Co. 148 U. S. 360, 37 L. ed. 480, 13 Sup. Ct. Rep. 585.

The granting or withholding of an injunction is a matter for the exercise of the sound discretion of the court under all the facts and circumstances surrounding each particular case.

Madison v. Ducktown Sulphur, Copper & I. Co. 113 Tenn. 331, 83 S. W. 658; Richards's Appeal, 57 Pa. 105, 98 Am. Dec. 202.

The courts will require a very strong case for the granting of an injunction which will cause more injury than it will remedy; and it may be said, as a general rule, that it will not be granted where it will be productive of greater injury than will result from a refusal of it. This rule is especially applicable when the party applying for an injunction has by his own laches made it impossible to grant it without inflicting serious injury on the party to be enjoined.

16 Am. & Eng. Enc. Law, 2d ed. pp. 363, 364; Spelling, Extr. Relief, §§ 23, 372; Edwards v. Allouez Min. Co. 38 Mich. 46, 31 Am. Rep. 301; Clifton Iron Co. v. Dye, 87 Ala. 468, 6 So. 192; Richards's Appeal, 57 Pa. 114, 98 Am. Dec. 202; Hall v. Rood, 40 Mich. 46, 29 Am. Rep. 528; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567.

Perhaps the latest and most important case having a direct bearing upon the questions here presented is Mountain Copper Co. v. United States, 73 C. C. A. 621, 142 Fed. 625.

Mr. James G. Parks argued the cause and filed a brief for the Ducktown Sulphur, Copper, & Iron Company:

A state cannot prosecute an original action in this court on the ground of any remote or contingent interest.

Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 557, 14 L. ed. 265.

An original suit of this kind cannot be maintained, unless it be shown that the state in its corporate capacity, or the entire people of the state, are being injured.

Louisiana v. Texas, 176 U. S. 22, 44 L. ed. 355, 20 Sup. Ct. Rep. 251; New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176.

The entire citizenship, or the state in its corporate capacity, must be affected.

Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; 2 Story, Const. § 1638.

Even if the ores were adapted to acid-making, their utilization in that way would be commercially impracticable.

Mountain Copper Co. v. United States, 73 C. C. A. 621, 142 Fed. 625.

In Madison v. Ducktown Sulphur, Copper, & I. Co. 113 Tenn. 338, 83 S. W. 658, it was judicially determined that at that time there was no method, other than by open-heap roasting, by which the Ducktown ores could be successfully treated, and that there was no known way of condensing the sulphur fumes arising from such roasting.

There is a wide distinction in principle between a case where a party, deliberately and as a matter of choice, locates an obnoxious enterprise in a thickly peopled neighborhood when it could have been, with equal advantage, but possibly at some greater cost, located elsewhere; and a case where the enterprise is, of necessity, located at a particular place on account of the mineral contents of the earth. In the one case the use is artificial; in the other, natural.

Mountain Copper Co. v. United States, supra.

No injunction will ever be granted, no matter how plain the legal right may be, if, under the facts of the particular case, it would be inequitable or oppressive to do so, or against the real justice of the case, instead of leaving the party to his remedy of compensation at law.

Clack v. White, 2 Swan, 545; Huckenstine's Appeal, 70 Pa. 103, 10 Am. Rep. 669; Richards's Appeal, 57 Pa. 105, 98 Am. Dec. 202; Pennsylvania R. Co. v. Marchant, 119 Pa. 541, 4 Am. St. Rep. 659, 13 Atl. 690; Hilton v. Granville, Craig & Ph. 298.

A landowner has equal right with an adjoining proprietor to put his land to the highest and best use to which it is adapted by nature, being responsible only in damages for such injuries as may flow therefrom.

Robb v. Carnegie Bros. 145 Pa. 324, 14 L.R.A. 329, 27 Am. St. Rep. 694, 22 Atl. 649.

It is frequently claimed, as in this case, that because the alleged nuisance is a recurring or continuing one, the alleged injury is therefore irreparable; and that, because it is irreparable, injunctive relief will be granted. It seems plain, however, that it is only against such nuisances that in-

junctive relief would be required; but, as such relief is frequently denied, it follows that injury from such nuisances is not necessarily irreparable. Whether it be so or not,—like the question of injunction,—depends upon all the facts of each particular case.

Clifton Iron Co. v. Dye, 87 Ala. 471, 6 So. 192.

It is also in line with modern decisions to refuse injunctive relief, and send the party to a court of law for redress, when, under all the circumstances, damages would be a fairer approximation to common justice between the parties.

Powell v. Bentley & G. Furniture Co. 34 W. Va. 804, 12 L.R.A. 53, 12 S. E. 1085; Madison v. Ducktown Sulphur, Copper, & I. Co. 113 Tenn. 338, 83 S. W. 658.

A court of equity, in passing upon the question of equitable relief in a case like this, will consider not only the relative advantages and disadvantages to the parties themselves, but will also look to the interests of the public.

Clifton Iron Co. v. Dye, supra; Wilder v. Strickland, 55 N. C. (2 Jones, Eq.) 391; Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 18 L.R.A. 707, 34 Am. St. Rep. 645, 25 Atl. 597.

Even natural rights must sometimes yield to the general good.

Hughes v. Anderson, 68 Ala. 284, 44 Am. Rep. 147.

The plaintiff is estopped by laches from claiming injunctive relief.

Madison v. Ducktown Sulphur, Copper, & I. Co. supra; Powers's Appeal, 125 Pa. 186, 11 Am. St. Rep. 882, 17 Atl. 254; Williams v. Jersey, Craig & Ph. 91; Clifton Iron Co. v. Dye, 87 Ala. 471, 6 So. 192; Sheldon v. Rockwell, 9 Wis. 166, 76 Am. Dec. 265; Ware v. Regent's Canal Co. 3 De G. & J. 230; Stewart Wire Co. v. Lehigh Coal & Nav. Co. 203 Pa. 479, 53 Atl. 1127.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity filed in this court by the state of Georgia, in pursuance of a resolution of the legislature and by direction of the governor of the state, to enjoin the defendant copper companies from discharging noxious gas from their works in Tennessee over the plaintiff's territory. It alleges that, in consequence of such discharge, a wholesale destruction of forests, orchards, and crops is going on, and other injuries are done and threatened in five counties of the state. It alleges also a vain application to the state of Tennessee for relief. A preliminary injunction was denied; but, as there was ground to fear that great and irreparable damage might be done, an early day was fixed for the final hearing, and the parties were given leave, if so minded, to try the case on affidavits. This has been done without objection, and, although the method would be unsatisfactory if our decision turned on any nice question of fact, in the view that we take we think it unlikely that either party has suffered harm.

*The case has been argued largely as if [237] it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the state as a private owner is merely a makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads.

The caution with which demands of this sort, on the part of a state, for relief from injuries analogous to torts, must be examined, is dwelt upon in Missouri v. Illinois, 200 U. S. 496, 520, 521, 50 L. ed. 572, 578, 579, 26 Sup. Ct. Rep. 268. But it is plain that some such demands must be recognized, if the grounds alleged are proved. When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court. Missouri v. Illinois, 180 U. S. 208, 241, 45 L. ed. 497, 512, 21 Sup. Ct. Rep. 331.

Some peculiarities necessarily mark a suit of this kind. If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. The states, by em[illegible] the Union, did not sink *to the [illegible] private owners, subject to one sys[illegible] private law. The court has not [illegible] same freedom to [illegible] [238]

balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power. Without excluding the considerations that equity always takes into account, we cannot give the weight that was given them in argument to a comparison between the damage threatened to the plaintiff and the calamity of a possible stop to the defendants' business, the question of health, the character of the forests as a first or second growth, the commercial possibility or impossibility of reducing the fumes to sulphuric acid, the special adaptation of the business to the place.

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether, for the injuries which they might be suffering to their property, they should not be left to an action at law.

The proof requires but a few words. It is not denied that the defendants generate in their works near the Georgia line large quantities of sulphur dioxid which becomes sulphurous acid by its mixture with the air. It hardly is denied, and cannot be denied with success, that this gas often is carried by the wind great distances and over great tracts of Georgia land. On the evidence the pollution of the air and the magnitude of that pollution are not open to dispute. Without any attempt to go into details immaterial to the suit, it is proper to add that we are satisfied, by a preponderance of evidence, that the sulphurous fumes cause and threaten damage on so considerable *a scale to the forests and vegetable life, if not to health, within the plaintiff state, as to make out a case within the requirements of Missouri v. Illinois, 200 U. S. 496, 50 L. ed. 572, 26 Sup. Ct. Rep. 268. Whether Georgia, by insisting upon this claim, is doing more harm than good to her own citizens, is for her to determine. The possible disaster to those outside the state must be accepted as a consequence of her standing upon her extreme rights.

It is argued that the state has been guilty of laches. We deem it unnecessary to consider how far such a defense would be available in a suit of this sort, since, in our opinion, due diligence has been shown. The conditions have been different until recent years. After the evil had grown greater in 1904 the state brought a bill in this court. The defendants, however, already were abandoning the old method of roasting ore in open heaps and it was hoped that the change would stop the trouble. They were ready to agree not to return to that method, and, upon such an agreement being made, the bill was dismissed without prejudice. But the plaintiff now finds, or thinks that it finds, that the tall chimneys in present use cause the poisonous gases to be carried to greater distances than ever before, and that the evil has not been helped.

If the state of Georgia adheres to its determination, there is no alternative to issuing an injunction, after allowing a reasonable time to the defendants to complete the structures that they now are building, and the efforts that they are making to stop the fumes. The plaintiff may submit a form of decree on the coming in of this court in October next.

Injunction to issue.

Mr. Justice Harlan, concurring:

The state of Georgia is, in my opinion, entitled to the general relief sought by its bill, and, therefore, I concur in the result. With some things, however, contained in the opinion, or to be implied from its language, I do not concur. When the Constitution gave this court original jurisdiction in cases *"in [240] which a state shall be a party," it was not intended, I think, to authorize the court to apply in its behalf any principle or rule of equity that would not be applied, under the same facts, in suits wholly between private parties. If this were a suit between private parties, and if, under the evidence, a court of equity would not give the plaintiff an injunction, then it ought not to grant relief, under like circumstances, to the plaintiff, because it happens to be a state, possessing some powers of sovereignty. Georgia is entitled to the relief sought, not because it is a state, but because it is a *party* which has established its right to such relief by proof. The opinion, if I do not mistake its scope, proceeds largely upon the ground that this court, sitting in this case as a court of equity, owes some special duty to Georgia as a state, although it is a party, while, under the same facts, it would not owe any such duty to the plaintiff if an individual.

UNITED STATES, Appt.,
v.
LEWIS E. BROWN. (No. 283.)

LEWIS E. BROWN, Appt.,
v.
UNITED STATES. (No. 284.)

(See S. C. Reporter's ed. 240–245.)

Courts-martial—who may sit.

1. An officer of the Regular Army is within the provisions of U. S. Rev. Stat. § 1342, art. 77, U. S. Comp. Stat. 1901, p. 959, that "officers of the Regular Army shall not be competent to sit on courts-martial to try officers or soldiers of other forces," although such officer has been granted an indefinite leave of absence from the Regular Army in order to enable him to accept a commission in the volunteer forces.

Army—pay—discharge.

2. The refusal of a certificate of honorable discharge to a volunteer officer as of the date when his regiment was mustered out, on the mistaken ground that he had already legally been dishonorably discharged, cannot be regarded as an active retention of such officer in the service, so as to entitle him to pay after that date, in view of the provision of the act of March 2, 1899 (30 Stat. at L. 977, 981, chap. 352), § 15, for the mustering out of officers and men of the Volunteer Army, and of the requirement of the act of January 12, 1899 (30 Stat. at L. 784, chap. 46), that, as far as practicable, the discharge of officers and men should take effect at the muster out of the organization to which they belonged.

Army—extra pay.

3. A volunteer officer who has been given the two months' extra pay for service outside the United States allowed by the act of January 12, 1899, on muster out and discharge, is not entitled to the one month's extra pay authorized by that act for service within the United States.

[Nos. 283, 284.]

Submitted April 25, 1907. Decided May 13, 1907.

CROSS APPEALS from the Court of Claims to review a judgment sustaining in part a claim for pay of a volunteer officer after the date on which he was dismissed from the service by sentence of a court-martial. Affirmed.

See same case below, 41 Ct. Cl. 275.

The facts are stated in the opinion.

Assistant Attorney General Van Orsdel and Messrs. George B. Davis and Franklin W. Collins, submitted the cause for the United States.

Messrs. Lorenzo A. Bailey, W. W. Dudley, and L. T. Michener submitted the cause for Brown.

Mr. Justice Holmes delivered the opinion of the court:

This is a claim for pay as first lieutenant of United States Volunteers after February 17, 1899, on which date, by the sentence of a court-martial, the claimant was dismissed from the service. The court-martial consisted of five members, the minimum number by the 75th and 79th articles of war (Rev. Stat. § 1342, U. S. Comp. Stat. 1901, pp. 959, 960), and the president of the court was an officer in the Regular Army. By article 77 "officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in article 78." (Article 78 has no bearing on the case.) On this ground it is contended that the proceedings were void. Even if the presence of an incompetent person as a member would not have made the proceedings invalid in any event, in this case without him there would have been no court. It has been decided that a sentence against a volunteer officer by a court composed wholly of regular officers is void, and this principle is thought to govern the present case. McClaughry v. Deming, 186 U. S. 49, 46 L. ed. 1049, 22 Sup. Ct. Rep. 786. On this ground the court of claims decided that the claimant was entitled to recover up to the time of the final muster out of his regiment on May 25, 1899, including two months' extra pay under the act of January 12, 1899, chap. 46 (30 Stat. at L. 784). 41 Ct. Cl. 275, 515. There are cross appeals to this court.

The answer of the United States to the foregoing argument is that the regular officer had been granted an indefinite leave of absence from the Regular Army in order to enable him to accept a commission as lieutenant colonel, Second United States Volunteer Infantry, and that he was serving in the latter capacity when he sat upon the court. It is argued that it always has been understood that under such circumstances the position in the volunteer service alone is to be regarded, that much harm will be done if a contrary construction should be adopted now, and that the leave given to appoint regular officers to the volunteer service should be construed to carry with an appointment the same consequences that would attach to a commission if held by anyone else. Act of April 22, 1898, chap. 187, § 12, Stat. at L. 363; act of May 26, 1898, c[illegible], § 2. [illegible] at L. 421, U. S. Comp. [illegible] t. [illegible] 11.

Th[illegible] would have great force when it [illegible] as formerly, only that

courts-martial for the trial of militia officers "should be composed entirely of militia officers." Act of April 10, 1806, chap. 20, art. 97, 2 Stat. at L. 359, 371. If there was a settled practice of treating these words as satisfied if the members of the court were militia officers, whether they also held commissions in the Regular Army or not, we well might hesitate to overthrow it. But when the express prohibition contained in article 77 was adopted by the Revised Statutes (U. S. Comp. Stat. 1901, p. 959), it made the former construction no longer possible. The words of the statute are peremptory and must be obeyed. We do not apprehend any serious consequences, in view of the date of the change. But, whatever the consequences, we must accept the plain meaning of plain words. It follows that the proceedings of the court were void and that it is not necessary to mention or consider other objections that were urged.

We are of opinion that the court of claims was right also in the allowances made to the claimant. In 1900 the claimant applied for an honorable discharge as of May 25, 1899, the date when his regiment was mustered out, but was refused. Of course, the refusal of a certificate of honorable discharge on the ground that the applicant already has been dishonorably discharged *is not an active retention of the officer in the service. The act of March 2, 1899, chap. 352, § 15 (30 Stat. at L. 977, 981), provided that the officers and men of the Volunteer Army should be mustered out, and, under the act of January 12, 1899, chap. 46 (30 Stat. at L. 784), "as far as practicable," the discharge of officers and men was to take effect at the muster out of the organization to which they belonged. It would be monstrous to hold that it had been determined not to be practical to discharge the claimant when his regiment was mustered out, or that the circumstances of his case, notwithstanding his technical success, afford a ground for a later claim. The claimant was allowed two months' extra pay for service outside the United States. He was not entitled to one month's extra pay for service within the United States. See act of May 26, 1900, chap. 586, 31 Stat. at L. 205, 217, U. S. Comp. Stat. 1901, p. 3346. Of course, the claim for travel under the same act (31 Stat. at L. 210, U. S. Comp. Stat. 1901, p. 841) must fail. The claimant was discharged before that act was passed.

Judgment affirmed.

Mr. Justice Moody did not sit and took no part in the decision.

*WILLIAM H. ELLIS, Plff. in Err., [246]
v.
UNITED STATES. (No. 567.)

EASTERN DREDGING COMPANY, Plff. in Err.,
v.
UNITED STATES. (No. 664.)

EASTERN DREDGING COMPANY, Plff. in Err.,
v.
UNITED STATES. (No. 665.)

EASTERN DREDGING COMPANY, Plff. in Err.,
v.
UNITED STATES. (No. 666.)

BAY STATE DREDGING COMPANY, Plff. in Err.,
v.
UNITED STATES. (No. 667.)

BAY STATE DREDGING COMPANY, Plff. in Err.,
v.
UNITED STATES. (No. 668.)

BAY STATE DREDGING COMPANY, Plff. in Err.,
v.
UNITED STATES. (No. 669.)

(See S. C. Reporter's ed. 246-267)

Constitutional law—validity of eight-hour law.

1. The prohibition, under penalty of fine or imprisonment, except in case of extraordinary emergency, against requiring or permitting laborers or mechanics employed upon any of the public works of the United States or of the District of Columbia to work more than eight hours each day, which is made by the act of August 1, 1892 (27 Stat. at L. 340, chap. 352, U. S. Comp. Stat. 1901, p. 2521), is not repugnant to the Federal Constitution.

Master and servant—eight-hour law—extraordinary emergency.

2. A delay, not entirely unexpected, in obtaining the timber required for the construction of a pier at the Boston navy yard, does not create an "extraordinary emergency," within the meaning of the exception in the act of August 1, 1892, forbidding a contractor upon any public work of the United States, under penalty of fine or imprisonment, to permit or require employees thereon to work more than eight hours each day.

Criminal law—intent—violation of eight-hour law.

3. A contractor for a public work of the

NOTE.—On statutory limitation of hours of labor—see notes to People v. Orange County Road Constr. Co. 65 L.R.A. 33; and Atkin v. Kansas, 48 L. ed. U. S. 148.

United States, who intentionally permits laborers employed thereon to work more than eight hours a day, under the mistaken assumption that an extraordinary emergency exists, intentionally violates the provisions of the act of August 1, 1892, prohibiting such action, except in case of extraordinary emergency, and punishing intentional violations of the act with fine or imprisonment.

Master and servant—eight-hour law—what are public works.

4. Dredging a channel in Boston harbor is not a public work of the United States, within the meaning of the act of August 1, 1892, forbidding a contractor upon any public work of the United States, under penalty of fine or imprisonment, to permit or require employees thereon to work more than eight hours each day.

Master and servant—eight-hour law—who are laborers or mechanics.

5. Masters, mates, engineers, firemen, crane men, deck hands, and scow men employed on tugs, dredges, and scows used in dredging a harbor channel are not laborers or mechanics within the meaning of the act of August 1, 1892, forbidding contractors upon any public work of the United States or of the District of Columbia, under penalty of fine or imprisonment, to permit or require laborers and mechanics employed thereon to work more than eight hours each day.

[Nos. 567, 664, 665, 666, 667, 668, 669.]

Argued and submitted April 23, 24, 1907.
Decided May 13, 1907.

IN ERROR to the District Court of the United States for the District of Massachusetts to review a conviction for permitting mechanics employed in the construction of a pier at the Boston navy yard to work more than eight hours a day. Affirmed.

Also

SIX WRITS of Error to the District Court of the United States for the District of Massachusetts to review convictions for permitting employees on tugs, dredges, and scows used in dredging a harbor channel to work more than eight hours a day. Reversed.

The facts are stated in the opinion.

Mr. D. T. Watson submitted the cause for Ellis:

The right of the individual to dispose of his labor upon such terms as he deems best is undoubted, and is admitted in Atkin v. Kansas, 191 U. S. 223, 48 L. ed. 158, 24 Sup. Ct. Rep. 124. If he may dispose of it at all, then the extent of the disposition is a matter optional with himself. The men who worked on the pier did so voluntarily. The sole crime of Ellis was that he did not forcibly restrain them from the work.

An adult may, if he sees fit, engage for what time he sees fit in ordinary employments, not dangerous, hazardous, or injurious to life, limb, or health; and he has that right, as part of his liberty, the preservation of which was one of the chief features of the Federal Constitution.

Lochner v. New York, 198 U. S. 53, 49 L. ed. 940, 25 Sup. Ct. Rep. 539.

The laborer can work nowhere unless employed. He works under contract. To take from him one of the places in which he may work over eight hours,—public work,—even if the contractor is willing to employ him, deprives him of part of his liberty, and is unconstitutional.

People v. Orange County Road Constr. Co. 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; 58 Cent. L. J. p. 361; Allgeyer v. Louisiana, 165 U. S. 578–591, 41 L. ed. 832–836, 17 Sup. Ct. Rep. 427; Holden v. Hardy, 169 U. S. 366–391, 42 L. ed. 780–790, 18 Sup. Ct. Rep. 383; Williams v. Fears, 179 U. S. 270-274, 45 L. ed. 186–188, 21 Sup. Ct. Rep. 128; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746–757, 28 L. ed. 585–591, 4 Sup. Ct. Rep. 652.

There is no pretense in the present case that the kind of work done was hazardous, or unhealthful, or in any way dangerous to life or limb. It was not of a class with such cases as Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

The case must not be confused and looked at as though it were a case between the subject and the sovereign, where the sovereign may dictate to the subject, and provide that the violation of its dictates is a crime.

Robertson v. Baldwin, 165 U. S. 275, 281, 41 L. ed. 715, 717, 17 Sup. Ct. Rep. 326; People ex rel. Rodgers v. Coler, 166 N. Y. 16, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; Ex parte Kuback, 85 Cal. 274, 9 L.R.A. 482, 20 Am. St. Rep. 226, 24 Pac. 737.

The question here is not one under the police laws, for the employment does not touch the public health, peace, and morals; and the United States has not the power, except in a restricted way, to pass police laws. The United States has not, in that sense, the well-being of the people of the states under its charge, but its police laws must relate to granted power, and be adapted to the enforcement of it.

Cooley, Const. Lim. 7th ed. 831; Hare, Am. Const. Law, 539.

If one engages in the kind of work which the morals or the health of society requires control of, and therefore is under its general supervision, as a part of the police laws, he may be subjected to reasonable restrictions by his state; but unless he falls within that class he is not subjected to such restrictions; and to attempt to pre-

vent him from working more than eight hours a day is to deprive him of his liberty, even under the state laws.

Ibid.

When a state enters into business relations, and makes contracts with private persons, it waives its sovereignty, and is to be treated as a private person, and subjected to the principles of law applicable as between individuals, save only in respect to its immunity from suit.

Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 560, 14 L. ed. 249, 266; Darrington v. Bank of Alabama, 13 How. 12, 14 L. ed. 30; Davis v. Gray, 16 Wall. 203, 232, 21 L. ed. 447, 457; Bank of United States v. Planters' Bank, 9 Wheat. 904, 907, 6 L. ed. 244; United States v. Bank of the Metropolis, 15 Pet. 377, 392, 10 L. ed. 774, 779; Cooke v. United States, 91 U. S. 389–396, 23 L. ed. 237–242.

How can it be fairly urged that the omission of Ellis to prevent two men from working on the pier was an appropriate and necessary act to enforce the power to build the pier?

United States v. Fox, 95 U. S. 670, 672, 24 L. ed. 538, 539.

The powers of Congress are limited to those expressly, or by necessary implication, conferred; and for every act of Congress a warrant must be found in the Constitution.

United States v. Harris, 106 U. S. 629, 635, 27 L. ed. 290, 292, 1 Sup. Ct. Rep. 601; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; United States v. Fisher, 2 Cranch, 358, 396, 2 L. ed. 304, 316; Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 657, 34 L. ed. 295, 302, 10 Sup. Ct. Rep. 965; Prigg v. Pennsylvania, 16 Pet. 539, 615, 10 L. ed. 1060, 1089; Hepburn v. Griswold, 8 Wall. 603–615, 19 L. ed. 513–523; Legal Tender Cases, 12 Wall. 543, 20 L. ed. 309.

In the following cases, statutes, some of them quite similar to the statute in question, have been held to be unconstitutional:

People v. Orange County Road Constr. Co. 175 N. Y. 87, 65 L.R.A. 33, 67 N. E. 129; Ryan v. New York, 177 N. Y. 271, 69 N. E. 599; People ex rel. Cossey v. Grout, 179 N. Y. 417, 72 N. E. 464; Re Morgan, 26 Colo. 415, 47 L.R.A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071; Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362. See Freund, Pol. Power, §§ 315–317; State ex rel. Bramley v. Norton, 5 Ohio N. P. 183; Cleveland v. Clements Bros. Constr. Co. 67 Ohio St. 197, 59 L.R.A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; Chicago v. Hulbert, 205 Ill. 363, 68 N. E. 786; Fiske v. People, 188 Ill. 210, 52 L.R.A. 291, 58 N. E. 985; Seattle v. Smyth, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120; Ex parte Kuback, 85 Cal. 274, 9 L. R.A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; Street v. Varney Electrical Supply Co. 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 N. E. 895.

There are distinctions between the police law and criminal legislation.

Freund, Pol. Powers, § 26; 1 Wharton, Crim. Law, § 23a.

As to the police power of Congress see—

Re Heff, 197 U. S. 488, 505, 49 L. ed. 848, 855, 25 Sup. Ct. Rep. 506; Leisy v. Hardin, 135 U. S. 100, 158, 34 L. ed. 128, 149, 3 Inters. Com. Rep. 36, 10 Sup. Ct Rep. 681; Lottery Case (Champion v. Ames) 188 U. S. 321, 365, 47 L. ed. 492, 504, 23 Sup. Ct. Rep. 321; License Cases, 5 How. 504, 583, 12 L. ed. 256, 291; Passenger Cases, 7 How. 424, 12 L. ed. 761; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 689, 43 L. ed. 858, 861, 19 Sup. Ct. Rep. 565; Legal Tender Case, 110 U. S. 467, 28 L. ed. 221, 4 Sup. Ct. Rep. 122; Downes v. Bidwell, 182 U. S. 369, 45 L. ed. 1138, 21 Sup. Ct. Rep. 770; Scott v. Sandford, 19 How. 401, 15 L. ed. 699.

Intention is a question belonging exclusively to the jury to decide. It is the material point on which the legality or criminality of the act must turn.

United States v. Quincy, 6 Pet. 445, 8 L. ed. 458; Lee v. Lee, 8 Pet. 44, 8 L. ed 860; People v. Flack, 125 N. Y. 335, 11 L.R.A. 807, 26 N. E. 267.

"Extraordinary emergency" means a decidedly unforeseen contingency.

People v. Lee Wah, 71 Cal. 80, 11 Pac 851; Moses v. Sun Mut. Ins. Co. 1 Duer, 170.

The practical construction of a statute by the department is entitled to great weight

Lewis's Sutherland, Stat. Constr. § 474 (309).

Mr. **Edward E. Blodgett** argued the cause, and, with Mr. G. Philip Wardner, filed a brief for the Eastern Dredging Company:

Men engaged in dredging a channel in Boston harbor cannot be said to be employed upon any of the public works of the United States or of the District of Columbia.

Ellis v. Grand Rapids, 123 Mich. 567, 82 N. W. 244; Winters v. Duluth, 82 Minn. 127, 84 N. W. 788; 23 Am. & Eng. Enc. Law, 2d ed. p. 459; Blank v. Kearny, 44 App. Div. 592, 61 N. Y. Supp. 79; Schneck v. Jeffersonville, 152 Ind. 204, 52 N. E. 212; Worcester v. Western R. Corp. 4 Met. 564; McHugh v. Boston, 173 Mass. 408, 53 N. E. 905; Lark v. State, 55 Ga. 435; Larose v. King, 31 Can. S. C. 206; Lane v. State, 14 Ind. App. 573, 43 N. E. 244; Denver v.

Rhodes, 9 Colo. 554, 13 Pac. 729; Seibert v. Cavender, 3 Mo. App. 421.

The tug, the dredge, and the scow were clearly vessels within the admiralty jurisdiction of the United States.

Ex parte Easton, 95 U. S. 68, 24 L. ed. 373; Cope v. Vallette Dry Dock Co. 119 U. S. 625, 629, 30 L. ed. 501, 502, 7 Sup. Ct. Rep. 336; The Mac, L. R. 7 Prob. Div. 126; The General Cass, Brown, Adm. 334, Fed. Cas. No. 5,307; Endner v. Greco, 3 Fed. 411; The Alabama, 19 Fed. 544, Affirmed in 22 Fed. 449; The Pioneer, 30 Fed. 206; Disbrow v. The Walsh Brothers, 36 Fed. 607; The Atlantic, 53 Fed. 607; The Starbuck, 61 Fed. 502; The International, 83 Fed. 840; Lawrence v. The Flatboat, 84 Fed. 200; McRae v. Bowers Dredging Co. 86 Fed. 344; Steam Dredge No. 1, 87 Fed. 760; McMaster v. One Dredge, 95 Fed. 832; Bowers Hydraulic Dredging Co. v. Federal Contracting Co. 148 Fed. 290; Saylor v. Taylor, 23 C. C. A. 343, 42 U. S. App. 206, 77 Fed. 476.

If the tug, the dredge, and the scows were vessels, then the men employed to operate them were seamen. There will, of course, be no dispute about the master and mate of the tug.

Curtis, Merchant Seamen, p. 5; Benedict, Admiralty, 3d ed. § 278; Hughes, Admiralty, p. 21.

The law is equally clear as to the engineer and fireman on the tug.

Wilson v. The Ohio, Gilpin, 505, Fed. Cas. No. 17,825; Gurney v. Crockett, Abb. Adm. 490, Fed. Cas. No. 5,874.

The others—namely, the master, fireman, craneman, and deck hands on the dredge, and the scow man—are seamen, for the reason that they were, each of them, one of the crew of the vessel on which they were employed, and they each of them co-operated in the operation, maintenance, and navigation of these vessels.

The D. C. Salisbury, Olcott, 71, Fed. Cas. No. 3,694; The Highlander, 1 Sprague, 510, Fed. Cas. No. 6,476; The Ocean Spray, 4 Sawy. 105, Fed. Cas. No. 10,412; The Minna, 11 Fed. 759; The Murphy Tugs, 28 Fed. 429; The Sarah E. Kennedy, 29 Fed. 264; The Atlantic; Saylor v. Taylor; Lawrence v. The Flatboat; McRae v. Bowers Dredging Co; Steam Dredge No. 1,—supra; The John McDermott, 109 Fed. 90; Domenico v. Alaska Packers' Asso. 112 Fed. 554; Hughes, Admiralty, p. 21; Benedict, Admiralty, 3d ed. §§ 241, 278.

Being seamen, they cannot be regarded as mechanics or laborers within the act.

Telles v. Lynde, 47 Fed. 912; The Grace Darling, 2 Haskell, 278, Fed. Cas. No. 5,651; 20 Ops. Atty. Gen. 459.

It is incredible that, if Congress proposed to legislate in regard to seamen,—a subject which has been so constantly and so specifically dealt with in congressional enactments,—it would not have mentioned seamen in the proposed statute. It is still more incredible that Congress should have passed another act interfering so completely with the well-known characteristics and necessities of the seaman's vocation as the eight-hour law does, without ever using the word "seaman."

McHugh v. Boston, 173 Mass. 468, 53 N. E. 905.

The idea underlying the term "laborer" is that of a man whose work or value consists in the mere application of muscular force in accordance with the orders of a superior. It excludes the idea of skill, knack, or any particular experience or training.

Centruy Dict. "Laborer;" Blanchard v. Portland & R. F. R. Co. 87 Me. 241, 32 Atl. 890; Wildner v. Ferguson, 42 Minn. 112, 6 L.R.A. 338, 18 Am. St. Rep. 495, 43 N. W. 794; Kline v. Russell, 113 Ga. 1025, 39 S. E. 477; Meands v. Park, 95 Me. 527, 53 Atl. 706; Savannah & C. R. Co. v. Callahan, 49 Ga. 506; Dano v. M. O. & R. R. Co. 27 Ark. 564; State ex rel. I. X. L. Grocery Co. v. Land, 108 La. 512, 58 L.R.A. 457, 89 Am. St. Rep. 392, 32 So. 433; Wakefield v. Fargo, 90 N. Y. 213.

The idea underlying mechanics is primarily, of course, skill; but it is manual skill, —not any kind of skill,—and it is skill applied to some tangible object to increase the value of the latter.

Savannah & C. R. Co. v. Callahan, supra; New Orleans v. Robira, 42 La. Ann. [illegible] 11 L.R.A. 141, 8 So. 40[illegible]; Story v. Walker, 11 Lea, 515, 47 Am. Rep. 305; United States v. Garlinger, 169 U. S. 316, 322, 42 L. ed. 762, 764, 18 Sup. Ct. Rep. 364; Gordon v. United States, 31 Ct. Cl. 254.

Mr. W. Orison Underwood argued the cause, and, with Messrs. Henry F. Knight and Johnson, Clapp, & Underwood, filed a brief for the Bay State Dredging Company:

Congress possesses no power to legislate except such as is affirmatively conferred upon it through the Constitution, or is fairly to be inferred therefrom.

Jacobson v. Massachusetts, 197 U. S. 11, 22, 49 L. ed. 643, 648, 25 Sup. Ct. Rep. [illegible]

An act which may be constitutional upon its face, or as applied to certain conditions, may yet be found to be unconstitutional when sought to be applied in a particular case.

Yick Wo. v. [illegible], 118 U. S. [illegible] L. ed. 220, 6 [illegible] Rep. 1064; Cotting v. Kansas City [illegible] Co. (Cotting v. [illegible] 206 U. S.

Goûard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Otis Co. v. Ludlow Mfg. Co. 201 U. S. 140, 50 L. ed. 696, 26 Sup. Ct. Rep. 353; Cooley, Const. Lim. 7th ed. 560.

The scow is a vessel.

Ex parte Easton, 95 U. S. 68, 24 L. ed. 373; Cope v. Vallette Dry Dock Co. 119 U. S. 625, 629, 30 L. ed. 501, 502, 7 Sup. Ct. Rep. 336; The General Cass, Brown, Adm. 334; Fed. Cas. No. 5,307; Endner v. Greco, 3 Fed. 411; The Alabama, 19 Fed. 544, Affirmed in 22 Fed. 449; The Pioneer, 30 Fed. 206; Disbrow v. The Walsh Brothers, 36 Fed. 607; The Starbuck, 61 Fed. 502.

The dredge and the scows are to be treated as a unit.

Saylor v. Taylor, 23 C. C. A. 343, 42 U. S. App. 206, 77 Fed. 476; The International, 83 Fed. 840; Lawrence v. The Flatboat, 84 Fed. 200.

A dredge is a vessel.

The Alabama, and The Pioneer, supra; The Atlantic, 53 Fed. 607; The Starbuck; Saylor v. Taylor; The International; and Lawrence v. The Flatboat,—supra; McRae v. Bowers Dredging Co. 86 Fed. 344; Steam Dredge No. 1, 87 Fed. 760; McMaster v. One Dredge, 95 Fed. 832; Bowers Hydraulic Dredging Co. v. Federal Contracting Co. 148 Fed. 290.

The masters and mate of the tug are seamen.

Curtis, Merchant Seamen, p. 5; Benedict, Admiralty, 3d ed. § 278; Hughes, Admiralty, p. 21.

And the same is true of the engineer and fireman.

Wilson v. The Ohio, Gilpin, 505, Fed. Cas. No. 17,825; Gurney v. Crockett, Abb. Adm. 490, Fed. Cas. No. 5,874.

All of the various men employed on the fleet and referred to in the various counts are seamen.

The D. C. Salisbury, Olcott, 71, Fed. Cas. No. 3,694; The Highlander, 1 Sprague, 510, Fed. Cas. No. 6,476; The Ocean Spray, 4 Sawy. 105, Fed. Cas. No. 10,412; The Minna, 11 Fed. 759; The Ole Oleson, 20 Fed. 384; The Murphy Tugs, 28 Fed. 429; The Sarah E. Kennedy, 29 Fed. 264; The Atlantic; Saylor v. Taylor; Lawrence v. The Flatboat; McRae v. Bowers Dredging Co.; and Steam Dredge No. 1,—supra; The John McDermott, 109 Fed. 90; Domenico v. Alaska Packers' Asso. 112 Fed. 554; Hughes, Admiralty, p. 21; Benedict, Admiralty, 3d ed. §§ 241, 278.

The work of dredging in Chelsea creek, in Boston harbor, as shown in the record, is not part of the "public works of the United States" within the meaning of the statute in question.

Century Dict. "Public Works;" Ellis v. Grand Rapids, 123 Mich. 569, 82 N. W. 244; Winters v. Duluth, 82 Minn. 127, 84 N. W. 788.

The various employees referred to in the several informations are not laborers or mechanics.

Century Dict. "Laborer;" Wildner v. Ferguson, 42 Minn. 113, 6 L.R.A. 338, 18 Am. St. Rep. 495, 43 N. W. 794; Blanchard v. Portland & R. F. R. Co. 87 Me. 241, 32 Atl. 890; Rogers v. Dexter & P. R. Co. 85 Me. 372, 21 L.R.A. 528, 27 Atl. 257; Kansas City use of Mullins v. McDonald, 80 Mo. App. 448; Wakefield v. Fargo, 90 N. Y. 217; Savannah & C. R. Co. v. Callahan, 49 Ga. 506; Dano v. M. O. & R. R. Co. 27 Ark. 564; Michigan Trust Co. v. Grand Rapids Democrat, 113 Mich. 615, 67 Am. St. Rep. 486, 71 N. W. 1102; State ex rel. I. X. L. Grocery Co. v. Land, 108 La. 512, 58 L.R.A. 407, 92 Am. St. Rep. 392, 32 So. 433; McPherson v. Stroup, 100 Ga. 228, 28 S. E. 157; Kline v. Russell, 113 Ga. 1085, 39 S. E. 477; Meands v. Park, 95 Me. 527, 50 Atl. 706; People ex rel. Langdon v. Dalton, 49 App. Div. 71, 63 N. Y. Supp. 258; Henderson v. Nott, 36 Neb. 154, 38 Am. St. Rep. 720, 54 N. W. 87; New Orleans v. Robira, 42 La. Ann. 1098, 11 L.R.A. 141, 8 So. 402; Story v. Walker, 11 Lea, 515, 47 Am. Rep. 305; Berks County v. Bertolet, 13 Pa. 522.

Solicitor General Hoyt argued the cause, and, with Attorney General Bonaparte and Mr. Otis J. Carlton, filed a brief for the United States:

The eight-hour law is constitutional.

Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124.

The phrase "public works of the United States" includes the work upon which appellants were engaged.

United States v. Jefferson, 60 Fed. 736; United States v. San Francisco Bridge Co. 88 Fed. 891; 26 Ops. Atty. Gen. 30, 34.

It was work for which the Congress could lawfully appropriate money; and it is competent to the Congress to define by certain enactments, even later in date than other acts, the words and phrases used in the other acts.

Johnson v. Southern P. Co. 196 U. S. 1, 21, 49 L. ed. 363, 371, 25 Sup. Ct. Rep. 158.

The exception, "in case of extraordinary emergency," only applies to sudden, unexpected happenings, not of the customary, usual, or regular kind, demanding prompt action to avert imminent danger to life, limb, health, or property.

Century Dict. "extraordinary" and "emergency;" Sttandard Dict.; Webster; Worcester; United States v. Sheridan-Kirk Contract Co. 149 Fed. 813.

To discover the evil which a statute is

designed to remedy, the court will read committee reports and the debates to know the situation as it existed and was pressed upon the attention of the Congress.

United States v. Union P. R. Co. 91 U. S. 72, 79, 23 L. ed. 224, 228; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; United States v. Laws, 163 U. S. 258, 41 L. ed. 151, 16 Sup. Ct. Rep. 998; American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; Dunlap v. United States, 173 U. S. 65, 43 L. ed. 616, 19 Sup. Ct. Rep. 319.

The term "laborers and mechanics" applies to all who come within the ordinary meaning of those words, irrespective of the manner in which they are paid.

12 Ops. Atty. Gen. 533; 25 Ops. Atty. Gen. 465.

Deck hands, scow men, crane men and their helpers, and firemen, who perform manual labor, and engineers, who perform mechanical labor, are within the ordinary meaning of the term "laborers and mechanics."

United States v. Jefferson, supra; United States v. Martin, 94 U. S. 400, 24 L. ed. 128; 26 Ops. Atty. Gen. 64; Sanner v. Shivers, 76 Ga. 335; State ex rel. I. X. L. Grocery Co. v. Land, 108 La. 512, 58 L.R.A. 407, 92 Am. St. Rep. 392, 32 So. 433; Wilson v. Zulueta, 14 Q. B. 405.

A dredge and scows have been held to be vessels, and therefore not subject to duty under a tariff act, but that decision rests upon the definition of the word "vessel," in U. S. Rev. Stat. § 3, U. S. Comp. Stat. 1901, p. 4, under which any water craft used or capable of being used for transportation is a vessel.

The International, 32 C. C. A. 258, 60 U. S. App. 419, 89 Fed. 484.

Before the general definition was made, it is quite clear that such craft would not have been considered as vessels, for the reason that they are not self-propelling.

United States v. The Ohio, 9 Phila. 448, Fed. Cas. No. 15,915; United States v. The Pennsylvania Canal Boat Nos. 68 and 69, Fed. Cas. No. 16,027.

Mr. Justice Holmes delivered the opinion of the court:

These are an indictment and informations under the act of August 1, 1892, chap. 352, 27 Stat. at L. 340, U. S. Comp. Stat. 1901, p. 2521, "Relating to the Limitation of the Hours of Daily Service of Laborers and Mechanics Employed upon the Public Works of the United States and of the District of Columbia." They all bring up the question of the constitutionality of the act, and they severally present some subordinate matters, which will be considered under the respective cases.

The act limits the service and employment of all laborers and mechanics employed by the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or the District, to eight hours in any one calendar day, and makes it unlawful "to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency." By § 2 "any officer or agent of the government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia, who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof." The plaintiffs in error were contractors within the scope of the act, were found guilty, and were fined. They all requested rulings that the act was unconstitutional, excepted to the refusal so to rule, and on that ground brought their cases to this court.

The contention that the act is unconstitutional is not frivolous, since it may be argued that there are relevant distinctions between the power of the United States and that of a state. But the arguments naturally urged against such a statute apply equally for the most part to the two jurisdictions, and are answered, so far as a state is concerned, by Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124. In that case a contractor for work upon a municipal boulevard was sentenced to a fine under a similar law of Kansas, and the statute was upheld. We see no reason to deny to the United States the power thus established for the states. Like the states, it may sanction the requirements made of contractors employed upon its public works by penalties in case those requirements are not fulfilled. It would be a strong thing to say that a legislature that had power to forbid or to authorize and enforce a contract had not also the power to make a breach of it criminal; but, however that may be, Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out only in a manner consistent with its

views of public policy, and may punish a departure from that way. It is true that it has not the general power of legislation possessed by the legislatures of the states, and it may be true that the object of this law is of a kind not subject to its general control. But the power that it has over the mode in which contracts with the United States shall be performed cannot be limited by a speculation as to motives. If the motive be conceded, however, the fact that Congress has not general control over the conditions of labor does not make unconstitutional a law otherwise valid, because the purpose of the law is to secure to it certain advantages, so far as the law goes.

One other argument is put forward, but it hardly needs an answer. A ruling was asked in Ellis's case, and is attempted to be sustained, to the effect that the government waived its sovereignty by making a contract, and that even if the act of 1892 were read into the contract, a breach of its requirements would be only a breach of contract, and could not be made a crime. This is a mere confusion of ideas. The government, purely as contractor, in the absence of special laws, may stand like a private person; but, by making a contract, it does not give up its power to make a law, and it may make a law like the present for the reasons that we have stated. We are of opinion that the act is not contrary to the Constitution of the United States.

We pass to the subordinate matters not common to all the cases. In Ellis's case the plaintiff in error agreed to construct and complete pier No. 2 at the Boston navy yard, within six months, according to certain specifications, and at a certain price. He found more difficulty than he expected, although he expected some trouble, in getting certain oak and pine piles called for by the contract, and, having been delayed by that cause, he permitted his associate in the business to employ men for nine hours, in the hurry to get the work done. The *judge instructed the jury that the evidence did not show an "extraordinary emergency" within the meaning of the act. The judge was right in ruling upon the matter. Even if, as in other instances, a nice case might be left to the jury, what emergencies are within the statute is merely a constituent element of a question of law, since the determination of that element determines the extent of the statutory prohibition and is material only to that end. The ruling was correct. It needs no argument to show that the disappointment of a contractor with regard to obtaining some of his materials—a matter which he knew involved some difficulty, of which he took the risk—does not create such an emergency as is contemplated in the exception to the law. Again, the construction of the pier was desirable for the more convenient repair of war ships, but it was not essential. Vessels had been docked without it since 1835 or 1836, so that there was no hot haste on that account, if, under any circumstances, that kind of need would have been enough.

There is only one other question raised in Ellis's case. It is admitted that he was a contractor within the meaning of the act and that the workmen permitted to work more than eight hours a day were employed upon "public works," and it is not denied that these workmen were "mechanics." The jury were instructed, subject to exception, that, if the defendant intended to permit the men to work over eight hours on the calendar day named, he intended to violate the statute. The argument against the instruction is that the word "intentionally" in the statute requires knowledge of the law; or at least that, to be convicted, Ellis must not have supposed, even mistakenly, that there was an emergency extraordinary enough to justify his conduct. The latter proposition is only the former a little disguised. Both are without foundation. If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent. The judgment in this case must be affirmed.

*The three cases against the Eastern Dredging Company were informations for employing certain men alleged to be laborers or mechanics more than eight hours a day upon what was alleged to be one of the public works of the United States; *viz.*, dredging a portion of the 35-foot channel, so called, in Boston harbor. The cases against the Bay State Dredging Company were similar, except that the place was Chelsea creek in Boston harbor. Of the former, No. 664 was in three counts for employing two deck hands and an assistant crane man and deck hand upon a dredge; No. 665 was for employing the master, crane man, and fireman of the dredge; and No. 666 was for employing the captain, mate, engineer, and foreman of a tug that towed a scow, etc., and a man in charge of the scow. Of the Bay State Dredging Company cases, No. 667 was for employing the captain, mate, and fireman of a dredge; No. 668 was for employing a crane man and deck hand on the dredge; and No. 669 was for employing a scow man and the captain and engineer of a tug. The offenses were admitted or proved subject to the questions that already have been considered, and to the further questions whether the dredging was upon one of [258]

the public works of the United States, and whether the persons employed were laborers or mechanics within the meaning of the act, with one or two lesser points that will not need to be discussed.

Both of the phrases to be construed admit a broad enough interpretation to cover these cases, but the question is whether that interpretation is reasonable, and, in a penal statute, fair. Certainly they may be read in a narrower sense with at least equal ease. The statute says, "laborers and mechanics . . . employed . . . upon any of the public works." It does not say, and no one supposes it to mean, "any public work." The words "upon" and "any of the," and the plural "works" import that the objects of labor referred to have some kind of permanent existence and structural unity, and are severally capable of being regarded as complete wholes. The fact that the persons mentioned as employed upon [259] them are laborers and *mechanics, words admitted not to include seamen, points in the direction of structures and away from the sea. The very great difficulty, if not impossibility, of dredging in the ocean if such a law is to govern it, is a reason for giving the defendants the benefit of a doubt; and the fact that until last year the government worked dredging crews more than eight hours is a practical construction not without its weight. A change seems to have been made simply for the sake of consistency between the different departments of the government, as is stated in an order of the Secretary of War. A different conclusion is sought to be drawn from some appropriation acts, but they simply refer to the improvement of harbors in general terms among the public works for which appropriations are made. The improvement of a harbor may consist in the erection of structures as well as in the widening of a channel, or the explosion of a rock. It is unnecessary to lay special stress on the title to the soil in which the channels were dug, but it may be noticed that it was not in the United States. The language of the acts is "public works of the United States." As the works are things upon which the labor is expended, the most natural meaning of "of the United States" is "belonging to the United States."

The words "laborers and mechanics" are admitted not to apply to seamen as that name commonly is used. Therefore it was contended but faintly that the masters of the tugs could not be employed more than eight hours. But the argument does not stop with masters of tugs, or even with mates, engineers, and firemen of the same. Wilson v. The Ohio, Gilpin, 505, Fed. Cas. No. 17,825; Holt v. Cummings, 102 Pa. 212, 48 Am. Rep. 199. The scows and the floating dredges were vessels. Rev. Stat. §§ 3, 4612, U. S. Comp. Stat. 1901, pp. 4, 3129. They were within the admiralty jurisdiction of the United States. The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8. A number of cases as to dredges in the circuit and district courts are referred to in Bowers Hydraulic Dredging Co. v. Federal Contracting Co. 148 Fed. 290. Therefore all of the hands mentioned in the informations were seamen within the definition in an earlier statute of the *United States. Rev. Stat. § 4612. [260] Saylor v. Taylor, 23 C. C. A. 343, 42 U. S. App. 206, 77 Fed. 476. See also act of March 3, 1875, chap. 156, § 3. 18 Stat. at L. 485, U. S. Comp. Stat. 1901, p. 3324; Bass v. Stupart, 1 Dougl. K. B. 11; Disbrow v. The Walsh Brothers, 36 Fed. 607. They all require something of the training and are liable to be called upon for more or less of the services required or ordinary seamen. The reasons which exclude the latter from the statute apply, although perhaps in a less degree, to them. Whatever the nature of their work, it is incident to their employment on the dredges and scows, so is the case of an engineer or coal shoveler on board ship. Without further elaboration of details we are of opinion that the persons employed by the two defendant companies were not laborers or mechanics, and were not employed upon any of the public works of the United States within the meaning of the act. As in other cases where a broad distinction is admitted, it ultimately becomes necessary to draw a line, and the determination of the precise place of that line in nice cases always seems somewhat technical, but still the line must be drawn.

Judgment in 567 affirmed.

Judgments in 664, 665, 666, 667, 668, and 669 reversed.

Mr. Justice Moody took no part in the decision of 567.

Mr. Justice McKenna is of opinion that the work upon the dredging of Chilson creek was within the act. In other particulars he agrees with the judgment of the court.

Mr. Justice Moody, dissenting:

I am unable to agree with the opinion of the court, so far as it relates to the employment for more than eight hours a day of the men engaged in work on the dredges and scow[illegible] are of such general importance [illegible] unwilling to allow the reasons for [illegible] agreement to remain undisclosed.

*The first question is whether the men named in the informations were employed by the defendants "upon any of the public works of the United States" within the meaning of those words as Congress used them. Let it be conceded, as I think it should be, that "any of the public works" is a narrower expression than "any public work" would be; that public works must "have some kind of permanent existence and structural unity, and be severally capable of being regarded as complete wholes," and still the works here in question fall within the description. The dredging of channels in our water ways is not mere digging. It has for its purpose the creation of something with as visible a form as a cellar to a house, a sunken road, a well, a tidal basin, or a sea-level canal. Surely all these are "works," and, if constructed by the government, "public works." Artificial water ways may not be so easily read out of the statute by any definition, and I cannot resist the belief that the definition accepted in the opinion of the court does not accomplish it.

Let us considere the history of one of these artificial approaches from the sea, such as the channel in Boston harbor, and see whether, when it is completed, it ought not to be regarded as a complete whole, having a permanent existence and structural unity. When a work of this kind is proposed, the engineers of the Army, first obtaining the authority from Congress, survey the region, consider the commercial reasons which support the project, and make plans for it and estimates of its cost. Upon consideration of the engineers' report, Congress, if it approves the project, makes an appropriation for its construction, designating it expressly as of the "public works" of the United States. For example, the appropriation for one of the works in question in these cases is in the following terms: "The following sums of money . . . are hereby appropriated . . . for the construction . . . of the public works hereinafter named; . . . for improving said harbor in accordance with the report submitted in House Document, number one hundred and nineteen, *Fifty-sixth Congress, Second Session, by providing channels thirty-five feet deep, . . . six hundred thousand dollars." That is to say, at the very threshold of the inquiry, we find that the Congress which had forbidden a longer day's work than eight hours upon "the public works of the United States" had, upon undertaking this very work, deliberately called it a "public work." The cogency of the argument arising from the use of the same words in the eight-hour law as in the appropriation law cannot be met by the suggestion that it is easy to read the words in the eight-hour law in a narrower sense than they were used in the appropriation law. The question here is not how the words may be interpreted, but how they ought to be interpreted. There is no necessity to explore the possibilities of escape from the intention which Congress has made sufficiently plain.

In the Digest of Appropriations, made and published under the direction of Congress, these constructions are constantly denominated as "works," and of course they are "public." After the channel is completed, it is buoyed and lighted by the government, and frequently defended by land fortifications constructed for that purpose. Sometimes breakwaters or jetties are constructed for the purpose of preserving it from impairment. The general appropriation act of September 19, 1890 (26 Stat. at L. 426, chap. 907), contains some provisions of permanent law, which are material here. It begins by appropriating "for the construction, completion, repair, and preservation of the public works hereinafter named." Then follow many specific appropriations for the improvement of rivers and harbors. Section 3717 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2496) was as follows: "Whenever the Secretary of War invites proposals for any *works*, or for any material or labor for any *works*, there shall be separate proposals and separate contracts for each *work*, and also for each class of material or labor for each work." Section 2 of this act (U. S. Comp. Stat. 1901, p. 3527) provided that that section of the Revised Statutes should not be construed to prohibit "the cumulation of two or more *works* of river and harbor improvement in *the same proposal and contract, where such [263] *works* are situated in the same region and of the same kind or character." Of course, the works here referred to are public works. Section 6 prohibits the deposit of material in harbors, navigable rivers or waters of the United States. Section 7, as amended by § 3 of the act of July 13, 1892 (27 Stat. at L. 88-110, chap. 158), makes it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War." The act of March 3, 1899 (30 Stat. at L. 1151, chap. 425, U. S. Comp. Stat. 1901, p. 3540), makes additional safeguard against the obstruction of navigable channels. Thus Congress, which has created these artificial channels, keeps them under the constant repair, supervision, control, and protection of the government.

When the work is done the government, through the Navy Department and the Coast and Geodetic Survey, makes, publishes, and issues charts which show their length, depth, and width in the minutest detail, and the buoys and lights which enable the mariner to use them with safety. He, like Congress, enters upon the channels, regarding them as completed wholes, as having a permanent existence, and, if he strays beyond their limits, he will quickly discover that they have a tangible form and structural unity Doubtless they are subject to alteration by the action of the elements, but so is a building; and given the constant repair and care which all structures need in order to prevent their disintegration, they are as permanent as the Capitol building itself. Quotations from acts of Congress might be multiplied indefinitely showing that, with respect to channels, Congress had appropriated for them as "works," and for their repair and maintenance as "works;" but if the acts already referred to will not show that Congress regarded such water ways as public works, no number of others will do it. I suppose it would be conceded that breakwaters or jetties were public works. [264] Is it to be supposed that Congress *intended that men who work on them should work only eight hours a day, while those who work near by on the channel itself should be exempted from this restriction? I conclude, therefore, that the labor performed was upon "the public works of the United States."

The eight-hour day is prescribed by the statute only for laborers and mechanics. These words of description have never been supposed to include, and would not include, all those who do work of any kind. Although the extent of these words is somewhat vague, nevertheless they were used in a technical sense, to describe classes of employees. The second question is whether the men named in the information were laborers or mechanics.

Seamen, whether employed in the Navy or other marine service of the United States, or by contractors with the United States, are not laborers or mechanics. They, while laboring as seamen, could no more be brought within the limits of an eight-hour day than a physician, a lawyer, or a clergyman. They have always been regarded with special favor by all governments, and a series of laws specially applicable to them control and affect their conditions of labor. The men employed on the seagoing tug, from the master down, were seamen, and their work was the work of seamen, and the conviction with respect to them was, I agree, erroneous. Those who are employed upon the dredges and scows were not, in respect of the work they were actually doing, in any proper sense, seamen. The master and engineer of the dredge were not licensed, and the men employed upon it seemed not to have entered into any contract of shipment. They were employed usually from those who had served in the merchant marine. They had doubtless acquired the skill and aptitude which especially fitted them for work upon the dredges, which required some handling of lines and some other minor things in which sailors become expert. But, because a man has acquired in one occupation skill which fits him for another, it does not follow that, when he passes from one occupation to the other, the work *which he does [265] in the new employment entitles him rightfully to be called by the old name. The sailor who is appointed the keeper of a lighthouse may have received his appointment because he was once a sailor, but, nevertheless, when he enters into the new service, he is a lighthouse keeper, and not a sailor. The occupation of dredging is not the only one for which life on the sea educates a man. There is a constant demand, for instance, for those who have an honorable discharge from the Navy for employment in civil life. The qualities of obedience, of daring, of fidelity, of the capacity for quick adaptation of insufficient means to the end which may be desired,—all the result of training upon the sea,—are qualities which are needed in many stations of civil life; but, when men have reached those stations by reason of qualities developed in them while seamen, they are no longer sailors. The work of the dredge men and scow men may be described in a sentence. They were digging a channel and emptying the material excavated in the sea. All those who were engaged in the work may fairly be described as either laborers or mechanics. They had nothing whatever to do with navigation. Neither the dredges nor the scows had steering gear, sails, or other methods of self-propulsion. They were towed to the place where the work was to be done, and there left to do it.

It does not seem to be important that, for some purposes, the scows and dredges were vessels, or those employed upon them, for some purposes, are deemed seamen. The question here is, What were the men when they were engaged in the work of construction? Were the men at that time employed as seamen, doing the work of seamen, or as laborers and mechanics, doing the work of laborers and mechanics? I think they then were laborers or mechanics, and employed as such, and that their occupation is determined not by what they have done in the past, or by what their employers chose to call them, but by what they were doing

when the government invoked the law for their benefit. If they were then doing the work of laborers and mechanics, whatever they may have done in the past, *which constitutes a motive for their employment, or by whatever name they were employed, they were, or rather their labor was, within the restrictions as to hours prescribed by the law. Nor was their work in dredging incident to their employment on the dredges, but quite the reverse. They never would have been employed at all except for dredging. They never would have set foot on the dredge save to use it as a platform on which to do the work of laborers and mechanics. It should not be forgotten that the object of this statute, in which is embodied an expression of a great public policy, is to regulate labor of the kind named, and the men concerned are in or out of its prohibitions solely by reason of the kind of labor they perform. How can it be material here whether the dredge is or is not a vessel within the admiralty jurisdiction, or that, in the construction of two specifically named statutes, all those upon it are deemed to be seamen? There is no artificial statutory construction prescribed for this act, and what the men on it are is left, under this act, to be determined according to the truth and fact, and the test to be applied is in the nature of the labor they actually perform. They were employed to do the work of laborers and mechanics; in the main they actually did that work; and whatever they did which was of the nature of seamen's work was a mere incident to the fact that they labored upon a floating platform instead of upon dry land.

It is conceded in the opinion of the court that the statute admits of an interpretation which brings these cases within it. May not more be said? Are not these cases fairly within the plain words of the act? If this be so, then the rule of strict interpretation, applicable to penal laws, a rule which has lost all of its ancient rigor, if indeed it is now more than a lifeless form (United States v. Lacher, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625), cannot be used to take them out. When the intention of the legislature is reasonably clear, the courts have no duty except to carry it out. The rule for the construction of penal statutes is satisfied if the words are not enlarged beyond their natural meaning, *and it does not require that they shall be restricted to less than that.

The impossibility or difficulty of applying this law to the operations of dredging, which, upon the evidence, I think, amounts to no more than that it would result in an inconvenience, which the defendants may readily avoid by refusing to contract with the government, is a consideration fit to be addressed to Congress rather than to this court.

I am authorized to say that Mr. Justice Harlan and Mr. Justice Day concur in this dissent.

R. G. STONE, R. M. Finley, and Nannie E. Finley, Plffs. in Err.,
v.
SOUTHERN ILLINOIS & MISSOURI BRIDGE COMPANY.

(See S. C. Reporter's ed. 267-275.)

Error to state court—questions reviewable—local law.

1. Rulings of the highest court of the state on questions involving the powers of corporations under the laws of that state are conclusive on the Federal Supreme Court when reviewing the judgment of the state court.

Error to state court—questions reviewable—local law.

2. Whether a given corporation comes within the scope of the statutes of a state conferring the right of eminent domain, and is entitled to assert such right, presents only a question of state law, which cannot be reviewed by the Federal Supreme Court on writ of error to a state court.

Eminent domain—bridge over navigable stream—effect of time limit set by Congress.

3. The owner of property taken by eminent domain for the approaches and terminal facilities necessary to the use of a bridge erected, under the authority of the act of January 26, 1901 (31 Stat. at L. 741, chap. 181), over a navigable stream, is denied no Federal right because the erection of the bridge was not begun within the time limit set by Congress, where the bridge has been constructed without complaint by the Federal authorities, Congress having, by the act of January 18, 1904 (33 Stat. at L. 6, chap. 5), extended the time for its completion.

Eminent domain—bridge over navigable stream—approaches and terminal facilities.

4. The appropriation by eminent domain of land for the approaches and terminal facilities necessary to the use of a bridge erected, under the authority of the act of January 26, 1901, over a navigable stream, is not forbidden by that act because the plans submitted to the Secretary of

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NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to State ex rel. Hill v. Dockery, 63 L.R.A. 571.

War, and specifically approved by him, although fully subserving the purpose of showing the extent to which navigation would be affected, do not include such terminal and connecting facilities, and cannot, under the act, be altered without his consent.

[No. 253.]

Argued March 22, 25, 1907. Decided May 13, 1907.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment affirming, on a second appeal, a judgment of the Circuit Court of Scott County, in that state, for the appropriation of land for approaches and terminal facilities necessary to the use of a bridge erected under congressional authority over a navigable stream. Affirmed.

See same case below, 194 Mo. 175, 92 S. W. 475.

The facts are stated in the opinion.

Mr. Shepard Barclay argued the cause, and, with Messrs. Madison R. Smith and Thomas T. Fauntleroy, filed a brief for plaintiffs in error:

When defendant in error submitted the map and secured its approval as an accurate delineation of the western approach to the bridge, it became bound by its own act until, at least, the Federal supervising authority approved a change.

Lake Shore & M. S. R. Co. v. Baltimore & O. & C. R. Co. 149 Ill. 272, 37 N. E. 91.

Congress alone has the right now to authorize a bridge across the Mississippi, for our state boundary is the middle of its main channel. Missouri has no state jurisdiction, beyond that line, to authorize a corporation to construct a permanent structure which might impede navigation of that stream. The Federal law on that subject is now too clear to admit of doubt, and it is likewise conclusive of the case at bar.

South Carolina v. Georgia, 93 U. S. 4, 23 L. ed. 782; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 81, 43 L. ed. 373, 19 Sup. Ct. Rep. 97.

The entire approach to every interstate bridge is considered by the legislation of Congress as subject to the supervisory control of the Federal authority. When the bridge is once located and defined, the same cannot be changed without express authority.

Re Poughkeepsie Bridge Co. 108 N. Y. 483, 15 N. E. 601.

It is not "due process of law," under the 14th Amendment to the Federal Constitution, for the bridge company to appropriate any land beyond that defined as the bridge approach in its own drawing and plan, approved by the Secretary of War.

Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522.

Even if it should be held that Missouri has conferred upon the bridge company the right of eminent domain, it could not lawfully exercise the power in Missouri without showing beyond doubt its power to condemn property in Illinois under the law of its being, and also conformity to the Federal law, without the sanction of which no such bridge or approaches as are in question here could lawfully be constructed.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; Morawetz, Priv. Corp. §§ 960–963; Beach, Priv. Corp. § 417, p. 399; Canada Southern R. Co. v. Gebhard, 109 U. S. 537, 27 L. ed. 1024, 3 Sup. Ct. Rep. 363.

When the Federal consent or authority was thus obtained on certain terms, the defendant in error is estopped from asserting a greater scope of authority than is thus obtained.

It took the benefit of the act and of the plans and drawings thereunder, for the purpose of constructing the bridge and approaches; it should justly bear likewise such burden as the terms of the grant may import.

Broom, Legal Maxims, 705–712.

The petition of defendant in error does not state a cause of action for condemnation, because it fails to show compliance with the Federal laws authorizing the construction of said bridge.

Pennsylvania R. Co. v. Baltimore & N. Y. R. Co. 37 Fed. 130.

The petition does not state a cause of action, because it alleges that the bridge is being constructed "within the territorial limits" set out in the act of Congress. The act of Congress sets out no limits expressly, but defines a method by which the limits were established; namely, by a map approved finally by the Secretary of War. Plaintiff alleges neither those specific steps nor the territorial limitations fixed by said map, and hence the petition is deficient on its face.

Re New York C. & H. R. R. Co. 5 Hun, 86; Pennsylvania R. Co. v. Baltimore & N. Y. R. Co. 37 Fed. 129; Miller v. New York, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228.

Where land is sought to be condemned for two purposes, one of which is authorized and the other not authorized by the law of eminent domain, the whole proceeding must fail.

Lake Shore & M. S. R. Co. v. Baltimore & O. & C. R. Co. [illegible]ra.

The petiti[illegible] y averment that the real pro[illegible] y [illegible] t to be taken "for public use." [illegible] t [illegible]ment is essential to support any t[illegible] property, as there

would be no "due process of law" if taken for private use. The averment of a proposed and legitimate public use is essential and jurisdictional.

Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Re New York C. & H. R. R. Co. supra; Colville v. Judy, 73 Mo. 651; Chicago & N. W. R. Co. v. Galt, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674; Evergreen Cemetery Asso. v. Beecher, 53 Conn. 551, 5 Atl. 353.

Laws conferring powers to take private property for public use are to be construed strictly, or narrowly.

10 Am. & Eng. Enc. Law, 2d ed. p. 1100.

Mr. Martin L. Clardy argued the cause, and, with Mr. Alexander G. Cochran, filed a brief for defendant in error:

The record does not show that the judgment of the state court was based on a Federal question.

Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; Hale v. Akers, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; Miller v. Swann, 150 U. S. 132, 37 L. ed. 1028, 14 Sup. Ct. Rep. 52.

The act of Congress and the plans approved by the Secretary of War were to protect the navigation of the river, and did not preclude the company from acquiring necessary lands for terminal purposes.

Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 588, 41 L. ed. 273, 16 Sup. Ct. Rep. 1173.

Mr. Justice Day delivered the opinion of the court:

On March 3, 1889, Congress passed an act providing, among other things:

"That it shall not be lawful to construct or commence the construction of any bridge, etc., . . . over . . . any . . . navigable river . . . of the United States until the consent of Congress to the building of such structures shall have been obtained, and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War."

The act further provided:

"That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure, unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War." 30 Stat. at L. 1151, § 9, chap. 425, U. S. Comp. Stat. 1901, p. 3540.

On January 26, 1901, Congress passed an act (31 Stat. at L. 741, chap. 181) authorizing the Southern Illinois & Missouri Bridge Company (defendant in error), a corporation of the state of Illinois, to erect, construct, maintain, and operate a bridge and approaches *thereto over the Mississippi river [270] from a point on the Mississippi river in Alexander county, in the state of Illinois, opposite the terminus of the St. Louis Southwestern Railway, at or near Gray's Point, in Scott county, in the state of Missouri, or from some other convenient point on said river in said Alexander county, Illinois, to some opposite point on said river in the state of Missouri, within the distance of 3 miles above or below the terminus of said railway.

The bridge was to be constructed for the passage of railway trains, and, at the option of the corporation, might be so constructed as to provide for the use thereof by wagons, vehicles, and the transit of foot passengers and animals at such reasonable tolls as might be approved by the Secretary of War.

It was also provided that the bridge constructed under the act and subject to its limitations should be a lawful structure and recognized and known as a post route of the United States.

Section 5 provides:

"That the approaches to the bridge built under this act shall be so designed and constructed as not to interfere with the free discharge of the river in seasons of flood; and any encroachment on the high-water cross sections by piers, solid embankments, or otherwise, which might result in unduly accelerating the high-water current at the site of the bridge, shall not be allowed."

Section 7 provides for the submission to the Secretary of War of the drawings of the bridge, piers, approaches, and accessory works and a map of the location, giving, for the space of at least 2 miles above and 1 mile below the proposed site, the topography of the banks of the river and the shore lines at high and low water. The maps and drawings are to be referred to the board of officers of the Corps of Engineers, United States Army, for examination and report.

Provision is made for hearing objections to the construction of the bridge, and it is provided that the proposed bridge shall be a lawful structure only when built in accordance with the plans recommended by the Board of Engineers and approved *by the [271] Chief of Engineers and by the Secretary of War, and while so managed and kept in repair as to offer at all times reasonable and proper means for the passage of rafts, steamboats, and other water craft under the said bridge, and while said requirements are observed.

Section 10 provides for alterations and changes as may be required by the Secretary of War, in accordance with existing law, in the bridge constructed under the provisions of the act, so as to preserve free and convenient navigation. Such changes were to be made, under the direction of the Secretary of War, at the expense of the persons, companies, or corporations owning, controlling, and operating the bridge.

Section 11 provides that the bridge shall be constructed under the general supervision of the Secretary of War, and no changes or alterations in the plan shall be made during the construction of said bridge or after its completion, unless recommended by the Chief of Engineers and approved by the Secretary of War.

The act makes provision for the preservation of the navigable channel during the construction of the bridge.

Section 12 provides that whenever Congress shall decide that the public interests require it, the right to order the removal of the bridge at the expense of the owners is expressly reserved, without liability for damages on the part of the United States.

Section 13 provides that if the bridge is not commenced within one year and completed within three years from the date of the approval of the act, the same shall be null and void, and the rights thereby conferred cease and determine.

The Southern Illinois & Missouri Bridge Company, in pursuance of this act, submitted its drawings and plans and the same were duly approved as required by law.

The bridge company, on the 24th day of April, 1902, filed its petition in the circuit court of Scott county, Missouri, for the appropriation of a strip of land containing 20.3 acres, said to be approximately 4,000 feet long and 200 feet wide, alleging that it [272] is necessary to have a right of way *for the railway tracks, bridge, and terminal yards of the company, and, for the purpose of carrying out its charter privileges, it is necessary to hold and own the described tract.

On trial in the circuit court that court held that the bridge company had no right to make the appropriation under the laws of Missouri.

From this adjudication an appeal was taken to the supreme court of Missouri and that court reversed the judgment of the circuit court, and remanded the case with directions to the lower court to appoint three disinterested commissioners to assess the damages which the defendants would sustain by the appropriation of the strip of land. 174 Mo. 1, 63 L.R.A. 301, 73 S. W. 453.

Such proceedings were had, and $10,000 was assessed as damages in favor of the plaintiffs in error, defendants below, and a second appeal was prosecuted to the supreme court of Missouri, where judgment below was affirmed. 194 Mo. 175, 92 S. W. 475.

To that judgment this writ of error is prosecuted.

Many of the assignments of error involve only questions of state law, the rulings concerning which, in the supreme court of the state, are conclusive, and involve no substantial Federal question.

Among these may be named:

The contention that the statutes of Missouri do not authorize the incorporation of a bridge company to build a bridge across the Mississippi river;

That the laws of Missouri do not confer the right of eminent domain on a corporation of another state;

That a corporation of Illinois can only exercise in Missouri such powers as are conferred upon it by the state of its creation.

These questions involve the powers of corporations under the laws of Missouri, which are concluded by the adjudication of the state supreme court.

There is no contention that the statutes conferring the right of eminent domain, passed by the legislature of the state of Missouri, and which its courts have decided authorize this *appropriation by the defend- [273] ant in error, do not make ample provision for assessment of damages to the landowner by due process of law. Whether a given corporation comes within the law of the state, and is entitled to assert its power, presents only a question of state law.

Nor is error shown in the contention that the erection of the bridge was not begun within the year, as provided by the act of Congress. The evidence shows that the bridge has been constructed without complaint by the Federal authorities, and, indeed, Congress has extended the time for the completion of the bridge by an act passed January 18, 1904. 33 Stat. at L. 6, chap. 5. It cannot prejudice any Federal right secured to the plaintiffs in error that the right of eminent domain is authorized by the state notwithstanding the bridge was not begun within the time which Congress might have insisted upon as a condition of enjoyment of the privileges conferred.

If the record presents any Federal question at all, it rests in the contention that the appropriation in controversy is in contravention of the act of Congress, because it is an unauthorized extension of the approaches to the bridge upon the Missouri side, not included in the drawings and plans as submitted to the Secretary of War, and

met with his approval, as already

opy of the approved drawings in the hows that the approach to the bridge ie west side was shown in a series es extending from the river bank to ice of 720 feet. And it is the con- of the plaintiffs in error that, in the act of Congress, the approach limited to the extent and construc- own in the plans and drawings thus d by the Secretary of War. Indeed, ntended that this plan, after its ap- became a limitation upon the power state to extend the bridge by au- g further approaches and connec-

ve think this contention wholly un- The act of Congress and the pow- n the Secretary of War thereunder result of the exertion of the consti- l power *conferred upon Congress to commerce between the states. Fed- trol of bridges constructed over nav- vaters is maintained because of the prevent obstructions to navigation serve such public highways as rivers and unobstructed use in the interest nerce. Newport & C. Bridge Co. v. States, 105 U. S. 470–475, 26 L. ed. 45, and cases therein cited.

xamination of the act of Congress which the bridge company was au- to construct this bridge manifests pose to prevent its becoming an ob- n or interference with free naviga- the river, and when the matter of hes is specifically spoken of it is l that they shall be so designed and ted as not to interfere with the free ge of the river in seasons of flood. evident that the purpose of requir- submission of plans, and their ap- y the Secretary of War, was to pre- s far as may be, the unobstructed of the river in the uses of naviga- o the extent that it was necessary ect such interests, the law provides structure shall be unalterable, and approaches shall be approved by the y and remain unchanged without his , but it certainly never was designed oy the usefulness of the bridge by the power of the state to authorize oration constructing and owning it, er connections and other facilities, the bridge available for the pur- r which it was intended. The bridge roaches as approved by the Secretary have not been altered. The con- approaches and tracks are addition- s of making the bridge available for poses intended.

is pertinently observed by the Chief Justice, in delivering the opinion of the court in Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 588, 41 L. ed. 273, 16 Sup. Ct. Rep. 1173: "A railroad bridge can be of no use to the public unless united with necessary appurtenances, such as approaches, tracks, depots, and other facilities for the public accommodation."

*If the state was deprived of its power to [275] authorize extensions and connections which should make this bridge available for the common use of railroads for which it was intended, it would have been a vain thing to provide for a bridge abruptly terminating at a height and point where, without further approaches and connecting facilities, its usefulness would have been destroyed.

This record shows that the point 720 feet to the west, where the approach required by the War Department ends, is at a height of some 60 feet from the ground. The structure was thence extended some distance to the crest of a bluff, thence over the lands of the plaintiffs in error to a point where the terminal yards of the bridge company are situated.

We cannot find it within the purpose of Congress, if it had the power so to do, by the terms of this act to limit the state in its right to authorize these necessary terminals and connecting facilities, because the plans and specifications, which fully subserved the purpose of showing the extent to which navigation would be affected, had been specifically approved by the Secretary of War, and are not to be altered without his consent.

In our view no Federal right was taken from the plaintiffs in error by the action complained of under the state laws as interpreted by the supreme court of the state of Missouri, and if it may be said that the contention fairly presents a Federal question, we are unable to find merit in it.

Judgment of the Supreme Court of Missouri is affirmed.

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*HENRY A. M. SMITH, as Receiver of the [276] late Corporation Named and Styled "The President, Directors, & Company of the State Bank," Plff. in Err.,

v.

R. H. JENNINGS, as Treasurer of the State of South Carolina.

(See S. C. Reporter's ed. 276–278.)

Error to state court—Federal question—conformity of state law to state Constitution.

1. The conformity with the state Con-

NOTE.—On the general subject of writs of error from United States Supreme Court

stitution of the proceedings of the state legislature in the enactment of a law is not a Federal question, which will sustain a writ of error from the Supreme Court of the United States to a state court, but is a question upon which the determination of the state court is final.

Error to state court—Federal question—impairing contract obligation.

2. No Federal question respecting the impairment of contract obligations which will sustain a writ of error from the Supreme Court of the United States to a state court is presented by the contention that the obligation of the contract made by bonds of the state is impaired by a joint resolution of the state legislature directing the state treasurer to write off of the books in his office certain of such bonds, and to carry no longer such bonds on the books as a debt of the state, since such law merely directed a change of entries in the books of the treasurer, and could in no respect impair or affect the rights of the holders.

[No. 104.]

Argued April 24, 25, 1907. Decided May, 13, 1907.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment denying an injunction to restrain the state treasurer from complying with the joint resolution of the state legislature, directing him to write certain state bonds off the books in his office, and to carry no longer such bonds on the books as a debt of the state. Dismissed for want of jurisdiction.

See same case below, 67 S. C. 324, 45 S. E. 821.

The facts are stated in the opinion.

Mr. T. W. Bacot argued the cause, and, with Messrs. A. M. Lee and Julian Mitchell, Jr., filed a brief for plaintiff in error.

Mr. Charles A. Douglas argued the cause, and, with Mr. E. B. Sherrill, filed a brief for defendant in error.

Mr. Justice Moody delivered the opinion of the court:

The plaintiff in error is the receiver of a state bank of South Carolina which has been many years in liquidation. The defendant in error is the treasurer of the state of South Carolina. The receiver brought in the supreme court of the state a petition for an injunction to restrain the treasurer from obeying the requirements of an act (presently to be stated) of the legislature of the state. The supreme court of the state dismissed the petition, and the case is here on writ of error.

*The state of South Carolina issued, in[277] 1859, bonds due in twenty years in aid of the Blue Ridge Railroad Company. The bank came to be the owner of one hundred of these bonds, each of the par value of $1,000. In 1865 the assets of the bank, including the hundred bonds, were seized and carried away by soldiers of the Federal Army. Sixty-three of the bonds have been recovered by the bank from time to time and have been paid or funded by the state. Thirty-seven of the bonds are still outstanding, and nothing is known of them. In 1896 the general assembly of the state passed an act directing that no coupon bond of the state payable to bearer should be funded or paid by the state treasurer after the expiration of twenty years from the date of maturity. In 1903 the general assembly passed the following act:

"A Joint Resolution to Authorize and Require the State Treasurer to Write off the Books in His Office Certain Bonds Entered on Said Books as Old Bonds, Not Fundable (Act of 1896), Blue Ridge Railroad Bonds, $37,000.

"Be it resolved by the general assembly of the state of South Carolina:

"Section 1. That whereas, by the act of the legislature of 1896, the treasurer of this state is forbidden to pay, consolidate, or fund any coupon bond of the state after the expiration of twenty years from the date of maturity of such bonds, and certain bonds entered on the books of the state treasurer as 'Old bonds, not fundable, act of 1896, Blue Ridge Railroad Bonds, $37,000,' are still carried on the books of the state treasurer. Therefore, be it resolved: That the state treasurer be, and he is hereby, authorized and required to write said bonds off of the books in his office, and no longer carry said bonds on the books as a debt of the state."

Thereupon the receiver brought this petition, alleging that the act last stated, if valid, impaired the obligation of the con-

to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On writs of error to state courts in cases presenting the question of impairment of contract obligations—see note to Osborne v. Clark, ante, 619.

tract made by the bonds, and that the act was not passed in conformity with the Constitution of the state, and was therefore void. The prayer of the petition was that]the respondent *be restrained by injunction "from writing the said $37,000 of the state bonds off the books in his office, and no longer carrying said bonds on the books as a debt of the state." The supreme court of the state decided against both these contentions, and they are brought here as Federal questions. But the conformity with the state Constitution of the proceedings in the enactment of the law is a question for the determination of the state court, and its judgment is final. Burt v. Smith, 203 U. S. 129, 135, ante, 121, 127, 27 Sup. Ct. 37; Montana ex rel. Haire v. Rice, 204 U. S. 291, ante, 490, 27 Sup. Ct. Rep. 281. Nor did the law complained of impair the obligation of the state to pay the bonds therein mentioned, or the remedy to recover upon them. The obligation and the remedy remained precisely the same after the enactment of the law as before. Neither one was in the slightest degree diminished or affected. The law merely directed a change of entries in the books of the state treasurer, and could by no possibility, in any respect whatever, deny, obstruct, impair, or affect the rights of the plaintiff in error. This was the view expressed by the court below, and the statute, thus interpreted, raises no Federal question.

Writ of error dismissed.

STATE OF WYOMING EX REL. WYOMING AGRICULTURAL COLLEGE and MATT BORLAND et al., Plffs. in Err.,

v.

WILLIAM C. IRVINE, as Treasurer of the State of Wyoming.

(See S. C. Reporter's ed. 278–284.)

Colleges—public aid—congressional grants and appropriations.

No particular institutions are entitled to the grants and appropriations made respectively by the act of July 2, 1862 (12 Stat. at L. 503, chap. 130), granting lands or land scrip to the several states for the endowment, support, and maintenance of at least one college, where the leading object shall be to teach agriculture and the mechanic arts, and by the act of August 30, 1890 (26 Stat. at L. 417, chap. 841, U. S. Comp. Stat. 1901, p. 3214), appropriating annually certain sums to each state and territory for the more complete endowment and maintenance of such colleges, but the states take the property, charged with the duty to devote it to the purposes named.

[No. 272.]

Argued April 19, 22, 1907. Decided May 13, 1907.

IN ERROR to the Supreme Court of the State of Wyoming to review a judgment sustaining a demurrer to a petition for a writ of mandamus to compel the state treasurer to pay to the treasurer of Wyoming Agricultural College certain funds in his hands, the proceeds of land grants and the amount of appropriations made by Congress for the promotion of education in agriculture and mechanic arts. Affirmed.

See same case below, 14 Wyo. 318, 84 Pac. 90.

Statement by Mr. Justice **Moody**:

The plaintiff in error the state of Wyoming, on the relation of the Wyoming Agricultural College and its officers, filed a petition in the supreme court of that state for a writ of mandamus against the defendant in error, the state treasurer. The object of the proceeding was to compel the state treasurer to pay to the treasurer of the college certain funds in his hands, being the proceeds of land grants and the amount of appropriations made by Congress for the promotion of education in agricultural and mechanical arts. An alternative writ issued, and the respondent appeared and demurred to the petition. The cause was then heard by the supreme court of Wyoming, and by that court the demurrer, which was regarded by court and counsel as sufficiently raising the merits of the controversy, was sustained and judgment rendered for the respondent. The case comes here upon writ of error, with allegations of violations of Federal rights, which, so far as material to the decision, are stated in the opinion.

Mr. **Porter B. Coolidge** argued the cause, and, with Messrs. Fenimore Chatterton, Samuel T. Corn, and A. E. L. Leckie, filed a brief for plaintiffs in error.

Mr. **Timothy F. Burke** argued the cause, and, with Messrs. W. E. Mullen, Nellis Corthell, Charles W. Burdick, and John W. Lacey, filed a brief for defendant in error.

Mr. Justice **Moody** delivered the opinion of the court:

The Wyoming Agricultural College was established by an act of the legislature of that state. Wyo. Sess. Laws 1890, 1891, chap. 92. It was declared to be "a state public educational institution," with the object of giving to men and women, without regard to color, "a liberal education and a thorough knowledge of such arts and sciences as will aid in the prosecution of agricultural pursuits, with their varied applications."

The University of Wyoming was established by the territory with the declared object of providing education for both sexes in "the different branches of literature, the arts and sciences, with their varied applications." The Constitution of the state of Wyoming confirmed the establishment of the university and declared it to be the university of the state of Wyoming. The first session of the state legislature enacted a law declaring more fully the objects of the [282] university, which *provided, among other things, that it should be open to both sexes, regardless of race or color, and should "embrace colleges or departments of letters, of science, and of the arts. . . . The college, or the department of the arts, shall embrace courses of instruction in the practical and fine arts, especially in the application of science to the arts of mining and metallurgy, mechanics, engineering, architecture, agriculture, and commerce, together with instruction in military tactics."

Land grants and appropriations, which presently will be described in detail, have been made by Congress for the support of education in the state, and the state, acting through its legislature, has accepted the appropriations under the conditions prescribed in the acts of Congress, and has appropriated these national bounties to the support of the university. The agricultural college claimed that, under the acts of Congress bestowing these gifts, it is entitled to them, and the denial of the supreme court of the state of this claim raises the Federal question first to be considered.

By the act of July 2, 1862 (12 Stat. at L. 503, chap. 130), amended by act of March 3, 1883 (22 Stat. at L. 484, chap. 102, U. S. Comp. Stat. 1901, p. 3212), Congress "granted to the several states, for the purposes hereinafter mentioned," certain quantities of the public lands, or, under certain conditions, in lieu thereof land scrip. The entire proceeds of the sale of the land or of the land scrip were directed to be safely invested by the states as a perpetual fund, whose interest should be "inviolably appropriated by each state which may take and claim the benefit of this act, to the endowment, support, and maintenance of at least one college, where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the states may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life." The act further provided that "if any portion of the fund invested . . . be . . . lost, it shall be replaced by the state to which it belongs;" and that "no state, while in a condition of rebellion or insurrection against the government of the United States, shall be entitled to the benefit of this act. No state shall be entitled to the benefits of this act unless it shall express its acceptance thereof by its legislature." [283]

The grant made in this statute is clearly to the state, and not to any institution established by the state. Montana ex rel. Haire v. Rice, 204 U. S. 291, ante, 490, 27 Sup. Ct. Rep. 281.

By the act of August 30, 1890 (26 Stat. at L. 417, chap. 841, U. S. Comp. Stat. 1901, p. 3214), Congress made permanent annual appropriations of a certain sum of money "to each state and territory for the more complete endowment and maintenance of colleges for the benefit of agriculture and the mechanic arts, now established, or which may be hereafter established, in accordance with an act of Congress approved July second, eighteen hundred and sixty-two, . . . to be applied only to instruction in agriculture, the mechanic arts, the English language, and the various branches of mathematical, physical, natural, and economic science, with special reference to their applications in the industries of life, and to the facilities for such instruction." It is so obvious that these appropriations are made to the state, and not to any institution within the state, and that the states, acting through their legislatures, are to expend the appropriations in accordance with the trust imposed upon them, that it is unnecessary to quote the numerous expressions in this act which support that view. By the act of March 2, 1887 (24 Stat. at L. 440, chap. 314, U. S. Comp. Stat. 1901, p. 3218), Congress directed that a certain sum should be annually appropriated "to each state" for the support of agricultural experiment stations at the institutions established under the act of 1862. The law provides that the appropriation shall be paid to the treasurer of the institution where the agricultural experiment station is established, and no money has come or will come into the hands of the state treasurer. It is, therefore, unnecessary to consider further the provisions of this act. There is in the hands of the state treasurer the permanent fund established under the act of 1862, and one of the annual *appropriations paid to him under the [284] act of 1890. The interest on the fund and the annual appropriation the state treasurer is about to pay to the University of Wyoming in obedience to the laws of the state. The agricultural college claims that it is entitled under those statutes to receive this money. If this claim fails it is the end of the case. But, as has been shown, both the

its interest and the annual appro- are the property of the state, and ıy institution within it. The agri- college shows no title or right to ey under these statutes. The whole the plaintiff in error fails at the , and it is unnecessary to determine the state has complied with its bestowing the government bounty ; University of Wyoming, or has the obligation of a contract by re- as it has, the act establishing the ral college. These questions were with learning and ability in the ow, and we do not intend to inti- r disagreement with the conclusions ourt. But, as the plaintiff in error l in the attempt to compel the pay- it of the money in the hands of the t for the reasons already given, no need to go further in this court, judgment of the Supreme Court of g is therefore affirmed.

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*WILLIAM F. KESSLER
v.
GEORGE S. ELDRED.

S. C. Reporter's ed. 285–290.)

ts—effect or conclusiveness.
final decree of a Federal circuit favor of defendant in a patent in- nt suit entitles him to continue ness of manufacturing and selling ut the United States the alleged g article, free from all interference omplainant by virtue of the patent o have been infringed.

ts—effect or conclusiveness.
efendant's rights under a final de- is favor rendered by a Federal cir- t in a patent infringement suit are by the action of the complainant in thereafter filing a bill against e former's customers for an alleged nent of the patent on account of or sale of the same article passed the prior suit.

—by conduct.
he assumption by the manufacturer defense of a patent infringement ught in a Federal circuit court against one of his customers does not deprive him of his right to proceed against the complainant in such suit in the state and district of the latter's residence for wrongfully interfering with the business of such manufacturer by instituting the suit after a final adjudication in a prior suit that the article in question did not infringe the patent.

Equity—adequate remedy at law.
4. Lack of any adequate remedy at law justifies a court of equity in taking jurisdiction of a suit by the successful defendant in a patent infringement suit to enjoin the complainant in the prior suit from interfering with the former's business by suing his customers for an alleged infringement of the patent on account of the use or sale of the same article passed upon in the prior suit.

[No. 196.]

Submitted January 28, 1907. Decided May 13, 1907.

IN A CERTIFICATE from the United States Circuit Court of Appeals for the Seventh Circuit presenting questions respecting the right of the successful defendant in a patent infringement suit to proceed in equity against the complainant to restrain him from interfering with the former's business by suing his customers for an alleged infringement of the patent on account of the use or sale of the same article passed upon in the prior suit. Answered in favor of the right to maintain such suit.

Statement by Mr. Justice Moody:

This case comes to this court from the circuit court of appeals for the seventh circuit upon a certificate of that court of questions of law concerning which it desires instructions. Accompanying the certificate is a statement of facts. The statement of the facts and the certificate of the questions of law are as follows:

Kessler, a citizen of Indiana, prior to 1898, had built up an extensive business in the manufacture and sale of electric cigar lighters, and had customers throughout the United States. Eldred, a citizen of Illinois, and an inhabitant of the northern district,

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—On conclusiveness of judgments —see notes to Sharon v. Terry, 1 72; Bollong v. Schuyler Nat. Bank, 142; Wiese v. San Francisco Music- Soc. 7 L.R.A. 577; Morrill v. Mor- L.R.A. 155; Shores v. Hooper, 11 08; Bank of United States v. Bev- L. ed. U. S. 76; Johnson Steel Street v. Wharton, 38 L. ed. U. S. 429, and P. R. Co. v. United States, 42 L. 355.

the operation and effect of decision ble suit for infringement of patent —see note to Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co. 68 C. C. A 541.

On estoppel by conduct—see notes to Stowe v. United States, 22 L. ed. U. S. 144, and Michigan v. Flint & P. M. R. Co. 38 L. ed. U. S. 478.

On the jurisdiction of equity where remedy at law exists—see notes to Meldrum v. Meldrum, 11 L.R.A. 65; Delaware, L. & W. R. Co. v. Central Stock Yards & Transit Co. 6 L.R.A. 855, and Tyler v. Savage, 36 L. ed. U. S. 83.

was the owner of patent No. 492,913, issued to Chambers on March 7, 1893, for an electric lamp lighter. Eldred was a competitor of Kessler's and manufactured a similar form of lighter (entirely dissimilar from that described in the Chambers patent), so that it was not a matter of much importance to customers which lighter they bought. In 1898 Eldred began a suit against Kessler in the district of Indiana for the infringement of the Chambers patent. The bill alleged that Kessler's manufacture and sale of the Kessler lighter infringed all the claims. The answer denied that Kessler's lighter infringed any of the Chambers claims. On final hearing the circuit court found for Kessler on the issue of nonin-
[286] fringement *and dismissed the bill. That decree was affirmed in 1900 by the circuit court of appeals for the seventh circuit. Eldred v. Kessler, 45 C. C. A. 454, 106 Fed. 509.

Subsequently, Eldred brought suit on the same patent in the northern district of New York against Kirkland, who was selling a similar lighter, but not of Kessler's make. The circuit court found for Kirkland on the issue of noninfringement and dismissed the bill. The circuit court of appeals for the second circuit reversed that decree and held the Kirkland lighter to be an infringement. Eldred v. Kirkland, 64 C. C. A. 588, 130 Fed. 342.

In June, 1904, Eldred filed a bill for infringement of the same patent in the Western district of New York against Breitwieser, user of Kessler lighters, which were identical with those held in Eldred v. Kessler, to be no infringement of the Chambers patent. Many of Kessler's customers were intimidated by the Breitwieser suit, so that they ceased to send in further orders for lighters. and refused to pay their accounts for lighters already sold and delivered to them. Kessler assumed the defense of the Breitwieser suit, and will be compelled, in the proper discharge of his duty to his customers, to assume the burden and expense of all suits which may be brought by Eldred against other customers. In this state of affairs Kessler, a citizen of Indiana, in July, 1904, filed a bill against Eldred in the circuit court for the northern district of Illinois, the state and district of Eldred's citizenship and residence, to enjoin Eldred from prosecuting any suit in any court of the United States against anyone for alleged infringement of the Chambers patent by purchase, use, or sale of any electric cigar lighter manufactured by Kessler and identical with the lighter in evidence before the circuit court for the district of Indiana and the circuit court of appeals for the seventh circuit in the trial and adjudication of the suit of Eldred against Kessler. From an adverse decree by [illegible] it court Kessler perfected an appeal to t[illegible] court.

Upon the for[illegible] facts the questions of law concerning *which this court desires the [287] instruction and advice of the Supreme Court are these:

First. Did the decree in Kessler's favor, rendered by the circuit court for the district of Indiana in the suit of Eldred against Kessler, have the effect of entitling Kessler to continue the business of manufacturing and selling throughout the United States the same lighter he had theretofore been manufacturing and selling, without molestation by Eldred, through the Chambers patent?

Second. Did the decree mentioned in the first question have the effect of making a suit by Eldred against any customer of Kessler's for alleged infringement of the Chambers patent by use or sale of Kessler's lighters a wrongful interference by Eldred with Kessler's business?

Third. Did Kessler's assumption of the defense of Eldred's suit against Breitwieser deprive Kessler of the right, if that right would otherwise exist, of proceeding against Eldred in the state and district of his citizenship and residence for wrongfully interfering with Kessler's business?

Fourth. If Eldred's acts were wrongful, had Kessler an adequate remedy at law?

Mr. Robert S. Taylor submitted the cause for Kessler. Mr. Elwin M. Hulse was on the brief:

Under a simple license to manufacture and sell, the right of the buyer to use would follow, or the license would be valueless to the licensee.

Withington-Cooley Mfg. Co. v. Kinney, [illegible] C. C. A. 531, 37 U. S. App. 117, [illegible] Fed. 500; 2 Robinson, Patents, 1st ed. § [illegible]; Steam Cutter Co. v. Sheldon, 10 [illegible] 1, Fed. Cas. No. 13,331; Keeler v. Standard Folding Bed Co. 157 U. S. [illegible], [illegible] L. ed. 848, 15 Sup. Ct. Rep. 738; Jackson v. Vaughan, 73 Fed. 837.

An adjudication establishing the manufacturer's right to make and sell is the full equivalent of a license.

While there may be no case holding directly that a judgment in the manufacturer's favor on an issue of validity or infringement entitles him to proceed with his business, and protects him and his customers against interference by the patentee in respect to the thing covered by the decree, there are cases which implicitly recognize that principle.

Ide v. [illegible] (C. C. 31 Fed. [illegible]; National [illegible] Co. v. Boston Cash Indicator [illegible] (C. C. 41 Fed. [illegible]; Allen v. Stov[illegible] Kelley v. [illegible] 206 U. S.

Dress-Stay Mfg. Co. 10 L.R.A. 686, 44 Fed. 19.

There is another large class of cases strongly in point by analogy. We refer to those in which injunctions have been granted to restrain interference with the complainant's business by strikers or boycotters.

Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; Union P. R. Co. v. Ruef, 120 Fed. 102; Allis Chalmers Co. v. Reliable Lodge, 111 Fed. 264; Consolidated Steel & Wire Co. v. Murray, 80 Fed. 811.

The court has the power to grant the injunction asked for.

Pom. Eq. Jur. § 1360; Story, Eq. Jur. §§ 899, 900; Craft v. Lathrop, 2 Wall. Jr. 103, Fed. Cas. No. 3,318; Barnum v. Goodrich, Fed. Cas. No. 1,036; Fisher v. Lord, Fed. Cas. No. 4,821; McCullough v. Absecom Land Improv. Co. (N. J. Eq.) 10 Atl. 606; Semple v. Cleveland & P. R. Co. 172 Pa. 369, 33 Atl. 365; Texas Land Co. v. Turman, 53 Tex. 619; McCauly v. Givens, 1 Dana, 261; Galveston, H. & S. A. R. Co. v. Dowe, 70 Tex. 5, 7 S. W. 368; Bradshaw v. Combs, 102 Ill. 428; Dodgson v. Henderson, 113 Ill. 360; Third Ave. R. Co. v. New York, 54 N. Y. 159; Norfolk & N. B. Hosiery Co. v. Arnold, 143 N. Y. 265, 38 N. E. 271; Pike v. Mechanics & T. Bank, 81 Hun, 78, 30 N. Y. Supp. 952; Lawrence v. Manning, 31 N. Y. S. R. 78, 9 N. Y. Supp. 223; Lehigh Valley R. Co. v. Society for Establishing Useful Manufacturers, 30 N. J. Eq. 145; Cuthbert v. Chauvet, 20 N. Y. Civ. Proc. Rep. 391, 14 N. Y. Supp. 385; National Park Bank v. Goddard, 62 Hun, 31, 16 N. Y. Supp. 343; Clinton Nat. Bank v. Stiger, 67 N. J. Eq. 522, 58 Atl. 1055; Hawkins v. Ireland, 64 Minn. 339, 58 Am. St. Rep. 534, 67 N. W. 73; Dehon v. Foster, 4 Allen, 550; Sandage v. Studabaker Bros. Mfg. Co. 142 Ind. 148, 34 L.R.A. 363, 51 Am. St. Rep. 165, 41 N. E. 380; Miller v. Gittings, 85 Md. 601, 37 L.R.A. 654, 60 Am. St. Rep. 352, 37 Atl. 372; Grand Rapids School Furniture Co. v. Haney School Furniture Co. 92 Mich. 558, 16 L.R.A. 721, 31 Am. St. Rep. 611, 52 N. W. 1009; Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Emack v. Kane, 34 Fed. 46.

Mr. **Charles C. Linthicum** submitted the cause for Eldred. Mr. Louis K. Gillson was on the brief:

This bill, if it belong to any recognized class, and is not *sui generis*, must be regarded as a bill of peace.

3 Enc. Pl. & Pr. p. 556.

According to the theory of the complainant therein, he had available and adequate legal defense to the suit brought against Breitwieser and assumed by him. This being true, a court of equity is without power to enjoin the prosecution of the Breitwieser suit.

Hungerford v. Sigerson, 20 How. 156, 15 L. ed. 869; Hapgood v. Hewitt, 119 U. S. 226, 30 L. ed. 369, 7 Sup. Ct. Rep. 193.

There can be no reason or propriety in appealing to a court of equity to restrain proceedings that are being regularly conducted in other courts.

Wilson v. Lambert, 168 U. S. 611, 42 L. ed. 599, 18 Sup. Ct. Rep. 217; Peck v. Jenness, 7 How. 612, 624, 12 L. ed. 841, 846.

As between Eldred and any customer of Kessler, there is no estoppel growing out of the earlier judgment.

Lyon v. Perin & G. Mfg. Co. 125 U. S. 698, 31 L. ed. 839, 8 Sup. Ct. Rep. 1024.

The rule is that an estoppel can exist only as to those questions which were actually adjudicated, and not as to those things which might have been adjudicated.

Washington, A. & G. Steam Packet Co. v. Sickles, 24 How. 333, 16 L. ed. 650; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195.

No estoppel can be predicated upon a judgment relating to different claims of a patent from those which are subsequently sued on.

Russell v. Place, 94 U. S. 606, 24 L. ed. 214.

Estoppels, to be good, must be mutual.

Litchfield v. Goodnow, (Litchfield v. Crane) 123 U. S. 549, 31 L. ed. 199, 8 Sup. Ct. Rep. 210.

Mr. Justice **Moody** delivered the opinion of the court:

The industry of counsel has not discovered any decision on the exact questions presented by the certificate, and they agree that those questions are not settled by controlling authority. The decision of the case turns upon the effect of the judgment in the suit which Eldred brought against Kessler. Both manufactured and sold electric cigar lighters. Eldred, being *the owner of a [288] patent issued to one Chambers for an electric lamp lighter, brought a suit against Kessler, in which it was alleged by the plaintiff and denied by the defendant that the cigar lighters manufactured by Kessler infringed each and all of the claims of the Chambers patent. On the issue thus joined there was final judgment for Kessler. This judgment, whether it proceeds upon good reasons or upon bad reasons, whether it was right or wrong, settled finally and everywhere, and so far as Eldred, by virtue of his ownership of the Chambers patent,

was concerned, that Kessler had the right to manufacture, use, and sell the electric cigar lighter before the court. The court, having before it the respective rights and duties on the matter in question of the parties to the litigation, conclusively decreed the right of Kessler to manufacture and sell his manufactures free from all interference from Eldred by virtue of the C[illegible]nbers patent, and the corresponding duty of Eldred to recognize and yield to that right everywhere and always. After this conclusive determination of the respective rights and duties of the parties, Eldred filed a bill for an infringement of the same patent against Breitwieser, on account of his use of the same kind of Kessler cigar lighter which had been passed on in the previous case, and Kessler has assumed the defense of that suit. Whether the judgment between Kessler and Eldred is a bar to the suit of Eldred v. Breitwieser, either because Breitwieser was a privy to the original judgment, or because the articles themselves were, by that judgment, freed from the control of that patent, we deem it unnecessary to inquire. We need not stop to consider whether the judgment in the case of Eldred v. Kessler had any other effect than to fix unalterably the rights and duties of the immediate parties to it, for the reason that only the rights and duties of those parties are necessarily in question here. It may be that the judgment in Eldred v. Kessler will not afford Breitwieser, a customer of Kessler, a defense to Eldred's suit against him. Upon that question we express no opinion. Neither it nor the case in which it is raised [289] are before us. But the question here *is whether, by bringing a suit against one of Kessler's customers, Eldred has violated the right of Kessler. The effect which may reasonably be anticipated of harassing the purchasers of Kessler's manufactures by claims for damages on account of the use of them would be to diminish Kessler's opportunities for sale. No one wishes to buy anything if with it he must buy a law suit. That the effect to be anticipated was the actual effect of the Breitwieser suit is shown by the statement of facts. Kessler's customers ceased to send orders for lighters, and even refused to pay for those which had already been delivered. Any action which has such results is manifestly in violation of the obligation of Eldred, and the corresponding right of Kessler, established by the judgment. Leaving entirely out of view any rights which Kessler's customers have or may have, it is Kessler's right that those customers should, in respect of the articles before the court in the previous judgment, be let alone by Eldred, and it is Eldred's duty to let them alone. The judgment in the previous case fails of the full effect which the law attaches to it if this is not so. If rights between litigants are once established by the final judgment of a court of competent jurisdiction those rights must be recognized in every way, and wherever the judgment is entitled to respect, by those who are bound by it. Having, then, by virtue of the judgment, the right to sell his wares freely, without hindrance from Eldred, must Kessler stand by and see that right violated, and then bring an action at law for the resulting damage, or may he prevent the infliction of the unlawful injury by proceedings *in personam* in equity? If Eldred succeeds in his suit against one of Kessler's customers, he will naturally bring suits against others. He may bring suits against others, whether he succeeds in one suit or not. There may be, and there is likely to be, a mutiplicity of suits. It is certain that such suits, if unsuccessful, would, at the same time, tend to diminish Kessler's sales, and to impose upon him the expense of defending many suits in order to maintain the right which, by a judgment, has already been declared to exist. If the suits are *successful the result will be practically to destroy Kessler's judgment right. Moreover though the impairment or destruction of Kessler's right would certainly follow from the course of conduct which Eldred has begun, it would be difficult to prove, in an action at law, the extent of the damage inflicted. An action at law would be entirely inadequate to protect fully Kessler's unquestioned right, and, under these circumstances, though there may be no exact precedent, we think that the jurisdiction in equity exists. Nor do we see any good reason why Kessler's interposition for the defense in the suit of Eldred v. Breitwieser debars him from his remedy in equity.

It follows from the foregoing reasoning that the first and second questions certified should be answered in the affirmative, and the third and fourth in the negative, and it is so ordered.

COMMONWEALTH OF VIRGINIA v. STATE OF WEST VIRGINIA.

(See S. C. Reporter's ed. 290-322.)

Supreme Court—original jurisdiction—suits between states.

1. The original jurisdiction of the Su-

NOTE.—On suits against a state—see notes to Murdock Parlor Grate Co. v. Com. 8 L.R.A. 399; Carr v. State, 11 L.R.A. 370; Beers v. Arkansas, 15 L. ed. U. S. 991; Hans v. Louisiana, 33 L. ed. U. S. 842; and Tindall v. Wesley, 13 C. C. A. 165.

preme Court of the United States extends to a suit by the commonwealth of Virginia against the state of West Virginia to determine the amount due to the former by the latter as the equitable proportion of the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state.

Supreme Court—original jurisdiction—suits between states.

2. The question of the liability of the state of West Virginia for its equitable proportion of the public debt of the commonwealth of Virginia was not so submitted to the West Virginia legislature as to defeat the original jurisdiction of the United States of a suit between the states by the provision of W. Va. Const. art. 8, § 8, that an equitable proportion of such public debt shall be assumed by the state, and the legislature "shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof," since such provision, when read *in pari materia* with the Virginia ordinance of August 20, 1861, that the new state shall take upon itself a just proportion of the public debt, to be ascertained as therein provided, must be regarded as meaning only that the legislature should ascertain, as soon as practicable, the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained.

Pleading—in suit between states—questions open on demurrer.

3. The question whether the commonwealth of Virginia has been released from all liability on account of the public debt evidenced by bonds of the state outstanding on January 1, 1861, will not be passed upon on a demurrer to a bill filed by that state against the state of West Virginia, which seeks an adjudication of the amount due the former by the latter as the equitable proportion of the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state, but the consideration of such question will be postponed until final hearing.

Pleading—in suit between states—questions open on demurrer.

4. Consideration of the objections of multifariousness, misjoinder of parties and of causes of action, may properly be postponed until the final hearing on a bill filed by the commonwealth of Virginia against the state of West Virginia, which seeks an adjudication of the amount due the former by the latter as the equitable proportion of the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state.

[No. 7, Original.]

Argued March 11, 12, 1907. Decided May 27, 1907.

ORIGINAL BILL in equity filed by the Commonwealth of Virginia against the State of West Virginia, which seeks an adjudication of the amount due the former state by the latter as the equitable proportion of the public debt of the original state of Virginia which was assumed by the state of West Virginia at the time of its creation as a state. Demurrer overruled without prejudice, and leave to answer given.

Statement by Mr. Chief Justice Fuller:

This is a bill filed, on leave, February 26, 1906, by the commonwealth of Virginia against the state of West Virginia.

The bill averred that—

"On the 1st day of January, 1861, complainant was indebted in about the sum of $33,000,000 upon obligations and contracts made in connection with the construction of works of internal improvement throughout her then territory. By far the greater part of this indebtedness was shown by her bonds and other evidences of debt, given for the large sums of money which she from time to time had borrowed and used for the above purpose; but a portion of her liabilities, though arising under contracts made before that date, had not then been covered by bonds issued for their payment.

"In addition to the above liability to the general public, there was a large indebtedness evidenced by her bonds and other liabilities held by and due to the commissioners of the sinking fund and the literary fund of the state, as created under her laws, amounting, the former, to $1,462,993.00, and the latter, to $1,543,669.05, as of the same date.

"The official reports and records showing the exact character and amounts of the public debt thus contracted and how the same was created are referred to, and will be produced upon a hearing of the case.

"(2) That portion of the territory embraced in what constitutes the present territorial limits of Virginia was, prior to that date, devoted mainly to agriculture, and to some extent to grazing and manufacturing, which afforded its chief sources of revenue, while that portion included in what now constitutes the state of West Virginia had vast potentialities of wealth and revenue in the undeveloped stores of minerals and timber, which had been known for many years prior to the date named, and their prospective values, if made accessible to the markets of the country, were understood to be well *nigh beyond computa- [292] tion. It was to hasten and facilitate the development of these sources of wealth and revenue by the construction of graded roads, bridges, canals, and railways, extending

through the state from tidewater towards the Ohio river, that the commonwealth of Virginia, in the first quarter of the nineteenth century, entered upon a system of public internal improvements which it was contemplated should include the entire territory of the state, and embraced in its design the construction of public works adapted, not to the needs of any one portion of the state alone, but of the entire state, as a unit of interest. The larger part of these works was constructed east of the Appalachian range, as leading up to the undeveloped territory west thereof, but a very considerable portion of them were, at an expense of several millions of dollars, constructed west of said range, within the territory now included in the state of West Virginia; and the completion of some of the main lines of improvement beyond the said range and through to the Ohio river, since the 1st day of January, 1861, has increased to a very great and material extent the values of real estate, including coal and timber, in the said territory now included in West Virginia, thus carrying into effect the original scheme of improvement, which could not have been done had not the lines east of said range been first constructed; and your oratrix believes and avers that the property values within the limits of West Virginia have been enormously enhanced in a large measure by reason of these improvements. The money appropriated to the payment of the annually accruing interest on the said debt, prior to January 1, 1861, and to the formation of the sinking fund for the ultimate redemption thereof, was derived from taxes imposed upon the property subject to taxation throughout the entire state. The first of this indebtedness to be contracted was a small amount borrowed by the state in the year 1820, and the debt was thereafter from time to time continued and increased by renewals and new loans until it reached the amount above stated in 1861.

[293] *"(3) The commonwealth of Virginia was induced to enter upon the construction of this general system of internal improvement in a very large measure for the purpose of developing the aforesaid resources of the western portion of the state, now constituting the state of West Virginia, thereby ameliorating the condition of her citizens residing therein; and it was with this view that she took upon herself the burden of the public debt for which her bonds were issued, without which debt such improvements could not have been undertaken. In corroboration of this view it will appear from an inspection of the legislative records of the state, where the vote carrying the appropriations for such public improvements was recorded, that in nearly every instance a majority of those members of the house and senate of the original state, who then represented the counties now composing West Virginia, voted for such appropriations. Indeed, it appears from those records that a great majority of the acts of the legislature of Virginia under which said indebtedness was created would have failed of their passage had the representatives from the counties embraced in what is now West Virginia opposed their enactment, and that a very large proportion of said indebtedness was actually contracted over the votes of a majority of the representatives from the counties and cities embraced in the limits of the present state of Virginia. This will be found to be true, not only in the legislature for one single session, but in the legislatures for many successive years, thus showing it to have been a fixed policy of the people in that portion of the state now constituting West Virginia to participate in, support, and carry out this general plan of internal improvements in the state.

"4. The development of this system of public improvements thus entered upon was, from its character and extent, necessarily progressive, and the same extended with the general growth and increasing needs of the state, and was incomplete, as above stated, in 1861, though a very considerable portion of such improvements had, prior to that time, been *constructed as [294] above stated, in the territory now constituting West Virginia, in order to meet the needs of the people of that portion of the state for their local purposes. As early as the year 1816 a board of public works was created by law for the state, the members of which were elected by the voters of the state at large, and this board had in charge the construction and supervision of all the works of public improvement in this state. The annual reports of this board will be referred to for information as to the character, extent, cost, and location of the public works and internal improvements constructed in the state prior to January 1st, 1861. The amounts expended upon the construction of these works in what is now West Virginia can only be accurately ascertained by an examination of the numerous entries in the records of this board extending through a number of years and showing such expenditures as made from time to time.

"5. On the 17th of April, 1861, the people of Virginia, in general convention assembled, adopted an ordinance by which it was intended to withdraw Virginia from the union of the states. From this action a considerable p[illegible] the people of Vir-

ginia dissented, and organized a separate government which was known and recognized by the government of the United States as the 'restored state of Virginia,' and will be hereafter referred to in this bill as the 'restored state.'

"6. On the 20th day of August, 1861, the restored state of Virginia, in convention assembled, in the city of Wheeling, Virginia, adopted an ordinance to 'provide for the formation of a new state out of the portion of the territory of this state,' § 9 of which ordinance was as follows, to-wit:

"'9. The new state shall take upon itself a just proportion of the public debt of the commonwealth of Virginia, prior to the 1st day of January, 1861, to be ascertained by charging to it all the state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government since any part of said debt was contracted, and deducting therefrom the]moneys paid into the treasury of the *commonwealth from the counties included within the said new state during said period. All private rights and interests in lands within the proposed state, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in the state of Virginia.'

"7. On the 31st day of December, 1862, an act was passed by the 37th Congress of the United States [12 Stat. at L. 633, chap. 6], providing that the new state thus formed in pursuance of the ordinances of the Wheeling convention above referred to, should, upon certain conditions, be admitted into the Union by the name of West Virginia, with a constitution which had theretofore been adopted for the new state by the people thereof, such conditions being that a change should be made in such proposed constitution in regard to the liberation of slaves therein; and it was provided by this act of Congress that whenever the President of the United States should issue his proclamation stating the fact that such change had been made and ratified, thereupon the act admitting the new state into the Union should take effect sixty days after the date of such proclamation. Such proclamation declaring these conditions to have been complied with was duly made by President Lincoln on April 20th, 1863, and West Virginia, in conformity therewith and by the operation of said act of Congress, was admitted into the Union as a state on the 20th day of June, 1863; and thereupon the state of West Virginia became fully organized and each of its departments of government commenced operation on the date last named.

"8. Pending the admission of the state of West Virginia to the Union the general assembly of the restored state of Virginia passed, February 3, 1863, the following act:

"'That all property—real, personal, and mixed—owned by, or appertaining to, this state, and being within the boundaries of the proposed state of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of, the state of West Virginia, and without any *other assignment, conveyance,[296] or transfer or delivery than is herein contained, and shall include, among other things not herein specified, all lands, buildings, roads, and other internal improvements or parts thereof, situated within said boundaries, and vested in this state, or in the president and directors of the literary fund, or the board of public works thereof, or in any person or persons for the use of this state, to the extent of the interest and estate of this state therein; and shall also include the interest of this state, or of the said president and directors, or of the said board of public works, in any parent bank or branch doing business within said boundaries, and all stocks of any other company or corporation, the principal office or place of business whereof is located within said boundaries, standing in the name of this state, or of the said president or directors, or of the said board of public works, or of any person or persons, for the use of this state.'

"'That if the appropriations and transfers of property, stocks, and credits provided for by this act take effect, the state of West Virginia shall duly account for the same in the settlement hereafter to be made with this state, provided that no such property, stocks, and credits shall have been obtained since the reorganization of the state government.'"

Complainant charged "that the property which was, by the operation of this act, appropriated and transferred from the state of Virginia to the state of West Virginia, and which was subsequently received and enjoyed by the state of West Virginia, consisted of a number of items, and the value of it amounted, in the aggregate, to several millions of dollars, the exact amount your oratrix is unable at this time more definitely to ascertain and state. That of the bank stocks alone which were transferred under the operation of this act, the state of West Virginia realized and received into her treasury from the sale thereof about $600,000; and that no part of the property so received by West Virginia had been obtained by Virginia since April, 1861.

*"9. And by a further act of the general[297] assembly of the restored state of Virginia,

passed on the next day, February 4th, 1863, it was enacted:

"'1. That the sum of $150,000 be, and is hereby, appropriated to the state of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized, and admitted as one of the states of the United States.

"'2. That there shall be, and hereby is, appropriated to the said state of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said state of West Virginia shall become one of the United States: provided, however, that when the said state of West Virginia shall become one of the United States, it shall be the duty of the auditor of this state to make a statement of all the moneys that, up to that time, have been paid into the treasury from counties located oustide of the boundaries of the said state of West Virginia, and also of all moneys that, up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this state.'

"And this last named sum of $150,000, together with other sums belonging to the state of Virginia, were turned over to and received or collected by the new state of West Virginia after its formation as aforesaid.

"10. The Constitution of the state of West Virginia, which became operative and was in force when she was admitted into the Union, contained the following provisions:

"By § 5 of article 8 of said Constitution it was provided:

"'5. No debt shall be contracted by this state except to meet casual deficits in the [298]revenue, to redeem a previous *liability of the state, to suppress insurrection, repel invasion, or defend the state in time of war.'

"And by § 7 of article 8 it was provided:

"'7. The legislature may, at any time, direct a sale of the stocks owned by the state, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the state shall not become a stockholder in any bank.'

"And by § 8 of article 8 it was provided:

"'8. An equitable proportion of the public debt of the commonwealth of Virginia prior to the 1st day of January, in the year 1861, shall be assumed by this state, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years.'

"At the time the Constitution containing these provisions was adopted, West Virginia did not owe, and could not have owed, any 'public debt' or 'previous liability,' except for her just, contributive proportion of the public debt of the original state of Virginia, and for the money and property of the original state which had been transferred to and received by her under the acts of the general assembly of the restored state of Virginia, above set forth. By the provisions of § 8 of article 8, above cited, she expressly assumed her equitable proportion of the debt of the original state as it existed prior to the 1st day of January, 1861. By § 5 of the same article 8, above set forth, her Constitution forbade the creation of any debt 'except to meet casual deficits in the revenue, to redeem a previous liability of the state,' etc., and there was not and could not have been any such 'previous liability,' except her portion of the debt of the original state, and her liability for the money and property of the original state which had been transferred to and received by her under the acts of the general assembly of the restored state. And § 7 of the same article of her Constitution, above cited, *authorized a sale of the stocks owned [299] by the state, in banks and other corporations, the proceeds to be applied to the liquidation of the public debt; and she had no such stocks except those acquired, as above stated, from the original state. This section of her Constitution also expressly required the proceeds of such sale to be applied to her public debt, which public debt could only have been her proportion of that of the original state of Virginia, and her liability for the money and property of the original state which had been transferred to her.

"11. After the year 1865, and prior to the year 1872, attempts were made at different times by the public authorities of both the commonwealth of Virginia and the state of West Virginia, respectively, to ascertain their contributive proportions of the common liability resting upon them for the public debt of Virginia, contracted prior to January 1st, 1861; but all such attempts proved ineffectual and vain, and no accounting or settlement of any kind was ever had between the two states in regard to this debt.

"12. The efforts looking to a settlement by the concurrent action of the two states having proved abortive, and your oratrix being anxious to adjust the portion of the

common debt which it was right that she should assume and pay, upon terms just and equitable alike to the public creditors and to West Virginia, made several efforts to effect such a settlement.

"The first of these was made by the general assembly which was chosen at the close of the period of 'destruction and reconstruction,' which, following closely upon the period of disastrous war, had inflicted upon her people injuries and losses, the harmful effects of which were then by no means realized.

"The purpose of the representatives of the commonwealth, then just emerging from conditions which had impoverished her people and paralyzed their productive energies, to assume and pay to the utmost every dollar which her most exacting creditor could demand of her, was expressed in the act of her general assembly, approved March 30, 1871.

[301] *"By the terms of settlement embodied in this act, your oratrix undertook to give her obligations bearing 6 per cent interest for two thirds of the principal, and for two thirds of the past-due interest, and also for two thirds of the interest on that accrued interest, which accrued interest, to the extent of nearly $8,000,000, had been funded after the war in new bonds of Virginia, thus capitalizing at 6 per cent not only the interest, but the interest upon that interest.

"It was soon apparent that Virginia had by this measure assumed a heavier burden than she was able to bear, and so other plans for the settlement of the state debt were attempted by the acts of the general assembly of the commonwealth approved March 28, 1879, and February 14, 1882, until at length a final and satisfactory settlement of the portion of the debt of the original state which Virginia should assume and pay was definitely concluded by the act of February 20, 1892. Your oratrix will file copies of each of the acts of her general assembly herein mentioned as exhibits to this bill, and to be read as part thereof.

"13. As farther indicating the great burden which your oratrix, notwithstanding the disaster and loss above referred to, has assumed and met on account of the common debt of the undivided state, she shows your honors that, since January 1st, 1861, she has actually paid off, retired, and discharged, or assumed and given her new outstanding obligations for, the aggregate sum of over $71,000,000, as will more particularly appear from a statement thereof filed as an exhibit herewith and hereinafter referred to as exhibit number 7.

"It is proper in this connection to call attention to the fact that, while your oratrix has made this large contribution toward the settlement of the common debt, West Virginia has not paid one dollar thereof; and although, in the early years of her history, she repeatedly conceded that there was some portion of that debt which should equitably be borne by her, her properly constituted authorities have for a number of years refused to recognize that any liability whatever rested upon her on that account, and have declined even to enter into an accounting or to treat with your oratrix in reference thereto.

"It would seem from the above statement that Virginia has already done as much under all the circumstances as she could be fairly expected to do towards paying off the common public debt of the old state. Such was the view and purpose of the general assembly in the several acts above cited.

"A question may be raised as to whether such was the effect of the language used in the act of March 30, 1871, with respect to the certificates issued thereunder; but the great mass of the creditors entitled to whatever may be due upon the unfunded obligations of the undivided state have in effect agreed, as will be hereinafter shown, to waive any such question, and to accept the adjudication of this court in this cause against West Virginia in full discharge of all their claims, thus giving that effect to the act of March 30, 1871, which it was the purpose of your oratrix that it should have.

"14. By each of the acts for the settlement of her debt, above recited, it was provided that the bonds of undivided Virginia, so far as not funded in the new obligations given by your oratrix, should be surrendered to and held by your oratrix, who, either by the express terms of the settlement provided for by said acts, or as a just and equitable consequence therefrom, received and holds said original bonds so far as unfunded, in trust for the creditor who deposited the same with her, or his assigns; and certificates to this effect were given by your oratrix to each creditor whose old Virginia bond was so surrendered to her.

"Having, as an essential part of the contract for the adjustment of the common debt of the original state, entered into this fiduciary relation in reference to these bonds, it became her obligation of duty to the creditors who had confided their securities to her keeping, as well as to her own people, whose credit and fair name required that these obligations [302] *of the old state should be fairly and honorably adjusted, to do all in her power to bring about a determination of West Virginia's just liability in respect thereto, and, if

possible, the recognition and settlement of the same by that state.

"Only after exhausting every means of amicable negotiation, and having her overtures to that end repeatedly refused, and as a last resort, has your oratrix been constrained at length reluctantly to apply to this, the only tribunal which can afford relief, for an adjudication and determination of this question, of such vast importance to your oratrix and to all of her people.

"15. All of the bonds and obligations and other evidences of the indebtedness of the original state of Virginia outstanding and contracted on January 1, 1861, as stated in paragraph 1, of this bill, except a comparatively insignificant sum, not amounting to 1 per cent of the aggregate of those liabilities, have been taken up and are now actually held by your oratrix, and she has the right to call upon West Virginia for a settlement with respect thereto. They are too numerous and involve too great a number of transactions running through many years, for it to be practicable to exhibit them here in detail, but the original bonds and other evidences of indebtedness so paid off or retired and now held by your oratrix will, when it shall be proper to do so, be exhibited to the master, who shall take the accounts hereinafter prayed for.

"16. Of the evidences of indebtedness representing principal and interest of the liabilities of Virginia contracted before her dismemberment, those so paid off or retired by your oratrix and now held by her in her own right, exclusive of the amounts represented by the certificates issued under the funding acts aforesaid, amount, in the aggregate, including the interest to be fairly computed thereon to this date, to a very large sum, considerably in excess of $25,000,000, by far the greater part of it being now, of course, on account of the interest computed thereon, at the rate of 6 per cent per annum, the then legal rate in both states.

[303] *"For all of these obligations taken up and payments made on account of the common debt, your oratrix has, in her own right, a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor.

"17. In addition to the above bonds there were outstanding on the 1st day of January, 1861, certain obligations of the state of Virginia as guarantor upon some of the securities issued by internal improvement companies, which your oratrix was called upon to provide for and settle. They were not comparatively of very large amount, however, and the questions involved in connection therewith can be stated and settled in the account hereinafter prayed for to be taken between the two states; and in such accounts your oratrix will also ask to have included all such items of debit against the state of West Virginia on account of the property and moneys of the original state which were received or appropriated by West Virginia which may not have been specifically or accurately stated herein. These items of accounting between the two states are so numerous and varied and extend throughout a period of so many years' duration that it is impossible, from the nature of the case, to state all of them in this bill; and the account between the two states can only be taken and settled, and the balance due your oratrix thereon ascertained, under the supervision of a court of equity.

"18. Your oratrix charges that the liability of the state of West Virginia, for a just and equitable proportion of the public debt of Virginia, as of the time when the state of West Virginia was created, rests upon the following, among many grounds which might be indicated here:

"First. The area of the territory now known as the state of West Virginia formed about one third of the territory of the commonwealth of Virginia when this public debt was created, and its population included about one third of that of the original state at the time of its dismemberment. And the state of West Virginia did, by the acquisition and appropriation of such territory, with the population thereof, assume *therewith liability for a just and equitable proportion of the public debt created prior to the partition of such territory.

"Second. The liability of West Virginia for a just proportion of the public debt of the commonwealth of Virginia, as it existed prior to the creation and erection of the state of West Virginia, forms part of her very political existence, and is an essential constituent of her fundamental law as shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861, in which the method of ascertaining her liability on account of said debt is prescribed. And this liability is imbedded in the Constitution under which she was admitted as a state into the Federal Union, and was one of the conditions under which she was created a state and admitted into the Union.

"Third. The state of West Virginia has further, by the repeated enactments and joint resolution of her legislature, recognized her liability for a just proportion of this debt.

"Fourth. The [illegible]te of West Virginia has, since her c[illegible] as a state, received from the state o[illegible] in real and personal

property, amounting in value to many millions of dollars, and held and enjoyed the same, but upon expressed condition that she should duly account for the same in a settlement thereafter to be had between her and the commonwealth of Virginia.

"Fifth. While the transfer of this property, real and personal, and also of certain moneys of the commonwealth of Virginia, purport to have been made to the state of West Virginia by the act of 'the restored government of Virginia,' there were in fact represented in said 'restored government' and in the legislature thereof no other people and no other territory than that which then, as now, constitute the state of West Virginia.

"19. The general assembly of Virginia, being anxious to effect a settlement of the portion of the common debt of the undivided state which remained unadjusted, and, if possible, to bring this about with the friendly co-operation and concurrence *of West Virginia, adopted: 'A joint resolution to provide for adjusting with the state of West Virginia the proportion of the public debt of the original state of Virginia proper to be borne by the state of West Virginia, and for the application of whatever may be received from the state of West Virginia to the payment of those found to be entitled to the same,' approved March 6, 1894. A copy of this resolution will be hereinafter shown as an exhibit to this bill, to be read as a part thereof.

"Under this resolution a commission of seven members was appointed for the purpose of carrying into effect the objects expressed therein.

"The efforts made by this commission, acting under the above resolution, to bring about a settlement with West Virginia, having proved ineffectual, and the overture which the commission, with the active co-operation of the Honorable Charles T. O'Ferral, the then governor of the commonwealth, made to the authorities of West Virginia for the purpose of bringing about a friendly adjustment, having been declined, the general assembly of Virginia passed the act approved March 6, 1900, entitled 'An Act to Provide for the Settlement with West Virginia of the Proportion of the Public Debt of the Original State of Virginia Proper to be Borne by West Virginia, and for the Protection of the Commonwealth of Virginia in the Premises,' the purpose of which act is sufficiently set forth in its title, and a copy of the act will also be hereinafter shown as one of the exhibits herewith filed.

"20. The commission, acting under said last-mentioned act, made most earnest efforts to bring about an amicable adjustment of the matters hereinbefore set forth with West Virginia, but all of their efforts in that behalf proved ineffectual and unavailing. An application to this honorable court being thus left as the only alternative for Virginia, this suit has been instituted at the request and direction of the said commission, and in strict conformity with the provisions of the said act of March 6, 1900, all of which will be more fully and completely *shown by the report of the said [306] commission dated January 6, 1906, made to the general assembly of Virginia, now in session, a copy of which report and the documents accompanying the same, and referred to therein, will be exhibited as a part of this bill."

21. Enumerates exhibits attached to the bill and prayed to be regarded as part thereof.

22. The bill prayed; "Forasmuch, therefore, as your oratrix is remediless save in this form and forum, and to the end that the state of West Virginia may be duly served, through her governor and attorney general, with a copy of this bill, your oratrix prays that the said state of West Virginia may be made a party defendant to this bill, and required to answer the same, that all proper accounts may be taken to determine and ascertain the balance due from the state of West Virginia to your oratrix, in her own right and as trustee as aforesaid; that the principles upon which such accounting shall be had may be ascertained and declared, and a true and proper settlement made of the matters and things above recited and set forth; that such accounting be had and settlement made, under the supervision and direction of this court by such auditor or master as may by the court be selected and empowered to that end, and that proper and full reports of such accounting and settlement may be made to this court; that the state of West Virginia may be required to produce before such auditor or master, so to be appointed, all such official entries, documents, reports, and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth, in order to a full and correct settlement and adjustment of the accounts between the two states; that this court will adjudicate and determine the amount due to your oratrix by the state of West Virginia in the premises; and that all such other and further and general relief be granted unto your oratrix in the premises as the nature of her case may require or to equity may seem meet."

*Attached to the bill were the numerous [307] exhibits referred to.

The state of West Virginia demurred and assigned special causes as follows:

"First. That it appears by said bill that there is a misjoinder of parties plaintiff and a misjoinder of causes of action. The said bill is brought by the commonwealth of Virginia to recover debts alleged to be due to her in her own right from the defendant for property and money alleged to have been transferred and delivered to the defendant under certain acts of the legislature passed in 1863, and also, as trustee for the owners of certain certificates mentioned and described in said bill, to have an accounting to ascertain and declare the amount claimed to be due from the defendant as her just proportion of the public debt of the plaintiff prior to the 1st day of January, 1861.

"Second. That this court has no jurisdiction of either the parties to or the subject-matter of this action, because it appears by the said bill that the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy or such controversies, between the commonwealth of Virginia and the state of West Virginia as can be heard and determined in this court, and this court has no power to render or enforce any final judgment or decree thereon.

"Third. That it appears by said bill that the plaintiff herein sues as trustee for the benefit of a number of individuals who are the alleged owners of certain certificates in the said bill set forth and described.

"Fourth. That the said bill does not state facts sufficient to entitle the commonwealth of Virginia to the relief prayed for, or to any relief, either in her own right or as trustee for the owners of the certificates therein set forth and described.

"Fifth. That it does not appear by said bill that the attorney general has ever been authorized to institute and prosecute this suit in the name of the commonwealth of Virginia in her own right, but only as [308] trustee for the use and *benefit of the owners of certain certificates mentioned in the act of March 6, 1900, which is referred to and made part of said bill.

"Sixth. That the said bill does not sufficiently and definitely set forth the claims and demands relied upon, but the allegations thereof are so indefinite and uncertain that no proper answer can be made thereto.

"Seventh. That the allegations in the said bill are not sufficient to entitle the plaintiff therein, either in her own right or as trustee, to an account or to a discovery from this defendant.

"Eighth. That the said bill does not contain any prayer for a judgment or decree or any other final relief against this defendant."

Hearing on the demurrer was had March 11, 12, 1907.

Messrs. William A. Anderson and Holmes Conrad argued the cause and filed a brief for complainant:

If this court has no jurisdiction of any controversies arising out of demands for money, or obligations for the payment of money, between states, then neither this court nor any other Federal court could have jurisdiction of any such pecuniary "controversy between citizens of different states," or of controversies to which a state is a party, or of a controversy to which the United States is a party, for in each case the jurisdiction is conferred by precisely the same language.

Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 440; Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; Cohen v. Virginia, 6 Wheat. 364, 375-440, 5 L. ed. 281-299; Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; Kansas v. Colorado, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 561; Georgia v. Brailsford, 2 Dall. 402, 1 L. ed. 433; Texas v. White, 7 Wall. 700, 19 L. ed. 227; Florida v. Anderson, 91 U. S. 667, 23 L. ed. 290; Alabama v. Burr, 115 U. S. 413, 29 L. ed. 435, 6 Sup. Ct. Rep. 81; United States v. North Carolina, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. Rep. 920; United States v. Texas, 143 U. S. 621, 36 L. ed. 285, 12 Sup. Ct. Rep. 488; United States v. Michigan, 190 U. S. 379, 396, 406, 47 L. ed. 1103, 1109, 1113, 23 Sup. Ct. Rep. 742; South Dakota v. North Carolina, 192 U. S. 286, 48 L. ed. 448, 24 Sup. Ct. Rep. 269.

The Supreme Court hath exclusive jurisdiction in every controversy of a civil nature between two or more states.

Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 445.

Questions of boundary, territorial right, and property rights of all kinds are proper for this jurisdiction.

2 Tucker, Const. p. 784.

The jurisdiction of the court will not be defeated because the plaintiff may not be able to collect from the defendant, or because this court may be unable to compel the defendant actually to pay such sum as the court may adjudge and decree to be due by him.

Carter v. State, 42 La. Ann. [illegible], 21 Am. St. Rep. 404, 8 [illegible]; United States v. North Carolina, [illegible] L. ed. 211, 34 L. ed. [illegible], 10 Sup. Ct. [illegible]; United States v. Mi[illegible] 406, 47 L. ed. 1109-1113, [illegible] 742.

Tried by the same principles which have controlled this court and the state courts in respect to judgments entered against municipal corporations, there can be no question that the fact that an effective execution cannot be issued upon the judgment does not invalidate the judgment.

2 Dill. Mun. Corp. 4th ed. §§ 576, 856; Tiedeman, Mun. Corp. § 212.

The execution is in no sense and under no circumstances an essential part of the judgment.

Freeman, Judgm. § 2.

Mr. Charles E. Hogg argued the cause, and, with Messrs. C. W. May, W. Mollohan, George W. McClintic, and W. G. Matthews, filed a brief for defendant:

This is not a controversy between two states.

New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; Re Hartung, 98 Wis. 140, 73 N. W. 988; People ex rel. Moloney v. General Electric R. Co. 172 Ill. 129, 50 N. E. 158.

To create a controversy between two states, it seems to us that there must be an assertion of a substantial right of one state as such, which is denied or repudiated, by the other, and which relates to the interests of each as states, and that the determination of the issue thus raised will promote or secure some substantial right of the one or the other of these states as states.

New Jersey v. New York, 5 Pet. 285, 8 L. ed. 127; Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233; Florida v. Georgia, 11 How. 293, 13 L. ed. 702; Virginia v. West Virginia, 11 Wall. 39, 20 L. ed. 67; Pennsylvania v. Wheeling & B. Bridge Co. 9 How. 657, 13 L. ed. 298; 11 How. 528, 13 L. ed. 799; 13 How. 518, 14 L. ed. 249; 18 How. 429, 15 L. ed. 436; Missouri v. Illinois, 180 U. S. 206, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; South Dakota v. North Carolina, 192 U. S. 289, 48 L. ed. 449, 24 Sup. Ct. Rep. 269.

The action of the proposed new state in adopting her Constitution by popular vote; the consent of Virginia, through her legislature, given to the formation of the new state, composed of the counties recited in the act giving her consent; and the deliberate consent of Congress, as required by the Constitution, consenting to the formation of the new state and admitting her into the Union,—constitute a compact between Virginia and West Virginia, the terms of which, with reference to the said debt, form a part of this compact, and are inviolable under the Constitution of the United States.

Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547.

Mr. John G. Carlisle also argued the cause and filed a brief for defendant:

Jurisdiction is the power to hear and determine a cause between the parties to the action who are before the court, and to render a final judgment or decree, and enforce its execution by judicial process. Judicial tribunals cannot take cognizance of controversies merely for the purpose of ascertaining and declaring what the legal or equitable rights of the parties are. They must render judgments or decrees which remedy the wrongs complained of, or enforce the rights asserted in the case. In other words, their powers are remedial, not merely declaratory.

Sheldon v. Newton, 3 Ohio St. 494; Re Ferguson, 9 Johns. 239; Hopkins v. Com. 3 Met. 460; Com. v. Curtis, Thacher, Crim. Cas. 202; 2 Bouvier's Law Dict. 26; Johnson v. Jones, 2 Neb. 135; Black's Law Dict. p. 63; Anderson's Words & Phrases, pp. 3877–813; 17 Am. & Eng. Enc. Law, 2d ed. p. 1041; Daniels v. Tearney, 102 U. S. 418, 26 L. ed. 187; Applegate v. Lexington & C. County Min. Co. 117 U. S. 267, 29 L. ed. 825, 6 Sup. Ct. Rep. 742; Simmons v. Saul, 138 U. S. 454, 34 L. ed. 1061, 11 Sup. Ct. Rep. 369; Holmes v. Oregon & C. R. Co. 6 Sawy. 275, 5 Fed. 534, 7 Sawy. 380, 9 Fed. 232; Grignon v. Astor, 2 How. 335, 11 L. ed. 289; United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; Decatur v. Paulding, 14 Pet. 499, 10 L. ed. 561; Re Bogart, 2 Sawy. 401, Fed. Cas. No. 1,596; Le Roy v. Clayton, 2 Sawy. 499, Fed. Cas. No. 8,268; Riggs v. Johnson County (United States ex rel. Riggs v. Johnson County) 6 Wall. 187, 18 L. ed. 773; McNitt v. Turner, 16 Wall. 366, 21 L. ed. 348; Cornett v. Williams (Nash v. Williams) 20 Wall. 240, 22 L. ed. 257.

The state of West Virginia was admitted into the Union under the Constitution framed by its convention, and approved by the state of Virginia and the Congress of the United States. And thus the consent of that body was given to all the provisions of the agreement, and it became a legal and constitutional compact between the two states.

Virginia v. West Virginia, 11 Wall. 39, 20 L. ed. 67; Green v. Biddle, 8 Wheat. 1–86, 5 L. ed. 547–568; Virginia v. Tennessee, 148 U. S. 503, 37 L. ed. 537, 13 Sup. Ct. Rep. 728.

If the court has any power to render and enforce a judgment or decree in this cause, which would afford to the plaintiffs effective and final relief, it must be a judgment or decree for a definite sum of money found to be due to the state of Virginia on a settlement made in the mode pro-

vided by the compact; or else the solemn compact entered into with the consent of Congress, thereby becoming, as this court said in Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 585, 14 L. ed. 277, "a law of the Union," must be wholly disregarded, and the amount of the judgment or decree must be ascertained according to some other rule or principle adopted by the court, to which the parties refused to assent when the compact was made. The adoption of the latter method is not even supposable; for the compact is either valid or invalid; and if it is valid it cannot be disregarded by the court; while if it is invalid the consequence would be that West Virginia was unconstitutionally admitted, and is not now a state of the Union, and therefore cannot be sued as such.

Green v. Biddle, 8 Wheat. 1-85, 86, 5 L. ed. 547-568; State v. Wheeling & B. Bridge Co. 13 How. 518, 566, 14 L. ed. 249, 269; Poole v. Fleeger, 11 Pet. 185, 209, 9 L. ed. 680, 690.

This court could not compel the legislature of West Virginia to levy a tax, or appropriate money, or issue bonds to provide for the payment of any judgment or decree which might be rendered in this case; and we may add that it could not even appoint a receiver or commissioner to collect a tax or to issue bonds for that purpose, even if the tax had been imposed by the proper legislative authority, or the issue of bonds had been duly authorized.

Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72; Heine v. Levee Comrs. 19 Wall. 655, 22 L. ed. 223; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; Meriweather v. Garrett, 102 U. S. 472, 501, 26 L. ed. 197, 200; Heine v. Levee Comrs. 1 Woods, 247, Fed. Cas. No. 6,325; Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; Thompson v. Allen County, 115 U. S. 550, 29 L. ed. 472, 6 Sup. Ct. Rep. 140, 13 Fed. 97.

In every case since the adoption of the 11th Amendment of the Constitution, where the court has found that the effect of granting the relief sought by the plaintiff would be to enforce the claim of an individual, whatever may be its nature, against a state, it has denied its power, or the power of any other court of the United States, to do so. It can make no difference what means or devices the parties may have resorted to for the purpose of getting the case into the court, if it appears that the real object of the action and the effect of the judgment or decree would be to conclude the state itself, and not merely its ministerial officers or agents, the court has refused to exercise jurisdiction for that purpose.

Hollingsworth v. Virginia, 3 Dall. 378, 1 L. ed. 644; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Briscoe v. Bank of the Commonwealth, 11 Pet. 257, 9 L. ed. 709; Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Marye v. Parsons, 114 U. S. 325, 29 L. ed. 205, 5 Sup. Ct. Rep. 932, 962; Hagood v. Southern, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; Christian v. Atlantic & N. C. R. Co. 133 U. S. 233, 33 L. ed. 589, 10 Sup. Ct. Rep. 260; Louisiana ex rel. New York Guaranty & I. Co. v. Steele, 134 U. S. 230, 33 L. ed. 891, 10 Sup. Ct. Rep. 511; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; Reagon v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269.

Mr. Chief Justice Fuller delivered the opinion of the court:

The state of West Virginia was admitted into the Union June 20, 1863, under the proclamation of the President of the United States of April 20, 1863 [13 Stat. at L. 731], in pursuance of the act of Congress approved December 31, 1862 [12 Stat. at L. 633, chap. 6], upon the terms and conditions prescribed by the commonwealth of Virginia in ordinances adopted in convention and in acts passed by the general assembly of the restored government of the commonwealth, giving her consent to the formation of a new state out of her territory, with a constitution adopted for the new state by the people thereof. The 9th section of the ordinance adopted by the people of the restored state of Virginia in convention assembled in the city of Wheeling, Virginia, on August 20, 1861, entitled, "An ordinance to Provide for the Formation of a New State out of a Portion of the Territory of This State," provided as follows:

"9. The new state shall take upon itself a just proportion of the public debt of the commonwealth of Virginia, prior to *the 1st [316]

day of January, 1861, to be ascertained by charging to it all state expenditures within the limits theerof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period. All private rights and interests in lands within the proposed state, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in the state of Virginia. . . ."

The consent of the commonwealth of Virginia was given to the formation of a new state on this condition. February 3 and 4, 1863, the general assembly of the restored state of Virginia enacted two statutes in pursuance of the provisions of which money and property amounting to and of the value of several millions of dollars were, after the admission of the new state, paid over and transferred to West Virginia. The Constitution of the state of West Virginia when admitted contained these provisions, being §§ 5, 7, and 8 of article 8 thereof, as follows:

"5. No debt shall be contracted by this state except to meet casual deficits in the revenue, to redeem a previous liability of the state, to suppress insurrection, repel invasion, or defend the state in time of war."

"7. The legislature may at any time direct a sale of the stocks owned by the state in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt; and hereafter the state shall not become a stockholder in any bank.

"8. An equitable proportion of the public debt of the commonwealth of Virginia, prior to the first day of January, in the year one thousand eight hundred and sixty-one, shall be assumed by this state; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund suffi-
[17] cient to pay the accruing *interest and redeem the principal within thirty-four years."

The "public debt" and the "previous liability" manifestly referred to a portion of the public debt of the original state of Virginia and liability for the money and property of the original state, which had been received by West Virginia under the acts of the general assembly, above cited, enacted while the territory and people afterwards forming the state of West Virginia constituted a part of the commonwealth of Virginia, though one may be involved in the other; while the provisions of §§ 7 and 8 were obviously framed in compliance with the conditions on which the consent of Virginia was given to the creation of the state of West Virginia, and the money and property were transferred. From 1863 to 1905 various efforts were made by Virginia, through its constituted authorities, to effect an adjustment and settlement with West Virginia for an equitable proportion of the public debt of the undivided state, proper to be borne and paid by West Virginia, but all these efforts proved unavailing, and it is charged that West Virginia refused or failed to take any action or to do anything for the purpose of bringing about a settlement or adjustment with Virginia.

The original jurisdiction of this court was, therefore, invoked by Virginia to procure a decree for an accounting as between the two states, and, in order to a full and correct adjustment of the accounts, the adjudication and determination of the amount due Virginia by West Virginia in the premises.

But is is objected that this court has no jurisdiction because the matters set forth in the bill do not constitute such a controversy or such controversies as can be heard and determined in this court, and because the court has no power to enforce, and therefore none to render, any final judgment or decree herein. We think these objections are disposed of by many decisions of this court. Cohen v. Virginia, 6 Wheat. 264, 378, 406, 5 L. ed. 257, 284, 291; Kansas v. Colorado, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552, May 13, 1907, 206 U. S. 46, ante, 956, 27 Sup. Ct. Rep. 655; Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331, 200 U. S. 496, 50 L. ed. 572, 26 Sup. Ct. Rep. 268; Georgia v. Tennessee Copper Co. May 13, *1907, 206 U. S. 230, ante, 1038, 27 Sup. Ct. [318] Rep. 618; United States v. Texas, 143 U. S. 621, 36 L. ed. 285, 12 Sup. Ct. Rep. 488; United States v. North Carolina, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. Rep. 920; United States v. Michigan, 190 U. S. 379, 47 L. ed. 1103, 23 Sup. Ct. Rep. 742.

In Cohen v. Virginia, the Chief Justice said: "In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more states, between a state and citizens of another state,' 'and between a state and foreign states, citizens, or subjects.' If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."

And, referring to the 11th Amendment, it was further said:

"It is a part of our history that, at the adoption of the Constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts formed a very serious objection to that instrument. Suits were instituted, and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this Amendment was proposed in Congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation may be inferred from the terms of the Amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases; and in these a state may still be sued. We must ascribe the Amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the Amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or [319] sister states would *be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The Amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states."

By the cases cited, and there are many more, it is established that, in the exercise of original jurisdiction as between states, this court necessarily in such a case as this has jurisdiction.

United States v. North Carolina and United States v. Michigan, supra, were controversies arising upon pecuniary demands, and jurisdiction was exercised in those cases just as in those for the prevention of the flow of polluted water from one state along the borders of another state, or of the diminution in the natural flow of rivers by the state in which they have their sources through and across another state or states, or of the discharge of noxious gases from works in one state over the territory of another.

The object of the suit is a settlement with West Virginia, and to that end a determination and adjudication of the amount due by that state to Virginia; and when this court has ascertained and adjudged the proportion of the debt of the original state which it would be equitable for West Virginia to pay, it is not to be presumed on demurrer that West Virginia would refuse to carry out the decree of this court. If such repudiation should be absolutely asserted we can then consider by what means the decree may be enforced. Consent to be sued was given when West Virginia was admitted into the Union, and it must be assumed that the legislature of West Virginia would, in the natural course, make provision for the satisfaction of any decree that may be rendered.

It is, however, further insisted that this court cannot proceed to judgment because of an alleged compact entered into between Virginia and West Virginia, with the consent of Congress, by which the question of the liability of West Virginia to Virginia was submitted to the arbitrament and award *of the legislature of West Virginia [320] as the sole tribunal which could pass upon it. As we have seen, the Constitution of West Virginia, when admitted into the Union, contained the provision: "An equitable proportion of the public debt of the commonwealth of Virginia prior to the first day of January, in the year one thousand eight hundred and sixty-one, shall be assumed by this state, and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund . . . and redeem the principal within thirty-four years." And it is said that, on May 13, 1862, the legislature of Virginia passed an act entitled "An Act Giving the Consent of the Legislature of Virginia to the Formation and Erection of a New State within the Jurisdiction of this State," by which consent was given to the creation of the proposed new state, "according to the boundaries and under the provisions set forth in the Constitution for the said state of West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the 26th day of November, 1861;" and that by the act of Congress the consent of that body was given to all those provisions which thus became a constitutional and legal compact between the two states. The act of May 13, 1862, was not made a part of the case stated in the bill, and its validity is denied by counsel for Virginia, but it is unnecessary to go into that, for when Virginia, on August 20, 1861, by ordinance provided "for the formation of a new state out of the territory of this state," and declared [illegible] new state shall take up its [illegible] proportion of the public d[illegible] of the [illegible] monwealth of Virginia prior to [illegible] of January, [illegible]"

to be ascertained as provided, it is to be supposed that the new state had this in mind when it framed its own Constitution, and that when that instrument provided that its legislature should "ascertain the same as soon as practicable," it referred to the method of ascertaining prescribed by the Virginia convention. Reading the Virginia ordinance and the West Virginia constitutional provision *in pari materia*, it [321] follows *that what was meant by the expression that the "legislature shall ascertain" was that the legislature should ascertain, as soon as practicable, the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained. And it may well be inquired why, in the forty-three years that have elapsed since the alleged compact was entered into, West Virginia has never indicated that she stood upon such a compact, and, if so, why no step has ever been taken by West Virginia to enter upon the performance of the duty which such "compact" imposed, and to notify Virginia that she was ready and willing to discharge such duty.

It is also urged that Virginia had no interest in the subject-matter of the controversy because she had been released from all liability on account of the public debt of the old commonwealth, evidenced by her bonds outstanding on the 1st day of January, 1861. This relates to the acts of the general assembly of Virginia of March 30, 1871, March 28, 1879, February 14, 1882, February 20, 1892, March 6, 1894, and March 6, 1900. According to the bill, Virginia, by the act of March 30, 1871, and subsequent acts, in an attempt to provide for the funding and payment of the public debt, having estimated that the liability of West Virginia was for one third of the amount of the old bonds, provided for the issue of new bonds to the amount of two thirds of the total, and for the issue of certificates for the other third, which showed that Virginia held the old bonds, so far as unfunded, in trust for the holders or their assignees, to be paid by the funds expected to be obtained from West Virginia as her "just and equitable proportion of the public debt." The legislation resulted in the surrender of most of the old bonds to Virginia, satisfied as to two thirds, and held as security for the creditors as to one third. We do not care to take up and discuss this legislation. We are satisfied that, as we have jurisdiction, these questions ought not to be passed upon on demurrer. Kansas v. Colorado, 185 U. S. 125, 144, 145, 46 L. ed. 838, 845, 846, 22 Sup. Ct. Rep. 552. And this also furnishes sufficient ground for not considering at length the objection of multifariousness. *The observations of Lord Cot- [322] tenham, in Campbell v. Mackay, 1 Myl. & C. 603, that it is impracticable to lay down any rule as to what constitutes multifariousness, as an abstract proposition; that each case must depend upon its own circumstances; and much must be left where the authorities leave it, to the sound discretion of the court,—have been often affirmed in this court. Oliver v. Piatt, 3 How. 333, 411, 11 L. ed. 622, 657; Gaines v. Chew, 2 How. 619, 642, 11 L. ed. 402, 411. But we do not mean to rule that the bill is multifarious. It is true that the prayer contains, among other things, the request, "that all proper accounts may be taken to determine and ascertain the balance due from the state of West Virginia to your oratrix in her own right and as trustee aforesaid," but it also prays that the court "will adjudicate and determine the amount due to your oratrix by the state of West Virginia in the premises." And we understand the reference to holding in trust to be in the interest of mere convenience, and that the bill cannot properly be regarded as seeking in chief anything more than a decree for "an equitable proportion of the public debt of the commonwealth of Virginia on the 1st day of January, 1861." The objections of misjoinder of parties and misjoinder of causes of action may be treated as resting on matter of surplusage merely, and, at all events, further consideration thereof may wisely be postponed to final hearing. Florida v. Georgia, 17 How. 491, 492, 15 L. ed. 188, 189; California v. Southern P. Co. 157 U. S. 249, 39 L. ed. 690, 15 Sup. Ct. Rep. 591.

The order will be—

Demurrer overruled without prejudice to any question, and leave to answer by the first Monday of next term.

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*RE JAMES POLLITZ, Petitioner. [323]

(See S. C. Reporter's ed. 323–333.)

Mandamus—to control judicial action.

Mandamus will not lie to compel a Federal circuit court to remand to a state court a cause which the circuit court has refused to remand to the state court because of the opinion that the case presents a controversy between the removing defendant and the plaintiff which can be fully determined between them without the presence of the other defendants.

[No. 16, Original.]

Argued April 8, 1907. Decided May 27, 1907.

NOTE.—As to when mandamus is the proper remedy—see notes to United States ex rel. International Contracting Co. v. Lamont,

PETITION for writ of mandamus to compel the Circuit Court of the United States for the Southern District of New York to remand to the Supreme Court of that state a cause which the Circuit Court has refused to remand because of the opinion that a separable controversy is presented, within its jurisdiction. Dismissed.

Statement by Chief Justice Fuller:

James Pollitz, a citizen of the state of New York, brought suit in the supreme court of the state of New York for the county of New York against the Wabash Railroad Company, a consolidated railroad corporation existing under the laws of the states of Ohio, Michigan, Illinois, and Missouri, and a citizen of the state of Ohio; and sundry other defendants, chiefly citizens and residents of the state of New York, being individual directors of the railroad company; the trust company, registrar of the stock of the railroad company; a committee representing debenture holders; mortgage trustees, etc. The complaint alleged in substance that the railroad company, in 1906, entered into certain negotiations for the retirement of the debenture mortgage bonds of the company through the issue of other securities, both bonds and stocks, and that the plan to accomplish that end was subsequently authorized and approved by the stockholders of the company and debenture mortgage bondholders, at a meeting at Toledo, October 22, 1906, at which the issue of certain new bonds and preferred and common stock of the company and the exchange of certain new bonds, preferred and common stock, for the company's debenture mortgage bonds, was authorized and approved. The complaint alleged that the plan of exchange was unlawful, unauthorized, and con-[324]trary to the laws of the states in which *the company was organized, and was unjust, inequitable, and injurious to complainant, who claimed to be the owner of one thousand shares of the common capital stock of the railroad company. It was also alleged that 90 per cent of the debenture holders voted in favor of the exchange, and that the plan had been carried out as to more than nine tenths of the debenture bonds, and new bonds and stocks to the requisite amount had been issued. And it was prayed that the plan "be decreed and adjudged to be *ultra vires*, and that all said bonds and the preferred and common stock, used and issued and applied by the said Wabash Railroad Company for the purpose and plan of said scheme, be decreed and adjudged of no effect." The complaint prayed in the alternative that if the court should decree that Pollitz was not entitled to the main relief he had asked, then that he might have an accounting by the defendant officers and directors of the railroad company, etc., in respect of the new bonds and common and preferred stock which had been issued under the plan of exchange.

The railroad company filed its petition to remove the case into the circuit court of the United States for the southern district of New York, which set forth in substance the foregoing matters, and further averred:

"That your petitioner disputes the claim against it as set forth by the plaintiff in his complaint, and denies that the plaintiff is entitled to the judgment and relief prayed for against this petitioner or to any judgment or relief against it; and this petitioner alleges that the fundamental and primary controversy, as set forth in said complaint, is whether or not the plan for the exchange of the debenture mortgage bonds by this petitioner, the authorization and creation by it of the new securities in the said complaint set forth, and the issue of the same by it for the purpose of carrying said plan into effect, is, as alleged in said complaint, illegal, unlawful, void, and prohibited by the charter of this petitioner and the laws under which it is incorporated; and whether said new securities *are, as alleged [325] in said complaint, invalid and void; and that such controversy is a separable and distinct controversy between the plaintiff and this petitioner.

"That a complete determination of said controversy can be had without the presence of any of the defendants in this action other than this petitioner; and that all of said other defendants are neither indispensable nor necessary parties to the complete determination of said controversy.

"That the foregoing controversy, which is solely between the plaintiff and the petitioner, must be determined before any other controversy alleged in the complaint can be considered and determined; and that said controversy between the plaintiff and this petitioner, as above set forth, is separate

39 L. ed. U. S. 160; M'Cluny v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie, 3 L.R.A. 54; Burnsville Turnp. Co. v. State, 3 L.R.A. 265; State ex rel. Charleston, C. & C. R. Co. v. Whitesides, 3 L.R.A. 777; and Ex parte Hurn, 13 L.R.A. 120.

On mandamus to control judicial action—see notes to State ex rel. Bayha v. Kansas City Ct. of Appeals, 3 L.R.A. 476; and Ex parte Morgan, 29 L. ed. U. S. 135.

On superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal—see note to State ex rel. Fourth Nat. Bank v. Johnson, 51 L.R.A. 33.

and distinct from any other or further controversy.

"That said fundamental and primary controversy herein between the plaintiff and this petitioner is a controversy wholly between citizens of different states,—to wit: Between the plaintiff, a citizen of the state of New York, and this petitioner, a citizen of the state of Ohio."

The cause was removed, and Pollitz made a motion to remand, which was denied by the circuit court, Lacombe, J., presiding.

Pollitz thereupon applied to this court on March 18 for leave to file a petition for a writ of mandamus directing the cause to be remanded to the state court. Leave to file was granted March 25, and a rule was entered thereon returnable April 8, to which return was duly made to the effect that the order denying the motion of Pollitz to remand the cause had been made and entered in the exercise of the jurisdiction and judicial discretion conferred upon the circuit judge by law, and for the reasons expressed in his opinion filed with the order. The case was heard on the return to the rule.

Mr. Roger Foster argued the cause and filed a brief for petitioner:

It would be a needless waste of time of the court below to reserve a decision upon this vital point of jurisdiction until after a final hearing on the merits.

Ex parte Wisner, 203 U. S. 449, ante, 264, 27 Sup. Ct. Rep. 150.

Mr. Rush Taggart argued the cause, and, with Mr. Lawrence Greer, filed a brief for respondent:

Mandamus is not the proper remedy.

United States v. Lawrence, 3 Dall. 42, 1 L. ed. 502; Ex parte Bradstreet, 7 Pet. 634, 8 L. ed. 810; Ex parte Bradley, 7 Wall. 364, 19 L. ed. 214; Knickerbocker Ins. Co. v. Comstock, 16 Wall. 258, 21 L. ed. 493; Chicago & A. R. Co. v. Wiswall, 23 Wall. 507, 23 L. ed. 103; Ex parte Loring, 94 U. S. 418, 24 L. ed. 165; Virginia v. Rives (Ex parte Virginia) 100 U. S. 313, 25 L. ed. 667; Ex parte Hoard, 105 U. S. 578, 26 L. ed. 1176; Re Pennsylvania Co. 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141; Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536; Re Hohorst, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; Re Rice, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; Re Atlantic City R. Co. 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208; Re Grossmayer, 177 U. S. 48, 44 L. ed. 665, 20 Sup. Ct. Rep. 535; Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387; Ex parte Wisner, 203 U. S. 449, ante, 264, 27 Sup. Ct. Rep. 150; United States ex rel. Harless v. United States Ct. App. Judges, 29 C. C. A. 78, 56 U. S. App. 33, 85 Fed. 177; Kimberlin v. Commission, 44 C. C. A. 109, 104 Fed. 653.

The proper and adequate remedy is by appeal after entry of final judgment or decree.

Graves v. Corbin, 132 U. S. 571, 33 L. ed. 462, 10 Sup. Ct. Rep. 196; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

In the following cases, all of which have been decided since the passage of the judiciary act of May 3, 1891, the jurisdiction of the Federal court has been reviewed by an appeal or writ of error:

Remington v. Central P. R. Co. 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577; Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420; Thomas v. Ohio State University, 195 U. S. 207, 49 L. ed. 160, 25 Sup. Ct. Rep. 24; Raphael v. Trask, 194 U. S. 272, 48 L. ed. 973, 24 Sup. Ct. Rep. 647; Minnesota v. Northern Securities Co. 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. Rep. 598; Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807; Hennessy v. Richardson Drug Co. 189 U. S. 25, 47 L. ed. 697, 23 Sup. Ct. Rep. 532; Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434; Mexican C. R. Co. v. Eckman, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; Wheless v. St. Louis, 180 U. S. 379, 45 L. ed. 583, 21 Sup. Ct. Rep. 402; Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; Louisville, N. A. & C. R. Co. v. Louisville Trust Co. 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; New Orleans v. Quinlan, 173 U. S. 191, 43 L. ed. 664, 19 Sup. Ct. Rep. 329; Barrow S. S. Co. v. Kane, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; Mattingly v. North Western Virginia R. Co. 158 U. S. 53, 39 L. ed. 894, 15 Sup. Ct. Rep. 725; Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563.

Mr. Chief Justice Fuller delivered the opinion of the court:

The suit was commenced in the state court by a citizen *and resident of the city, [331] county, and state of New York, against a corporation, a citizen of the state of Ohio, and other defendants, many of whom were residents and citizens of the state of New York, the value of the matter in dispute, exclusive of interest and costs, exceeding the jurisdictional sum.

The defendant the Wabash Railroad Company, a citizen of Ohio, filed its petition and bond in proper form for the removal of the

suit into the United States circuit court for the southern district of New York, on the ground of separable controversy so far as it was concerned, and it was removed accordingly. A motion to remand was made and denied by the circuit court, which held that the controversy was separable, and that the other defendants were not indispensable or necessary parties to the complete determination of that separable controversy.

The issue on the motion to remand was whether such determination could be had without the presence of defendants other than the Wabash Railroad Company, and this was judicially determined by the circuit court, to which the decision was by law committed.

The application to this court is for the issue of the writ of mandamus directing the circuit court to reverse its decision, although in its nature a judicial act, and within the scope of its jurisdiction and discretion.

But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.

Where the court refuses to take jurisdiction of a case and proceed to judgment therein, when it is its duty to do so and there is no other remedy, mandamus will lie unless the authority to issue it has been taken away by statute. Re Grossmayer, 177 U. S. 48, 44 L. ed. 665, 20 Sup. Ct. Rep. 535; Re Hohorst, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221. And so where the court assumes to exercise jurisdiction on removal when, on the face of the record, [332] absolutely *no jurisdiction has attached. Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536; Ex parte Wisner, 203 U. S. 449, ante, 264, 27 Sup. Ct. Rep. 150.

"In Re Hohorst, supra, the bill was filed in the circuit court of the United States for the southern district of New York against the corporation and certain other defendants, and was dismissed against the corporation for want of jurisdiction. From that order complainant took an appeal to this court, which was dismissed for want of jurisdiction because the order, not disposing of the case as to all the defendants, was not a final decree from which an appeal would lie. 148 U. S. 262, 37 L. ed. 443, 13 Sup. Ct. Rep. 590. Thereupon an application was made to this court for leave to file a petition for a writ of mandamus to the judge of the circuit court to take jurisdiction and to proceed against the company in the suit. Leave was granted and a rule to show cause entered thereon, upon the return to which the writ of mandamus was awarded." Re Atlantic City R. Co. 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208.

In Ex parte Wisner, Wisner, a citizen of the state of Michigan, commenced an action at law in the circuit court for the city of St. Louis, state of Missouri, against Beardsley, a citizen of the state of Louisiana. After service of summons on Beardsley, he filed his petition to remove the action from the state court into the circuit court of the United States for the eastern district of Missouri, on the ground of diversity of citizenship, with the proper bond, and an order of removal was made by the state court, and the transcript of record was filed in the circuit court. Wisner (who had had no choice but to sue in the state court) at once moved to remand the case, on the ground that the suit did not raise a controversy within the jurisdiction of the circuit court, and that, as it appeared on the face of the record that plaintiff was a citizen and resident of Michigan, and defendant a citizen and resident of Louisiana, the case was not one within the original jurisdiction of the circuit court, in accordance with the statute providing that where jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought *only in the district of [333] the residence of either the plaintiff or the defendant. The motion to remand was denied, and Wisner applied to this court for a writ of mandamus, which was subsequently awarded.

In the present case the removal was granted and sustained on the ground that there was a controversy between the removing defendant and plaintiff, which could be fully determined as between them without the presence of the other defendants. That being so, the suit might have been brought originally in the circuit court against the railroad company as sole defendant.

If the ruling of the circuit court was erroneous, as is contended, but which we do not intimate, it may be reviewed after final decree on appeal or error. Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 569, 40 L. ed. 536, 542, 16 Sup. Ct. Rep. 389.

Rule discharged; petition dismissed.

HOMER E. GRAFTON, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 333-335.)

Courts-martial—effect and conclusiveness of judgments.

1. Civil tribunals cannot disregard the

judgments of a general court-martial against an accused officer or soldier for mere errors, or for any reason not affecting the jurisdiction of the military court, even though the civil court, if it had first taken hold of the case, might have tried the accused for the same offense or even for one of higher grade arising out of the same facts.

Courts-martial—jurisdiction.

2. A general court-martial has jurisdiction under the 62d Article of War, as of a crime not capital, to try a soldier for a homicide punishable under the Penal Code of the Philippine Islands, art. 404, by imprisonment.

Criminal law—former jeopardy.

3. An acquittal of homicide, as defined in the Penal Code of the Philippine Islands, art. 404, is a bar to a subsequent conviction of the same offense arising out of the same facts, under an information charging the higher crime of assassination, as defined by art. 403, since, if not guilty of the lesser crime, the accused could not, for the same acts, be guilty of the offense of higher grade.

Criminal law—former jeopardy—acquittal by court-martial.

4. One acquitted by a military court of competent jurisdiction of the crime of homicide, as defined by the Penal Code of the Philippine Islands, art. 404, cannot be tried a second time in a civil court of those islands for the same offense.

[No. 358.]

Argued March 18, 19, 1907. Decided May 27, 1907.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed a judgment of the Court of First Instance in the Province of Iloilo, convicting a soldier of homicide, notwithstanding his prior acquittal by a court-martial. Reversed and remanded with directions to dismiss the complaint or information and discharge the accused from custody.

The facts are stated in the opinion.

Messrs. Clarence S. Nettles and John H. Atwood argued the cause, and, with Mr. F. D. McKenney, filed a brief for plaintiff in error:

The plaintiff in error having been tried and acquitted of the alleged homicide by a lawfully constituted court having jurisdiction of his person and the subject-matter of the offense, his second trial unlawfully put him in jeopardy of punishment a second time for the same offense, in direct violation of the 5th Amendment to the Constitution and § 5 of the act of Congress of July 1, 1902 (32 Stat. at L. 691, chap. 1369).

Ex parte Lange, 18 Wall. 205, 21 L. ed. 888; 1 Bishop, Crim. Law, §§ 979, 1029; Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797; People v. Minor, 144 Ill. 308, 19 L.R.A. 342, 33 N. E. 40; State v. Bowen, 45 Minn. 145, 47 N. W. 650; State v. Layne, 96 Tenn. 668, 36 S. W. 390; Com. v. Roby, 12 Pick. 496; Wilkes v. Dinsman, 7 How. 123, 12 L. ed. 633; 1 Kent, Com. 341.

General courts-martial have jurisdiction of crimes, as well as purely military offenses, when committed by persons of the military establishment.

Ex parte Milligan, 4 Wall. 123, 18 L. ed. 296; Re Davison, 21 Fed. 620; Ex parte Reed, 100 U. S. 13, 25 L. ed. 538; Re McVey, 23 Fed. 878; Ex parte Mason, 105 U. S. 696, 26 L. ed. 1213; Carter v. Roberts, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713; Carter v. McClaughry, 183 U. S. 365, 46 L. ed. 236, 22 Sup. Ct. Rep. 181.

The charge and specifications upon which the plaintiff was arraigned and tried in the general court-martial conformed to the pleading and practice of military courts, were sufficient to support a valid judgment, and cannot be attacked in any collateral proceeding.

Re McVey, supra; Re Eckart, 166 U. S. 482, 41 L. ed. 1086, 17 Sup. Ct. Rep. 638.

Is the offense with which the plaintiff is charged, and for the commission of which he now stands in jeopardy of punishment, in fact identical with that of which he was acquitted by the judgment of the general court-martial?

Hoffman v. State, 20 Md. 425; Holt v. State, 38 Ga. 187; State v. Cooper, 13 N. J. L. 361, 25 Am. Dec. 490; State v. Cameron, 3 Heisk. 78; Dill v. People, 19 Colo. 469, 41 Am. St. Rep. 254, 36 Pac. 229; Wilson v. State, 24 Conn. 57; Roberts v. State, 14 Ga. 8, 58 Am. Dec. 528; State v. Keogh, 13 La. Ann. 243; Com. v. Morgan, 9 Kulp, 573; Com. v. Roby, supra; Com. v. Wade, 17 Pick. 395; State v. Birmingham, 44 N. C. (Busbee, L.) 120; Price v. State, 19 Ohio, 423; State v. Copeland, 46 S. C. 13, 23 S. E. 980; Parchman v. State, 2 Tex. App. 228, 28 Am. Rep. 435.

The government cannot legally, for the same transaction, put a person in jeopardy a second time by simply calling the offense another name.

Cooley, Const. Lim. 401; 11 Am. & Eng. Enc. Law, p. 935; Bishop, Crim. Law, 7th ed. § 1050; Hirshfield v. State, 11 Tex. App.

NOTE.—On former jeopardy—see notes to Com. v. Fitzpatrick, 1 L.R.A. 451; Altenburg v. Com. 4 L.R.A. 543; Ex parte Lange, 21 L. ed. U. S. 872; United States v. Perez, 6 L. ed. U. S. 165; and Silsby v. Foote, 14 L. ed. U. S. 394.

207; Moore v. State, 71 Ala. 307; Holt v. State, 38 Ga. 187.

Even granting the validity of the charge of "assassination" or "murder" against the accused, he, having once been tried for the lesser offense of "manslaughter," which is included in the greater offense of murder, cannot legally be put in jeopardy a second time upon an indictment charging the greater offense of "murder."

State v. Foster, 33 Iowa, 526; Com. v. Roby, 12 Pick. 503; 12 Cyc. Law & Proc. p. 280; Com. v. Neeley, 2 Chester Co. Rep. 191.

Solicitor General Hoyt argued the cause and filed a brief for defendant in error:

The acquittal by court-martial was no bar to the civil prosecution.

Steiner's Case, 6 Ops. Atty. Gen. 413; Howe's Case, 6 Ops. Atty. Gen. 506; Hammond v. State, 14 Md. 135; United States v. Maney, 61 Fed. 140; Moore v. Illinois, 14 How. 13, 14 L. ed. 306; United States v. Clark, 31 Fed. 710; Coleman v. Tennessee, 97 U. S. 509, 24 L. ed. 1118; United States v. Cashiel, 1 Hughes, 552, Fed. Cas. No. 14,744; Morey v. Com. 108 Mass. 433; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Moore v. Illinois, 14 How. 17, 14 L. ed. 307; United States v. Barnhart, 10 Sawy. 491, 22 Fed. 285; State v. Taylor, 133 N. C. 760, 46 S. E. 5; Abbott v. People, 75 N. Y. 602; Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621; 3 Ops. Atty. Gen. 749; Digest Opinions of the Judge Advocates General of the Army, ¶¶ 306, 309, p. 92.

Mr. Justice Harlan delivered the opinion of the court:

The writ of error brings up for review a judgment of the supreme court of the Philippine Islands, affirming a judgment of the court of first instance in the province of Iloilo, by which the plaintiff in error, Grafton, was adjudged guilty of homicide as defined by the Penal Code of the Philippines, and sentenced to imprisonment for twelve years and one day.

The history of this criminal prosecution, as disclosed by the record, is as follows:

Homer E. Grafton, a private in the Army of the United States, was tried before a general court-martial convened in 1904 by Brigadier General Carter, commanding the department of the Visayas, Philippine Islands, upon the following charge and specifications: "Charge: Violation of the 62d Article of War: Specification 1. In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, wilfully, and feloniously kill Florentino Castro, a Philippino, by shooting him with a U. S. magazine rifle, caliber .30. This at Buena Vista Landing, Guimaras, P. I., July 24th, 1904. Specification 2. In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, wilfully, and feloniously kill Felix Villanueva, a Philippino, by shooting him with a U. S. magazine rifle, caliber .30. This at Buena Vista Landing, Guimaras, P. I., July 24th, 1904."

By the 58th Article of War it is provided: "In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided for the like offense by the laws of the state, territory, or district in which such offense may have been committed."

The 62d Article of War is in these words: "All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general, or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

The accused pleaded not guilty to each specification as well as to the charge. At the trial he made the following admission in writing: "I admit that on July 24th, 1904, I was a member of a detachment of Company G, 12th Infantry, on duty at Buena Vista Landing, Guimaras, P. I.; that on July 24th, 1904, I was regularly detailed on guard and was a member of the first relief. That I was on post between the hours of 2 and 4 p. m. In the execution of my duty I shot two male Philippinos with a U. S. magazine rifle, caliber .30."

The court found the soldier not guilty as to each specification, and not guilty of the charge. His acquittal was approved by the department commander on August 22d, 1904, and he was released from confinement and restored to duty. It appeared in proof that the accused was of excellent character; and it is stated in the opinion of the supreme court of the Philippines that, before holding the court-martial, the department commander offered to submit the case to the court of first instance of the province, but it did not appear what action was taken by the judge of that court in reference to that offer.

On the 28th day of November, 1904, the prosecuting attorney of the province of Iloilo, Philippine Islands, filed a criminal information or complaint in the name of the United States, in the court of first instance of that province, as follows: "The subscriber accuses Homer E. Grafton of the crime of assassination, committed in the manner following: That on the 24th of July, 1904, and in the *barrio* of Santo Rosario, within the jurisdiction of the municipality of Buena Vista, Guimaras island, province of Iloilo, Philippine Islands, the said accused, with illegal intention, and maliciously, and without justification, and with treachery and deliberate premeditation, killed Felix Villanueva in the manner following: That on said day and in said *barrio* the said accused, Homer E. *Grafton, with the rifle that he carried at the time, known as the United States magazine rifle c. .30, fired a shot directly at Felix Villanueva, causing, with said shot, a serious and necessarily fatal wound, and in consequence of said wound the aforesaid Felix Villanueva died immediately after the infliction thereof, in violation of the law."

When the above information was filed, as well as when the court-martial convened, the Philippines Penal Code provided as follows:

"Art. 402. He who shall kill his father, mother, or child, whether legitimate or illegitimate, or any other of his ascendants or descendants or his spouse, shall be punished as a parricide, with the penalty of *cadena perpetua* to death.

"Art. 403. He who, without being included in the preceding article, shall kill any person, is guilty of assassination if the deed is attended by any of the following circumstances: (1) With treachery; (2) for price or promise of reward; (3) by means of flood, fire, or poison; (4) with deliberate premeditation; (5) with vindictiveness by deliberately and inhumanly increasing the suffering of the person attacked. A person guilty of assassination shall be punished with the penalty of *cadena temporal* in its maximum degree to death.

"Art. 404. He who, without being included in the provisions of article 402, shall kill another without the attendance of any of the circumstances specified in the foregoing article, is guilty of homicide. A person guilty of homicide shall be punished with the penalty of *reclusión temporal*."

At the trial in the court of first instance the accused interposed a demurrer, alleging that that court had no jurisdiction to try him for the offense charged, for the following reasons: The acts constituting the alleged offense were committed within the limits of a military reservation of the United States and by a soldier duly enlisted in the Army of the United States, in the line of duty; the court of first instance of the Philippine Islands had no jurisdiction of the persons of officers or enlisted men of the United States Army for offenses committed *by them in the per- [344] formance of military duty; such courts were not constitutional courts, as contemplated by the 3d article of the Constitution of the United States, and were without jurisdiction to try causes of which such constitutional courts have exclusive jurisdiction; the courts of the Philippine Islands could not deprive the accused of his constitutional privilege of trial by jury; and no court other than a military tribunal, constituted by the authority of the United States, could try the accused upon an indictment which had not been found or presented by a grand jury.

The demurrer also stated that if the court held that it had jurisdiction to try the accused, then he pleaded, in bar of the proceedings against him, the judgment of the general court-martial, acquitting him of the offense of which he was found guilty in the court of first instance.

The demurrer and plea were both overruled, the trial court holding that it had jurisdiction to try the accused, and that the plea of jeopardy based on his trial by court-martial was insufficient, in that the military court could not legally have taken cognizance of the crime of assassination charged in the information, but only of a violation of the 62d Article of War.

A trial was then had in the court of first instance before the judge thereof, without a jury, and resulted in a judgment declaring Grafton guilty of "an infraction of article 404 of said Penal Code, and of the crime of homicide, in killing the said Felix Villanueva, at the time and place and in the manner hereinbefore stated, and, in view of the extenuating circumstances before remarked upon, he is sentenced by the court to imprisonment in such prison as the law directs, for the term of twelve years and one day, it being the minimum term of the minimum degree of *reclusión temporal* which is the penalty for homicide, and to pay the costs of the prosecution, and to suffer all the other accessories of said sentence." The case was carried to the supreme court of the Philippines, where the judgment was affirmed by a divided court. The plea of double jeopardy was overruled by that court and three of the seven *judges were of opin- [345] ion that, under the facts proved at the trial, the accused should have been acquitted.

The principal contention of the accused is that his acquittal by the court-martial forbade his being again tried in the civil

court for the same offense. He bases this contention, in part, upon that clause of the 5th Amendment of the Constitution, providing: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;" and, in part, upon the act of Congress of July 1st, 1902, providing temporarily for the administration of the affairs of civil government in the Philippine Islands, and which act declared that "no person, for the same offense, shall be twice put in jeopardy of punishment." 32 Stat. at L. 691, chap. 1369. That the prohibition of double jeopardy is applicable to all criminal prosecutions in the Philippines was settled upon full consideration in the recent case of Kepner v. United States, 195 U. S. 100, 124, 126, 129, 130, 49 L. ed. 114, 122–125, 24 Sup. Ct. Rep. 797, in which it was held that by force of the above act of Congress such prohibition was carried to the Philippines and became the law of those islands. In the same case it was said—what may be repeated as applicable to the present case—that "this case does not call for a discussion of the limitations of such power [the power of Congress], nor require determination of the question whether the jeopardy clause became the law of the islands after the ratification of the treaty without congressional action, as the act of Congress made it the law of these possessions when the accused was tried and convicted."

We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged. It is alike indisputable that if a court-martial has jurisdiction to try an officer or soldier for a crime, its judgment will be accorded the finality and conclusiveness as to the issues involved which attend the judgments of a civil court in a case of which it may legally [346] take cognizance. In Ex parte Reed, *100 U. S. 13, 23, 25 L. ed. 538, 539, the court, referring to a court-martial, said: "The court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations, which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances. The exercise of discretion, within authorized limits, cannot be assigned for error and made the subject of review by an appellate court."

In Ex parte Mason, 105 U. S. 696, 698, 26 L. ed. 1213, 1214, the question arose whether a court-martial could lawfully sentence an officer of the Army, charged with the offense of attempting to kill a prisoner in the custody of the United States, to be imprisoned at hard labor in the penitentiary. The accused was tried under the 62d Article of War. The court said: "He has offended both against the civil and the military law. As the proper steps were not taken to have him proceeded against by the civil authorities, it was the clear duty of the military to bring him to trial under that jurisdiction. Whether, after trial by the court-martial, he can be again tried in the civil courts, is a question we need not now consider. It is enough if the court-martial had jurisdiction to proceed, and what has been done is within the powers of that jurisdiction." It was objected, in that case, that the sentence was in excess of what the law allowed. The court referred to the 97th Article of War, which provided that "no person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless the offense of which he may be convicted would, by some statute of the United States or by some statute of the state, territory, or district in which such offense may be committed, or by the common law, as the same exists *in such state, territory, or [347] district, subject such convict to such imprisonment." It then proceeded: "Under this article, when the offense is one not recognized by the laws regulating civil society, there can be no punishment by confinement in a penitentiary. The same is true when the offense, though recognized by the civil authorities, is not punishable by the civil courts in that way. But when the act charged as 'conduct to the prejudice of good order and military discipline' is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear that a court-martial is authorized to inflict that kind of punishment. The act done is a civil crime, and the trial is for that act. The proceedings are had in a court-martial because the offender is personally amenable to that jurisdiction, and what he did was not only criminal according to the laws of the land, but prejudicial to the good order and discipline of the Army to which he belonged. The 62d article provides that the offender, when convicted, shall be punished at the discretion of the c[illegible] and the 97th article does no more than [illegible]hibit the court from sentencing him to [illegible]risonment in a penitentiary in a case [illegible]re, if he were tried

or the same act in the civil courts, such imprisonment could not be inflicted." In Carter v. Roberts, 177 U. S. 496, 498, 44 L. ed. 861, 862, 20 Sup. Ct. Rep. 713, which was a case of the punishment under the judgment of a general court-martial of an officer of the Army, the court, after observing that every officer, before entering on the duties of his office, subscribes to the Articles of War enacted by Congress and places himself within the power of courts-martial to pass on any offense which he may have committed in contravention of them, said: "Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its powers *in the sentence pronounced." This language was repeated in Carter v. McClaughry, 183 U. S. 365, 380, 46 L. ed. 236, 242, 22 Sup. Ct. Rep. 181.

It thus appears to be settled that the civil tribunals cannot disregard the judgments of a general court-martial against an accused officer or soldier, if such court had jurisdiction to try the offense set forth in the charge and specifications; this, notwithstanding the civil court, if it had first taken hold of the case, might have tried the accused for the same offense or even one of higher grade arising out of the same facts.

We are now to inquire whether the court-martial in the Philippines had jurisdiction to try Grafton for the offenses charged against him. It is unnecessary to enter upon an extended discussion of that question, for it is entirely clear that the court-martial had jurisdiction to try the accused upon the charges preferred against him. The 62d Article of War, in express words, confers upon a general, or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, jurisdiction to try "all crimes" not capital, committed in time of peace by an officer or soldier of the Army. The crimes referred to in that article manifestly embrace those not capital, committed by officers or soldiers of the Army in violation of public law as enforced by the civil power. No crimes committed by officers or soldiers of the Army are excepted by the above article from the jurisdiction thus conferred upon courts-martial, except those that are capital in their nature. While, however, the jurisdiction of general courts-martial extends to all crimes, not capital, committed against public law by an officer or soldier of the Army within the limits of the territory in which he is serving, this jurisdiction is not exclusive, but only concurrent with that of the civil courts. Of such offenses courts-martial may take cognizance under the 62d Article of War, and, if they first acquire jurisdiction, their judgments cannot be disregarded by the civil courts for mere error or for any reason not affecting the jurisdiction of the military court.

We are next to inquire whether, having been acquitted by a *court-martial of the [349] crime of homicide as defined by the Penal Code of the Philippines, could Grafton be subjected thereafter to trial for the same offense in a civil tribunal deriving its authority, as did the court-martial, from the same government, namely, that of the United States? That he will be punished for the identical offense of which he has been acquitted, if the judgment of the civil court, now before us, be affirmed, is beyond question, because, as appears from the record, the civil court adjudged him guilty and sentenced him to imprisonment specifically for "an infraction of article 404 of said Penal Code and of the crime of homicide."

It was said by the trial judge that the offense *charged* against Grafton in the civil court was "assassination," which offense, he said, was punishable under § 403 of the Philippines Penal Code by death, and of which crime the military court could not, under the Articles of War, have taken cognizance; whereas, the offense for which he was tried by court-martial was only homicide, as defined by § 404 of the Penal Code. But if not guilty of homicide, as defined in the latter section of the Penal Code,—and such was the finding of the court-martial,—he could not, for the same acts and under the same evidence, be guilty of assassination, as defined in the former section of the Code. Looking at the matter in another way, the above suggestion by the trial judge could only mean that simply because, speaking generally, the civil court has jurisdiction to try an officer or soldier of the Army for the crime of assassination, it may yet render a judgment by which he could be subjected to punishment for an offense included in the charge of assassination, although of such lesser offense he had been previously acquitted by another court of competent jurisdiction. This view is wholly inadmissible. Upon this general point the supreme court of the Philippines, referring to the defense of former jeopardy, said: "The circumstance that the civil trial was for murder, a crime of which courts-martial in time of peace have no jurisdiction, while the prior military trial was for manslaughter only, does not defeat the *defense on this theory. The identity of the [350]

offenses is determined, not by their grade, but by their nature. One crime may be a constituent part of the other. The criterion is, Does the result of the first prosecution negative the facts charged in the second? It is apparent that it does. The acquittal of the defendant of the charge of manslaughter pronounces him guiltless of facts necessary to constitute murder and admits the plea of jeopardy." The offense, homicide or manslaughter, charged against Grafton, was the unlawful killing of a named person. The facts which attended that killing would show the degree of such offense, whether assassination, of which the civil court might take cognizance if it acquired jurisdiction before the military court acted, or homicide, of which the military court could take cognizance if it acted before the civil court did. If tried by the military court for homicide, as defined in the Penal Code, and acquitted on that charge, the guaranty of exemption from being twice put in jeopardy of punishment for the same offense would be of no value to the accused if, on trial for assassination, arising out of the same acts, he could be again punished for the identical offense of which he had been previously acquitted.

In Chitty's Criminal Law, vol. 1, pp. 452, 455, 462, the author says: "It is not in all cases necessary that the two charges should be precisely the same in point of degree, for it is sufficient if an acquittal of the one will show that the defendant could not have been guilty of the other. Thus, a general acquittal of murder is a discharge upon an indictment of manslaughter upon the same person, because the latter charge was included in the former, and if it had so appeared on the trial the defendant might have been convicted of the inferior offense; and, on the other hand, an acquittal of manslaughter will preclude a future prosecution for murder, for, if he were innocent of the modified crime, he could not be guilty of the same fact, with the addition of malice and design." Mr. Bishop, in his Treatise on Criminal Law, 7th ed. § 1050, says: It is not necessary, to establish the defense [351] "*autrefois acquit*" or "convict," that *the offense in each indictment should be the same in name. If the transaction is the same, or if each rests upon the same facts between the same parties, it is sufficient to make good the defense. In Com. v. Roby, 12 Pick. 503, the court said: "Thus an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter, and, *e converso*, an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder; for, in the first instance, had the defendant been guilty, not of murder, but of manslaughter, he would have been found guilty of the latter offense upon that indictment; and in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder. 1 Starkie, Crim. Pl. 2d ed. 322."

It must, then, be taken on the present record that an affirmance of the judgment of the civil court will subject the accused to punishment for the same acts, constituting the same offense as that of which he had been previously acquitted by a military court having complete jurisdiction to try and punish him for such offense. It is attempted to meet this view by the suggestion that Grafton committed two distinct offenses,—one against military law and discipline, the other against the civil law, which may prescribe the punishment for crimes against organized society, by whomsoever those crimes are committed,—and that a trial for either offense, whatever its result, whether acquittal or conviction, and even if the first trial was in a court of competent jurisdiction, is no bar to a trial in another court of the same government for the other offense. We cannot assent to this view. It is, we think, inconsistent with the principle, already announced, that a general court-martial has, under existing statutes, in time of peace, jurisdiction to try an officer or soldier of the Army for any offense, not capital, which the civil law declares to be a crime against the public. The express prohibition of double jeopardy for the same offense means that wherever such prohibition is applicable, either by operation of the Constitution *or by action of [352] Congress, no person shall be twice put in jeopardy of life or limb for the same offense. Consequently, a civil court proceeding under the authority of the United States cannot withhold from an officer or soldier of the Army the full benefit of that guaranty, after he has been once tried in a military court of competent jurisdiction. Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter. If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States, and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States. A different interpretation finds no sanction in the Articles of War; for the 102d article of War (which

is the same as article 87, adopted in 1806, 2 Stat. at L. 369, chap. 20) declares that "no person",—referring, we take it, to persons in the Army—"shall be tried a second time for the same offense." But we rest our decision of this question upon the broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government. Congress has chosen, in its discretion, to confer upon general courts-martial authority to try an officer or soldier for any crime, not capital, committed by him in the territory in which he is serving. When that was done the judgment of such military court was placed upon the same level as the judgments of other tribunals when the inquiry arises whether an accused was, in virtue of that judgment, put in jeopardy of life or limb. Any possible conflict in these matters, between civil and military courts, can be obviated either [353] by withholding from courts-martial all *authority to try officers or soldiers for crimes prescribed by the civil power, leaving the civil tribunals to try such offenses, or by investing courts-martial with exclusive jurisdiction to try such officers and soldiers for all crimes not capital.

In support of the view that the judgment of a military court against an officer or soldier of the Army for acts constituting a crime against both the civil law and the military organization is no bar to a second trial in the civil courts for the same acts, we are referred to Fox v. Ohio, 5 How. 410, 435, 12 L. ed. 213, 224; United States v. Marigold, 9 How. 560, 13 L. ed. 257, and Moore v. Illinois, 14 How. 13, 19, 20, 14 L. ed. 306, 308, 309. Nothing said or determined in either of those cases conflicts with the decision in this case. In the above cases, especially in Moore's Case, the question was mooted whether the same acts could be treated as crimes both against the United States and a state. It was there suggested that a person could not be punished by two governments on account of or for the same act constituting crime, without violating the 5th Amendment. But this court, speaking by Mr. Justice Grier, said: "An offense, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offense. Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the state,—a riot, assault, or a murder,—and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. *Yet it [354] cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this court has decided, in the case of Fox v. Ohio, 5 How. 432, 12 L. ed. 222, that a state may punish the offense of uttering or passing false coin, as a cheat or fraud practised on its citizens; and, in the case of the United States v. Marigold, supra, that Congress, in the proper exercise of its authority, may punish the same act as an offense against the United States."

It is clear that the cases above cited are not in point here. The government of the United States and the governments of the several states, in the exercise of their respective powers, move on different lines. The government of the United States has no power, except as expressly or by necessary implication has been granted to it, while the several states may exert such powers as are not inconsistent with the Constitution of the United States nor with a republican form of government, and which have not been surrendered by them to the general government. An offense against the United States can only be punished under its authority and in the tribunals created by its laws; whereas, an offense against a state can be punished only by its authority and in its tribunals. The same act, as held in Moore's Case, may constitute two offenses, one against the United States and the other against a state. But these things cannot be predicated of the relations between the United States and the Philippines. The government of a state does not derive its powers from the United States, while the government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States. The jurisdiction and authority of

the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount. So that the cases holding that the same acts committed in a state of the Union may constitute an [355] offense *against the United States and also a distinct offense against the state do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government,—that of the United States.

It may be difficult at times to determine whether the offense for which an officer or soldier is being tried is, in every substantial respect, the same offense for which he had been previously tried. We will not therefore attempt to formulate any rule by which every conceivable case must be solved. But passing by all other questions discussed by counsel, or which might arise on the record, and restricting our decision to the above question of double jeopardy, we adjudge that, consistently with the above act of 1902, and for the reasons stated, the plaintiff in error, a soldier in the Army, having been acquitted of the crime of homicide, alleged to have been committed by him in the Philippines, by a military court of competent jurisdiction, proceeding under the authority of the United States, could not be subsequently tried for the same offense in a civil court exercising authority in that territory. This is sufficient to dispose of the present case.

The judgment must be reversed, and the case remanded with directions to the Supreme Court of the Philippines to order the complaint or information in the Court of First Instance to be dismissed and the plaintiff in error discharged from custody.

It is so ordered.

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[356] *EDWARD H. LOVE, Plff. in Err.,

v.

ANNIE FLAHIVE and Andrew J. Lansing.

(See S. C. Reporter's ed. 356, 357.)

Public lands—homestead—effect of sale before entry.

A party who, while in possession of a tract of public land with intent to enter it as a homestead, makes a sale, which the Land Department treats as an abandonment of his right of entry, cannot, by merely continuing in possession, create a new right of entry as against the party in whose favor he has relinquished his right.

[No. 236.]

Submitted April 29, 1907. Decided May 27, 1907.

IN ERROR to the Supreme Court of the State of Montana to review a judgment which affirmed a judgment of the District Court of Missoula County, in that state, sustaining a demurrer to the complaint in a suit to have the holders of the legal title to real property adjudged to hold it in trust. Petition for rehearing denied.

For former opinion see p. 768.

Mr. C. B. Nolan submitted the cause on petition for rehearing. Mr. Charles Edmund Pew was on the brief.

Mr. Justice Brewer delivered the opinion of the court:

A petition for rehearing calls our attention to a misstatement in the opinion. We said that "it appears from the complaint and exhibits that during the time that these proceedings were pending in the Land Department, Love made a sale to James Rundell," etc. The facts are that in May, 1882, Love settled upon and occupied the tract in controversy with the purpose of entering it as a homestead; that the land was then unsurveyed public land; that it was not surveyed until 1888, and that on January 2, 1889, plaintiff for the first time filed in the land office an application for an entry. It further appears that the sale to Rundell was made in September, 1883, after the original settlement by the plaintiff, while the land was unsurveyed, and before the application to enter. Hence it is not strictly true that while "proceedings were pending in the Land Department, *Love made a sale," [357] for there was nothing of record or on file in that Department until after the entry.

Now the plaintiff contends that, conceding that there was a sale, and that thereby the plaintiff relinquished the right of entry which he had acquired by his settlement, yet thereafter, without having abandoned the possession, he filed his application in the land office; that that application must be considered as an entirely new proceeding, initiated by one in actual possession, desiring to take the land as a homestead, and that it is error, and error of law, to adjudge it vitiated or affected by the prior sale.

Conceding that the effect of a sale prior to the application projects into the case a question of law, we are still of opinion that the decision of the Secretary was right, and that the award of the patent to Mrs. Flahive must be sustained. A sale made by a party who is in possession of a tract of public land with an intent thereafter to enter it as a homestead is equivalent to a relinquishment of his right to enter, and the Department may properly treat him as having no further claims upon the land. He may not sell, and still have the rights of one who has not sold. He

not, by merely continuing in posses-
create a new right of entry as against
ırty in whose favor he has relinquished
ght.

are of opinion, therefore, that the
n 1883 was rightfully held by the De-
ıent to estop the plaintiff from subse-
entry of the land; at least, as against
ho was a purchaser from his vendee.
petition for rehearing is denied.

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*HIGINIO ROMEU, Appt.,
v.
ROBERT H. TODD.

See S. C. Reporter's ed. 358–370.)

endens—in Porto Rico—cautionary no-
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. A suit in equity to enforce a judg-
upon real property which, though
ing upon the public records in the
of another than the judgment debtor,
eged to have been paid for with his
y, resulting in a decree that such judg-
debtor is the owner of the equitable
eneficial title, is within the scope of
orto Rico mortgage law, art. 42, which,
der to protect innocent purchasers
nte lite, provides for the giving of a
nary notice in suits for the owner-
of real property or for the creation,
ation, modification, or extinction of
roperty right.

endens—in Porto Rico—cautionary no-
.

. The local statutory law of real prop-
requiring the giving and recording of
nary notice of a pending suit in order
ect innocent third parties dealing with
ecorded owner is applicable to a suit
ht on the equity side of the United
s district court of Porto Rico, in view
e provision of the act of April 12,
(31 Stat. at L. 79, chap. 191), § 8, con-
ıg in force the local laws not incon-
ıt with the laws of the United States,
ugh, by § 34, the district court of the
d States for Porto Rico is given, in
ion to the ordinary jurisdiction of Fed-
district courts, jurisdiction of all cases
zant in the Federal circuit courts, with
to proceed therein in the same man-
s a circuit court.

[No. 269.]

itted April 19, 1907. Decided May 27, 1907.

EAL from the District Court of the
nited States for the District of Porto
to review a decree dismissing, on de-
murrer, a bill to enjoin a judicial sale of real property. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Mr. F. L. Cornwell submitted the cause for appellant:

In Porto Rico the registry of the property is the only office for the information of prospective purchasers of land as to conditions of title thereto; and one who purchases land in litigation from one of the parties to the suit acquires a good title if, upon due search being made in said registry, nothing is found that will affect the title to be acquired.

2 Galindo & Escosura, Com. Mortg. Legislation of Spain, pp. 426, 427.

Whatever should be recorded, but is not recorded or inscribed, has no effect at all as against third persons.

Ibid. pp. 272, 361.

The equitable doctrine of *lis pendens* being inapplicable to the case at bar, the United States district court should have decided as the insular court would have done in the premises.

Smith v. Gale, 144 U. S. 509, 36 L. ed. 521, 12 Sup. Ct. Rep. 674; Hinde v. Vattier, 5 Pet. 398, 8 L. ed. 168; Union P. R. Co. v. Reed, 25 C. C. A. 389, 49 U. S. App. 233, 80 Fed. 239; Hoge v. Magnes, 29 C. C. A. 564, 56 U. S. App. 500, 85 Fed. 357; Myers v. Reed, 17 Fed. 404; O'Connell v. Reed, 5 C. C. A. 586, 12 U. S. App. 369, 56 Fed. 531; Belding v. Hebard, 43 C. C. A. 308, 103 Fed. 532; 24 Am. & Eng. Enc. Law, p. 1011; Edwards v. Davenport, 4 McCrary, 34, 20 Fed. 763; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Bondurant v. Watson, 103 U. S. 281, 26 L. ed. 447; Vance v. Wesley, 29 C. C. A. 63, 42 U. S. App. 709, 85 Fed. 161; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51, 27 L. ed. 648, 2 Sup. Ct. Rep. 236.

Mr. N. B. K. Pettingill submitted the cause for appellee:

If a litigation pending in any court of the United States within the states had taken the same course as that herein involved, and the same question now brought before the court on this appeal had come from a Federal court in any one of the states, we think there can be no question how it would have been decided, because there seems to have been a uniform line of decisions, from early times, as to the application of the equitable doctrine of *lis pendens*, which, as we understand it, is entirely distinct from the statutory *lis pendens* which is provided for, in many states, in suits at law.

Pom. Eq. Jur. §§ 632, 633; Murray v.

RE.—On the doctrine of *lis pendens*—
otes to Green v. Rick, 2 L.R.A. 48;
on v. Timmerman, 4 L.R.A. 716; Ben-
. Shafer, 7 L.R.A. 812; and Holland v.
n's Sav. Bank, 8 L.R.A. 553.

Ballou, 1 Johns. Ch. 566; Union Trust Co. v. Southern Inland Nav. & Improv. Co. 130 U. S. 565, 32 L. ed. 1043, 9 Sup. Ct. Rep. 606; Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 33 L. ed. 178, 9 Sup. Ct. Rep. 781; Murray v. Lylburn, 2 Johns. Ch. 441; Warren County v. Marcy, 97 U. S. 105, 24 L. ed. 980; Miller v. Sherry, 2 Wall. 237, 17 L. ed. 827; Terrell v. Allison, 21 Wall. 289, 22 L. ed. 634; Lacassagne v. Chapuis, 144 U. S. 119, 36 L. ed. 368, 12 Sup. Ct. Rep. 659.

Congress intended to maintain the distinction between the law and equity sides of the Federal district court of Porto Rico, and the pleading and procedure to be followed on each side.

Rodriguez v. Vivoni, 201 U. S. 371, 50 L. ed. 792, 26 Sup. Ct. Rep. 475; Garrozi v. Dastas, 204 U. S. 64, ante, 369, 27 Sup. Ct. Rep. 224.

The equity jurisdiction of the courts of the United States is derived from the Constitution and the laws of the United States. Their powers and rules of decision are the same in all the states. Their practice is regulated by themselves, and by rules established by the Supreme Court. This court is invested by law with authority to make such rules. In all these respects they are unaffected by state legislation.

Noonan v. Lee (Noonan v. Braley) 2 Black, 499, 17 L. ed. 278.

While the courts of the Union are required by the statutes creating them to accept as rules of decision, in trials at common law, the laws of the several states, except where the Constitution, laws, treaties, and statutes of the United States otherwise provide, their jurisdiction in equity cannot be impaired by the local statutes of the different states in which they sit.

Kirby v. Lake Shore & M. S. R. Co. 120 U. S. 130, 30 L. ed. 569, 7 Sup. Ct. Rep. 430.

State or territorial recording or registry laws have nothing to do with the validity of equitable *lis pendens* and its effects.

Lacassagne v. Chapuis, supra; Stewart v. Wheeling & L. E. R. Co. 53 Ohio St. 151, 29 L.R.A. 438, 41 N. E. 247.

Mr. Justice White delivered the opinion of the court:

Robert H. Todd obtained a judgment in the United States provisional court of Porto Rico, in the year 1900, for the sum of $2,946.05, against Pedro and Juan Agostini, and execution to enforce the same was returned *nulla bona*. Thereupon Todd, in 1901, filed a bill in equity in the United States court for the district of Porto Rico against the judgment debtors (the two Agostinis) and one Ana Merle for the purpose of enforcing the judgment upon certain real property of which Ana Merle stood upon the public records as the owner. The ground was that the property had been paid for with the money of the Agostinis and was hence liable to be applied to their debts. Without further detail it is only necessary to say that the court decreed that a certain parcel of land described in the bill had been purchased by Ana Merle with funds belonging to Pedro Agostini, and said Agostini "was the owner of the equitable and beneficial title of the same." And it was ordered that, to pay the indebtedness to Todd, the property, with the improvements thereon, be sold at public sale by a commissioner appointed for that purpose. Whilst this suit was pending, before decree, the piece of real estate embraced by the decree was sold by Merle to Higinio Romeu, the plaintiff in error. The present bill was filed on behalf of Romeu against Todd to enjoin the sale of this piece of property. The bill alleged the bringing of the Todd suit, the purchase by Romeu pending such suit, the *decree rendered there- [362] in as above stated, and the fact that the decree was about to be executed. It was averred that the purchase by Romeu had been made for an adequate consideration, with the utmost good faith and without knowledge of the pendency of the Todd suit; that the property, since it was bought by Romeu, had been largely improved by him, and that, as no cautionary notice concerning the Todd suit, as authorized and required by the law of Porto Rico, had been put upon the records, the property acquired by Romeu under the circumstances alleged was not subject, in Romeu's hands, to the Todd decree. A temporary restraining order was allowed. The bill was demurred to on two grounds,—first, that it stated no cause of action, and second, that, admitting all its averments to be true, as the property was bought whilst the equity cause was pending, the purchaser took subject to the *lis pendens*. The demurrer was sustained, and, Romeu electing not to plead further, a final decree was made dismissing the bill.

The court below, in its opinion, assumed that, under the local law, a third party in good faith purchasing from or dealing with the registered owner of real estate, without notice in fact of the existence of a pending suit concerning the title to property, was not to be treated by operation of law as constructively notified of the pendency of the suit unless the cautionary notice which the law of Porto Rico required to be put upon the record was given. But, whilst so declaring, it was nevertheless decided that the local rule of real property referred to was not controlling in this case. This ru-

ing was based upon the conception that the constructive notice resulting from a suit in equity in the United States court for Porto Rico was to be imputed, irrespective of the positive requirements of the local law. The court said:

"As this is a proceeding on the equity side of the court it is governed by the principles of equity followed by the Federal courts, as distinguished from suits at law, where local statutes are adopted. As local laws have no binding force upon the United States courts in matters of procedure in [363] equity and *maritime law, the laws of Porto Rico relating to filing of notice of *lis pendens* have therefore no application in this case, and the sufficiency of this bill must be determined by the rules and principles followed in like proceedings in the courts of the United States. Stewart v. Wheeling & L. E. R. Co. 52 Ohio St. 151, 29 L.R.A. 438, 41 N. E. 247."

Proceeding then to apply what is deemed to be the conclusive force of decisions of this court, it was held that the pendency of an equity cause in a court of the United States affecting real property constituted constructive notice as to third parties, and was therefore operative against those dealing with the owner as to such property, in good faith, any rule of state law to the contrary.

In the argument at bar on behalf of the appellee the correctness of the ground upon which the court based its decision is insisted on as follows:

"The main contention of appellant, however, seems to be that even courts of equity of the United States in a state are bound by the statutory provisions for recording a *lis pendens* when such provision has been enacted in such state. But in this contention counsel fail to distinguish between cases of law and cases in equity. . . ."

Nevertheless, in substance, it is contended that, even if the court below was wrong in its reasoning, it was right in its conclusion. This rests on the proposition that the court mistakenly assumed that the local law provided for a notice of the pendency of suit of the character of the Todd case, and protected an innocent purchaser where a notice was not given.

That issue arises, therefore, and as it underlies the question whether the court should have applied the local law, we come first to ascertain the local law concerning notice and its effect.

It appears certain that by the ancient Spanish law the sale or the dismemberment by mortgage of the ownership of real property which was involved in a pending litigation was forbidden. Law 13, title 7, Part. 3; see also Resolution of November 29, 1770, referred to in commentaries upon the Spanish *mortgage legislation by D. [364] Leon Galindo y De Vera, 1903 ed., vol. 2, p. 594. The result was that acts done in violation of the prohibitory law were void, even as to innocent third parties. But, as pointed out by the author just referred to, the prohibition in question was omitted from the Spanish Civil Code, and therefore the right to deal with real property involved in a pending litigation was no longer prohibited. And when the comprehensive system known as the mortgage law came to be adopted, the power of the record owner of real property involved in litigation, to mortgage or contract concerning the same, was not left to the implication resulting from the disappearance of the ancient prohibitions, but was expressly recognized by articles 71 and 107 of the mortgage laws. D. Leon Galindo y De Vera, in his commentaries, considering the provisions of the mortgage law concerning the power of the owner of real property to deal with it *pendente lite*, and of the right of the plaintiff in a suit affecting such property to obtain a cautionary notice, and his duty to record the same in order to affect third parties, points out that these provisions were the natural result of three considerations: respect for the rights of property, regard for the rights of one seeking redress in the courts against such owner, and solicitude for the public interest. Because of the first the owner was not deprived of his right to dispose of his real property merely because a suit relating to the same had been brought against him, but was left free to make contracts concerning the property, if anyone could be found willing to do so, and thus assume the risk of the pending litigation. On account of the second consideration a means was provided for giving a notice by which one who brought suit would be able to secure the results of an ultimate decision in his favor. Because of the third, those dealing in good faith, in reliance on public records, were protected from the risks of pending suits unless the cautionary notice was made and recorded according to the statute.

That the essence of the statute was the protection of innocent third parties dealing with the recorded owner when no *caution- [365] ary notice had been given is obvious. Answering the contrary contention, D. Leon Galindo y De Vera says (p. 192):

"That is not so; if the mortgagor has on the record the ownership of the properties in litigation and those who claim the properties have not made the cautionary notice on the register, and the writing establishing the mortgage does not show that the properties are in litigation, the

debtor can freely mortgage them, and the mortgage will have effect, even when the decision of the case is in favor of the plaintiffs, declaring that the ownership of the properties mortgaged belongs to them."

See articles 71 and 107 of the "Mortgage Law for Cuba, Porto Rico, and the Philippine Islands," War Department translation, 1899, and see also title 2 of the same law, concerning the method of recording instruments and the effect of such record, and title 3, relating to cautionary notices.

Granting that the general result of the local law is as we have just stated it, the contention yet is that the character of the Todd suit and the nature of the relief sought therein caused it to be not within the scope of the mortgage law and the provisions thereof for giving a cautionary notice. This is based upon article 42 of the mortgage law, reading:

"Art. 42. Cautionary notices of their respective interests in the corresponding public registries may be demanded by:

"1. The person who enters suit for the ownership of the real property, or for the creation, declaration, modification, or extinction of any property right. . . ."

And article 91 of the general regulations for the execution of the mortgage law, War Department translation, 1899, as follows:

"The person who brings the action for ownership, referred to in case No. 1 of article 42 of the law, may, at the same time or subsequently, request that a cautionary notice thereof be made, offering to indemnify any damages which may be caused the defendant thereby, should he win the suit."

Now, it is said when the issues in the Todd suit are clearly apprehended, they were not within the purview of the articles [366]*in question, since that suit did not seek to devest Ana Merle of the ownership of the property standing in her name on the public records, but simply to subject such property to the payment of the indebtedness due by the Agostinis to Todd. This, however, assumes that article 42 embraces only suits having for their object the entire devestiture of ownership,—that is, the devestiture of perfect ownership,—whilst the text of the article relied upon not only relates to suits so operating, but also to those which seek the modification "or extinction of any property right." But even if the proposition relied upon might find some color of support in a narrow and technical construction of the provisions of the mortgage law referred to, its unsoundness is, we think, demonstrated by a consideration of other provisions of the law, especially articles 2 and 23 of that law, the first reading as follows:

"In the registries mentioned in the preceding article shall be recorded:

"1. Instruments transferring or declaring ownership of realty, or of property rights thereto.

"2. Instruments by which rights of use and occupancy, emphyteusis, mortgage, annuity (censo), servitudes, and any others by which estates are created, acknowledged, modified, or extinguished."

The second (art. 23) reads as follows:

"The instruments mentioned in articles 2 and 5, which are not duly recorded or entered in the registry, cannot prejudice third persons."

Mark the constructive power of the provision of the second paragraph of article 2, requiring the registry, in order that they may affect third parties, of all acts "by which estates are created, acknowledged, modified, or extinguished" when applied to the words of article 42, providing for the registry of a cautionary notice, not only of all suits for the "ownership of the real property," but likewise of suits brought "for the creation, declaration, modification, or extinction of *any property right*."

Besides, when the purpose of the mortgage law is borne in *mind, it is apparent [367] that the interpretation relied upon would frustrate the very ends which the adoption of the law was intended to subserve.

But, passing this view, it is, we think, clear, that the proposition rests upon a misconception of the true import of the bill in the Todd case. The property stood upon the records, not in the name of the Agostinis, but in the name of Merle. The bill alleged that the Agostinis, and not Merle, owned the property, because it had been bought and paid for by the former. The purpose, therefore, of the suit was to change the recorded title by in effect obtaining a decree placing the property in the name of the real owner. In the very nature of things, under the civil law, the cause of action thus asserted was not merely revocatory (the Actio Pauliana of the Roman law), but was an action to unmask a simulation. It was therefore essentially revendicatory. Bonnafon v. Wiltz, 10 La. Ann. 657; and see the copious list of authorities illustrating the subject, compiled in Hennen's La. Dig. vol. 2, p. 1691, No. 1. The decree rendered conforms to this conclusion. It held Pedro Agostini to be the "owner of the equitable and beneficial title" to the property. It therefore devested the registered owner, Merle, of every essential element of ownership. This is clearly the case, since the *fructus*, the *usus*, and the *abusus* could not be in one who was stripped of all beneficial interest. This becomes more clearly manifest when

it is borne in mind that the civil law prevailing in Porto Rico is oblivious concerning a technical or formal distinction between legal and equitable title. As beyond peradventure, then, the suit and the decree took from the recorded owner the ownership upon which necessarily the innocent third party must have relied, we think it clearly follows that the cautionary notice required by the provisions of the mortgage law was essential to affect the innocent third person.

The remaining question, then, is, Was the local statutory rule of real property, requiring the giving and recording of a cautionary notice of the pending suit in order to affect innocent third parties dealing with [368]the recorded owner, applicable to a *suit brought on the equity side of the United States district court for Porto Rico? Let us assume, for the sake of argument, that the lower court correctly reasoned that an innocent third party would be affected by the constructive notice resulting from the pendency of an equity cause in a circuit court of the United States sitting within a state. Again, let us further assume, for the sake of argument, that it was correctly held that the rule just stated would govern, although there had been no compliance with a statutory rule of property prevailing in such state, requiring the recording of a notice of the pendency of suits affecting real property, in order to make the same operative against innocent third parties. Neither of these concessions, we think, is here controlling. The district court of the United States for Porto Rico is in no sense a constitutional court of the United States, and its authority emanates wholly from Congress under the sanction of the power possessed by that body to govern territory occupying the relation to the United States which Porto Rico does. Now by § 8 of the act commonly known as the Foraker act (31 Stat. at L. 79, chap. 191) it is provided as follows:

"Sec. 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States. . . ."

The provision just quoted, it may be added, is qualified by a proviso repealing enumerated provisions of the local laws concerning marriage, divorce, and other subjects.

Now, as a general proposition, it is clear that, as a result of the relation which Porto Rico occupies to the United States, all the local law of that island has its ultimate sanction in the *lawful exercise by Congress [369] of its legislative authority. So also, as Congress has provided that the local law "not inconsistent or in conflict with the statutory laws of the United States" shall remain in force "until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States," it must follow that the local law of real property prevailing in the island is controlling until changed, as provided by Congress. This being true, we cannot assent to the conclusion that the court of the United States created by Congress had the authority to disregard the local law which Congress, by express legislation, directed to be continued in force. But it is said that the act (§ 34) in providing for the district court of the United States for Porto Rico declared, among other things, that that court shall have, "in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court." From this it is argued that the constructive notice resulting from the equity cause in the district court for Porto Rico must, in the nature of things, be operative against innocent purchasers without reference to the local law prevailing for cautionary notices and registry, if such result would flow from an equity cause pending in a constitutional court of the United States sitting within one of the states. But the proposition begs the question, since it puts out of review the express provision of the act of Congress sanctioning and enforcing the local law, except in so far as Congress had deemed fit to abrogate the same. Considering the manifest intent of Congress, we cannot close our eyes to the fact that that body, in providing a government for Porto Rico, evidently intended to preserve to the people of that island the system of local law to which they had been accustomed; nor can we, consistently with this enlightened purpose, assent to the conclusion that the mere provision of the act by which a court was created to enforce the local law empowered the court so created to set at naught the local law *by disregarding fundamental rules of real [370] property governing in the island, thereby creating confusion and uncertainty, and hence tending to the destruction of the rights of innocent third parties. Especially

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1 Pet. 539, thewson, 2 Watson v. 876, 884; Wait, Act. Orleans, 11 Dall. 386, Co. v. Nes- 469–472; U. S. 198, 86; Street 33 L. ed. ttingly v. 687, 24 L. U. S. 416, 33; Stock- 11. 323, 22 o. v. Rey- 3, 22 Sup.

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A voidable assessment may be made valid because the legislature has dispensed with some formality which by prior statute had been made necessary; but it cannot, under the guise of a tax, ratify and legalize a mere tortious seizure,—the act "of the strong arm."

Cromwell v. MacLean, 123 N. Y. 491, 25 N. E. 932.

The old cases, even if not otherwise easily distinguishable, can have no relevancy to the question at bar.

Bartemeyer v. Iowa, 18 Wall. 129, 140, 21 L. ed. 929, 933; Holden v. Hardy, 169 U. S. 366, 382, 42 L. ed. 780, 787, 18 Sup. Ct. Rep. 383.

Neither the Federal government at any time, nor a state since the 14th Amendment, can take property without due process under the guise of the taxing power.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Wight v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; Tonawanda v. Lyon, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 618.

A wholly extra-jurisdictional act, such as was the exaction in this case, cannot be given retroactive force so as to devest property.

People ex rel. Hays v. Brooklyn, 71 N. Y. 496; People ex rel. Nostrand v. Wilson, 119 N. Y. 515, 23 N. E. 1064; Re Pell, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; State, App. Prosecutor, v. Stockton, 61 N. J. L. 523, 39 Atl. 921; Conway v. Cable, 37 Ill. 90, 87 Am. Dec. 240; Hamilton, Special Assessments, §§ 816 et seq.

The section of the act of June 30, 1906, under consideration, is in substance and effect an *ex post facto* law, prohibited by article 1, § 9, of the Constitution.

Cummings v. Missouri, 4 Wall. 277, 325, 18 L. ed. 356, 363; Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; Ogden v. Saunders, 12 Wheat. 213, 266, 6 L. ed. 606, 624; Burgess v. Salmon, 97 U. S. 381, 24 L. ed.

debtor can freely mortgage them, and the mortgage will have effect, even when the decision of the case is in favor of the plaintiffs, declaring that the ownership of the properties mortgaged belongs to them."

See articles 71 and 107 of the "Mortgage Law for Cuba, Porto Rico, and the Philippine Islands," War Department translation, 1899, and see also title 2 of the same law, concerning the method of recording instruments and the effect of such record, and title 3, relating to cautionary notices.

Granting that the general result of the local law is as we have just stated it, the contention yet is that the character of the Todd suit and the nature of the relief sought therein caused it to be not within the scope of the mortgage law and the provisions thereof for giving a cautionary notice. This is based upon article 42 of the mortgage law, reading:

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But, passing this view, it is, we think, clear, that the proposition rests upon a misconception of the true import of the bill in the Todd case. The property stood upon the records, not in the name of the Agostinis, but in the name of Merle. The bill alleged that the Agostinis, and not Merle, owned the property, because it had been bought and paid for by the former. The purpose, therefore, of the suit was to change the recorded title by in effect obtaining a decree placing the property in the name of the real owner. In the very nature of things, under the civil law, the cause of action thus asserted was not merely revocatory (the Actio Pauliana of the Roman law), but was an action to unmask a simulation. It was therefore essentially revendicatory. Bonnafon v. Wiltz, 10 La. Ann. 657; and see the copious list of authorities illustrating the subject, compiled in Hennen's La. Dig. vol. 2, p. 1081, No. 1. The decree rendered conforms to this conclusion. It held Pedro Agostini to be the "owner of the equitable and beneficial title" to the property. It therefore devested the registered owner, Merle, of every essential element of ownership. This is clearly the case, since the *fructus*, the *usus*, and the *abusus* could not be in one who was stripped of all beneficial interest. This becomes more [illegible]ly manifest when

it is borne in mind that the civil law prevailing in Porto Rico is oblivious concerning a technical or formal distinction between legal and equitable title. As beyond peradventure, then, the suit and the decree took from the recorded owner the ownership upon which necessarily the innocent third party must have relied, we think it clearly follows that the cautionary notice required by the provisions of the mortgage law was essential to affect the innocent third person.

The remaining question, then, is, Was the local statutory rule of real property, requiring the giving and recording of a cautionary notice of the pending suit in order to affect innocent third parties dealing with the recorded owner, applicable to a *suit brought on the equity side of the United States district court for Porto Rico? Let us assume, for the sake of argument, that the lower court correctly reasoned that an innocent third party would be affected by the constructive notice resulting from the pendency of an equity cause in a circuit court of the United States sitting within a state. Again, let us further assume, for the sake of argument, that it was correctly held that the rule just stated would govern, although there had been no compliance with a statutory rule of property prevailing in such state, requiring the recording of a notice of the pendency of suits affecting real property, in order to make the same operative against innocent third parties. Neither of these concessions, we think, is here controlling. The district court of the United States for Porto Rico is in no sense a constitutional court of the United States, and its authority emanates wholly from Congress under the sanction of the power possessed by that body to govern territory occupying the relation to the United States which Porto Rico does. Now by § 8 of the act commonly known as the Foraker act (31 Stat. at L. 79, chap. 191) it is provided as follows:

"Sec. 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States. . . ."

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Now, as a general proposition, it is clear that, as a result of the relation which Porto Rico occupies to the United States, all the local law of that island has its ultimate sanction in the *lawful exercise by Congress [369] of its legislative authority. So also, as Congress has provided that the local law "not inconsistent or in conflict with the statutory laws of the United States" shall remain in force "until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States," it must follow that the local law of real property prevailing in the island is controlling until changed, as provided by Congress. This being true, we cannot assent to the conclusion that the court of the United States created by Congress had the authority to disregard the local law which Congress, by express legislation, directed to be continued in force. But it is said that the act (§ 34) in providing for the district court of the United States for Porto Rico declared, among other things, that that court shall have, "in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court." From this it is argued that the constructive notice resulting from the equity cause in the district court for Porto Rico must, in the nature of things, be operative against innocent purchasers without reference to the local law prevailing for cautionary notices and registry, if such result would flow from an equity cause pending in a constitutional court of the United States sitting within one of the states. But the proposition begs the question, since it puts out of review the express provision of the act of Congress sanctioning and enforcing the local law, except in so far as Congress had deemed fit to abrogate the same. Considering the manifest intent of Congress, we cannot close our eyes to the fact that that body, in providing a government for Porto Rico, evidently intended to preserve to the people of that island the system of local law to which they had been accustomed; nor can we, consistently with this enlightened purpose, assent to the conclusion that the mere provision of the act by which a court was created to enforce the local law empowered the court so created to set at naught the local law *by disregarding fundamental rules of real [370] property governing in the island, thereby creating confusion and uncertainty, and hence tending to the destruction of the rights of innocent third parties. Especially

is this conclusion rendered necessary when a consideration, previously adverted to, is again called to mind; that is, that all the local law of Porto Rico is within the legislative control of Congress. The considerations which we have thus expounded are illustrated in various other aspects by previous rulings concerning the construction and import of the Foraker act. Crowley v. United States, 194 U. S. 461, 48 L. ed. 1075, 24 Sup. Ct. Rep. 731; Rodriguez v. United States, 198 U. S. 156, 49 L. ed. 994, 25 Sup. Ct. Rep. 617; Serralles v. Esbri, 200 U. S. 103, 50 L. ed. 391, 26 Sup. Ct. Rep. 176; American R. Co. v. Castro, 204 U. S. 453, ante, 564, 27 Sup. Ct. Rep. 466.

The decree of the District Court for Porto Rico must be reversed, and the cause remanded for further proceedings conformable to this opinion.

UNITED STATES, Appt.,
v.
CONRAD HEINSZEN and Gustav Brockmann, Trading as Partners under the Firm Name of C. Heinszen & Company.

(See S. C. Reporter's ed. 370–392.)

Constitutional law—delegation of power.

1. Congress, in dealing with the Philippine Islands, may delegate legislative authority to such agencies as it may select.

Duties—ratification of illegal collection.

2. Aside from any question of intervening rights, Congress could, by the act of June 30, 1906 (34 Stat. at L. 636, chap. 3912), ratify the illegal collection of duties on imports to the Philippine Islands which were levied under the President's order of July 12, 1898, between the dates of the ratification of the treaty of peace with Spain and the passage of the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369), enacting a tariff of duties for those islands.

Constitutional law—due process of law—ratification of illegal duties—effect of pending action.

3. The ratification by Congress by the act of June 30, 1906, of the illegal collection of duties on imports to the Philippine Islands which were levied under the President's order of July 12, 1898, between the dates of the ratification of the treaty of peace with Spain and the passage of the act of July 1, 1902, enacting a tariff of duties for those islands, does not deprive importers of their property without due process of law, in violation of U. S. Const., 5th Amend., even though they had commenced an action to recover the amount of the duties so collected before the ratifying statute was enacted.

[No. 580.]

Argued April 9, 10, 1907. Decided May 27, 1907.

APPEAL from the Court of Claims to review a judgment for the recovery of duties illegally collected on imports to the Philippine Islands which were levied under the President's order of July 12, 1898, between the dates of the ratification of the treaty of peace with Spain and the passage of the statute enacting the tariff of duties for those islands. Reversed.

The facts are stated in the opinion.

Attorney General Bonaparte, Solicitor General Hoyt, and Assistant Attorney General Van Orsdel argued the cause, and, with Mr. George M. Anderson, filed a brief for appellant:

The territories are under exclusive control of Congress.

Dorr v. United States, 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. Rep. 808; American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 243; First Nat. Bank v. Yankton County, 101 U. S. 129, 25 L. ed. 1046.

The act of Congress under consideration is not affected by the revenue clauses of the Constitution.

Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770; Dooley v. United States, 183 U. S. 151, 46 L. ed. 128, 22 Sup. Ct. Rep. 62.

The obligation of contracts is not impaired.

15 Am. & Eng. Enc. Law, 2d ed. pp. 1002, 1045.

Retroactive laws may be enacted where they are not *ex post facto* and do not interfere with vested rights to the extent of impairing the obligation of contracts.

Grim v. Weissenberg School District, 57 Pa. 433, 98 Am. Dec. 237; 2 Cooley, Tax. p. 1403; Iowa Railroad Land Co. v. Soper, 39 Iowa, 112; Boardman v. Beckwith, 19 Iowa, 292; Nottage v. Portland, 35 Or. 538, 76 Am. St. Rep. 513, 58 Pac. 883; Hardman v. Downer, 39 Ga. 436; Wilson v. Hardesty, 1 Md. Ch. 66; Sandusky City Bank v. Wilbor, 7 Ohio St. 481; Charles

NOTE.—On delegated authority—see note to Bradshaw v. Lankford, 11 L.R.A. 582.

On the power of the legislature to pass curative statutes—see note to Steele County v. Erskine, 39 C. C. A. 180.

As to the validity of retrospective statutes—see notes to Otoe County v. Baldwin, 28 L. ed. U. S. 331; Ex parte Medley, 33 L. ed. U. S. 835; and Barnitz v. Beverly, 41 L. ed. U. S. 94.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

River Bridge v. Warren Bridge, 11 Pet. 539, 9 L. ed. 820; Satterlee v. Matthewson, 2 Pet. 380, 413, 7 L. ed. 458, 469; Watson v. Mercer, 8 Pet. 88, 110, 8 L. ed. 876, 884; Butler v. Palmer, 1 Hill, 324; 4 Wait, Act. & Def. p. 506; Hyde v. New Orleans, 11 La. Ann. 191; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Baltimore & S. R. Co. v. Nesbit, 10 How. 395-401, 13 L. ed. 469-472; Comanche County v. Lewis, 133 U. S. 198, 33 L. ed. 604, 10 Sup. Ct. Rep. 286; Street v. United States, 133 U. S. 299, 33 L. ed. 631, 10 Sup. Ct. Rep. 309; Mattingly v. District of Columbia, 97 U. S. 687, 24 L. ed. 1098; Utter v. Franklin, 172 U. S. 416, 43 L. ed. 498, 19 Sup. Ct. Rep. 183; Stockdale v. Atlantic Ins. Co. 20 Wall. 323, 22 L. ed. 348; Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176.

Messrs. **Frederic R. Coudert** and **Henry M. Ward** argued the cause, and, with Messrs. John G. Carlisle and Paul Fuller, filed a brief for appellees:

Congress has not the power to ratify the collection of moneys exacted without warrant of law under the circumstances disclosed by the record now before the court.

Dooley v. United States, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762; Lincoln v. United States, 197 U. S. 419, 429, 49 L. ed. 816, 819, 25 Sup. Ct. Rep. 455, 202 U. S. 484, 50 L. ed. 1117, 26 Sup. Ct. Rep. 728; De Lima v. Bidwell, 182 U. S. 1, 199, 200, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743.

The act of June 30, 1906, is not valid, since it attempts to transfer claimants' property to the United States without due process of law, and to appropriate it to the public use without compensation.

United States v. Lee, 106 U. S. 196, 219, 27 L. ed. 171, 181, 1 Sup. Ct. Rep. 240; Sinking Fund Cases, 99 U. S. 710, 738, 25 L. ed. 496, 508; Dent v. West Virginia, 129 U. S. 114, 124, 32 L. ed. 623, 626, 9 Sup. Ct. Rep. 231; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 235, 41 L. ed. 979, 984, 17 Sup. Ct. Rep. 581.

Taxation assumes an equivalent; but here the exaction was made because of the act of bringing the goods from the United States; but this act having been performed and completed several years ago and at a time when such act was the common, untrammeled, and untaxed right of all who chose to engage in the Philippine trade, upon what logical or legal theory can it now be taxed? The property so imported has long since ceased to exist so as to be ascertainable as property. Clearly, an attempt now to tax this property would be invalid as without basis. There exists nothing upon which the statute would operate. It is consequently not a tax, but an arbitrary transfer of property, taken by "the strong hand."

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 19, 38 L. ed. 55, 64, 14 Sup. Ct. Rep. 240; Auffm'ordt v. Rasin, 102 U. S. 620, 622, 26 L. ed. 262, 263; Sturges v. Carter, 114 U. S. 511, 519, 29 L. ed. 240, 243, 5 Sup. Ct. Rep. 1014; United States v. Burr, 159 U. S. 78, 84, 85, 40 L. ed. 82, 84, 15 Sup. Ct. Rep. 1002.

A voidable assessment may be made valid because the legislature has dispensed with some formality which by prior statute had been made necessary; but it cannot, under the guise of a tax, ratify and legalize a mere tortious seizure,—the act "of the strong arm."

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Bartemeyer v. Iowa, 18 Wall. 129, 140, 21 L. ed. 929, 933; Holden v. Hardy, 169 U. S. 366, 382, 42 L. ed. 780, 787, 18 Sup. Ct. Rep. 383.

Neither the Federal government at any time, nor a state since the 14th Amendment, can take property without due process under the guise of the taxing power.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Wight v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; Tonawanda v. Lyon, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 615.

A wholly extra-jurisdictional act, such as was the exaction in this case, cannot be given retroactive force so as to devest property.

People ex rel. Hays v. Brooklyn, 71 N. Y. 496; People ex rel. Nostrand v. Wilson, 119 N. Y. 515, 23 N. E. 1064; Re Pell, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; State, App. Prosecutor, v. Stockton, 61 N. J. L. 523, 39 Atl. 921; Conway v. Cable, 37 Ill. 90, 87 Am. Dec. 240; Hamilton, Special Assessments, §§ 816 et seq.

The section of the act of June 30, 1906, under consideration, is in substance and effect an *ex post facto* law, prohibited by article 1, § 9, of the Constitution.

Cummings v. Missouri, 4 Wall. 277, 325, 18 L. ed. 356, 363; Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; Ogden v. Saunders, 12 Wheat. 213, 266, 6 L. ed. 606, 624; Burgess v. Salmon, 97 U. S. 381, 24 L. ed.

1104; United States v. Burr, 159 U. S. 78, 84, 40 L. ed. 82, 84, 15 Sup. Ct. Rep. 1002.

Messrs. Hilary A. Herbert and Benjamin Micou filed a brief for certain claimants having interests similar to those of appellees:

The President's authority, as Commander in Chief, to exact duties in the Philippine Islands upon imports from the United States, ceased with the ratification of the treaty of peace, and the right to free entry of such goods then began and continued until Congress passed a tariff law for the Philippines.

Dooley v. United States, 182 U. S. 235, 45 L. ed. 1082, 21 Sup. Ct. Rep. 762; Warner, B. & Co. v. United States, 197 U. S. 428, 49 L. ed. 818, 25 Sup. Ct. Rep. 455, 202 U. S. 484, 50 L. ed. 1117, 26 Sup. Ct. Rep. 728.

This status makes it the law of this case that the action of the authorities in levying these payments was, at the time of exaction, *ipso facto* void and without color of law; and the right of the claimant to recover for such collections immediately vested and became at once complete and perfect in every respect.

Such right of action was property of the claimant, just as much so as money in bank, or land to which he had a fee-simple title, and could not be taken from him by legislative fiat.

Darlington, Pers. Prop. 107; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 13, 38 L. ed. 62, 14 Sup. Ct. Rep. 240.

Congress could not legalize and ratify the wrongful taking and holding by the United States of this claimant's property. If it could, then claimant's property could be taken without due process of law and appropriated to public use without just compensation, and the legislature could exercise the powers vested by the Constitution exclusively in the judiciary.

Calder v. Bull, 3 Dall. 388, 389, 1 L. ed. 649, 650; Koshkonong v. Burton, 104 U. S. 668, 26 L. ed. 886.

The result of the act here being construed would be to take the claimant's property and give it to the United States, and to do this by a legislative fiat.

McDaniel v. Correll, 19 Ill. 228, 68 Am. Dec. 587; Richards v. Rote, 68 Pa. 256; Pryor v. Downey, 50 Cal. 406, 19 Am. Rep. 656; Israel v. Arthur, 7 Colo. 11, 1 Pac. 438; Forster v. Forster, 129 Mass. 561; Lambertson v. Hogan, 2 Pa. 25; Moser v. White, 29 Mich. 60; Reis v. Graff, 51 Cal. 90; Ervine's Appeal, 16 Pa. 266, 55 Am. Dec. 499; Greenough v. Greenough, 11 Pa. 495, 51 Am. Dec. 567; De Chastellux v. Fairchild, 15 Pa. 21, 53 Am. Dec. 570; Lincoln Bldg. & Sav. Asso. v. Graham, 7 Neb. 180.

The right of these goods to free entry was acquired by treaty, and Congress has no power to do away with that right save by itself fixing a tariff law for the Philippines under the authority conferred upon it by the Constitution.

Jones v. Meeham, 175 U. S. 32, 44 L. ed. 61, 20 Sup. Ct. Rep. 1.

Congress cannot ratify what in the first place it could not authorize.

Cooley, Const. Lim. 7th ed. 163; Marshall Field & Co. v. Clark, 143 U. S. 659, 692, 36 L. ed. 294, 309, 12 Sup. Ct. Rep. 495.

Before the passage of the act in question, this court had declared such a law to be unconstitutional.

De Lima v. Bidwell, 182 U. S. 199, 45 L. ed. 1057, 21 Sup. Ct. Rep. 743.

Mr. Justice White delivered the opinion of the court:

In an endeavor to clarify the consideration of this controversy *we invert some-[377] what the order in which the facts have been stated in the findings below, and refer to previous rulings of this court pertinent to the subject in hand, besides supplementing the same by a reference to relevant matters of public history, of which we take judicial notice.

After the Philippine Islands came under the military control of the United States, the President, on July 12, 1898, issued an order providing for the enforcement by the military power in those islands of a system of tariff duties. This order, promulgated by the Secretary of War, was accompanied with an enumeration of the tariff proposed, and regulations for the collection of the same. However, for causes which need not be referred to, the tariff in question was subsequently modified, and did not go into operation until November, 1898.

The duties imposed by this tariff were levied on goods coming into the Philippine Islands, whether from the United States or other countries. This tariff was in force when the treaty of peace [30 Stat. at L. 1754] was signed (December 10, 1898), when the treaty was ratified (April 11, 1899), and was continued by the Philippine commission appointed by the President in April, 1900. Indeed, the civil government, as established in the islands by the President, either in virtue of his inherent authority or as a result of the power recognized and conferred by the act of Congress approved March 2, 1901 (31 Stat. at L. 910, chap. 803), continued the original tariff in force, except as to some modifications not material to be noticed, and formulated its provisions in the shape of a legislative act entitled "An Act

to Revise and Amend the Tariff Laws of the Philippine Archipelago. And this tariff was in force in March, 1902, when it was expressly approved and continued by Congress. (32 Stat. at L. 54, chap. 140, U. S. Comp. Stat. Supp. 1905, p. 388.)

In May, 1901, the cases of De Lima v. Bidwell and Dooley v. United States were by this court decided. 182 U. S. 1, 222, 45 L. ed. 1041, 1074, 21 Sup. Ct. Rep. 743, 762. The first case involved the right to recover duties paid under protest to the collector of the port of New York upon sugar brought into the United States from the island of Porto Rico during the autumn of 1899, and [subsequent to *the cession of the island. The second case involved the right to recover the amount of certain duties on goods carried into Porto Rico from the United States between July 6, 1898, and May 1, 1900, the duties in question having been levied by authority of the general in command of the army of occupation or subsequently by order of the President as commander in chief. In the first case (De Lima v. Bidwell) it was decided that, as the effect of the ratification of the treaty was to take the island of Porto Rico out of the category of foreign territory, within the meaning of that word as used in existing tariff laws of the United States, no right remained to enforce, against goods coming from Porto Rico into the United States, the previously enacted tariff of duties, although, considering the terms of the treaty and the relation of the island to the United States, Congress had power to impose a tariff on goods coming from that island into the United States. As a corollary of the doctrine announced in De Lima v. Bidwell, in the second case (Dooley v. United States) it was held that whilst the President, as commander in chief, had authority to impose tariff duties in Porto Rico on goods coming into that country from the United States prior to the ratification of the treaty, no such executive power existed after that ratification. It was consequently held that none of the duties paid prior to the ratification of the treaty could be recovered, whilst those paid subsequently could be.

In the following year (December 2, 1901) another case, entitled Dooley v. United States, was decided. 183 U. S. 151, 46 L. ed. 128, 22 Sup. Ct. Rep. 62. That case involved the validity of tariff duties levied in Porto Rico on goods brought into that island from the United States, the duties in question having been imposed after the ratification of the treaty, and in and by virtue of the act of Congress known as the Foraker act. Applying the principles announced in the previous cases just referred to, it was held that the duties were lawful because, although collected after the ratification, they were imposed not simply by virtue of the authority of the President, acting under *the [380] military power, but in conformity to a valid act of Congress.

And on the same day with the foregoing the case of Fourteen Diamond Rings v. United States (The Diamond Rings) was decided. 183 U. S. 176, 46 L. ed. 138, 22 Sup. Ct. Rep. 59. That case involved the validity of tariff duties levied on diamond rings brought from the Philippine Islands into the United States. Adhering to the doctrines settled by the prior rulings, it was held that, as the Philippine Islands, by the ratification of the treaty, had ceased to be foreign within the meaning of the tariff laws, the imposition of the duties complained of was unlawful. In the course of the opinion the effect of the treaty as applied in the previous cases to Porto Rico was pointed out, and the status of the Philippine Islands in virtue of the treaty was, in effect, held to be controlled by the former decisions.

In April, 1905, the two cases of Lincoln v. United States and Warner, B. & Co. v. United States were by this court decided. 197 U. S. 419, 49 L. ed. 816, 25 Sup. Ct. Rep. 455. The cases came here, one on error to the district court of the United States for the southern district of New York, and the other by appeal from the court of claims. The one (Lincoln Case) was commenced on March 29, 1902; the other (Warner, B. & Co. Case) on January 17, 1902. In both cases recovery from the United States was sought of the amount of duty paid upon goods taken from the United States into the Philippine Islands after the ratification of the treaty with Spain, and before the passage of the act of Congress of March 8, 1902. Reversing the judgments which had been rendered below in both cases in favor of the United States, it was declared that there was nothing in the situation of the Philippine Islands which took that territory out of the reach of the doctrine announced in the previous cases which we have reviewed, and it was therefore decided that the President was without power, after the ratification of the treaty, in the absence of express authority from Congress, to impose the tariff duties in question. A contention on the part of the United States that Congress, by the 2d section of the act approved July 1, 1902 (entitled "An Act *Temporarily [381] to Provide for the Administration of the Affairs of Civil Government in the Philippine Islands, and for Other Purposes") [32 Stat. at L. 691, chap. 1369], had ratified the action of the President in imposing and collecting the duties in controversy, therefore no recovery could be had, was

held to be unfounded, for grounds stated in the opinion, to which we shall hereafter advert. The case was heard upon rehearing, and in a decision announced on May 28, 1906, the views previously entertained by the court were reiterated and adhered to. 202 U. S. 484, 50 L. ed. 1117, 26 Sup. Ct. Rep. 728. In the month following (June, 1906) Congress passed an act containing a provision which reads as follows (34 Stat. at L. 636, chap. 3912):

"That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eight, nineteen hundred and two, at all ports and places in said islands, upon all goods, wares, and merchandise imported into said islands from the United States, or from foreign countries, or exported from said islands, are hereby legalized and ratified, and the collection of all such duties prior to March eight, nineteen hundred and two, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized and directed."

Now this case was commenced after the decision in the Fourteen Diamond Rings, to recover the amount of tariff duties exacted in the Philippine Islands on merchandise brought from the United States, the duties having been collected under the authority of the order of the President after the ratification of the treaty, but before the time when Congress, by §.1 of the act of March 8, 1902, had enacted tariff duties for the Philippine Islands. The case was pending in the court of claims when the Lincoln and Warner, B. & Co. Cases were decided by this court. It was found by the court below that the military officers of the United States collected the duties and paid over the amount thereof to the treasurer of the Philippine Islands, and that the money was disbursed [382] for the expenses of that *government without going into the Treasury of the United States. Considering that the original illegality of the duties complained of was established by the previous decisions of this court, and that the act of Congress of June 30, 1906, ratifying the collection of duties, was beyond the power of Congress to enact, the court below rendered judgment against the United States for the amount of duties paid Ct. Cl.

Applying the doctrine settled by this court in the cases to which we have referred, concerning the power to levy tariff duties under the authority of the President, on goods taken from the United States into Porto Rico and the Philippine Islands, or brought into the United States from either of such countries subsequent to the ratification of the treaty, and prior to the levy by Congress of tariff duties, it is obvious that the court below correctly held that such tariff exactions were illegal. It follows, therefore, that the only question open for consideration is whether the court below erred in refusing to give effect to the act of Congress of June 30, 1906, which ratified the collection of the duties levied under the order of the President.

As the text of the act of Congress is unambiguous, and manifests, as explicitly as can be done, the purpose of Congress to ratify, the case comes to the simple question whether Congress possessed the power to ratify which it assumed to exercise. When the controversy is thus reduced to its ultimate issue we think the error committed by the court below, both in reason and authority, is readily demonstrable.

That where an agent, without precedent authority, has exercised, in the name of a principal, a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement. That the power of ratification as to matters within their authority may be exercised by Congress, state governments, or municipal corporations, is also elementary. We shall not stop to review the whole subject, or cite the numerous cases contained in the books dealing with *the matter, but content our- [383] selves with referring to two cases as to the power of Congress, which are apposite and illustrative. In Hamilton v. Dillin, 21 Wall. 73, 22 L. ed. 528, the facts were as follows: During the Civil War the Secretary of the Treasury, with the sanction of the President, adopted rules and regulations for granting permits to trade between the belligerent lines. One of these rules exacted the payment of a contribution, styled a fee, of 4 cents a pound on cotton purchased. Hamilton, having taken a permit and paid Dillin, surveyor of the port of Nashville, Tennessee, under the regulations, a sum of money for a permit to trade in cotton, sued to recover the same as having been illegally exacted. In deciding the case (p. 88, L. ed. p. 531) the court came to consider whether "the action of the Executive was authorized, or, if not originally authorized, was confirmed by Congress." Both these questions were determined in the affirmative. When the court came to consider the legislation relied upon as having confirmed the acts of the President in establishing the regulations in question, after stating the same the court declared: "We are also of opinion that the act of July 2, 1864 [13 Stat.

at L. 375, chap. 225], recognized and confirmed the regulations in question." Mattingly v. District of Columbia, 97 U. S. 687, 24 L. ed. 1098, concerned the validity of an act of Congress in effect confirming the doings of the board of public works of the District of Columbia touching the improvement of streets and roads, and ratifying certain void assessments for street improvements. The court said (p. 690, L. ed. p. 1099):

"We do not propose to inquire whether the charges of the bill are well founded. Such an inquiry can have no bearing upon the case as it now stands; for were it conceded that the board of public works had no authority to do the work that was done at the time when it was done, and consequently no authority to make an assessment of a part of its costs upon the complainants' property, or to assess in the manner in which the assessment was made, the concession would not dispose of the case, or establish that the complainants have a right to the equitable relief for which they pray. [384] There has been congressional *legislation since 1872, the effect of which upon the assessments is controlling. There were also acts of the legislative assembly of the District, which very forcibly imply a confirmation of the acts and assessments of the board of which the bill complains. If Congress or the legislative assembly had the power to commit to the board the duty of making the improvements, and [the power] to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized. And the ratification, if made, was equivalent to an original authority, according to the Maxim, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.* Under the Constitution Congress had power to exercise exclusive legislation in all cases whatsoever over the District, and this includes the power of taxation. Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257. Congress may legislate within the District, respecting the people and property therein, as may the legislature of any state over any of its subordinate municipalities. It may therefore cure irregularities, and confirm proceedings which, without the confirmation, would be void, because unauthorized, provided such confirmation does not interfere with intervening rights."

It is then evident, speaking generally, both on principle and authority, that Congress had the power to pass the ratifying act of June 30, 1906, and that that act bars the plaintiff's right to recover, unless, by the application of some exception, this case is taken out of the operation of the general rule. And this brings us to consider the several propositions relied upon at bar to establish that such is the case.

First. Whilst it is admitted that Congress had the power to levy tariff duties on goods coming into the United States from the Philippine Islands or coming into such islands from the United States after the ratification of the treaty, it is yet urged that, as that body was without authority to delegate to the President the legislative power of prescribing a tariff of duties, it hence could not, by ratification, make valid the exercise by the President of a legislative authority which could not have *been dele- [385] gated to him in the first instance. But the premise upon which this proposition rests presupposes that Congress, in dealing with the Philippine Islands, may not, growing out of the relation of those islands to the United States, delegate legislative authority to such agencies as it may select,—a proposition which is not now open for discussion. Dorr v. United States, 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. Rep. 808.

Second. As the duties collected were illegal, it is insisted that, for the purpose of testing the validity of the act of Congress, the fact of such collection must be put out of view, and the act ratifying the exaction must be treated as if it were solely an original exercise by Congress of the taxing power. This being done, it is said, reduces the case to the inquiry, had Congress power, years after goods which were entitled to free entry had been brought into the Philippine Islands, to retroactively impose tariff duties upon the consummated act of bringing the goods into that country? But the proposition begs the question for decision, by shutting out from view the potential fact that when the goods were brought into the Philippine Islands there was a tariff in existence under which duties were exacted in the name of the United States. Indeed, the contention goes further even than this, since it entirely disregards the important consideration that, although the duties were illegally exacted, the illegality was not the result of an inherent want of power in the United States to have authorized the imposition of the duties, but simply arose from the failure to delegate to the official the authority essential to give immediate validity to his conduct in enforcing the payment of the duties. And when these misconceptions are borne in mind it results that the unsoundness of the proposition relied upon is demonstrated by the application of the elementary principle of ratification to which we have previously referred. Moreover, the fallacy which the proposition involves becomes yet more obvious when it is observed that the contention cannot even

be formulated without misstating the nature of the act of Congress; in other words, without treating that act as retro-
[386] spective legislation *enacting a tariff, when, on its very face, the act is but an exercise of the conceded power dependent upon the law of agency to ratify an act done on behalf of the United States, which the United States could have originally authorized.

Third. It is urged that the ratifying statute cannot be given effect without violating the 5th Amendment to the Constitution, since to give efficacy to the act would deprive the claimants of their property without due process of law, or would appropriate the same for public use without just compensation. This rests upon these two contentions: It is said that the money paid to discharge the illegally exacted duties after payment, as before, "justly and equitably belonged" to the claimants, and that the title thereto continued in them as a vested right of property. It is consequently insisted that the right to recover the money could not be taken away without violating the 5th Amendment, as stated. But here, again, the argument disregards the fact that when the duties were illegally exacted in the name of the United States Congress possessed the power to have authorized their imposition in the mode in which they were enforced, and hence, from the very moment of collection, a right in Congress to ratify the transaction, if it saw fit to do so, was engendered. In other words, as a necessary result of the power to ratify, it followed that the right to recover the duties in question was subject to the exercise by Congress of its undoubted power to ratify. To hold to the contrary would be to say that whilst the unauthorized act of an officer done on behalf of the United States was subject to ratification by the United States, yet, if the officer acted without authority, the act, when performed, annihilated the power to ratify; that is, that the very condition which engendered the power destroyed it.

But if it be conceded that the claim to a return of the moneys paid in discharge of the exacted duties was, in a sense, a vested right, it in principle, as we have already observed, would be but the character of right referred to by Kent in his Commentaries, where, in treating of the validity of statutes retroactively operating on certain classes of rights, it is said (vol. 2, pp. 415, 416):

[387] *"The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced. Goshen v. Stonington, 4 Conn. 209, 10 Am. Dec. 121; Wilkinson v. Leland, 2 Pet. 627, 7 L. ed. 542; Langdon v. Strong, 2 Vt. 234; Watson v. Mercer, 8 Pet. 88, 8 L. ed. 876; 3 Story, Const. 267."

Nor does the mere fact that, at the time the ratifying statute was enacted, this action was pending for the recovery of the sums paid, cause the statute to be repugnant to the Constitution. The mere commencement of the suit did not change the nature of the right. Hence again, if it be conceded that the capacity to prosecute the pending suit to judgment was, in a sense, a vested right, certainly also the power of the United States to ratify was, to say the least, a right of as high a character. To arrogate to themselves the authority to divest the right of the United States to ratify is, then, in reason, the assumption upon which the asserted right of the claimants to recover must rest.

Considering how far the bringing of actions would operate to deprive government of the power to enact curative statutes which, if the actions had not been brought, would have been unquestionably valid, Cooley, in his Constitutional Limitations, says (7th ed. p. 543):

"Nor is it important, in any of the cases to which we have referred, that the legislative act which cures the irregularity, defect, or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suit vests in a party no right to a particular decision (Bacon v. Callender, 6 Mass. 303; Butler v. Palmer, 1 Hill, 324; Cowgill v. Long, 15 Ill. 202; Miller v. Graham, 17 Ohio St. 1; State v. Squires, 26 Iowa, 340; Patterson v. Philbrook, 9 Mass. 151); and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered (Watson v. Mercer, 8 Pet. 88, 8 L. ed. 876; Mather v. Chapman, 6 Conn. 54; People ex rel. Bristol v. Ingham County, 20 Mich. 95; Satterlee v. Matthewson, 16 *Serg. & R. 169, and 2 Pet. [illegible] 380, 7 L. ed. 458; Excelsior Mfg. Co. v. Keyser, 62 Miss. 155; Phenix Ins. Co. v. Pollard, 63 Miss. 641; McLane v. Bean, 70 Iowa, 752, 30 N. W. 478; Johnson v. Richardson, 44 Ark. 365)."

And the following cases, in various forms, illustrate the application of the principle: United States v. Morris, 10 Wheat. [illegible], 6 L. ed. 314; Grim v. Weissenberg School District, 57 Pa. 433, 438, 98 Am. Dec. [illegible]; Chester v. Black, 132 Pa. 568, 6 L.R.A. [illegible], 19 Atl. 276; Price v. Huey, 22 Ind. [illegible]; Welch v. Wadsw[illegible] Conn. 14[illegible], 15[illegible], [illegible] Am. Dec. 236; [illegible] v. Flanders, 30 N. H. 310, 311; Iowa [illegible] L[illegible] Co. v. Sage, [illegible] Iowa, 112, 119; [illegible]y v. Campbell, 110 [illegible], 206 U. S.

290, 50 L.R.A. 92, 81 N. W. 604; Mills v. Geer, 111 Ga. 275, 279, 287, 288, 52 L. R.A. 934, 36 S. E. 673.

Fourth. Aside, however, from principle and the general result of the adjudged cases, it is finally insisted that the want of power in Congress to ratify the collection of the duties in question under the circumstances here disclosed conclusively results from the decision in De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743. As we have seen, that case concerned the validity of collections of duties in the port of New York on goods brought into the United States from Porto Rico, and, whilst insisting on the legality of the duties, the government, at the same time, urged that, even if originally invalid, they had yet been ratified as the result of provisions of a specified act of Congress which had been passed after the suit to recover the duties had been commenced. As that portion of the duties sued for which had been collected after ratification of the treaty were decided to be illegal, it followed that a decision as to the question of ratification was required. In passing upon the subject, after intimating doubt as to whether the act relied upon, as manifesting the intention of Congress to ratify, was intended to have that effect, it was remarked (p. 199, L. ed. p. 1057, Sup. Ct. Rep. p. 754):

"It can clearly have no retroactive effect as to moneys theretofore paid under protest, for which an action to recover back had already been brought. As the action in this case was brought March 13, 1900, eleven days before the act was passed, the right to recover the money sued for could [389] not be taken away by a *subsequent act of Congress. Plaintiffs sue in assumpsit for money which the collector has in his hands, justly and equitably belonging to them. To say that Congress could, by a subsequent act, deprive them of the right to prosecute this action, would be beyond its power. In any event, it should not be interpreted so as to make it retroactive. Kennett's Petition, 24 N. H. 139; Alter's Appeal, 67 Pa. 341, 5 Am. Rep. 433; Norman v. Heist, 5 Watts & S. 171, 40 Am. Dec. 493; Donovan v. Pitcher, 53 Ala. 411, 25 Am. Dec. 634; Palairet's Appeal, 67 Pa. 479, 5 Am. Rep. 450; State use of Methodist Episcopal Church v. Warren, 28 Md. 338."

Now, considering the language just quoted in connection with the doubt expressed as to the import of the alleged ratifying statute, it results that the reasoning employed stated two considerations: First, the want of power in Congress to ratify after suit brought; and second, the duty of construing the statute relied upon so as not to produce ratification, in view of its ambiguity. As the question of construction was last stated and that question was declared to be "in any event" decisive, we think the observations made concerning the want of power to ratify after suit brought must be regarded as not having been necessary to the decision rendered, and therefore must be treated as *obiter*. And this interpretation was, we think, applied in the cases of Lincoln v. United States and Warner, B. & Co. v. United States, 197 U. S. 419, 49 L. ed. 816, 25 Sup. Ct. Rep. 455. In those cases, as we have said, one of the defenses insisted upon by the government was a ratification alleged to have been operated by the act of Congress of July 1, 1902, which was passed after the bringing of the actions to recover. It is patent on the face of the opinion announced on the original hearing that the decision was exclusively based upon the ground that the act of Congress was so ambiguous concerning the ratification relied upon that it should not be implied that such ratification was contemplated. And it is to be observed that De Lima v. Bidwell was not overlooked, since that case was referred to in the course of the opinion. On the rehearing the case was argued on questions submitted by the court, *viz.*, whether the act relied upon manifested the purpose to ratify, and, if it did, whether Congress had [390] *power so to do. In the opinion on the rehearing, while the court reiterated the view previously expressed, that the act could not be treated as ratifying the collection of the duties sought to be recovered, because of its ambiguity in that regard, yet it expressly recognized the power in Congress to ratify, and in effect declared that, as to those things to which the alleged ratifying act clearly applied, ratification had resulted. This is so, since in the course of the opinion, in answering the argument that the alleged ratifying statute would be meaningless unless it was held applicable to the particular duties in controversy, it was pointed out (202 U. S. p. 499, 50 L. ed. p. 1119, 26 Sup. Ct. Rep. p. 730) that there were duties which had been levied and collected other than those in controversy, to which the act clearly applied, and "that question [as to them] was put at rest by this ratification." Further, in calling attention to the ambiguity in the ratifying statute relied upon and the resulting doubt whether it embraced all duties, it was pointed out that the fact that actions were pending at the time of the passage of the ratifying act lent cogency to the view that, if Congress had intended by the ratification to affect them, it would have explicitly so declared. On this subject the court said (p. 498, L. ed. p. 1119, Sup. Ct. Rep. p. 730):

"This construction is favored by the consideration that the suits had been begun when the act of July 1, 1902, was passed, and that, even if Congress could deprive plaintiffs of their vested rights in process of being asserted (Hamilton v. Dillin, 21 Wall. 73, 22 L. ed. 528), still it is not to be presumed to do so on language which, literally taken, has a narrower sense."

Certainly, this language, particularly in view of the reference made to Hamilton v. Dillin, is wholly incompatible with the conception that the observation as to pending actions made in De Lima v. Bidwell was to be taken as having settled the proposition that a power to ratify which otherwise obtained could not be exerted after suit brought.

Be this as it may, however, as, after deliberate consideration, we are of opinion that the mere bringing of this action did not deprive Congress of its power to ratify [391] the collections made by *its officers, in the name of the United States, of the moneys sought to be recovered in this action, we may not allow the remarks made in De Lima v. Bidwell, under the circumstances stated, to control our judgment.

There was much discussion at bar concerning whether the payments of the duties were voluntary. As it would seem that the circumstances surrounding these payments were substantially like unto those existing in the Lincoln and Warner, B. & Co. Cases, in which the opinions of the court made no reference to the question of voluntary payment, we have concluded to pass that question by, as our conclusion on the subject of ratification disposes of the controversy.

Reversed.

Mr. Justice Brewer and Mr. Justice Peckham dissent.

Mr. Justice Moody took no part in the decision of the cause.

Mr. Justice Harlan, concurring:

By the act of 1906, 34 Stat. at L. 636, chap. 3912, Congress legalized, ratified, and confirmed, as fully, to all intents and purposes, as if the same had, by prior act, been specifically authorized and directed, the collection of all duties, both import and export, imposed by the authorities of the United States or of the provisional military government in the Philippine Islands, prior to March 8th, 1902, at all parts and places in said Islands, from the United States or from foreign countries. Interpreted in the light of previous and pending litigation, this act should be construed as denying the authority of any court to take cognizance of a suit brought against the United States to recover any claim arising out of such collections. The act should, therefore, be construed as withdrawing the consent of the United States to be sued on account of claims of that character. In this view, it was error to render judgment against the United States, whatever might be the liability of the collector, if his exaction of the [392] duties in question was without authority of law. Upon this ground alone, and without considering any of the questions discussed in the opinion of the court, I concur in the judgment of reversal.

JAMES BUCK, Trustee under the Will of Job M. Nash, Deceased, Plff. in Err.,

v.

WILLIAM E. BEACH, Treasurer of Tippecanoe County, Indiana.

(See S. C. Reporter's ed. 392-415.)

Taxes—situs—property of nonresident.

The state of Indiana cannot, consistently with due process of law, tax debts evidenced by notes given and payable in Ohio, by residents of that state, to a resident of New York, for loans made in Ohio on lands there situated, merely because, in the attempt to escape proper taxation in Ohio, such notes, together with mortgages securing their payment, were sent to an Indiana agent of the payee, there to be held by him until they were needed in Ohio to have payments of interest indorsed, or to be delivered up if the principal were paid.

[No. 14.]

Argued March 22, 1907. Decided May 27, 1907.

IN ERROR to the Supreme Court of the State of Indiana to review a judgment which affirmed a judgment of the Warren Circuit Court, in that state, sustaining a tax on certain intangible property of a nonresident. Reversed and remanded for further proceedings.

See same case below, 164 Ind. 37, 108 Am. St. Rep. 272, 71 N. E. 963.

Statement by Mr. Justice Peckham:

Judgment against the plaintiff in error (who was defendant below) was recovered in a state circuit court in Indiana, which was affirmed by the supreme court of the state (164 Ind. 37, 108 Am. St. Rep. 272, 71 N. E. 963), and the plaintiff in error brings the case here to review that judgment. The predecessor of the defendant in error, being at the time treasurer of Tippecanoe county, in the state of Indiana, brought this action in 1897 against the plaintiff in error to subject funds in his

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NOTE.—On the situs for purposes of taxation of debts evidenced by notes and mortgages—see notes to Boyd v. Selma, 16 L.R.A. 729; and New Orleans v. Stempel, 44 L. ed. U. S. 174. And see case note to Monongahela River Consol. Coal & Coke Co. v. Board of Assessors, 2 L.R.A.(N.S.) 637.

On the taxation of intangible property of nonresidents—see note to Walker v. Jack, 31 C. C. A. 467.

hands to the payment of taxes alleged to be due from the estate of one Job M. Nash, deceased, which taxes had been assessed in above county and state in 1894, after the death of Nash, on personal property of the deceased that *had been omitted from the tax list in his lifetime, during the years 1881 to 1893, both inclusive.

The point in dispute between the parties relates to the assessment for omitted property on what are called the "Ohio notes," the plaintiff in error insisting that such assessment was illegal as beyond the jurisdiction of the state to impose.

The material facts are not really in dispute. It appears that Nash died in 1893, at that time, and for more than twenty years prior thereto, a resident of the city and state of New York. He left a will which was admitted to probate in Hamilton county, Ohio, and his executors qualified there. They thereafter refused to pay the tax imposed upon the Ohio notes in Indiana. By the terms of the will a trust was created, and part of the personal property constituting such trust (more than enough to pay the taxes in dispute) was turned over to James Buck, plaintiff in error and one of the two trustees named in the will. He resided in Lafayette, in the state of Indiana, and the other trustee resided in Cincinnati, in the state of Ohio. From this fund, in the hands of Buck, the defendant in error asked to have the taxes paid which had been assessed, as above stated, and which he claimed were due the state. This was refused, and this action was thereupon commenced.

A former action had been brought by the trustees for relief by injunction against the predecessor of the defendant in error to enjoin him from seizing upon or interfering with the trust fund for the payment of the taxes in dispute, and in that action the trustees had been unsuccessful. Buck v. Miller, 147 Ind. 586, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8, decided in 1896.

The amount assessed on the estate of decedent upon the "Ohio notes" from 1884 to 1893, on account of omitted assessments during those years, aside from the penalties for nonpayment, was $36,357.71.

During the above-mentioned years, while the decedent was, as stated, a resident of the state of New York, he had a large sum of money invested in the states of Ohio and Indiana, approximating $750,000. The money loaned by him in Ohio *was evidenced by Ohio notes, made by the borrowers, who were residents of Ohio, the payment of the money borrowed being secured by mortgages on lands situated in Ohio. The moneys loaned in Ohio were loaned through an agent of Mr. Nash, residing in Cincinnati. The notes were dated and payable in Cincinnati, to the order of Mr. Nash, but were not indorsed by him, and all renewals and payments on account of them were made to his agent in Cincinnati. All moneys paid upon or by reason of these notes were deposited in a bank in Cincinnati to the credit of Mr. Nash, and no part thereof was sent to Indiana. The Cincinnati agent commenced loaning decedent's money about 1860, and, upon the removal of decedent to New York in 1870, and until his death, in 1893, the agent made investments on decedent's behalf in Ohio, collected the principal and interest upon his mortgage loans, and had general charge of his financial interests in that state.

James Buck was the agent of decedent at Lafayette, in the state of Indiana, for many years preceding the death of Mr. Nash. The Ohio notes were sent to him from Cincinnati by the agent there, during the years in question, together with the mortgages securing the payment of the notes, and they were kept in a safe at Lafayette, Indiana, by Mr. Buck, but no business was transacted in regard to them nor any use made of them in Indiana, otherwise than that a short time before the interest on or principal of the notes became due they were sent to the Ohio agent to have the interest payments made to him indorsed upon them, or to be delivered up if the principal were paid.

Nothing else was done in Indiana in regard to the notes, except that a few days prior to the 1st day of April in each year (which is the day upon which assessments for taxes are, by law, made in the state of Indiana) Mr. Buck sent the notes and mortgages to the Ohio agent, and a few days subsequent to that day in each year the same were returned by the Ohio agent to Mr. Buck, who retained them in his possession.

When the Ohio notes and mortgages were sent from Cincinnati *to Mr. Buck by the [395] Ohio agent, Mr. Buck made a record of their receipt in a book kept by him for that purpose, showing the dates and amounts of the notes and when due, and whenever payment or renewal of said notes was reported by the Ohio agent to the Indiana agent, he made entries of the facts in the register kept by him.

Mr. Buck also had possession of the notes and mortgages given to Mr. Nash for moneys loaned in the state of Indiana, and such moneys were invested and reinvested in that state during these years, and the taxes thereon were duly paid.

Mr. Buck transacted no business directly with the makers of the Ohio notes or mort-

gages, but, as stated, sent the notes to the Ohio agent for any business to be done in regard to them.

During Mr. Buck's agency money was sometimes sent to him at Lafayette from Cincinnati to be invested, which money was placed on deposit in the bank in Indiana and loaned for Mr. Nash. Such moneys have nothing to do with the "Ohio notes" in issue in this action.

During these years, at least from 1886, Mr. Buck was authorized by virtue of a power of attorney from Mr. Nash to satisfy when due and when the money was paid all notes and mortgages; but, so far as the Ohio notes and mortgages were concerned, he never assumed to satisfy any of them or receive payment for the same. That was all done by the Ohio agent at Cincinnati.

Messrs. Byron W. Langdon and W. H. H. Miller argued the cause and filed a brief for plaintiff in error:

The powers of taxation of a state are uncontrollable except as restrained by the provisions of the Federal Constitution.

M'Culloch v. Maryland, 4 Wheat. 316, 418, 428, 429, 4 L. ed. 579, 604, 606, 607.

These powers can only be exercised over persons, property, and business within the jurisdiction of the state.

State Tax on Foreign-held Bonds, 15 Wall. 300, 319, 21 L. ed. 179, 186; Dewey v. Des Moines, 173 U. S. 193, 204, 43 L. ed. 665, 668, 19 Sup. Ct. Rep. 379; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 396, 398, 47 L. ed. 513, 518, 519, 23 Sup. Ct. Rep. 463.

There must be statutory warrant for taxation.

New Orleans v. Stempel, 175 U. S. 309, 312, 44 L. ed. 174, 177, 20 Sup. Ct. Rep. 110.

The Constitution requires that property, wealth, substantial value shall be taxed, not imaginary values.

Florer v. Sheridan, 137 Ind. 42, 23 L.R.A. 278, 36 N. E. 365.

The right of the lender to have his money back was taxable property, in the legal sense of the word, because it was itself convertible into money or valuable things by its owner, and, its situs being in New York, and within the power of that state, it was taxable there if the tax laws thereof had included it.

Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558.

While the notes were in Indiana, there was no power in that state to enforce the transfer of Nash's right of action or the payment of the debt, because the creditors, debtors, and owing property were in other states and jurisdictions. An actual seizure and sale of the notes on any pretense in any procedure in Indiana could not have involved any taxable property of Nash, and would have been futile.

Owen v. Miller, 10 Ohio St. 136, 75 Am. Dec. 502; Wyman v. Halstead (Wyman v. United States) 109 U. S. 654, 656, 27 L. ed. 1068, 1069, 3 Sup. Ct. Rep. 417.

There are only two taxable properties in a case of a note or bond. They are the right of the payee to have his money returned, and the owing money or property; the first is only taxable at the domicil of the payee, and the second, in case the payee is a nonresident of the state where the debt property is.

Kirtland v. Hotchkiss, supra.

There was no power in Indiana to reach the property; it had no possible available remedies for that purpose.

Blake v. Williams, 6 Pick. 314, 17 Am. Dec. 372; Bragg v. Gaynor, 85 Wis. 468, 21 L.R.A. 166, 55 N. W. 919; Catlin v. Wilcox Silver-Plate Co. 123 Ind. 483, 8 L.R.A. 62, 18 Am. St. Rep. 338, 24 N. E. 250; Sargeant v. Leland, 2 Vt. 280; Wyman v. Halstead, supra; Swancy v. Scott, 9 Humph. 333.

In case of a nonresident, the money due him, in the taxing state, is the only subject of taxation, and not his paper evidence.

Catlin v. Hull, 21 Vt. 152; Tazewell County v. Davenport, 40 Ill. 209; Goldgart v. People, 106 Ill. 29; Re Jefferson, 35 Minn. 221, 28 N. W. 256; Finch v. York County, 19 Neb. 54, 56 Am. Rep. 741, 26 N. W. 589; Savings & L. Soc. v. Multnomah County, 169 U. S. 422-427, 42 L. ed. 803-805, 18 Sup. Ct. Rep. 392; New Orleans v. Stempel, 175 U. S. 309, 312, 313, 316, 44 L. ed. 174, 177-179, 20 Sup. Ct. Rep. 110; Bristol v. Washington County, 177 U. S. 133, 141, 142, 44 L. ed. 701, 705, 706, 20 Sup. Ct. Rep. 585.

Assessments are made periodically, and, in many of the states, every year. The customary regulation is that the assessment shall be made or completed on a certain day, or that it shall be made as of a certain day. This fixes the liability of persons and property to taxation for the year.

1 Cooley, Taxn. 3d ed. pp. 604, 605.

The taxes assessed were assessed either on the personal right of Nash to reclaim his loaned money or on the property in Ohio owed to him, and as both of these properties were beyond the jurisdiction of the state of Indiana, the taxes are void. This personal right was vested in Nash and was always with him.

Thorne v. Watkins, 2 Ves. Sr. 35; Wil-

kins v. Ellett, 9 Wall. 740, 743, 19 L. ed. 586, 587.

The assessment in this case, while nominally on the notes, was in reality on the owing money or property in Ohio, and therefore void, and the collection of the taxes out of the trust property would deprive the plaintiff in error of his property without due process of law.

Northern C. R. Co. v. Jackson, 7 Wall. 262, 267, 19 L. ed. 88, 89; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 396–398, 47 L. ed. 513, 518, 519, 23 Sup. Ct. Rep. 463.

Taxes are impossible without legislative warrant, and the exaction of taxes without it manifestly deprives the owner of property, which is the object of it, without due process of law; and in such a case this court has declared that it will not be conclusively bound by the decision of a state court upon a question of what is due process of law.

Fallbrook Irrig. District v. Bradley, 164 U. S. 112, 159, 41 L. ed. 369, 388, 17 Sup. Ct. Rep. 56.

Until this case was decided the decisions of the supreme court of Indiana were all that unless these notes arose out of or were used in a business in Indiana they were nontaxable in that state.

Herron v. Keeran, 59 Ind. 476, 26 Am. Rep. 87; Foresman v. Byrns, 68 Ind. 247; Senour v. Ruth, 140 Ind. 320, 39 N. E. 946; Buck v. Miller, 147 Ind. 586, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8.

Mr. Will R. Wood argued the cause, and, with Messrs. Cassius C. Hadley and J. Frank Hanly, filed a brief for defendant in error:

The state cannot be deprived of its right to tax property within its jurisdiction by the owner thereof removing the property temporarily out of its jurisdiction for the purpose of avoiding taxation thereon.

Dundee Mortg. Trust Invest. Co. v. School Dist. No. 1, 10 Sawy. 52, 19 Fed. 368; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; Connecticut Valley Lumber Co. v. Monroe, 71 N. H. 473, 52 Atl. 942; H. M. Loud & Sons Lumber Co. v. Elmer Twp. 123 Mich. 61, 81 N. W. 965; Shotwell v. Moore, 129 U. S. 596, 32 L. ed. 828, 9 Sup. Ct. Rep. 362; Ogden v. Walker, 59 Ind. 460; Senour v. Matchett, 140 Ind. 640, 40 N. E. 122; Crowder v. Riggs, 153 Ind. 160, 53 N. E. 1019; Diamond Match Co. v. Ontonagon, 188 U. S. 91, 47 L. ed. 398, 23 Sup. Ct. Rep. 268.

In determining what the law of a state is, this court will look not only at the state Constitution and statutes, but at decisions of its highest court giving construction to them, and the construction given the statute of a state by its highest court will be adopted by this court.

Wade v. Travis County, 174 U. S. 508, 43 L. ed. 1064, 19 Sup. Ct. Rep. 715; New Orleans v. Stempel, 175 U. S. 316, 44 L. ed. 178, 20 Sup. Ct. Rep. 110; Stockard v. Morgan, 185 U. S. 30, 46 L. ed. 789, 22 Sup. Ct. Rep. 576; Williams v. Parker, 188 U. S. 504, 47 L. ed. 563, 23 Sup. Ct. Rep. 440; Williams v. Eggleston, 170 U. S. 311, 42 L. ed. 1049, 18 Sup. Ct. Rep. 617; Board of Liquidation v. Louisiana, 179 U. S. 638, 45 L. ed. 353, 21 Sup. Ct. Rep. 263; Yazoo & M. Valley R. Co. v. Adams, 181 U. S. 583, 45 L. ed. 1012, 21 Sup. Ct. Rep. 729; Mead v. Portland, 200 U. S. 164, 50 L. ed. 420, 26 Sup. Ct. Rep. 171; Armour Packing Co. v. Lacy, 200 U. S. 234, 236, 50 L. ed. 456, 457, 26 Sup. Ct. Rep. 232.

The general assembly of Indiana has power to make notes, mortgages, bonds, and other evidences of indebtedness taxable. The question as to the taxability of such property is therefore one of will or intention, and not of power.

Hart v. Smith, 159 Ind. 193, 58 L.R.A. 949, 95 Am. St. Rep. 280, 64 N. E. 631; Gallup v. Schmidt, 154 Ind. 203, 56 N. E. 443; Western Assur. Co. v. Halliday, 110 Fed. 264; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Finch v. York County, 19 Neb. 50, 56 Am. Rep. 741, 26 N. W. 590; Hutchinson v. Board of Equalization, 66 Iowa, 35, 23 N. W. 250; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189; Savings & L. Soc. v. Multnomah County, supra; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

Notes, mortgages, bonds, and other evidences of indebtedness are "property" within the meaning of the Constitution, and ought to be assessed for taxation. In the construction of the legislative scheme of taxation the court ought to impute to the general assembly an intent to obey the constitutional mandate if its enactments fairly admit of such construction.

Hart v. Smith, 159 Ind. 185, 58 L.R.A. 949, 95 Am. St. Rep. 280, 64 N. E. 661.

The act of 1891 does not limit the taxation of promissory notes, mortgages, and other evidences of indebtedness to those owned by inhabitants of this state. On the contrary, it provides for the listing and assessment of all such evidences of indebtedness found within the jurisdiction of the state, without regard to the domicil of the owner.

Buck v. Miller, 147 Ind. 589, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47

N. E. 8; Senour v. Ruth, 140 Ind. 320, 39 N. E. 946; Finch v. York County, supra; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110.

By the express terms of the statute the phrase "personal property" includes goods, chattels, evidences of debt, and things in action.

It is not essential that both the owner and the thing assessed should be within the jurisdiction of the state. It is sufficient if either is within such jurisdiction.

Pullman's Palace Car Co. v. Pennsylvania, supra; Goldgart v. People, 106 Ill. 28; Re Romaine, 127 N. Y. 88, 12 L.R.A. 401, 27 N. E. 759; Re Whiting, 150 N. Y. 29, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715; Re Morgan, 150 N. Y. 35, 44 N. E. 1126; Re Houdayer, 150 N. Y. 37, 34 L.R.A. 235, 55 Am. St. Rep. 642, 44 N. E. 718.

The Ohio notes were not kept by plaintiff in error in Lafayette for clerical convenience. They were kept there permanently. They had at no time any other permanent location. They were kept there and held and controlled by Buck, as the agent of Nash, under such circumstances as to give them a taxable situs in Indiana.

Buck v. Miller, 147 Ind. 596, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8; Tousey v. Bell, 23 Ind. 426; Schmidt v. Failey, 148 Ind. 153, 37 L.R.A. 442, 47 N. E. 326; Powell v. Madison, 21 Ind. 340; Rieman v. Shepard, 27 Ind. 289; Standard Oil Co. v. Combs, 96 Ind. 183, 49 Am. Rep. 156; Brown County v. Standard Oil Co. 103 Ind. 304, 2 N. E. 758; Western Assur. Co. v. Halliday, 110 Fed. 263; Dundee Mortg. Trust Invest. Co. v. School Dist. No. 1, 10 Sawy. 52, 19 Fed. 368; Billinghurst v. Spink County, 5 S. D. 84, 58 N. W. 275; Walker v. Jack, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 578; Hutchinson v. Board of Equalization, supra; Miller v. Dorris, 116 Iowa, 446, 90 N. W. 90; Re Jefferson, 35 Minn. 215, 28 N. W. 257; State v. London & N. W. A. Mortg. Co. 80 Minn. 277, 83 N. W. 340; People ex rel. Westbrook v. Ogdensburgh, 48 N. Y. 390; People ex rel. Jefferson v. Smith, 88 N. Y. 581; People ex rel. McHarg v. Gaus, 169 N. Y. 19, 61 N. E. 989; Tazewell County v. Davenport, 40 Ill. 200; Goldgart v. People, 106 Ill. 28; Matzenbaugh v. People, 194 Ill. 108, 88 Am. St. Rep. 134, 62 N. E. 548; Curtis v. Richland Twp. 56 Mich. 490, 23 N. W. 175; Comptoir Nat. D'Escompte v. Board of Assessors, 52 La. Ann. 1319, 27 So. 805; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189; Pullman's Palace Car Co. v. Pennsylvania, supra; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; New Orleans v. Stempel, supra; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; Armour Packing Co. v. Savannah, 115 Ga. 140, 41 S. E. 237; Connecticut Valley Lumber Co. v. Monroe, 71 N. H. 473, 52 Atl. 941; Corry v. Baltimore, 96 Md. 310, 103 Am. St. Rep. 364, 53 Atl. 942; State, Metropolitan L. Ins. Co., Prosecutor, v. Newark, 62 N. J. L. 74, 40 Atl. 574; John Hancock Ice Co. v. Rose, 67 N. J. L. 86, 50 Atl. 364; Bluefields Banana Co. v. Board of Assessors, 49 La. Ann. 43, 21 So. 630; Re Romaine; Re Whiting; Re Morgan; and Re Houdayer,—supra.

The notes and mortgages upon which the assessment in this case is based had a "business situs" in the city of Lafayette within the meaning of the law.

Ibid.

Bank bills, municipal bonds, promissory notes, and real estate mortgages have such a concrete form that they are subject to taxation where found, irrespective of the domicil of the owner. If such evidences of indebtedness are kept for an indefinite period, and are given a permanent location within the limits of the state, they are subject to taxation.

Buck v. Miller, 147 Ind. 586, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8; Tousey v. Bell, 23 Ind. 426; Western Assur. Co. v. Halliday, 110 Fed. 264; Miller v. Dorris; State v. London & N. W. A. Mortg. Co.; People ex rel. Westbrook v. Ogdensburgh; People ex rel. Jefferson v. Smith; People ex rel. McHarg v Gaus; Comptoir Nat. D'Escompte v. Board of Assessors; Armour Packing Co. v. Savannah; and Tappan v. Merchants' Nat Bank,—supra; Pullman's Palace Car Co. v Pennsylvania, 141 U. S. 18, 35 L. ed. 613 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep 876; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; New Orleans v. Stempel 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct Rep. 110; Bristol v. Washington County 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct Rep. 585; Vicksburg v. Armour Packing Co. (Miss.) 24 So. 224; Waggoner v Whaley, 21 Tex. Civ. App. 1, 50 S. W. 154; Kelley v. Rhodes, 9 Wyo. 352, 87 Am. St. Rep. 959, 63 Pac. 938; Fennell v Pauley, 112 Iowa, 94, 83 N. W. 799; Hardesty v. Fleming, 57 Tex. 395; Re Romaine, 127 N. Y. 88, 12 L.R.A. 401, 27 N. E. 759; Re Whiting, 150 N. Y. 29, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715; Re Morgan, 150 N. Y. 35, 44 N. E. 1126; Re Houdayer, 150 N. Y. 37, 34 L.R.A. 235, 55 Am. St. Rep. 642, 44 N. E. 718; Monongahela River

Consol. Coal & Coke Co. v. Board of Assessors, 115 La. 564, 2 L.R.A.(N.S.) 637, 112 Am. St. Rep. 275, 39 So. 601; People ex rel. Burke v. Wells, 184 N. Y. 275, 77 N. E. 20.

No question in the case at bar, apart from the specific constitutional objection that the assessment of the property in issue contravenes § 1, article 14, of the Federal Constitution, is subject to review in this court.

Blackstone v. Miller, 188 U. S. 207, 47 L. ed. 445, 23 Sup. Ct. Rep. 277.

The assessment of the property in issue in this cause does not contravene § 1, article 14, of the Federal Constitution.

Pullman's Palace Car Co. v. Pennsylvania; New Orleans v. Stempel; and Savings & L. Soc. v. Multnomah County,—supra; Comptoir Nat. D'Escompte v. Board of Assessors, 52 La. Ann. 1319, 27 So. 805.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The only question involved here is in regard to the taxability of the Ohio notes in the state of Indiana.

The plaintiff in error asserts that the [400] simple physical presence of the Ohio notes in Indiana, payable to, and not indorsed by, the decedent, did not constitute taxable property there, because such notes were given and were payable and were paid in Ohio, by residents of Ohio, and to a nonresident of Indiana, and for loans made in Ohio, the capital represented by such notes never having been used in business in Indiana, and he insists that a tax upon such capital or upon the notes themselves as representing that capital, is an illegal tax, and that to take property in payment of such an illegal tax is to take it without due process of law, and constitutes a violation of the 14th Amendment.

If the facts in this case constituted the debts evidenced by the Ohio notes property in the jurisdiction of the state of Indiana at the time when such taxes were imposed, then the tax was valid, if there were statutory authority of that state for the same. The state court has held that there was such authority (Buck v. Miller, 147 Ind. 586, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8; Buck v. Beach, 164 Ind. 37, 108 Am. St. Rep. 272, 71 N. E. 963, being the case at bar), and that construction of the statute concludes this court (Delaware L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 352, 49 L. ed. 1077, 1081, 25 Sup. Ct. Rep. 669).

The sole question, then, for this court, is whether the mere presence of the notes in Indiana constituted the debts of which the notes were the written evidence property within the jurisdiction of that state, so that such debts could be therein taxed.

Generally, property, in order to be the subject of taxation, must be within the jurisdiction of the power assuming to tax. State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 646, 38 L. ed. 846, 852, 14 Sup. Ct. Rep. 952; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 427, 42 L. ed. 803, 805, 18 Sup. Ct. Rep. 392; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 342, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, ante, 853, 27 Sup. Ct. Rep. 499.

In regard to tangible property the old rule was *mobilia sequuntur personam*, by which personal property was supposed to follow the person of its owner, and to be subject to the law of the owner's domicil. [401] For the purpose of taxation, however, it has long been held that personal property may be separated from its owner, and he may be taxed on its account at the place where the property is, although it is not the place of his own domicil, and even if he is not a citizen or resident of the state which imposes the tax. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 22, 35 L. ed. 613, 616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189; People ex rel. Hoyt v. Tax & A. Comrs. 23 N. Y. 224, 240. The same rule applies to intangible property. Generally speaking, intangible property in the nature of a debt may be regarded, for the purposes of taxation, as situated at the domicil of the creditor and within the jurisdiction of the state where he has such domicil. It is property within that state. Thus it has been held that a debt owned by a citizen of one state against a citizen of another state and evidenced by the bond of the debtor, secured by a deed of trust or mortgage upon real estate situated in the state where the debtor resides, is properly taxed by the state of the residence of the creditor, if the statute of that state so provides, and such tax violates no provision of the Federal Constitution. Kirtland v. Hotchkiss, 100 U. S. 491, 498, 25 L. ed. 558, 562.

Rejecting the fiction of law in regard to the situs of personal property, including therein choses in action, the courts of Indiana have asserted jurisdiction by reason

debtor can freely mortgage them, and the mortgage will have effect, even when the decision of the case is in favor of the plaintiffs, declaring that the ownership of the properties mortgaged belongs to them."

See articles 71 and 107 of the "Mortgage Law for Cuba, Porto Rico, and the Philippine Islands," War Department translation, 1899, and see also title 2 of the same law, concerning the method of recording instruments and the effect of such record, and title 3, relating to cautionary notices.

Granting that the general result of the local law is as we have just stated it, the contention yet is that the character of the Todd suit and the nature of the relief sought therein caused it to be not within the scope of the mortgage law and the provisions thereof for giving a cautionary notice. This is based upon article 42 of the mortgage law, reading:

"Art. 42. Cautionary notices of their respective interests in the corresponding public registries may be demanded by:

"1. The person who enters suit for the ownership of the real property, or for the creation, declaration, modification, or extinction of any property right. . . ."

And article 91 of the general regulations for the execution of the mortgage law, War Department translation, 1899, as follows:

"The person who brings the action for ownership, referred to in case No. 1 of article 42 of the law, may, at the same time or subsequently, request that a cautionary notice thereof be made, offering to indemnify any damages which may be caused the defendant thereby, should he win the suit."

Now, it is said when the issues in the Todd suit are clearly apprehended, they were not within the purview of the articles [366]*in question, since that suit did not seek to devest Ana Merle of the ownership of the property standing in her name on the public records, but simply to subject such property to the payment of the indebtedness due by the Agostinis to Todd. This, however, assumes that article 42 embraces only suits having for their object the entire devestiture of ownership,—that is, the devestiture of perfect ownership,—whilst the text of the article relied upon not only relates to suits so operating, but also to those which seek the modification "or extinction of any property right." But even if the proposition relied upon might find some color of support in a narrow and technical construction of the provisions of the mortgage law referred to, its unsoundness is, we think, demonstrated by a consideration of other provisions of the law, especially articles 2 and 23 of that law, the first reading as follows:

"In the registries mentioned in the preceding article shall be recorded:

"1. Instruments transferring or declaring ownership of realty, or of property rights thereto.

"2. Instruments by which rights of use and occupancy, emphyteusis, mortgage, annuity (censo), servitudes, and any others by which estates are created, acknowledged, modified, or extinguished."

The second (art. 23) reads as follows:

"The instruments mentioned in articles 2 and 5, which are not duly recorded or entered in the registry, cannot prejudice third persons."

Mark the constructive power of the provision of the second paragraph of article 2, requiring the registry, in order that they may affect third parties, of all acts "by which estates are created, acknowledged, modified, or extinguished" when applied to the words of article 42, providing for the registry of a cautionary notice, not only of all suits for the "ownership of the real property," but likewise of suits brought "for the creation, declaration, modification, or extinction of *any property right.*"

Besides, when the purpose of the mortgage law is borne in *mind, it is apparent [367] that the interpretation relied upon would frustrate the very ends which the adoption of the law was intended to subserve.

But, passing this view, it is, we think, clear, that the proposition rests upon a misconception of the true import of the bill in the Todd case. The property stood upon the records, not in the name of the Agostinis, but in the name of Merle. The bill alleged that the Agostinis, and not Merle, owned the property, because it had been bought and paid for by the former. The purpose, therefore, of the suit was to change the recorded title by in effect obtaining a decree placing the property in the name of the real owner. In the very nature of things, under the civil law, the cause of action thus asserted was not merely revocatory (the Actio Pauliana of the Roman law), but was an action to unmask a simulation. It was therefore essentially revendicatory. Bonnafon v. Witz, 10 La. Ann. 657; and see the copious list of authorities illustrating the subject, compiled in Hennen's La. Dig. vol. 2, p. 1[illegible], No. 1. The decree rendered conforms to this conclusion. It held Pedro Agostini to be the "owner of the equitable and beneficial title" to the property. It therefore devested the registered owner, Merle, of every essential element of ownership. This is clearly the case, since the *fructus*, the *usus*, and the *abusus* could not be in one who was stripped of all beneficial interest. This becomes more [illegible] manifest when

it is borne in mind that the civil law prevailing in Porto Rico is oblivious concerning a technical or formal distinction between legal and equitable title. As beyond peradventure, then, the suit and the decree took from the recorded owner the ownership upon which necessarily the innocent third party must have relied, we think it clearly follows that the cautionary notice required by the provisions of the mortgage law was essential to affect the innocent third person.

The remaining question, then, is, Was the local statutory rule of real property, requiring the giving and recording of a cautionary notice of the pending suit in order to affect innocent third parties dealing with [368]the recorded owner, applicable to a *suit brought on the equity side of the United States district court for Porto Rico? Let us assume, for the sake of argument, that the lower court correctly reasoned that an innocent third party would be affected by the constructive notice resulting from the pendency of an equity cause in a circuit court of the United States sitting within a state. Again, let us further assume, for the sake of argument, that it was correctly held that the rule just stated would govern, although there had been no compliance with a statutory rule of property prevailing in such state, requiring the recording of a notice of the pendency of suits affecting real property, in order to make the same operative against innocent third parties. Neither of these concessions, we think, is here controlling. The district court of the United States for Porto Rico is in no sense a constitutional court of the United States, and its authority emanates wholly from Congress under the sanction of the power possessed by that body to govern territory occupying the relation to the United States which Porto Rico does. Now by § 8 of the act commonly known as the Foraker act (31 Stat. at L. 79, chap. 191) it is provided as follows:

"Sec. 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States. . . ."

The provision just quoted, it may be added, is qualified by a proviso repealing enumerated provisions of the local laws concerning marriage, divorce, and other subjects.

Now, as a general proposition, it is clear that, as a result of the relation which Porto Rico occupies to the United States, all the local law of that island has its ultimate sanction in the *lawful exercise by Congress [369] of its legislative authority. So also, as Congress has provided that the local law "not inconsistent or in conflict with the statutory laws of the United States" shall remain in force "until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States," it must follow that the local law of real property prevailing in the island is controlling until changed, as provided by Congress. This being true, we cannot assent to the conclusion that the court of the United States created by Congress had the authority to disregard the local law which Congress, by express legislation, directed to be continued in force. But it is said that the act (§ 34) in providing for the district court of the United States for Porto Rico declared, among other things, that that court shall have, "in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court." From this it is argued that the constructive notice resulting from the equity cause in the district court for Porto Rico must, in the nature of things, be operative against innocent purchasers without reference to the local law prevailing for cautionary notices and registry, if such result would flow from an equity cause pending in a constitutional court of the United States sitting within one of the states. But the proposition begs the question, since it puts out of review the express provision of the act of Congress sanctioning and enforcing the local law, except in so far as Congress had deemed fit to abrogate the same. Considering the manifest intent of Congress, we cannot close our eyes to the fact that that body, in providing a government for Porto Rico, evidently intended to preserve to the people of that island the system of local law to which they had been accustomed; nor can we, consistently with this enlightened purpose, assent to the conclusion that the mere provision of the act by which a court was created to enforce the local law empowered the court so created to set at naught the local law *by disregarding fundamental rules of real [370] property governing in the island, thereby creating confusion and uncertainty, and hence tending to the destruction of the rights of innocent third parties. Especially

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sent to analyze these cases. Brief reference to some of them, in my judgment, shows that the principles therein declared, when extended to this case, would warrant the state, if it so chose in exerting its taxing power, to reach notes and mortgages held within its jurisdiction under the circumstances which we have detailed.

In New Orleans v. Stempel, supra, a tax on credits evidenced by notes and secured by mortgages was upheld, where the owner left them in Louisiana in the possession of an agent, who collected the same as they fell due. There was no fact of investment and reinvestment of capital in the case, and the court, speaking through Mr. Justice Brewer, said:

"This matter of situs may be regarded in another aspect. In the absence of statute, bills and notes are treated as choses in action, and are not subject to levy and sale on execution, but, by the statutes of many states, they are made so subject to seizure and sale, as any tangible personal property. 1 Freeman, Executions, § 112; 4 Am. & Eng. Enc. Law, 2d ed. p. 282; 11 Am. & Eng. Enc. Law, 2d ed. p. 623. Among the states referred to in these authorities as [412] having statutes warranting *such levy and sale are California, Indiana, Kentucky, New York, Tennessee, Iowa, and Louisiana. Brown v. Anderson, 4 Mart. N. S. 416, affirmed the rightfulness of such a levy and sale. In Fluker v. Bullard, 2 La. Ann. 338, it was held that if a note was not taken into the actual possession of the sheriff a sale by him on an execution conveyed no title on the purchaser, the court saying: 'In the case of Simpson v. Allain it was held that, in order to make a valid seizure of tangible property, it is necessary that the sheriff should take the property levied upon into actual possession. 7 Rob. (La.) 504. In the case of Goubeau v. New Orleans & N. R. Co. the same doctrine is still more distinctly announced. The court there says: "From all the different provisions of our laws above referred to, can it be controverted that, in order to have them carried into effect, the sheriff must necessarily take the property seized into his possession? This is the essence of the seizure. It cannot exist without such possession." 6 Rob. (La.) 348. It is clear, under these authorities, that the sheriff effected no seizure of the note in controversy, and consequently his subsequent adjudication of it conferred no title on Bailey.'

"The same doctrine was reaffirmed in Stockton v. Stanbrough, 3 La. Ann. 390. Now, if property can have such a situs within the state as to be subject to seizure and sale on execution, it would seem to follow that the state has power to establish a like situs within the state for purposes of taxation. It has also been held that a note may be made the subject of seizure and delivery in a replevin suit. Graff v. Shannon, 7 Iowa, 508; Smith v. Eals, 81 Iowa, 235, 25 Am. St. Rep. 486, 46 N. W. 1110; Pritchard v. Norwood, 155 Mass. 539, 30 N. E. 80.

"It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicil of the owner, are subject to levy and sale on execution, and to seizure and delivery under replevin; and yet they are but promises to pay,—evidences of existing indebtedness. *Notes and mortgages are of the same nature; and, while they may not have become* [413] **so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a state may not declare that, if found within its limits, they shall be subject to taxation.*"

In commenting on this case and State Assessors v. Comptoir National D'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109, Mr. Justice Moody, speaking for the court in the late case of Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, ante, 853, 27 Sup. Ct. Rep. 499, said: "In both of these cases the written evidences of the credits were continuously present in the state, and their presence was clearly the dominant factor in the decisions."

In Blackstone v. Miller, 188 U. S. 206, 47 L. ed. 445, 23 Sup. Ct. Rep. 277, Mr. Justice Holmes, speaking for the court, said:

"There is no conflict between our views and the point decided in the case reported under the name of State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179. The taxation in that case was on the interest on bonds held out of the state. *Bonds and negotiable instruments are more than merely evidences of debt.* The debt is inseparable from the paper which declares and constitutes it by a tradition which comes down from more archaic conditions. Bacon v. Hooker, 177 Mass. 335, 337, 83 Am. St. Rep. 279, 58 N. E. 1078."

To the consideration of the subject in the opinions of the learned Justices just quoted, it may be added that bills and notes are the subject of conversion in trover, and the measure of damages is the collectible value of the obligation. Mercer v. Jones, 3 Campb. 477; 2 Ames's Bills & Notes, p. 693, and numerous cases there cited. Bills and notes may be the subject of *donatio causa mortis*, even though payable to order and unindorsed. 2 Ames's Bills & Notes, 699-701. They are held to be governed by the designation of "goods and chattels" in

the statute of frauds and other statutes. 2 Ames's Bills & Notes, 706.

Bills and notes have been held to be "goods, wares, and merchandise" within the meaning of the statute of frauds. Baldwin v. Williams, 3 Met. 365; Somerby v. Buntin, 118 Mass. 279, 19 Am. Rep. 459.

16] *in manufacturing hose and other knit acter of bills and notes as tangible property, it seems to me inaccurate to say that they are mere evidences of debt. They are tangible things, capable of delivery, passing from hand to hand, and for many purposes may be regarded as of the value of the debt which they evidence.

It is elementary that the power of the states as to matters of taxation is very broad, and subject only, in the limitation of its exercise, to the Constitution of the state and the nation.

It seems to me that a state, in pursuance of its taxing policy, may give a situs to such evidences of debt held within its jurisdiction as have taken the tangible form of bonds, notes, and mortgages.

It is said to deny this power to the states, under the circumstances of this case, will tend to prevent double taxation,—a thing much to be desired. This case seems to me an apt illustration of the contrary view; by denying the power to Indiana to tax these notes under the circumstances shown, the scheme of the owner to avoid any tax upon them is made effectual, and, except for the recovery after his death for a small part of the taxes actually due, this vast sum of money escapes taxation altogether. I think that the powers of taxation here invoked by the state of Indiana ought not to be denied, and if the practical effect can be given any weight in deciding legal rights, to me it seems evident that such denial will work immunity from just taxation of property represented in promissory notes and mortgages sent beyond the jurisdiction of the state where the owner is domiciled, and held by agents in distant states, within the protection of their laws, for the sole purpose of avoiding contribution to the public treasury. As I understand the opinion, municipal bonds or other such securities held as these are would be legitimately subject to taxation. They are but promises to pay, in a concrete form, of the same character as notes and mortgages. In my opinion there is no constitutional objection to their local-

15] ization for taxation *by the law of the state when the owner has chosen to give them a situs there as in this case.

Without further extending these views, I am constrained to dissent from the opinion and judgment of the court in this case.

Mr. Justice Brewer concurs in this dissent.

SECURITY WAREHOUSING COMPANY, W. B. McKeand, the L. C. Hyde & Brittain Bank of Beloit, and Citizens Bank of Mukwonago, Appts.,

v.

ELBERT R. HAND, Andrew Dietrich, and E. McDill, Trustees of the Racine Knitting Company, Bankrupt.

(See S. C. Reporter's ed. 415–427.)

Pledge—of warehouse receipts—change of possession.

1. No such change of possession results from the issuance of so-called warehouse receipts acknowledging the receipt of goods on premises really occupied by the owner, though in form leased by the latter to the warehousing company, as renders valid a pledge of such receipts, where actual possession of the goods was exercised by and existed with the owner substantially the same after issuance of the receipts as before.

Bankruptcy—equitable lien—validity as against trustee.

2. Holders of so-called warehouse receipts under a pledge which was invalid for want of a change of possession have no equitable lien which takes precedence of the title of the trustee in bankruptcy of the pledgeor, by virtue of the special provisions of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 70a, vesting in the trustee the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which, prior to the filing of the petition, might have been levied upon and sold by judicial process against him, and of § 70e, giving the trustee power to avoid transfers by the bankrupt which a creditor of the latter might avoid, and to recover the property so transferred or its value.

[No. 229.]

Argued and submitted March 7, 8, 1907. Decided May 27, 1907.

APPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed a decree of the District Court for the Eastern District of Wisconsin, dismissing, for want of equity, the petitions of persons claiming to be pledgees of a bankrupt to restrain the trustees in bankruptcy from asserting title to the property. Affirmed.

NOTE.—On the necessity of change of possession to validate pledge—see notes to Norton v. Baxter, 4 L.R.A. 306, and Yeatman v. New Orleans Sav. Inst. 24 L. ed. U. S. 589.

As to how far a pledge may be effectual where the pledgeor's agent is made the depositary—see note to Re Lanaux, 25 L.R.A. 577.

On equitable liens generally—see notes to Bell v. Pelt, 4 L.R.A. 248, and Walker v. Brown, 41 L. ed. U. S. 865.

See same case below, 74 C. C. A. 186, 143 Fed. 32.

Statement by Mr. Justice **Peckham**:

The above-named appellants have appealed from a judgment of the circuit court of appeals of the seventh circuit, affirming a decree of the United States district court for the eastern district of Wisconsin, dismissing certain petitions of the appellants for want of equity. 74 C. C. A. 186, 143 Fed. 32.

Certain creditors filed a petition in bankruptcy October 5, 1903, against the Racine Knitting Company, a company engaged [416] in manufacturing hose and other knit goods, with factories at Racine and Stevens Point, Wisconsin. The company was, on the 26th of October, 1903, duly adjudged a bankrupt, and the appellees were appointed receivers and were later elected trustees. The appellees asserted the right to certain merchandise covered by receipts issued by the appellants, the security company, which company thereupon filed in the bankruptcy court an intervening petition asserting its exclusive possession and control of the merchandise in question and the issuing of its receipts therefor to the knitting company, and their negotiation by it prior to its bankruptcy, and that those receipts were given to the other appellants in good faith in due course of business as security for loans. The intervening petitioner alleged that the appellees were claiming title to the merchandise, and were obstructing the petitioner in its possession, and the prayer was for an order that the appellees be restrained from interfering with the petitioner in its custody and control of the property. The other appellants then intervened and also set up the same facts, and prayed that the appellees might be restrained from interfering with the security company in delivering the merchandise to the petitioners, and from asserting any right or title to the property as against them. Issues were joined and the matters were referred to the referee, who reported his findings of fact. From these findings it appeared that the Security Warehousing Company was a corporation of the state of New York, duly licensed to do business in the state of Wisconsin, and that it was engaged in the business of "field warehousing," so called; that it owned no warehouse of its own and occupied no public warehouse at any place. The warehousing company leased certain premises from the knitting company in Racine, in the state of Wisconsin, and also certain premises at a place called Stevens Point, in the same state. These two places were occupied by the knitting company with their goods to be sold, and the goods were placed on the premises really occupied by the knitting company, *although in form [4] leased by it to the warehousing company, and the so-called warehouse receipts were given to the knitting company by the warehousing company, acknowledging the receipt of the property at such places. There was no change of possession in fact, and scarcely any in form. These receipts were in turn pledged by the knitting company to various banks, and moneys obtained upon the security of such receipts from them. The general character of business of this form is stated in Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. ed. 1154, 25 Sup. Ct. Rep. 766, but the particular facts in this case, given in detail as findings by the referee, and adopted by the district court and circuit court of appeals, may be found in 143 Fed. supra. Reference is made to that report for the findings of the referee. The report shows a radically different state of facts from the Wilson Case.

Mr. **Henry S. Robbins** submitted the cause for appellants:

This appeal seeks the application of the principle of Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. ed. 1154, 25 Sup. Ct. Rep. 766, to a case which is deemed by appellants a similar one.

Nor does a substantial difference between the two cases arise out of the fact that, in the case at bar, the pledge is not invalid because the custodians appointed by the warehousing company to watch the property and release it upon the return of the receipts were also employees of the dealer.

Sumner v. Hamlet, 12 Pick. 76; Love v. Export Storage Co. 74 C. C. A. 155, 143 Fed. 1; Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co. 81 Fed. 439; Dunn v. Train, 60 C. C. A. 113, 125 Fed. 221; Combs v. Tuchelt, 24 Minn. 423; First Nat. Bank v. Harkness, 42 W. Va. 156, 32 L.R.A. 408, 24 S. E. 548.

Substitutions—especially trifling ones—do not invalidate a pledge.

Blydenstein v. New York Secur. & T. Co. 15 C. C. A. 14, 35 U. S. App. 175, 67 Fed. 469; Sumner v. Hamlet, supra; Clark v. Iselin, 88 U. S. 360, 22 L. ed. 568; Colebrooke, Collateral Securities, 2d ed. § 15; Sawyer v. Turpin, 91 U. S. 114, 23 L. ed. 235; Cook v. Tullis, 18 Wall. 332, 21 L. ed. 933.

The law of Illinois abhors secret liens as much as does that of Wisconsin.

Harkness v. Russell, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51; Funk v. Staats, 24 Ill. 632.

If the receipts issued under this method of warehousing be valid warehouse receipts

under the common law, there is nothing in this Wisconsin statute to invalidate them.

Rice v. Cutler, 17 Wis. 351, 84 Am. Dec. 747; Millhiser Mfg. Co. v. Gallego Mills Co. 101 Va. 579, 44 S. E. 760.

But it is not essential at common law to the validity of warehouse receipts as an instrument of title, that the issuer thereof should be the keeper of a public or general warehouse.

Gibson v. Stevens, 8 How. 384, 12 L. ed. 1123; Note to Lickbarrow v. Mason, 1 Smith, Lead. Cas. 7th Am. ed. pt. 2, p. 1197; Northrop v. First Nat. Bank, 27 Ill. App. 527; Montgomery, W. & Co. v. American Trust & Sav. Bank, 71 Ill. App. 20.

If there was not a sufficient change of possession to support a pledge or warehouse receipt, still, the delivery by the knitting company of these receipts as security for loans, created equitable liens.

Union Trust Co. v. Trumbull, 137 Ill. 146, 27 N. E. 24; Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075; Walker v. Brown, 165 U. S. 654, 41 L. ed. 865, 17 Sup. Ct. Rep. 453; McDonald v. Daskam, 53 C. C. A. 554, 116 Fed. 276.

The question, then, is whether an equitable lien is superior to the title of the trustee in bankruptcy. It was expressly so held under the bankrupt act of 1841.

Fletcher v. Morey, 2 Story, 555, Fed. Cas. No. 4,864; Winsor v. McLellan, 2 Story, 492, Fed. Cas. No. 17,887.

Such, also, was the law under the bankrupt act of 1867.

Hauselt v. Harrison, supra; Yeatman v. New Orleans Sav. Inst. 95 U. S. 764, 24 L. ed. 589; Stewart v. Platt, 101 U. S. 731, 25 L. ed. 816.

The trustee in bankruptcy under the present act is estopped when the bankrupt is.

Re Standard Laundry Co. 53 C. C. A. 644, 116 Fed. 476; Pennington v. Hunt, 20 Fed. 195.

In First Nat. Bank v. Pennsylvania Trust Co. 60 C. C. A. 100, 124 Fed. 968, where there had been a setting aside of iron by way of pledge, accompanied by signs placed thereon indicating the pledge, which, however, had, without the knowledge of the pledgee, been removed by the pledgeor before bankruptcy proceedings, the circuit court of appeals of the third circuit decided that the trustee took subject to the lien of the creditor.

The following decisions, although not upon the precise point here presented, would seem necessarily to lead to the same conclusion:

York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Thompson v. Fairbanks, 196 U. S. 516-520, 49 L. ed. 577-580, 25 Sup. Ct. Rep. 306; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Re New York Economical Printing Co. 49 C. C. A. 133, 110 Fed. 514; Re Garcewich, 53 C. C. A. 510, 115 Fed. 87; see also Re Chase, 59 C. C. A. 631, 124 Fed. 753; Chattanooga Nat. Bank v. Rome Iron Co. 102 Fed. 755; Re Josephson, 116 Fed. 404; Re Hinsdale, 111 Fed. 502; Re Sewell, 111 Fed. 791.

Mr. John B. Simmons argued the cause and filed a brief for appellees:

In controversies of this sort, involving the validity of transfers of property by warehouse receipts, chattel mortgage, and the like, the law of the state where the property is situated must govern.

Swedish-American Nat. Bank v. First Nat. Bank, 89 Minn. 98, 99 Am. St. Rep. 549, 94 N. W. 218; Hallgarten v. Oldham, 135 Mass. 1, 46 Am. Rep. 433; Etheridge v. Sperry, 139 U. S. 276, 277, 35 L. ed. 176, 11 Sup. Ct. Rep. 563; Ramberger v. Schoolfield, 160 U. S. 149, 40 L. ed. 374, 16 Sup. Ct. Rep. 225; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33.

The whole policy of the law of Wisconsin is distinctly opposed to all secret liens upon or sales of personal property.

Menzies v. Dodd, 19 Wis. 343; Manufacturers' Bank v. Rugee, 59 Wis. 221, 18 N. W. 251; Schneider v. Kraby, 97 Wis. 519, 73 N. W. 61; Shepardson v. Cary, 29 Wis. 34; Geilfuss v. Corrigan, 95 Wis. 651, 37 L.R.A. 166, 60 Am. St. Rep. 143, 70 N. W. 306.

This system of warehousing is not entitled to and should not receive judicial sanction as a legitimate commercial development, either in Wisconsin or elsewhere; it is merely another form or phase of devices which have been resorted to from an early day, to deceive creditors, and which have, one after the other, been condemned by the courts.

Anderson's Law Dict.; Bucher v. Com. 103 Pa. 529; Nash v. Page, 80 Ky. 539, 44 Am. Rep. 490; Yenni v. McNamee, 45 N. Y. 614; Farmers & M. Nat. Bank v. Lang, 87 N. Y. 209; Adams v. Merchants' Nat. Bank, 9 Biss. 396, 2 Fed. 174; Thorne v. First Nat. Bank, 37 Ohio St. 254; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 39 L.R.A. 725, 63 Am. St. Rep. 302, 49 N. E. 592; Thurber v. Oliver, 26 Fed. 224; Valley Nat. Bank v. Frank, 12 Mo. App. 460; People's Bank v. Gayley, 92 Pa. 518; State v. Bryant, 63 Md. 66; Sinsheimer v. Whitely, 111 Cal. 378, 52 Am. St. Rep. 192, 43 Pac. 1109; People's Bank v. Gayley, 12 Phila. 183; Troutman v. People's Bank, 12 Phila. 276; Cathcart v. Snow, 64 Iowa, 584, 21 N. W. 94; Sexton v. Graham, 53 Iowa, 181, 4 N.

W. 1090; Fishback v. G. W. Van Dusen & Co. 33 Minn. 111, 22 N. W. 244; Mechanics Trust Co. v. Dandridge, 18 Ky. L. Rep. 625, 37 S. W. 288; Bell & C. Co. v. Kentucky Glass Works, 20 Ky. L. Rep. 1089, 48 S. W. 440; Tradesmen's Nat. Bank v. Kent Mfg. Co. 186 Pa. 556, 65 Am. St. Rep. 876, 40 Atl. 1018; Moors v. Jagode, 195 Pa. 163, 45 Atl. 723; Bucher v. Com. 103 Pa. 528; Union Trust Co. v. Trumbull (Ill.) 23 N. E. 355; Re Rodgers, 60 C. C. A. 567, 125 Fed. 169.

The facts shown by the record do not establish the existence of valid liens by way of pledge.

Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. ed. 1154, 25 Sup. Ct. Rep. 766; Lee v. Bradlee, 8 Mart. (La.) 20; 28 Laurent, § 471, p. 464; Citizens Banks v. Janin, 46 La. Ann. 1001, 15 So. 471; Denis, Contract of Pledge, § 134; First Nat. Bank v. Caperton, 74 Miss. 857, 60 Am. St. Rep. 540, 22 So. 60; Bank of Martinque v. Thomas, L. & Co. Journal Du Pless, 1817, p. 145; Dirigo Tool Co. v. Woodruff, 41 N. J. Eq. 336, 7 Atl. 125; Seymour v. Colburn, 43 Wis. 67; Davenport v. City Bank, 9 Paige, 12; Mahoney v. Hale, 66 Minn. 463, 69 N. W. 334; Lanaux Succession, 46 La. Ann. 1036, 25 L.R.A. 577, 15 So. 708; Menzies v. Dodd, 19 Wis. 344; Missinskie v. McMurdo, 107 Wis. 583, 83 N. W. 758; Schneider v. Kraby, 97 Wis. 521, 73 N. W. 61; Moors v. Reading, 167 Mass. 322, 57 Am. St. Rep. 460, 45 N. E. 760; Citizens' Nat. Bank v. Oldham, 142 Mass. 379, 8 N. E. 115; Drury v. Moors, 171 Mass. 252, 50 N. E. 618; Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779; Byxbee v. Dewey (Cal.) 47 Pac. 52; Cook v. Mann, 6 Colo. 21; Vance v. Boynton, 8 Cal. 554; Bunting v. Saltz, 84 Cal. 168, 24 Pac. 167; Murphy v. Mulgrew, 102 Cal. 547, 41 Am. St. Rep. 200, 36 Pac. 857; Joshua Hendy Mach. Works v. Connolly, 76 Cal. 305, 18 Pac. 327; Burchinell v. Weinberger, 4 Colo. App. 6, 34 Pac. 911; Seavey v. Walker, 108 Ind. 78, 9 N. E. 347; Stephens v. Gifford, 137 Pa. 219, 21 Am. St. Rep. 868, 20 Atl. 542; Button v. Rathbone, 126 N. Y. 187, 27 N. E. 266; Story v. Cordell, 13 Mont. 204, 33 Pac. 6; Iowa State Nat. Bank v. Taylor, 98 Iowa, 631, 67 N. E. 677; George v. Pierce, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53; 22 Am. & Eng. Enc. Law, pp. 855, 856; Jones, Pledges, § 36; Story, Bailments, §§ 287, 288; McKibbin v. Martin, 64 Pa. 352, 3 Am. Rep. 593; Hale v. Sweet, 40 N. Y. 97; Wickham v. Levistones, 11 La. Ann. 702; Jones, Chat. Mortg. § 185; Grant v. Lewis, 14 Wis. 488, 80 Am. Dec. 785; Osen v. Sherman, 27 Wis. 501; Schneider v. Kraby, 97 Wis. 519, 73 N. W. 61; Pierce v. Kelly, 25 Or. 95, 34 Pac. 963; Hale v. Sweet, 40 N. Y. 97; Steele v. Benham, 84 N. Y. 634; Griffith v. Douglass, 73 Me. 532, 40 Am. Rep. 402; Sumner v. Dalton, 58 N. H. 295; Atchison v. Graham, 14 Colo. 217, 23 Pac. 876; Allen v. Massey, 17 Wall. 351, 21 L. ed. 542; Anderson v. Brenneman, 44 Mich. 198, 6 N. W. 222.

The transferee in good faith of instruments purporting to be warehouse receipts, where the requisite possession is lacking, acquires no title or lien whatever as against a receiver or assignee in insolvency or trustee in bankruptcy, as the case may be.

Shepardson v. Cary, 29 Wis. 34; Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779; Nisbet v. Macon Bank & T. Co. 4 Woods, 464, 12 Fed. 686; Thurber v. Oliver, 36 Fed. 224; Adams v. Merchants' Nat. Bank, 9 Biss. 396, 2 Fed. 174; Moors v. Reading, 167 Mass. 325, 57 Am. St. Rep. 460, 45 N. E. 760; Drury v. Moors, supra; Mahoney v. Hale, 66 Minn. 463, 69 N. W. 334; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 39 L.R.A. 725, 63 Am. St. Rep. 302, 49 N. E. 592; Christian v. Atlantic & N. C. R. Co. 133 U. S. 233, 33 L. ed. 589, 10 Sup. Ct. Rep. 260; Story, Bailments, § 297; Hook v. Ayers, 26 C. C. A. 287, 53 U. S. App. 195, 80 Fed. 981; Mechanics Trust Co. v. Dandridge, 18 Ky. L. Rep. 625, 37 S. W. 288; Bell & C. Co. v. Kentucky Glass Works, 20 Ky. L. Rep. 1089, 48 S. W. 440; Moors v. Jagode, 195 Pa. 163, 45 Atl. 723; Whitney v. Wenman, 140 Fed. 959; Davenport v. City Bank, 9 Paige, 12; Re Ronk, 111 Fed. 154; Long v. Farmers' State Bank (C. C. App. 8th C.) 17 Am. Bankr. Rep. 103.

The so-called "equitable lien" for which counsel contend is not a lien in fact; it is a mere "claim" or right to have a lien which failed "for want of record or for other reasons." It comes clearly within the language of the act and consequently is not a lien against the bankrupt estate.

Re Ronk, supra.

The transactions, being a mere subterfuge and device for evading the laws of the state, and violative of its policy concerning secret liens, were fraudulent as to creditors.

This has been found by both the district court and the circuit court of appeals, and supplies the element said by this court to be lacking in Union Trust Co. v. Wilson. It must be admitted there is ample evidence to support the finding, and this court will not, therefore, review it.

Illinois v. Illinois C. R. Co. 184 U. S. 77, 46 L. ed. 440, 22 Sup. Ct. Rep. 300; Stuart v. Hayden, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274; Brainard v. Bank, 184 U. S. 99, 46 L. ed. [illegible] 9, 22 Sup. Ct. Rep. [illegible]

458; Smith v. Burnett, 173 U. S. 430, 43 L. ed. 756, 19 Sup. Ct. Rep. 443.

The fraud is of the same character as that which results from withholding a chattel mortgage from record, to avoid injury to the mortgagor's credit; which the supreme court of the state has repeatedly declared sufficient to invalidate the mortgage.

Standard Paper Co. v. Guenther, 67 Wis. 101, 30 N. W. 298; Sanger v. Guenther, 73 Wis. 354, 41 N. W. 436; Valley Lumber Co. v. Hogan, 85 Wis. 366, 55 N. W. 415.

Under the state law of Wisconsin, as interpreted by the courts, an assignee in insolvency has powers substantially the same as those of an assignee in bankruptcy under the act of 1867.

Batten v. Smith, 62 Wis. 98, 22 N. W. 342.

And it is held that he, and he alone, can sue to set aside a mortgage as fraudulent on this ground, even when it is void only as to those creditors who became such before the mortgage was filed.

Valley Lumber Co. v. Hogan, supra.

Re H. G. Andrae Co. 117 Fed. 563, was a case relating to a mortgage of this character, and it was held void both as to an assignee appointed under the state law and a subsequently elected trustee in bankruptcy. The court said: "No amount of good faith can rescue it from the condemnation of the statute."

Re Shaw, 17 Am. Bankr. Rep. 196, was also a case of this kind, but there a pretense had been made of delivering the property (which consisted of tanbark in piles), by sealing the piles, attaching wooden blocks thereto, marked with letters of the alphabet, and formally delivering to an agent of the mortgagee. The court held that although the mortgagor might be estopped himself from contesting the possession, the mortgage was not enforceable against the trustee.

This court has also pronounced such a mortgage fraudulent as to creditors, and so voidable by an assignee in bankruptcy.

Blennerhassett v. Sherman, 105 U. S. 100, 26 L. ed. 1080.

Another class of cases of deceptive appearances with which the law deals in the same way is that of chattel mortgages of stocks of merchandise where the mortgagor, either by express or implied consent of the mortgagee, is permitted to sell in the usual course of trade, applying the proceeds or part thereof to his own use.

Blakeslee v. Rossman, 43 Wis. 116; Anderson v. Patterson, 64 Wis. 557, 25 N. W. 541; Charles Baumbach Co. v Hobkirk, 104 Wis. 488, 80 N. W. 740; Bank of Kaukauna v. Joannes, 98 Wis. 321, 73 N. W. 997; Durr v. Wildish, 108 Wis. 401, 84 N. W. 437.

Such a mortgage is invalid as against the assignee of the mortgagor under the state insolvent law, and the latter may recover the property, even though the mortgagee may have taken possession before the assignment.

Durr v. Wildish, supra.

The case of Robinson v. Elliott, 22 Wall. 513, 22 L. ed. 758, places this court in line with the state court as to the fraudulent character of this class of mortgages, and, under a statute like that of Wisconsin, they were declared void as against the mortgagor's assignee in bankruptcy.

The question under discussion being the right to a mere equitable lien, the rule of bona fide purchaser does not apply. He only is a bona fide purchaser in the law who secures the legal title, not one who obtains an equity only.

Hawley v. Diller, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986; Clark v. Herington, 186 U. S. 206, 46 L. ed. 1128, 22 Sup. Ct. Rep. 872.

The trustees in this case are not seeking to avoid any transfer of title. There is no instrument in the case purporting to transfer any property. A chattel mortgage transfers title, but a pledge is made effective by "possession only," the title remaining in the pledgeor.

Jones, Chat. Mortg. § 4; Casey v. Cavaroc, 96 U. S. 467, 478, 24 L. ed. 779, 784.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

A careful reading of the findings of the referee and of the evidence upon which they were based satisfies us that they ought to be approved. The findings show that the receipts of the warehousing company were not entitled to the status of negotiable instruments, the transfer of which operates as a delivery of the property mentioned in them. Upon that question the case is sufficiently stated in the opinion of the court below, wherein it was said that the "receipts themselves would put the holders on notice of the facts."

If the receipts were not negotiable instruments, it is contended that the transactions showed a valid pledge of the property to some of the appellants, and hence they are entitled to its possession until they are paid the debts due them from the bankrupt. Whether there was a sufficient change of *possession of the thing pledged to [421] render the same valid under the law of Wisconsin, we think was correctly answered in the negative by the courts below. Geil-

fuss v. Corrigan, 95 Wis. 651, 665, 669, 37 L.R.A. 166, 60 Am. St. Rep. 143, 70 N. W. 306. The general law of pledge requires possession, and it cannot exist without it. Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779. There was scarcely a semblance of an attempt at such change of possession from the hands of the knitting company to the hands of the warehousing company. Actual possession of the property in question was exercised by and existed with the knitting company substantially the same after the issuing of the receipts as before. It is a trifling with words to call the various transactions between the knitting company and the warehousing company a transfer of possession from the former to the latter. There was really no delivery, and no change of possession, continuous or otherwise. The alleged change was a mere pretense, a sham. Upon the subject of change of possession the opinion of the circuit court of appeals contains the following statement of fact: "In the present case the main office of the security company was in New York; the nearest district office was in Chicago; from there the receipts were issued; and in Wisconsin the security company had no office and no warehouses, unless the inclosures within the buildings of the knitting company at Racine and Stevens Point be counted such. The receipts themselves would put the holders thereof on notice of these facts. And at Racine and Stevens Point the security company gave no evidences to the public of its presence. No signs were displayed to the passer-by. No business was sought from the public. The only property within the inclosures was the knitting company's. The knitting company did not want storage room, but collaterals, which the security company agreed to furnish for a commission upon the amount thereof plus all expenses. The security company's only agents on the scene were the agents of the knitting company, who cared for and shipped out its goods. That this was the only business contemplated is disclosed by the agreement that [422] the knitting *company should be restored to full possession of the premises at any time it returned the outstanding receipts. This, in our judgment, was not warehousing within the law of Wisconsin."

Also: "So far from the security company's maintaining an open, exclusive, unequivocal possession during the two years this arrangement was carried on, it seems to us that the security company might as well have been eliminated, and the knitting company have employed its own stock keepers and shipping clerks as custodians for intending lenders, directly, instead of indirectly through the security company. In that view this becomes one of the cases 'in which the exclusive power of the so-called bailee' (Union Trust Co. v. Wilson, 198 U. S. 530, 537, 49 L. ed. 1154, 1156, 25 Sup. Ct. Rep. 766) tapers away to nothingness (Drury v. Moors, 171 Mass. 252, 50 N. E. 618; Tradesmen's Nat. Bank v. Kent Mfg. Co. 186 Pa. 556, 65 Am. St. Rep. 876, 40 Atl. 1018).

The actual transactions in the case at bar differ radically from the facts as stated in Union Trust Co. v. Wilson, supra. The court there held that there was sufficient proof to show a change of possession, and that the transaction was valid within the law of the state of Illinois. Assuming the law of Wisconsin to be the same on the subject of possession by the pledgee of the property pledged, the facts in this case are so different from the Wilson Case as to prevent that case from forming a foundation for holding there was a sufficient change of possession here to make the pledge a valid one.

We are satisfied with the decision of the courts below upon the merits.

There is, however, an important matter which has been raised by the appellants aside from the merits. That is, whether a trustee in bankruptcy can question the validity of these receipts, or the sufficiency of the alleged transfer of the property belonging to the bankrupt knitting company, to constitute a pledge of such property. The right is denied by the appellants, and it is contended that the transfers were valid between the parties; that the trustee in bankruptcy takes only the title and right of the bankrupt, and therefore he cannot assert a right not possessed by the knitting company.

*It is no new doctrine that the assignee [423] or trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands, unless otherwise provided in the bankrupt act, is subject to all of the equities impressed upon it in the hands of the bankrupt. This has been the rule under former acts and is now the rule. Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 699; Thompson v. Fairbanks, 196 U. S. 516, 518, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 50 L. ed. 782, 785, 26 Sup. Ct. Rep. 481.

In the Hewit Case there was a sale of property to the bankrupt upon condition that the title should not pass until the property was paid for. Such a conditional sale was good in New York state, where the contract was made, and it was held good as against the trustee in bankruptcy.

because it was good against the bankrupt. It was further held that the property was not, under the facts and the law of New York, such as might have been levied upon and sold under judicial process against the bankrupt, nor could she have transferred it, within the meaning of § 70 of the bankrupt act. It was a clear case for the application of the doctrine that the trustee stands in the shoes of the bankrupt, and there was nothing in the act which made any inconsistent provision.

In Thompson v. Fairbanks the question arose as to the validity of a chattel mortgage (which had been duly filed) upon after-acquired property as against the trustee in bankruptcy of the mortgagor. The mortgagee took possession of the mortgaged property before the filing of the petition in bankruptcy, and the question raised was whether there was a violation of any provision of the bankruptcy act. It was held that the validity of such a mortgage was a local, and not a Federal, question, and that in such case this court would follow the decisions of the state court; and as in Vermont such a mortgage was good, and the taking possession of the property related back to the date of the mortgage, even as against an assignee in insolvency, it was good as against the trustee in bankruptcy. It was said: "Under the present [424] bankrupt act, *the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act." As there was no provision therein making such a mortgage void, the mortgagee was permitted to enforce his mortgage as a valid instrument, and to retain possession of the property. There was no fraud in fact and no transfer of any property in fraud of creditors, and the property was not, at the time of the filing of the petition in bankruptcy, or at the time of the adjudication, liable to levy and sale under judicial process against the bankrupt. It had already been taken possession of by the mortgagee under a valid mortgage, and was not subject to any other liability of the mortgagor.

Humphrey v. Tatman reiterates the principle that whether such a mortgage as is referred to in the Fairbanks Case is good or bad depends upon the state law.

In York Mfg. Co. v. Cassell, the same question arose as in the Hewit Case. There was a sale of property to one who thereafter became bankrupt, with a condition that no title to the property should pass until it was paid for. Such a conditional sale was good under the Ohio law, where the instrument was executed, except as to those creditors who, between the time of the execution of the instrument and the filing thereof, had obtained some specific lien upon the property. There were no such creditors, and hence there was no one who could question the validity of the instrument at the time the trustee's title would have accrued, unless it was the trustee in bankruptcy. He made the claim that the adjudication in bankruptcy was equivalent to a judgment or an attachment or other specific lien on the property, so as to prevent the vendor from asserting its title and its legal right to remove the property on account of the nonpayment of the purchase price. We held that, as the conditional sale was valid *by the law of Ohio, except as to [425] a certain class of creditors, if there were no such creditors there was no one who could question the validity of the instrument; that the adjudication in bankruptcy did not give the trustee the right to do so, because in that case the adjudication did not operate as the equivalent of a judgment or attachment or other specific lien on the property. The trustee represented no one who had that right as there were no creditors who had liens on the property when the title of the trustee to the property of the bankrupt accrued. Section 70 of the bankrupt act had no application. There was no property within either the fourth or fifth subdivision of that section. The fact that if there had been a creditor of the bankrupt of the class mentioned who had obtained a specific lien on the property prior to the adjudication in bankruptcy, the trustee could in that case have enforced the same, did not make any difference, because no such thing had been done when the adjudication in bankruptcy was made. This court had theretofore approved the remark in Re New York Economical Printing Co. 49 C. C. A. 133, 110 Fed. 514, 518, that the present bankrupt act contemplates that a lien good as against the bankrupt and all of his creditors at the time of the filing of the petition in bankruptcy should remain undisturbed. Hewit Case, supra. Upon these facts it was reiterated that the trustee takes the property as the bankrupt held it.

The case at bar bears no resemblance in its facts to the cases just cited. There was no valid disposition of the property in the case before us, or any valid lien. The so-called warehouse receipts issued by the warehousing company to the knitting company, upon the facts of this case, gave no lien under the law in Wisconsin, in which

state they were issued. In such case this court follows the state court. Etheridge v. Sperry, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 503; Dooley v. Pease, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. Rep. 308.

By § 70a, the trustee in bankruptcy is vested, by operation of law, with the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which, prior to the filing of the [426] petition, might have been *levied upon and sold by judicial process against him; and, by subdivision (e) of the same section, the trustee in bankruptcy may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might avoid, and may recover the property so transferred, or its value. Here are special provisions placing the title to the property transferred by fraud or otherwise, as mentioned, in the trustee in bankruptcy, and giving him the power to avoid the same.

The title to this property was in the knitting company. There had been no valid pledge of it, because the possession had been, at all times, in the knitting company, and it could have been levied upon and sold under judicial process against the knitting company at the time of the adjudication in bankruptcy. The security company had, of course, full knowledge that the knitting company in fact, at least, shared in the possession of the property. It was itself an actor, or it acquiesced in the arrangement under which it had, at most, but a partial possession, and even that was subject to the control of the knitting company.

The method taken to store the property was, as found by the district court, a mere device or subterfuge to enable the bankrupt to hypothecate the receipts, and thus raise money upon secret liens on property in the possession of the pledgeor and under its control; and such scheme, the court said, ought not to receive judicial sanction. Such a scheme, under the facts, and as carried out in this case, and with regard to Wisconsin law, was a fraud in fact, and neither the receipts nor the so-called pledge could be asserted against any of the creditors.

It was held by the circuit court of appeals in a case arising in Wisconsin, relative to a chattel mortgage, which gave power to the mortgagor to make sales from the mortgaged property for his own use and benefit, that such a mortgage was fraudulent in fact, so it could not be asserted even against general creditors: citing Wisconsin cases. Re Antigo Screen Door Co. 59 C. C. A. 248, 123 Fed. 249, 254.

[427] *A further question was ruled upon in the above-cited case. It was in respect to a second mortgage upon chattels, which had not been properly filed, but the mortgagee had taken possession of the mortgaged property prior to the filing of the petition in bankruptcy, although long subsequent to the giving of the mortgage, and it was held that the mortgagee might hold the property as against the trustee in bankruptcy representing general creditors. There was no fraud in fact alleged. It was said by Judge Jenkins, in delivering the opinion of the court: "When the statute (Rev. Stat. Wis. 1898, § 2313) declares that a chattel mortgage shall be invalid against any other person than the parties thereto, unless possession be delivered and retained, or the mortgage be filed,—there being no actual fraud and no collusive delay in the filing or the taking of possession,—we think the statute must be construed to mean that the omission to file or to take possession renders the mortgage invalid only as to the creditor who, by execution or attachment, has acquired a lien upon the property." The case illustrates the distinction taken between fraud in fact and the mere failure to file a mortgage otherwise valid against the world.

Under the circumstances of this case we are satisfied there was no valid pledge and no equitable lien in favor of the interveners which would take precedence of the title of the trustee by virtue of the special provisions of the bankrupt act.

The decree is affirmed.

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*SOUTHERN RAILWAY COMPANY et al., [428]
Appts.,
v.
H. H. TIFT et al., Appellees.

(See S. C. Reporter's ed. 428-440.)

Action—remedy for exacting unreasonable interstate rate—necessity of action by Interstate Commerce Commission.

1. The rule that an action at law to recover excessive interstate freight charges cannot be maintained in advance of action by the Interstate Commerce Commission will not prevent a Federal circuit court which has suspended proceedings on a bill seeking relief from an advance in freight rates, pending action by the Commission, from granting relief in the exercise of its powers under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 16, as a court of equity, on a petition filed after the Commission has acted, stating the substance of the findings of the Commission, and containing a copy of its report and opinion, where defendants have stipulated in open court that, in case complainants prevailed, decree of restitution might be made.

Trial—stipulation—judicial enforcement of order of Interstate Commerce Commission.

2. Parties, after action by the Interstate Commerce Commission declaring an increased freight rate to be unreasonable, may make a valid stipulation, in the subsequent proceedings had in the Federal court under the act of February 4, 1887, § 16, that such court may adjudge the amount of the reparation.

Judgment—stipulation—enforcing order of Interstate Commerce Commission.

3. The final decree of a Federal circuit court in the proceedings prosecuted under the act of February 4, 1887, § 16, after action by the Interstate Commerce Commission declaring an increased freight rate to be unreasonable, may direct an order of reference to the standing master of the pleadings and evidence in the cause, with instructions to ascertain the sum of the increase in rates paid since the rate went into effect, where defendants stipulated in open court that, in case complainants prevailed, a decree of restitution might be made.

[No. 601.]

Argued April 22, 23, 1907. Decided May 27, 1907.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree affirming a decree of the Circuit Court for the Southern District of Georgia, enjoining interstate carriers from enforcing an increased freight rate on lumber. Affirmed.

See same case below, 138 Fed. 753.

The facts are stated in the opinion.

Mr. Ed. Baxter argued the cause and filed a brief for appellants.

Messrs. William A. Wimbish and William Hepburn Russell argued the cause, and, with Ellis, Wimbish, & Ellis, and Mr. W. D. Ellis, filed a brief for appellees.

Mr. Justice McKenna delivered the opinion of the court:

This is an appeal from a decree of the circuit court of appeals affirming a decree of the circuit court for the southern district of Georgia, adjudging an advance in freight rates made by appellants, to be effective June 22, 1903, upon yellow pine lumber, of 2 cents per 100 pounds over rates previously in force, to be unjust and [434] unreasonable, and enjoining *the appellants, jointly and severally, from maintaining the same, "in so far as they apply to shipments of lumber from points in Georgia to Ohio river destinations and points basing thereon."

The original bill was filed April 14, 1903, by appellees, to enjoin such advance in rates, and a temporary restraining order was issued and notice to appellants to show cause why an injunction should not issue. On May 8 the bill was amended. On May 12 the appellants filed a demurrer to the amended bill for want of jurisdiction in the court as a court of equity and as a court of the United States, and the Southeastern Freight Association filed an answer. Appellants also filed a response to the order to show cause. On May 16 the demurrer was overruled. The temporary injunction was, however, dissolved, but the following condition was expressed:

"In case the respondents shall enforce the rates complained of, and the complainants shall make proper application to the Interstate Commerce Commission to redress their alleged grievances, the court will entertain a renewed application on the record as made, and such appropriate additions thereto as may be proposed by either party, for enjoining the enforcement of such rates pending the investigation of the Commission, unless otherwise dissolved, and, on presentation to the court of the report of the Commission, such other action be taken as will be conformable to law and the principles of equity." 138 Fed. 756.

The appellants took the steps prescribed by the interstate commerce act to put the advanced rates into effect, and the appellees, on June 23, 1903, filed a petition before the Interstate Commerce Commission, charging that "in promulgating said tariff of increased rates, and maintaining and enforcing the same," the appellants were acting "in concert with each other and with other lumber-carrying roads," who, with them, were "comembers of the Southeastern Freight Association." The petition also charged that the advance was "arbitrary, unreasonable, and unjust," and prayed for an order commanding *appellants, and each [435] of them, to desist from enforcing the advance. All of the appellants except the Macon & Birmingham Railway Company filed a joint and several answer, in which they traversed the allegations of the petition and pleaded justification by the conditions affecting the roads and the traffic. They also alleged that the Georgia Saw Mill Association, to which appellees belonged, was a combination in restraint of trade and commerce, and that, therefore, appellees did not "come before the Commission with clean hands." A great deal of testimony was taken on the issues presented, and the Commission found and concluded that the advance in rates "was not warranted by the testimony, and that the increased rates put in force June 22, 1903, were unreasonable and unjust." The specific findings and conclusions of the Commission are reported in 10 Inters. Com. Rep.

state they were issued. In such case this court follows the state court. Etheridge v. Sperry, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 563; Dooley v. Pease, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. Rep. 308.

By § 70a, the trustee in bankruptcy is vested, by operation of law, with the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which, prior to the filing of the [426] petition, might have been *levied upon and sold by judicial process against him; and, by subdivision (e) of the same section, the trustee in bankruptcy may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might avoid, and may recover the property so transferred, or its value. Here are special provisions placing the title to the property transferred by fraud or otherwise, as mentioned, in the trustee in bankruptcy, and giving him the power to avoid the same.

The title to this property was in the knitting company. There had been no valid pledge of it, because the possession had been, at all times, in the knitting company, and it could have been levied upon and sold under judicial process against the knitting company at the time of the adjudication in bankruptcy. The security company had, of course, full knowledge that the knitting company in fact, at least, shared in the possession of the property. It was itself an actor, or it acquiesced in the arrangement under which it had, at most, but a partial possession, and even that was subject to the control of the knitting company.

The method taken to store the property was, as found by the district court, a mere device or subterfuge to enable the bankrupt to hypothecate the receipts, and thus raise money upon secret liens on property in the possession of the pledgeor and under its control; and such scheme, the court said, ought not to receive judicial sanction. Such a scheme, under the facts, and as carried out in this case, and with regard to Wisconsin law, was a fraud in fact, and neither the receipts nor the so-called pledge could be asserted against any of the creditors.

It was held by the circuit court of appeals in a case arising in Wisconsin, relative to a chattel mortgage, which gave power to the mortgagor to make sales from the mortgaged property for his own use and benefit, that such a mortgage was fraudulent in fact, so it could not be asserted even against general creditors; citing Wisconsin cases. Re Antigo Screen Door Co. 59 C. C. A. 248, 123 Fed. 249, 254.

[427] *A further question was ruled upon in the above-cited case. It was in respect to a second mortgage upon chattels, which had not been properly filed, but the mortgagee had taken possession of the mortgaged property prior to the filing of the petition in bankruptcy, although long subsequent to the giving of the mortgage, and it was held that the mortgagee might hold the property as against the trustee in bankruptcy representing general creditors. There was no fraud in fact alleged. It was said by Judge Jenkins, in delivering the opinion of the court: "When the statute (Rev. Stat. Wis. 1898, § 2313) declares that a chattel mortgage shall be invalid against any other person than the parties thereto, unless possession be delivered and retained, or the mortgage be filed,—there being no actual fraud and no collusive delay in the filing or the taking of possession,—we think the statute must be construed to mean that the omission to file or to take possession renders the mortgage invalid only as to the creditor who, by execution or attachment, has acquired a lien upon the property." The case illustrates the distinction taken between fraud in fact and the mere failure to file a mortgage otherwise valid against the world.

Under the circumstances of this case we are satisfied there was no valid pledge and no equitable lien in favor of the interveners which would take precedence of the title of the trustee by virtue of the special provisions of the bankrupt act.

The decree is affirmed.

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*SOUTHERN RAILWAY COMPANY et al., [428] Appts.,
v.
H. H. TIFT et al., Appellees.

(See S. C. Reporter's ed. 428-440.)

Action—remedy for exacting unreasonable interstate rate—necessity of action by Interstate Commerce Commission.

1. The rule that an action at law to recover excessive interstate freight charges cannot be maintained in advance of action by the Interstate Commerce Commission will not prevent a Federal circuit court which has suspended proceedings on a bill seeking relief from an advance in freight rates, pending action by the Commission, from granting relief in the exercise of its powers under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 16, as a court of equity, on a petition filed after the Commission has acted, stating the substance of the findings of the Commission, and containing a copy of its report and opinion, where defendants have stipulated in open court that, in case complainants prevailed, decree of restitution might be made.

Trial—stipulation—judicial enforcement of order of Interstate Commerce Commission.

2. Parties, after action by the Interstate Commerce Commission declaring an increased freight rate to be unreasonable, may make a valid stipulation, in the subsequent proceedings had in the Federal court under the act of February 4, 1887, § 16, that such court may adjudge the amount of the reparation.

Judgment—stipulation—enforcing order of Interstate Commerce Commission.

3. The final decree of a Federal circuit court in the proceedings prosecuted under the act of February 4, 1887, § 16, after action by the Interstate Commerce Commission declaring an increased freight rate to be unreasonable, may direct an order of reference to the standing master of the pleadings and evidence in the cause, with instructions to ascertain the sum of the increase in rates paid since the rate went into effect, where defendants stipulated in open court that, in case complainants prevailed, a decree of restitution might be made.

[No. 601.]

Argued April 22, 23, 1907. Decided May 27, 1907.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree affirming a decree of the Circuit Court for the Southern District of Georgia, enjoining interstate carriers from enforcing an increased freight rate on lumber. Affirmed.

See same case below, 138 Fed. 753.

The facts are stated in the opinion.

Mr. Ed. Baxter argued the cause and filed a brief for appellants.

Messrs. William A. Wimbish and William Hepburn Russell argued the cause, and, with Ellis, Wimbish, & Ellis, and Mr. W. D. Ellis, filed a brief for appellees.

Mr. Justice McKenna delivered the opinion of the court:

This is an appeal from a decree of the circuit court of appeals affirming a decree of the circuit court for the southern district of Georgia, adjudging an advance in freight rates made by appellants, to be effective June 22, 1903, upon yellow pine lumber, of 2 cents per 100 pounds over rates previously in force, to be unjust and [34] unreasonable, and enjoining *the appellants, jointly and severally, from maintaining the same, "in so far as they apply to shipments of lumber from points in Georgia to Ohio river destinations and points basing thereon."

The original bill was filed April 14, 1903, by appellees, to enjoin such advance in rates, and a temporary restraining order was issued and notice to appellants to show cause why an injunction should not issue. On May 8 the bill was amended. On May 12 the appellants filed a demurrer to the amended bill for want of jurisdiction in the court as a court of equity and as a court of the United States, and the Southeastern Freight Association filed an answer. Appellants also filed a response to the order to show cause. On May 16 the demurrer was overruled. The temporary injunction was, however, dissolved, but the following condition was expressed:

"In case the respondents shall enforce the rates complained of, and the complainants shall make proper application to the Interstate Commerce Commission to redress their alleged grievances, the court will entertain a renewed application on the record as made, and such appropriate additions thereto as may be proposed by either party, for enjoining the enforcement of such rates pending the investigation of the Commission, unless otherwise dissolved, and, on presentation to the court of the report of the Commission, such other action be taken as will be conformable to law and the principles of equity." 138 Fed. 756.

The appellants took the steps prescribed by the interstate commerce act to put the advanced rates into effect, and the appellees, on June 23, 1903, filed a petition before the Interstate Commerce Commission, charging that "in promulgating said tariff of increased rates, and maintaining and enforcing the same," the appellants were acting "in concert with each other and with other lumber-carrying roads," who, with them, were "comembers of the Southeastern Freight Association." The petition also charged that the advance was "arbitrary, unreasonable, and unjust," and prayed for an order commanding *appellants, and each [435] of them, to desist from enforcing the advance. All of the appellants except the Macon & Birmingham Railway Company filed a joint and several answer, in which they traversed the allegations of the petition and pleaded justification by the conditions affecting the roads and the traffic. They also alleged that the Georgia Saw Mill Association, to which appellees belonged, was a combination in restraint of trade and commerce, and that, therefore, appellees did not "come before the Commission with clean hands." A great deal of testimony was taken on the issues presented, and the Commission found and concluded that the advance in rates "was not warranted by the testimony, and that the increased rates put in force June 22, 1903, were unreasonable and unjust." The specific findings and conclusions of the Commission are reported in 10 Inters. Com. Rep.

548. After the petition was filed before the Interstate Commerce Commission, but before final action, appellees filed an amended bill and again moved the circuit court for an injunction. In the amended bill it was alleged that appellants, after the dissolution of the restraining order, filed with the Interstate Commerce Commission and gave public notice that on June 22, 1903, the advance in sales on lumber would be established and put in effect, and such advance became effective June 22, 1903. The appellants, in a joint and several answer, admitted the averments of the amended bill, but reserved the benefit of their demurrer to the original bill. The motion for an injunction was dismissed. 123 Fed. 789.

The Commission made its order hereinbefore referred to on the 7th of February, 1905, and on March 17, 1905, the appellees presented a petition to the circuit court stating the substance of the findings of the Commission, and attaching a copy of its report and opinion.

An order to show cause was issued. On June 3, 1905, appellants filed a joint and several answer, which was verified. The Southeastern Association answered separately. The appellees also filed a supple-
[436] mental bill, the purpose of which *was to obtain restitution of the excess of rates charged over those which it was alleged were reasonable. To this bill a demurrer was filed.

It was stipulated by counsel of the respective parties that the testimony, including exhibits taken before the Interstate Commerce Commission, should be filed in the case, subject only to objections to its relevancy. In addition to such testimony other evidence was submitted to the circuit court, and that court rendered a decree July, 1905, that the advance in rates "from lumber-shipping points within the state of Georgia to Cincinnati, Louisville, Evansville, Cairo, and points on the Ohio river or crossings was and is excessive, unreasonable, and unjust, and in violation of the provisions of the act of Congress known as the act to regulate commerce, and the amendments thereto, and that the rates and charges resulting from said advance are likewise excessive, unreasonable, and unjust, and in violation of the act to regulate commerce." The appellants were enjoined, as we have already said, from enforcing the advance.

The decree also directed an order of reference to the standing master of the pleadings and evidence in the cause, with instructions to ascertain the sum total of the increase in rates paid by each of the appellees and other members of the Georgia Saw Mill Association to either or all of the appellants since the rate went into effect. This was done, the decree recited, in pursuance of a stipulation made by the respondents (appellants) in open court that, in case the complainants (appellees) prevailed, decree of restitution might be made. 138 Fed. 753. The decree was affirmed by the circuit court of appeals without an opinion.

On the merits, as distinguished from the questions which concern the jurisdiction and procedure in the circuit court, this case is, though variant in some detail of facts, similar in principle and depends upon the same legal considerations as Illinois C. R. Co. v. Interstate Commerce Commission, just decided. [206 U. S. 441, post, 1128, 27 Sup. Ct. Rep. 700.] The advance here involved grew *out of the same action by the railroads [43 there considered, and is the advance there referred to as having been made west of the Mississippi. This case was argued and submitted with that and depends on the same ultimate contentions. We need not repeat the discussion of those contentions, nor trace out or dwell upon the many subsidiary considerations which the assignments of error and the elaborate briefs of counsel present.

In the case at bar, however, there are assignments of error based on the objections to the jurisdiction of the circuit court. These might present serious questions in view of our decision in Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, ante, 553, 27 Sup. Ct. Rep. 350, upon a different record than that before us. We are not required to say, however, that because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed, is forbidden by the interstate commerce act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates. The circuit court granted no relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission, where, upon sufficient pleadings, identical with those before the court, and upon testimony adduced upon the issues made, the decision was adverse to the appellants. This action of the Commission, with its findings and conclusions, was presented to the circuit court, and it was upon these, in effect, the decree of the court was rendered. There was no demurrer to that petition, and the testimony taken before the Commission was stipulated into the case, and the opinion of the court recites that, "with e[illegible] meritorious purpose, counsel for [illegible] respective parties

agreed that this would stand for and be the hearing for final decree in equity."

It was certainly competent for the appellees to proceed in the circuit court under § 16 of the interstate commerce act (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154) and to apply by petition to the circuit court, "sitting in equity," [438]for the court to hear and determine *the matter "as a court of equity," and issue an injunction "or other proper process, mandatory or otherwise," to enforce the order of the Commission. We think that, under the broad powers conferred upon the circuit court by § 16 and the direction there given to the court to proceed with efficiency, but without the formality of equity proceedings, "but in such manner as to do justice in the premises," and in view of the stipulation of the parties, recited in the decree of the court, the appellants are precluded from making the objection that the court did not have jurisdiction to entertain the petition and grant the relief prayed for and decreed.

But objection is made to the extent of the decree. Indeed, the objection may be said to go farther back, and is based on the bill itself, on the ground that "pecuniary reparation was demanded" in it, and "such payment necessarily involves a trial by jury, guaranteed by the Constitution of the United States." And further, that each complainant is separately interested in any amount which may be recovered. The specific part of the decree which is objected to is as follows:

"Third. That an order be taken referring to the standing master of this court, J. N. Talley, Esquire, the pleadings and evidence in this cause, with instructions to ascertain the sum total of the increase in rates paid by each of the complainants and other members of the Georgia Saw Mill Association to either or all of the defendant companies, since the rate went into effect, and to the end of the litigation, and report such amount to the court in order that, pursuant to the stipulation made by the respondents in open court, in case the complainants prevailed, decree of restitution may be made."

The errors assigned against this part of the decree are: (a) That there is nothing in the pleadings or the evidence to justify any reference. (b) The master should only have been ordered to ascertain the sum total of the advance paid by each of the appellees as is unreasonable and unjust. (c) That no members of the Georgia Saw Mill Association except the complainants (appellees) had themselves been made parties to the [439]cause prior *to the rendition of the decree of July 8, 1905, and, therefore, no reference should have been made to ascertain the amounts paid by such other members. (d) The master should not have been ordered to report any amount at all. (e) No stipulation was made by appellants that a decree of restitution should be made except "in the event that complainants (appellees) finally prevail, and whether they finally prevail cannot be known until the determination of this appeal."

In support of these contentions appellants rely on Texas & P. R. Co. v. Abilene Cotton Oil Co. supra. In that case the Abilene Cotton Oil Company sued in one of the courts in Texas to recover the excess of what it alleged to be an unjust and unreasonable charge on shipments of car loads of cotton seed. The defense was that the rates were charged according to the schedule of rates filed under the interstate commerce act, and that the court had no jurisdiction to grant relief upon the basis that the established rate was unreasonable, when it had not been found to be so by the Interstate Commerce Commission. The defense prevailed in the trial court, but did not prevail in the court of civil appeals, where judgment was rendered in favor of the cotton oil company. The judgment was reversed by this court on the ground that the state courts had no jurisdiction to entertain a suit based on the unreasonableness of a rate as published in advance of the action of the Interstate Commerce Commission adjudging the rate unreasonable. And it was in effect held that reparation after such action for the excess above a reasonable rate must be by a proceeding before the Commission, "because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one." There is nothing in that case, however, which precludes the parties, after action by the Commission declaring rates unreasonable, from stipulating in the proceedings prosecuted under § 16 that the court adjudge the amount of reparation. By the action of the Commission the foundation for reparation, as *provided in the [440] interstate commerce act, was established, and the inquiry submitted to the court was but of its amount, and had the natural and justifiable inducement to end all the controversies between the parties without carrying part of them to another tribunal. We do not understand that the assignment of errors questions the truth of the recital in the decree that the reference was made in pursuance of the stipulation in open court, and it is upon the stipulation we rest our decision. It is said, however, that it was stipulated that restitution should only be made in the event

the appellees prevailed. Necessarily it was so dependent. So was every part of the relief prayed by the appellees. The decree was the first judgment that they should prevail, and properly provided for the satisfaction of all the relief dependent upon their success. Of course, what was granted by the decree was subject to review and change or defeat in the circuit court of appeals and in this court. But it equally was subject to affirmance, and was put in such form and made such provision as made it ready to be executed upon affirmance.

The objection that the reference is too broad is not of substance. What the court may award upon the coming in of the report of the master we cannot know. Presumably it will make the reparation adequate for the injury, and award only the advance on the old rate, and to those who are parties to the cause.

Decree affirmed.

Mr. Justice Moody took no part in the decision of this case.

Mr. Justice Brewer dissented.

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[441] *ILLINOIS CENTRAL RAILROAD COMPANY, Gulf and Ship Island Railroad Company, Southern Railroad Company, et al., Appts.,

v.

INTERSTATE COMMERCE COMMISSION.

(See S. C. Reporter's ed. 441–466.)

Appeal—harmless error.

1. Even if error could be attributed to the Interstate Commerce Commission in deciding that expenditures for permanent improvements and equipment should not be charged to the current or operating expenses of a single year for the purpose of testing the reasonableness of an increased freight rate, such error would not require the reversal of a decree enforcing an order of the Commission requiring carriers to desist from enforcing such rate, where the findings show that the old rates were profitable and that dividends were declared even when permanent improvements and equipment were charged to operating expenses.

Carriers—reasonableness of rates.

2. Expenditures for permanent improvements and equipment should not be charged to the current or operating expenses of a single year for the purpose of testing the reasonableness of an increased freight rate.

Carriers—reasonableness of rates—presumption.

3. No presumption of law that a freight rate upon a particular commodity is reasonably low exists because such rate has been duly published and filed by the carrier with the Interstate Commerce Commission.

Interstate Commerce Commission—powers—judicial enforcement of order.

4. A concerted advance by interstate carriers in the freight rate upon a particular commodity may be held unreasonable and unjust by the Interstate Commerce Commission and by a Federal circuit court in the subsequent proceedings to enforce the order of the Commission, although such rate may be but a mere division of a through rate.

Appeal—review of facts.

5. Findings of fact made by the Interstate Commerce Commission, when concurred in by a Federal circuit court, will not be disturbed unless the record establishes that clear and unmistakable error has been committed.

[No. 588.]

Argued April 22, 23, 1907. Decided May 27, 1907.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana to review a decree enforcing an order of the Interstate Commerce Commission requiring carriers to desist from charging an increased freight rate on lumber. Affirmed.

Statement by Mr. Justice McKenna:

This case involves the validity of an order of the Interstate Commerce Commission requiring the appellants "to cease and desist on or before the 1st day of April, 1905, from further maintaining or enforcing the unlawful advance of 2 cents per 100 pounds, or the said unlawful rates resulting therefrom, for the transportation of lumber from shipping points 'on defendants' respective [442] lines in the state of Louisiana east of the Mississippi river, and in the states of Mississippi and Alabama to Cincinnati, Louisville, Evansville, Cairo, and other points on the Ohio river commonly called and known as Ohio river points."

The order was made in the matter of the complaint filed with the Commission by the Central Yellow Pine Association, an incorporated association composed of persons, firms, and corporations engaged in the business of manufacturing yellow pine lumber in the states of Mississippi, Alabama, and that part of Louisiana east of the Mississippi river.

The complaint charged that the appellants were common carriers by rail, engaged in interstate commerce, and as such were engaged

NOTE.—On the jurisdiction and powers of the Interstate Commerce Commission—see note to United States v. Tozer, 2 L.R.A. 446.

in the transportation of yellow pine lumber from the mills and lumber plants of the members of the Yellow Pine Lumber Association to the territory known as the "Central Freight Association territory," which lies on the north of the Ohio river and on and between the Mississippi river on the west and a line running through Buffalo and Pittsburg on the east, and that the members of the association are dependent upon appellants for the transportation of their lumber to the markets of the country; that the appellants and the railways carrying yellow pine lumber to the same markets from the territory west of the Mississippi river, embracing the states of Texas, Arkansas, and that part of Louisiana west of the river, by agreement or concert of action advanced the rate on yellow pine lumber from the territories both east and west of the Mississippi river on and beyond the Ohio river in Central Freight Association territory 2 cents per 100 pounds. The advance was made applicable south of the Ohio river and effective on and from April 15, 1903, except as to the Louisville & Nashville road, as to which it became effective June 22, 1903. And it was alleged that such advance was "unjust, unreasonable, as well as discriminative, in violation of the act to regulate commerce." The answer of the railways admitted the advance, but denied that it had the [443] *character and effect charged, but alleged that, on the contrary, it was reasonable and just and not in violation of law. The answers also specifically justified the advance by the conditions of the market and the traffic, including competition, and the costs of operating the roads. Testimony was taken on the issues thus formed.

The Commission sustained the complaint and made the order recited above. 10 Inters. Com. Rep. 505. The railways refused to obey. The Commission then instituted this proceeding in the circuit court of the United States for the eastern district of Louisiana, where further proof was taken and a decree rendered which affirmed the order of the Commission and made it the order of the court. The roads were also enjoined from further disobedience to the order. No opinion was filed. The testimony was voluminous, and the report and findings of the Commission are very long. They are reported in 10 Inters. Com. Rep. 505, supra. The conclusions of the Commission are mingled somewhat with legal arguments, but the following may be selected as important and pertinent to the questions which the controversy presents:

The lumber-producing districts are divided in territory (1) west of the Mississippi river; (2) territory east of the river; and (3) southeastern territory, composed of the states of Georgia, Florida, and part of Alabama. The lumber of each of these districts competes in the sale of their products in "Central Freight Association territory."

The roads of the appellants are located in and serve the second of these territories.

The advance in rates was made as well in territory west of the Mississippi river, "and was made, in fact, though not expressly, by agreement between the defendants (appellants) and the roads west of the river," after several meetings, at a consultation between the representatives of the roads. The roads east of the river took the initiative.

At Cairo traffic from a large portion of the lumber-producing districts meets or converges *en route* to destination. The *rates [444] on other Ohio river crossings are based on Cairo; that is, they bear a fixed relation to the Cairo rate, being advanced or reduced as that rate is advanced or reduced. The through rates to points beyond the Ohio river in Central Freight Association territory are made up of the full local rates of the roads north of the Ohio as the proportions of those roads. Whatever is left of the through rates are the proportions of the roads south of the Ohio. The rates to interior points north of the Ohio are made on the lowest combination rates to the Ohio plus the rates beyond, and are blanket rates, being the same from all shipping points or points of production to the same destination. The rates to the Ohio are to the north bank and include the bridge tolls.

There are divisions of rates south of the Ohio between what are termed the "originating" roads, on which the lumber is principally manufactured, and the roads intermediate between them and the river.

There had been, from time to time, changes or fluctuations in the rate. Prior to 1894 the roads west of the Mississippi claimed and were allowed a differential of 2 cents. This placed at a disadvantage the shippers east of the Mississippi, and a readjustment of rates was made, and on May 1, 1894, the rate to Cairo from east of the Mississippi was reduced to 13 cents per 100 pounds, the rate in force from west of the Mississippi. This rate remained until September 9, 1899, about five years, when it was advanced to 14 cents, and so remained until April 15, 1903, nearly four years, when the advance of 2 cents complained of was made.

The railroads west of the Mississippi make a certain allowance to the mills which have "logging roads," that is, roads by which logs are hauled from the timber to the mills. This is called "tap line allowance or division." It ranges 1 to

2 cents per 100 pounds, up to as high as 6 cents, and varies, to some extent, according to the destination of the traffic. The mills east of the river have logging roads also, but appellants make no allowance to them. The [445] only exception *is the Mobile & Ohio road, which grants allowances to about four mills on its line. The New Orleans & Northeastern road put in a tap line allowance of 2 cents, but other roads east of the river objected, and it was withdrawn. There does not appear to be any reason for such allowance west of the Mississippi which does not apply east of that river, and it amounts to a rebate or reduction from the regularly published rate, and gives an advantage to the mills west of the Mississippi over those east, although the published rates from both are the same.

The lumber business had grown from its inception and was largely and possibly more prosperous than it had been before, but the proof does not show that for two or three years preceding the advance the prices of mill products had materially increased or that the profits realized were unusual or excessively large.

As to the operating expense of the roads the Commission said:

"The proof shows increases in wages and in prices of material and equipment, but not in a marked degree for the two years, 1901 and 1902, immediately preceding the advance rate. These increases have doubtless added materially to operating expenses, but the total annual increases in those expenses are, of course, due only in part to the advances in wages and prices of supplies and equipment. They are attributable in a great measure to the constant growth or enlargement of the business of the roads. Not only has the lumber business of the roads greatly increased, but their business in general. The greater the volume of business, the greater is the aggregate cost of conducting it; or, in other words, of operating the roads. The total operating expenses of the roads, as reported by them, have also been much enlarged by the inclusion therein of large expenditures for permanent improvements.

. . . . . .

"While the operating expenses of the defendants have constantly grown, the gross [446] earnings from operation have also *increased from year to year to such an extent as to have resulted in a constant increase in net earnings. This is shown in the tables set forth in our findings of fact (finding 14)."

Sufficient cause was not shown, either in the alleged profit in the lumber business or in the increased cost of operating the roads, for the advance in the rates on lumber. And, answering the contention that the former rate was not adequately remunerative, the Commission expressed the view that "reasonableness in this sense of a rate on a single article of traffic is one of almost insuperable difficulty." And further, that the value of the entire property of a road "can shed but little, if any, light upon the question." The rate on one article might reasonably or unreasonably be high and the total of rates be remunerative or otherwise. But, it was concluded, even if that be a mistaken view, it was impossible, with any degree of accuracy, to determine from the voluminous and conflicting testimony on the subject introduced in behalf of both parties what was the value of the property employed by the roads. The Commission thought that the elements to be considered in determining the reasonableness of an entire system of rates were "widely variant" from those to be considered in determining the reasonableness of a single rate, and expressed the elements upon which the latter depends to be "the value, volume, and other characteristics affecting the transportation of the particular commodity to which it is applied." The Commission referred to its findings of facts as having "many things disclosed by the evidence" which bore directly upon the reasonableness of the particular rate in question, and which aided it in arriving at a correct judgment in respect thereto, saying that:

"In the first place, the present advanced rate is the last (up to date) of a series of advances, and was made by joint or concerted action of the carriers. It is claimed by them that in advancing the rate they acted independently, each for itself, but the proof shows conclusively that the advance was the outcome of a concert of action and a previous understanding *between the companies. [44[illegible] Through their authorized official representatives they conferred with each other repeatedly as to the making of an advance; recognized the fact that, because of competition in common markets between the lumber-producing districts served by them, the advance should be from all those districts or none, and finally they all promulgated the advance, to take effect at exactly the same time for exactly the same amount. This concurrence of action was not only between the railway companies, parties defendant in this case, and in relation to the rates charged by them, but was participated in by the lumber-hauling roads serving the territories west as well as east of the Mississippi river."

The 14-cent rate in force at the date of the advance had [illegible] maintained nearly four years, and a still lower rate, 13 cents, had been maintained [illegible] the preceding five years and four [illegible] And the testimony

of the officers of the roads was that there was a profit in both rates. The answer also admitted profit, but averred that lumber "was not an exceedingly profitable commodity." The Commission said:

"No reason is given or shown why lumber should be singled out as a commodity upon which an 'exceedingly' large profit should be earned. A reasonable profit is all the defendants are entitled to, and the testimony is far from convincing us that the profit under the 14-cent rate was not reasonable or would not now be reasonable. As stated in our 'Findings of Facts,' the 14-cent rate appears to be reasonably high when compared with the rates on other commodities which are at all analogous to lumber in respect to value, volume, and the various conditions affecting the service of transportation. During the period from 1894 to 1899, while the 13-cent rate was operative, there were large annual increases in the net earnings of the defendants, and the same was the case from 1899 to 1903, while the 14-cent rate was operative (finding 15). During those periods there was [448] also a large *growth in the tonnage of lumber hauled by the defendants, and therefore their increases in net earnings were in part, at least, derived from the lumber traffic under those rates. Dividends have been declared during those periods, and in addition considerable surpluses have been reported (finding 16), and large sums have been invested in permanent improvements or betterments (finding 14)."

The seventh and eighth conclusions of the Commission we give entire, as follows:

"The defendants, other than the originating roads, complain of the small amount of revenue or low rate per ton per mile realized by them out of their proportions of the through rates. This is due to the large allowances out of the rates made to the originating roads. (See findings 3 and 4.) Those allowances commenced under the lower rates in force prior to the advance, and raise the presumption that those lower rates, minus the allowances, were then considered reasonably remunerative for the remainder of the hauls to the Ohio river crossings. As the 2 cents advance goes entirely to the roads continuing the transportation on to the Ohio and none of it to the originating roads, the inference is that advance was made solely with a view of increasing the proportions of the former roads. If the allowances to the originating roads are unreasonably large, as they appear to be from a distant standpoint, and result in unreasonably low proportions to the other roads, this cannot be remedied by an advance in the total through rates charged the public. It is the total rate, and not its proportions, which is in issue.

"Although both the net and gross earnings of the defendants have grown from year to year, the percentages of what are reported by the defendants as 'operating expenses' to earnings have also somewhat increased (table, finding 14), and this is urged as showing the necessity for an advance in the lumber and some other rates. It is to be noted that these operating expenses embrace large annual expenditures for real estate, right of way, tunnels, bridges, and other strictly *permanent im- [449] provements, and also for equipment, such as locomotives and cars."

And the Commission said repairs whether to improvement or equipment, were properly chargeable to operating expenses, but that expenditures for improvements and equipments should not "be taxed as part of the current or operating expenses of a single year, but should be, so far as practicable, and so far as rates exacted from the public are concerned, 'projected proportionately over the future.'" It was said further, if such expenditures should be deducted from the annual operating expenses it would be found that the percentage of operating expenses to earnings had, in some instances, diminished, and in others increased, to no material extent.

The tenth and eleventh conclusions are as follows:

"10. The general rule is, the greater the tonnage of an article of traffic, the lower is the rate. No rule is more firmly grounded in reason or more universally recognized by carriers. It is because of the greater density of traffic north of the Ohio river in Central Freight Association territory and in eastern territory that rates in general are materially lower in those territories than in southern territory. The defendants have made yellow pine lumber an exception to this rule; while the tonnage in general of the defendants and lumber tonnage in particular have grown greatly, the lumber rate has not been lowered, but has been materially advanced. Moreover, the testimony is that 'a decrease in the rates on traffic in general has been going on throughout the United States since the improvements in transportation have been put in operation;' here, again, lumber has been taken from under, and deprived of the benefits of, the general rule.

"11. As said in Marten v. Louisville & N. R. Co. 9 Inters. Com. Rep 589, and shown by the proof in this case, 'lumber is an inexpensive freight and only a few other commodities furnish to carriers so large a tonnage.' The lumber business is constant, yielding the carriers revenue all the year;

no special equipment is constructed or fur-
[450] nished for its carriage; it is *loaded by the shipper and unloaded by the consignee, and where open cars are furnished, the shipper is required at considerable expense to equip them so as to protect the load and the train; there is small risk incident to its transportation, and, in case of accident, the damage is insignificant. For these reasons lumber should be given rates which are relatively low.

"Our conclusion on the whole is that the advance, April 15, 1903, of 2 cents in the Cairo rate (with a corresponding increase in the rates to the other Ohio river crossings) was not warranted under all the facts in evidence, and that the resultant increased rate is unreasonable and unjust. An order will be issued in accordance with these views."

Mr. Ed. Baxter argued the cause and filed a brief for appellants:

The interstate commerce act provides for and prescribes indirectly a standard, by comparison with which it may be determined whether a given rate is or is not to be deemed unreasonable (*i. e.*, in and of itself) within the meaning of the act; and that standard is the rate adopted, printed, and kept posted, as required by the statute, by those engaged in the business, and subject to the effect of free competition.

Van Patten v. Chicago, M. & St. P. R. Co. 81 Fed. 545; Kinnavey v. Terminal R. Asso. 81 Fed. 802; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628.

Permanent improvements and equipment are properly chargeable to operating expenses.

Union P. R. Co. v. United States, 99 U. S. 420, 421, 25 L. ed. 282, 283.

Neither the Commission nor the court had jurisdiction to determine the reasonableness of the proportions of a through rate.

11 Ann. Rep. I. C. C. 1897, p. 27.

The findings of fact made by the Commission in the case at bar are not conclusive on this court.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 235, 238, 239, 40 L. ed. 953, 954, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Louisville & N. R. Co. v. Behlmer, 175 U. S. 676, 44 L. ed. 319, 20 Sup. Ct. Rep. 209; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 175, 42 L. ed. 426, 18 Sup. Ct. Rep. 45; Interstate Commerce Commission v. Atchison, T. & S. F. R. Co. 4 Inters. Com. Rep. 323, 50 Fed. 304; Interstate Commerce Commission v. Lehigh Valley R. Co. 3 Inters. Com. Rep. 796, 49 Fed. 180; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 614.

The finding made by the Commission on a mixed question of law and fact is not entitled to as much weight as the general verdict of a jury.

Kentucky & I. Bridge Co. v. Louisville & N. R. Co. supra; Shinkle, W. & K. Co. v. Louisville & N. R. Co. 62 Fed. 693.

The finding made by the Commission on a mixed question of law and fact is not entitled to as much weight as the general finding of a court.

Norris v. Jackson, 9 Wall. 128, 129, 19 L. ed. 609; Miller v. Brooklyn L. Ins. Co. 12 Wall. 297, 20 L. ed. 398; Martinton v. Fairbanks, 112 U. S. 672, 673, 28 L. ed. 863, 864, 5 Sup. Ct. Rep. 321.

Mr. L. A. Shaver argued the cause and filed a brief for appellee:

When carriers advance a rate which has been for some time in force the burden is upon them to show sufficient grounds for such advance.

17 Am. & Eng. Enc. Law, p. 133; Holmes v. Southern R. Co. 8 Inters. Com. Rep. 568.

Where the Commission has duly investigated the facts, and the court below has sustained the finding of the Commission on such investigation, this court will decline to undertake an original investigation of the facts on its own account, and will not set aside the findings of the Commission except in a clear case of error.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 194, 40 L. ed. 938, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Louisville & N. R. Co. v. Behlmer, 175 U. S. 675, 44 L. ed. 319, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 27, 45 L. ed. 729, 21 Sup. Ct. Rep. 516.

The presumption will always be that the compensation charged for a service or thing is sufficient to be reasonable.

Interstate Commerce Commission v. East Tennessee, V. & G. R. Co. 85 Fed. 114

Mr. T. M. Miller also argued the cause and filed a brief for appellee:

While the Interstate Commerce Commission is not a court, it is an administrative body, exercising quasi-judicial powers, and its decisions are entitled to the highest respect by the Federal courts.

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 5 Inters. Com. Rep. 131, 64 Fed. 981.

In respect to interstate commerce matters, governed by the law, the Commission may be regarded as the general referee of each and every circuit court of the United

States, upon which jurisdiction is conferred, for enforcing the rights, duties, and obligations recognized and enforced by said law.

Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567.

The findings of fact of the Commission are prima facie evidence of the facts found.

Interstate Commerce Commission v. Atchison, T. & S. F. R. Co. 4 Inters. Com. Rep. 323, 50 Fed. 295; Tift v. Southern R. Co. 138 Fed. 753; Interstate Commerce Commission v. Louisville & N. R. Co. 118 Fed. 613; Interstate Commerce Commission v. Louisville & N. R. Co. 102 Fed. 709; Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 275, 47 L. ed. 1048, 23 Sup. Ct. Rep. 687; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209.

The Interstate Commerce Commission, by reason of the experience of its members in this kind of controversy, and their great opportunity for full information, is, in a sense, an expert tribunal.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 39 C. C. A. 413, 99 Fed. 64; Interstate Commerce Commission v. Southern P. Co. 123 Fed. 603.

The reasonableness of a given rate, and, by consequence, the reasonableness of any advance upon such rate, are questions of fact.

Louisville & N. R. Co. v. Behlmer, supra.

Mr. Marcellus Green also argued the cause, and, with Mr. Garner Wynn Green, filed a brief for appellee:

The question of the reasonableness, *vel non*, of a rate, is a question of fact. The Commission, a body of rate experts, skilled in the knowledge of conditions, of environment, and of transportation relations (East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 39 C. C. A. 413, 99 Fed. 52), and peculiarly fitted to determine the question of reasonableness of a rate (Tift v. Southern R. Co. 138 Fed. 753), with the witnesses before it, and who, like a jury, saw them and their manner of testifying, on a conflict of evidence, has found the facts against the defendants. The statute gives to this finding the effect of being prima facie evidence of correctness. In probative force, its findings carry greater weight than prima facie evidence because of its ability, experience, and great learning on these questions.

Where a master and the circuit court, or the district and circuit court, concur in findings of fact, they will not be disturbed on appeal unless there is no evidence to support them.

Schwartz v. Duss, 187 U. S. 10, 47 L. ed. 53, 23 Sup. Ct. Rep. 4, 43 C. C. A. 323, 103 Fed. 561; Murphy v. Southern R. Co. 53 C. C. A. 477, 115 Fed. 257; Dravo v. Fabel, 132 U. S. 487, 33 L. ed. 421, 10 Sup. Ct. Rep. 170.

This bill is in the nature of an appeal from the judgment of the Commission, and while the decree in the Tift Case was in another proceeding, it was an adjudication upon common questions of law and fact, and, as such, should be tantamount, as evidence, to an adjudication of the like issues here.

1 Pom. Eq. Jur. §§ 245, 253, 255, 256; Sharon v. Tucker, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720; Virginia-Carolina Chemical Co. v. Home Ins. Co. 51 C. C. A. 21, 113 Fed. 1; Crawford v. Mobile, J. & K. C. R. Co. 83 Miss. 717, 102 Am. St. Rep. 476, 35 So. 949.

The burden of proof was on the railroads to show that the conditions had so changed as to justify the advance.

Tift v. Southern R. Co. 138 Fed. 753; 1 Greenl. Ev. § 41; Holmes v. Southern R. Co. 8 Inters. Com. Rep. 568; McMorran v. Grand Trunk R. Co. 2 Inters. Com. Rep. 604.

The Commission had plenary power to make the order complained of, and the circuit court, upon the complaint of the Commission, had jurisdiction to enforce it.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, ante, 553, 27 Sup. Ct. Rep. 350.

Mr. Justice McKenna delivered the opinion of the court:

Counsel for appellants in his oral argument made the declaration that it would not be necessary for this court to open the pages of testimony contained in the record, and says in his supplemental brief:

"I do not insist that this court shall read the voluminous testimony contained in these records, but I do most respectfully ask it to lay down the rules or principles of transportation law which are fairly involved in the just determination of these cases, and to remand them to the Commission, to be reexamined upon the testimony in conformity with the principles of transportation law to be announced by this court."

To what, then, shall we resort? How shall we determine what "principles of transportation law" were involved? How determine whether they were recognized and applied, or denied and rejected, by the Commission, and, necessarily, by the circuit court? An examination of the testimony, by concession of counsel, is out of the question. And the findings of the Commission are made by law prima facie true. This

court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 27, 45 L. ed. 719, 729, 21 Sup. Ct. Rep. 516. And, in any special case of conflicting evidence, a probative force must be attributed to the findings of the Commission, which, in addition to "knowledge of conditions, of environment, and of transportation relations," has had the witnesses before it and has been able to [455] judge of them and *their manner of testifying. In the case at bar these considerations are reinforced by a concurrent judgment of the circuit court.

The question is one of the reasonableness of a rate, and such a question was said to be one of fact in Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700. In these cases, however, it was declared that the conclusions of the Commission are subject to review if it excluded "facts and circumstances that ought to have been considered." Upon this declaration appellants rely, and justify their invocation that this court express and enforce the principles of transportation which, they contend, the Commission disregarded; and appellants venture the observation that unless this be done "there will be no settled principles of law for the guidance of either the Commission or of the courts," and that "the interstate railroad companies will be the only persons in this country who will not be able to obtain the opinion of the courts upon questions of law which vitally affect their interest." We think the apprehension is groundless and is demonstrated to be groundless by the cases cited. In all of them legal propositions were reviewed as elements in the inquiry of the reasonableness of a rate. Those cases, however, are in marked contrast to the pending case. It will be observed that in them the instances were very simple. There was a salient circumstance in each of them about which there was no uncertainty. In other words, it was unconfused by dispute and was not put to question by a conflict of testimony. A definite legal proposition unmixed with fact was presented, and the only act of judgment exercised by the Commission was to reject it.

In Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, passing on the effect of a shipment on a through bill of lading to give jurisdiction to the Commission (in which the Commission was sustained), the questions presented were the power in the Commission *to fix a maximum [456] rate, and whether competitive conditions could be considered by a railroad in fixing a greater charge for a shorter than a longer distance on its own line. It was decided that the power to pass on the reasonableness of an existing rate did not imply the power to prescribe a rate. On the conditions affecting competition it was not found necessary to pass, but the following passage is worth the quoting as bearing on the contention of appellants:

"It has been forcibly argued that, in the present case, the Commission did not give due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged. But the question was one of fact, peculiarly within the province of the Commission, whose conclusions have been accepted and approved by the circuit court of appeals, and we find nothing in the record to make it our duty to draw a different conclusion."

In Texas & P. R. Co. v. Interstate Commerce Commission, ocean competition as constituting a dissimilar condition and as justifying a difference in rates between import and domestic traffic was the circumstance considered. The Interstate Commerce Commission had ruled against such competition as a factor, and condemned rates made in view of it to be undue and unjust. The court observed:

"But we understand the view of the Commission to have been that it was not competent for the Commission to consider such facts—that it was shut up by the terms of the act of Congress, to consider only such 'circumstances and conditions' as pertained to the articles of traffic after they had reached and been delivered at a port of the United States or Canada."

And further:

"We have, therefore, to deal only with a question of law, and that is, What is the true construction, in respect to the matters involved in the present controversy, of the act to regulate commerce? If the construction put upon the act by the Commission was right, then the order was lawful; otherwise it was not."

*The ruling of the Commission was re- [457]
versed.

In Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45, there was passed upon a [illegible] f the Commission that the comp [illegible] river lines of transportation was a [illegible] tor to be considered when determin [illegible] er property tax-

ported over the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in the 4th section of the interstate commerce act. The decision was declared to be an erroneous construction of the act.

In Louisville & N. R. Co. v. Behlmer (passing by subordinate questions) the dominant element was the construction of the 4th section of the interstate commerce act. The Commission and the circuit court of appeals, it was said, "mistakenly considered as a matter of law that competition, however material, arising from carriers who were subject to the act to regulate commerce, could not be taken into consideration, and likewise that all competition, however substantial, not originating at the initial point of the traffic, was equally, as a matter of law, excluded from view."

In all these cases, therefore, there was a single, distinct, and dominant proposition of law which the Commission had rejected, and the exact influence of which, in its decisions, could be estimated. Indeed, they were mere constructions of the statute, the delegation of the Commission's duties and power. Let us now see what the propositions are which appellants propose for our adoption. They are presented as presumptions of law, which dispense with evidence until rebutted, or countervail evidence by their probative force. (1) That the rate published by a carrier is reasonably low. (2) A rate upon a commodity, made by the competition of carriers, is reasonably low, and the burden is on him who assails it. (3) A rate upon a commodity as low, or lower, than the majority of rates charged by other carriers for the transportation of the same grade of commodities for similar distances in the same or other territory, is reasonably low, and the burden is upon him [458] who *insists that it is unreasonably high. (4) A rate charged by a carrier which has the "strongest possible motive" to develop and increase a traffic in a particular commodity, and has maintained such rate for a "long series of years," so as to have induced a large and continuous increase of business in that commodity and of the capital invested, is reasonably low. (5) Rates being so adjusted upon a commodity as to enable it to move with profit to the shipper, whatever the conditions of the market, reducing the rates as the market declines, only increasing them as the market improves, a particular increase is reasonable if it be shown that the percentage of increase has been greater in the price of the commodity than in the rates on it. (6) Rates reduced to meet a market depression, and kept in effect during the depression, and increased when the depression ceases, which does not cause the increased rates to exceed the rates that were maintained by the carrier prior to the depression, are reasonable. (7) (8) Increase in rates upon all commodities impartially to meet largely increased expenditures on account of an abnormal increase in the volume of traffic is reasonable, "provided the gross earnings of the carrier yield less than the normal proportion of net earnings." Or provided the percentage of increase has been greater in the operating expenses of the carrier than in the rates upon the commodity. (9) (10) Upon the supposition that certain improvements have been made necessary by "an abnormal increase of traffic," they should be taken into account in determining the reasonableness of an increase of rates upon a commodity, whether, as a matter of bookkeeping, the expenditures should be charged to capital account or to the operating expenses; and without regard to the fact whether such expenditures have been paid out of the carrier's earnings or have been provided for by the issuance of bonds. (11) A rate on a commodity is profitable if it exceeds the cost of its movement; and yet the rate may be unreasonably low if it does not contribute its fair share to operating expenses, taxes, and fixed charges.

*If these propositions should be granted as [459] axioms of transportation there is the difficulty, as we have already pointed out, of determining to what extent—that is, whether to prejudicial extent, if at all—they were disregarded by the Commission and by the circuit court. The circuit court affirmed the order of the Commission, and it is an instant assumption that the court considered all the elements in the testimony and inferences from it. And the propositions of appellants are inferences of mixed law and fact, hence disputable,—may be overcome or counterpoised; and, therefore, the court, in reaching its ultimate judgment, may have given them all the weight to which they were entitled.

It is almost impossible to discuss the contentions of appellants without bringing forward the elemental. A presumption is the expression of a process of reasoning, and most, if not all, the rules of indirect evidence may be expressed as such. We cannot go far in the investigation of any controversy without finding ourselves compelled to infer one fact from another, but we would not therefore be justified in declaring such inferences legal axioms. It is to this that appellants invite us and seek to erect disputable inferences from conduct that may have many explanations into intendments of law.

In this connection Texas & P. R. Co. v. Interstate Commerce Commission, supra, is

an instructive case. In that case, we have seen, it was decided that whether the rate was reasonable or unreasonable was a question, whatever its theoretical nature, for the tribunal that decides upon matters of fact. Among other cases cited to sustain that position was Denaby Main Colliery Co. v. Manchester, etc. R. Co. 3 Railway & Canal Traffic Cases, 426. In that case it was declared that reasonableness of a rate was a question of fact, and not reviewable by an appellate court unless circumstances which ought to have been considered were not considered, and that a decision must be arrived at fairly looking at all the circumstances that are proper to be looked at. The appellant in the case contended against the con-
[460] sideration by the railway *commissioners of competition between two places, and the court of appeals, replying, said:

"If the appellants can make out that, in point of law, that is a consideration which cannot be permitted to have any influence at all, that those circumstances must be rigidly excluded from consideration, and that they are not circumstances legitimately to be considered, no doubt they establish that the court below has erred in point of law. But it is necessary for them to go as far as that in order to make any way with this appeal, because once admit that to any extent, for any purpose, the question of competition can be allowed to enter in, whether the court has given too much weight to it or too little becomes a question of fact, and not of law. The point is undoubtedly a very important one."

And it may be well to say here, as a suggestive principle throughout, that it was pointed out, such conclusions of fact were "to be arrived at, looking at the matter broadly and applying common sense to the facts that are proved." The remarks of Willes, J., in Phipps v. London & N. W. R. Co. [1892] 2 Q. B. pp. 229, 236, when the case was before the railway commissioners, were in effect approved. This court also quoted them. Willes, J., said, speaking of the questions of undue or unreasonable preference or advantage to or in favor of any particular person under § 2 of the railway and canal traffic acts, that they were eminently practical, "and if this court once attempts the hopeless task of dealing with questions of this kind with any approach to mathematical accuracy, and tries to introduce a precision which is unattainable in commercial and practical matters, it would do infinite mischief and no good."

It is conceded, as we have said, that the presumptions contended for by appellants are mixed of law and fact, except, may be, those which we shall presently consider. If either element is dominant in such presumptions, it must be that of fact. In other words, the fact must be ascertained before the law draws its inference. This is especially pertinent to *the propositions [461] urged by appellants. Let us illustrate. Take, for example, the second proposition, that "a rate upon a commodity *made by competition* of carriers is reasonably low, and the burden is on him who assails it." But suppose competition is not established, or is disproved, what becomes of the inference and the onus of proof dependent upon it? The question marks the condition that appellants encounter in the findings of the Commission. The findings of the Commission in effect negative the facts upon which the propositions depend. In still greater degree there is illustration in the first proposition. That proposition is an inference from an inference, as we shall presently point out. The reasonableness of the rate is inferred from competition, and competition is inferred from the publication of the rate.

This comment, it may be said, is not applicable to the ninth and tenth propositions of appellants, as they present propositions of law which were not only disregarded by the Commission, but the antithesis of them was asserted in the eighth finding. This contention must be specifically considered. The Commission finds that the net and gross earnings of the appellants have grown from year to year, and also that what they have reported as operating expenses have also grown. But in these operating expenses there were included "expenditures for real estate, right of way, tunnels, bridges, and other strictly permanent improvements, and also for equipment, such as locomotives and cars." The Commission expressed the opinion that such expenditures should not be charged to a single year, but "should be, so far as practicable and so far as rates exacted from the public are concerned, projected proportionately over the future." And it was said: "If these large amounts are deducted from the annual operating expenses reported by the defendants (appellants), it will be found that the percentage of operating expenses to earnings has in some instances diminished and in others increased to no material extent." The exact effect of the difference of view between appellants and the Commission as to operating expenses there is no test; "but it cannot be said, even if the Commission was wrong as to such expenses, that error in its ultimate conclusion is demonstrated or that the correctness of the conclusion is made so doubtful as to justify a reversal. The findings show that the old rates were profitable and

that dividends were declared even when permanent improvements and equipment were charged to operating expenses. But may they be so charged? Appellants contend that the answer should be so obviously in the affirmative that it should be made an axiom in transportation. On principle it would seem as if the answer should be otherwise. It would seem as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year. But it is insisted that Union P. R. Co. v. United States, 99 U. S. 402, 25 L. ed. 274, establishes the contrary. That case was not concerned with rates of transportation or the rule which should determine them against shippers. It was concerned with the construction of the words "net earnings" in an act of Congress, 5 per cent of which earnings were provided to be applied annually to a loan by the government to the railroad. Considering the provision of the act and its purpose, it was concluded "that the true interest of the government" was "the same as that of stockholders, and would be subserved by encouraging a liberal application of the earnings to the improvement of the works." "It is better," it was said, "for the ultimate security of the government in reference to the payment of its loan, as well as for the service which it may require in the transportation of its property and mails, that $100 should be spent in improving the works, than that it should receive $5 towards the payment of its subsidy. If the 5 per cent of net earnings, demandable from the company, amounted to a new indebtedness, not due before, like a rent accruing [463] upon a lease, a more *rigid rule might be insisted on. But it is not so; the amount of the indebtedness is fixed and unchangeable. The amount of the 5 per cent and its receipt at one time or another is simply a question of earlier or later payment of a debt already fixed in amount. If the employment of any earnings of the road in making improvements lessens the amount of net earnings, the government loses nothing thereby. The only result is, that a less amount is presently paid on its debt, whilst the general security for the whole debt is largely increased." The interest of the government in the improvement of the road was even greater than that of a stockholder. This was manifest from its munificent gift of lands, in addition to its generous loan of credit. As benefactor of the road and as creditor of it, as a government concerned with the development of the country, as a money lender concerned with the extent of security, "the true interest" of the United States might be that revenue should be applied to improvements. Payment of the debt was only postponed, not denied, and this and the other considerations might well determine the construction of words in the statute which were capable of different meanings. But such is not the relation or concern of a shipper of lumber. His right is immediate. He may demand a service. He must pay a toll, but a toll measured by the reasonable value of the service. The elements of that value may be many and complex, not always determinable, as we have seen, with mathematical accuracy, but, we think it is clear that instrumentalities which are to be used for years should not be paid for by the revenues of a day or year; and this is the principle of returns upon capital which exists in durable shape.

The first proposition submitted by appellants may also be said to be so far absolute and independent of evidence as to be considered as a presumption of law simply. This is contended on the authority of Van Patten v. Chicago, M. & St. P. R. Co. 81 Fed. 545. It is difficult to analyze the case briefly. It was an action of damages against the railroad for charging unjust and unreasonable rates under *the assumption that §§ [464] 8 and 9 of the interstate commerce act gave such an action, though the railroad had charged according to the schedule of rates filed with the Interstate Commerce Commission. The answer of the railroad set up the schedule and that rates had been charged shippers in accordance with it. The court overruled a demurrer to the answer and adjudged the defense good. The court discussed the question in an elaborate opinion, and, led by the difficulties of applying all of the provisions of the act, which were enacted, the court observed, to correct "the mode in which carriers imposed their charges," sought in the act itself a standard of reasonableness.

The court, in its opinion, referred to the evils which had existed,—rebates from published schedules, preferences and discriminations against shippers,—and the purpose and hope of the act to correct them through the requirement of an imperative statutory standard, and by that and other requirements to establish free competition between railroads, and, as a result of competition, reasonable rates. But it was not said or intended to be said that competition fol-

lowed as a presumption of law in any given case. The court did not intend to assert a rule deduced from the conduct of railroads, —conduct so far constant that the law would base a presumption upon it and forever fix it as one of its intendments. Indeed, the court meant to do no more than to deny a right of action for unreasonableness in the rates as filed. And this court, in Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, ante, 553, 27 Sup. Ct. Rep. 350, has decided that the redress of a shipper for such unreasonableness must be through the Interstate Commerce Commission. It is certain that a presumption that was sufficient to defeat an action in the circuit court could not be urged to defeat an inquiry by the Commission. Of course, if a complaint should be filed before the Commission and no proof adduced to support it, we cannot doubt but that the complaint would be dismissed; but this because of the principle that the party who asserts [465] the affirmative in any controversy ought *to prove the assertion, and that he who denies may rest on his denial until, at least, the probable truth of the matter asserted has been established. "The reason is obvious: to all propositions which are neither the subject of intuitive or sensitive knowledge, nor probabilized by experience, the mind suspends its assent until proof of them is adduced." Best, Presumptions, § 32.

There are other contentions of appellants which we think are untenable. One only needs comment. It is said that it was error to hold the advance unreasonable and unjust because the charges made on lumber to Cairo and other points on the Ohio river "are mere divisions of through rates, the justness of which neither the Interstate Commerce Commission nor the circuit court has any jurisdiction to determine." Indeed, it is said, to do so is an exercise of a legislative function. We think the contention is in effect answered by Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700. If the contention is intended to be as extensive as its words seemingly make it, it would withdraw from the supervision of the Interstate Commerce Commission and from the courts every shipment over two or more railroads. There necessarily must be some apportionment of the rates between such roads, and whether the advance should be made in the rates over one road or the other, or in the rates over all, can make no difference. In other words, it is competent for the Commission or the courts to consider the through rate, however composed. It must not be overlooked that the Commission and the circuit court found that the advance in the case at bar was made by agreement between the roads, and was not the individual action of each, induced by competition. It is true the contrary fact is asserted. It is asserted, that such action was the result of competition, and, that the "legal value" to which competition was entitled was not given it. The argument to support the contention has not convinced us. The inquiry was essentially one of fact, and the attempt to make competition an inference of law and dominating against the *findings of the Commission [466] and their affirmance by the circuit court we have already rejected.

But little more discussion is necessary. The concession of counsel with which we have commenced this opinion is a frank recognition of the effect which this court has given to the decisions of the Interstate Commerce Commission on questions of fact. And we have said very recently: "The statute gives prima facie effect to the findings of the Commission, and, when those findings are concurred in by the circuit court, we think they should not be interfered with unless the record establishes that clear and unmistakable error has been committed." Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 206 U. S. 142, ante, 995, 27 Sup. Ct. Rep. 648.

It is true appellants assert, that clear and unmistakable error has been committed, but upon ground untenable, as we have seen. And the present case, above all others, calls for the application of the rule. The question submitted to the Commission, as we have said, with tiresome repetition, perhaps, was one which turned on matters of fact. In that question, of course, there were elements of law, but we cannot see that any one of these or any circumstances probative of the conclusion was overlooked or disregarded. The testimony was voluminous. It is not denied that it was conflicting, and, by concession of counsel, it included a large amount of testimony taken on behalf of appellants in support of the propositions contended for by them. Whether the Commission gave too much weight to some parts of it and too little weight to other parts of it is a question of fact, and not of law. It seems from the findings, report, and conclusions of the Commission that it considered every circumstance pertinent to the problem before it.

Further testimony was taken by the circuit court and its judgment confirmed that

of the Commission and approved its order. Decree affirmed.

Mr. Justice Moody took no part in the decision of this case.

Mr. Justice Brewer dissented.

467] *UNITED STATES, Plff. in Err.,
v.
PAINE LUMBER COMPANY.

(See S. C. Reporter's ed. 467–474.)

Indians—rights of allottees—cutting timber for sale.

Indian allottees under the Stockbridge and Munsee treaty of February 5, 1856 (11 Stat. at L. 663), and the act of February 6, 1871 (16 Stat. at L. 404, chap. 38), are, notwithstanding the restraint upon alienation of the land, vested with sufficient title in their allotments to authorize the cutting of timber therefrom for sale, and not by way of improvements, without approval of the Department of the Interior.

[No. 101.]

Submitted April 15, 1907. Decided May 27, 1907.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin to review a judgment dismissing the complaint in an action by the United States to recover the value of timber cut by Indian allottees from their land. Affirmed.

The facts are stated in the opinion.

Solicitor General Hoyt and Mr. Henry C. Lewis submitted the cause for plaintiff in error:

Congress had a right to modify or repeal the treaty by legislative action.

Thomas v. Gay, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216.

Under the treaty of 1856 and the act of 1871 the Indians had a mere right of occupancy in their lands.

United States v. Gardner, 66 C. C. A. 663, 133 Fed. 285; United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; Pine River Logging Co. v. United States, 186 U. S. 279, 46 L. ed. 1164, 22 Sup. Ct. Rep. 920.

The title of these Indians cannot be determined by the application of the common-law rules of real property, or the doctrine of trusts and uses, as found in that law and its modifications under the statute of uses. The question must be determined in the light of the history of each tribe, the general policy of Congress with respect to the Indians, and its intention as gleaned from the treaties and laws relating to each tribe.

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

The treaty and the act of 1871 contain the word "trust" as defining the relation between the government and the Indians. This trusteeship, however, is a mere substitution for the guardianship exercised over the tribe prior to the date of the Stockbridge and Munsee treaty.

19 Ops. Atty. Gen. 232.

In the earlier days of the government the Indians were never given anything more than a right of occupancy in their lands. It is doubted whether the government, in its original negotiation with any tribe, ever granted any greater title.

Johnson v. M'Intosh, 8 Wheat. 574, 5 L. ed. 688.

The presumption is against the authority of the Indians to cut and sell the timber, and that every purchaser from them is charged with notice of this presumption, and to maintain his title it is incumbent upon him to show that the timber was rightfully taken from the land.

United States v. Cook, 19 Wall. 592, 22 L. ed. 211.

Mr. Charles Barber submitted the cause for defendant in error. Mr. J. C. Thompson was on the brief:

The treaty was, in effect, in part a land contract for a valuable consideration, and such agreements to convey and conveyances may be made by treaty.

Holden v. Joy, 17 Wall. 211–247, 21 L. ed. 523–535.

The provision for the withholding of the patent for a time was placed in the treaty agreement at the request of the Indians themselves and for their benefit, and not for the purpose of reserving any right, title, or interest in the United States for the benefit or use of the United States.

2 Francis Huebschmann, Indian Laws & Treaties, p. 565.

The right conveyed by the treaty was an estate in fee.

11 Am. & Eng. Enc. Law, 2d ed. p. 368; 2 Bl. Com. 109; United States v. Reese, 5 Dill. 405, Fed. Cas. No. 16,137.

While this estate continues, and until the qualification upon which it is limited is at an end, the grantee has the same

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NOTE.—On the right to cut timber on public land—see note to King-Ryder Lumber Co. v. Scott, 70 L.R.A. 874.

rights and privileges over his estate as if it were a fee simple.

2 Am. & Eng. Enc. Law, 2d ed. pp. 369, 370; State, Morris Canal & Bkg. Co., Prosecutors, v. Brown, 27 N. J. L. 13; 1 Cruise's Digest, 52, title 1, § 86.

The right conveyed by the treaty, pending the issuing of a patent, was of greater extent than the estate of a tenant in tail, because, under the treaty, the rights were limited to the person and his heirs generally, while in a tenancy in fee tail the estate is limited to the heirs of his body. It has always been the rule of law that a tenant in tail, as against his remainderman and as against the world, had the right to cut timber on his land for any purpose. That is, such a tenant could not commit waste.

2 Bl. Com. 115; 2 Am. & Eng. Enc. Law, 2d ed. p. 374ee; Co. Litt. 224a.

Indians, even on the Oneida reservation, had the right to cut timber for their support.

United States v. Foster, 2 Biss. 377, Fed. Cas. No. 15,141.

There was nothing to prevent the United States conveying a virtual fee to these allottees by treaty.

Delaware Indians v. Cherokee Nation, 193 U. S. 129-136, 48 L. ed. 646-651, 24 Sup. Ct. Rep. 342.

Mr. Justice McKenna delivered the opinion of the court:

Action by the United States against the Paine Lumber Company for the recovery of the value of a quantity of timber and logs, to wit: 7,500 feet of basswood, 6,500 feet of elm, 51,020 feet of pine logs, alleged to have been cut and removed from certain lands in the eastern district of Wisconsin.

The answer contained denials of the complaint, and set up that defendant company purchased the basswood and elm logs of one Thomas Gardner, and the pine logs [468] of one Daniel *Davids, in the fore part of 1899, the logs being at the time in the county of Shawano in Wisconsin, and being in possession of Gardner and Davids respectively, who claimed and represented themselves to be the sole and absolute owners thereof, and that defendant, in the regular course of its business, sold and disposed of them.

Defendant also pleaded payment of the sum of $271.37 in full satisfaction and accord.

The action was tried by the court, who found the following facts:

"That the defendant is and was, during all the times mentioned in the complaint, a duly incorporated Wisconsin corporation.

"That long prior to the commencement of this action and long prior to the acts alleged in the complaint the head men or council of the Stockbridge and Munsee Indians, claiming authority so to do under the treaties and arrangements with the United States, allotted to one Thomas Gardner the east half of the northwest quarter of section thirty-five (35), township twenty-eight (28), range fourteen (14) east, of the fourth principal meridian, of the state of Wisconsin, and to one Daniel Davids the northeast quarter of the southeast quarter of section twenty-one (21), township twenty-eight (28), range fourteen (14) east, of the fourth principal meridian, of the state of Wisconsin, said lands being a part of the tract of land given to the Stockbridge and Munsee Indians by the treaty of 1856, each of said Indians being a member of said tribe of Stockbridge and Munsee Indians and the head of a family, and the said allotments being made to them respectively as their separate and individual allotments, and being the same lands described in the complaint herein.

"That thereupon Thomas Gardner and Daniel Davids entered into immediate possession of their respective allotments and each of them has ever since claimed to hold the same as his allotment, and has constantly asserted his ownership and right to take the timber therefrom without restrictions *under the said treaty and arrangements [469] with the plaintiff.

"That no patent has ever been issued for either of said parcels of land and that the ownership of the same by said Indians has received no official sanction on the part of the plaintiff aside from the recognition of their respective rights to the occupancy of the parcels so claimed and held by them respectively as aforesaid.

"And that their respective rights to the occupancy of their respective parcels of land allotted to them as aforesaid has been recognized by the United States.

"That the timber and logs involved in this case, to wit, 7,500 feet of basswood, 6,500 of elm, and 51,020 feet of pine, were cut in the winter of 1898-1899, upon said respective parcels of land by the said Thomas Gardner and the said Daniel Davids, respectively, not for the purpose of clearing the land for cultivation, but for the purpose of providing means for the support of their families, and that such cutting by each of them was done in good faith, and each of them claiming and believing that he had the right to so cut for said purpose.

"That after said cutting, and in the summer of 1899, at Weeds Point, in the county of Shawano, Wisconsin, the said logs were bought by the defendant of said Thomas Gardner and Daniel Davids, the same then

and there being at said Weeds Point and off of the said reservation, for a valuable and fair consideration.

"That the defendant bought the same in good faith, believing the said Thomas Gardner and the said Daniel Davids were the bona fide and absolute owners thereof, and that they respectively were lawfully entitled to sell the logs cut from their respective allotments.

"That at the time of the cutting of the timber in question the said Thomas Gardner was living upon his said allotment; that shortly thereafter his wife died, and that he has not since lived thereon except at in-[70]tervals of two or three months at *a time, but for the most part has lived elsewhere with his brother.

"That at the time of the said cutting the said Daniel Davids had no house on his allotment and was only there at times temporarily.

"It is stipulated in this case that if defendant is liable for the value of the logs and timber at the time of taking or while in his hands, that the measure of damages therefor be the sum of five hundred and sixty-six dollars and twenty-eight cents ($566.28), and that if it be liable for the value of said logs and timber at the time of the cutting thereof or at the time of the taking thereof by the defendant, less the additions in value made thereto by the Indians in cutting, hauling, and banking the same, then the measure of damages therefor shall be the sum of three hundred and seventy-eight dollars and fifty-nine cents ($378.59). The measure of damages in both cases includes the cost of the scale and estimate thereof made by the government officials."

From these findings the conclusion of law was deduced:

"That the said Thomas Gardner and the said Daniel Davids, as such allottees, had the right to cut and sell the timber on their respective allotments for the purpose for which the same was cut and sold, and that the defendant is entitled to judgment herein in its favor and against the plaintiff, dismissing the plaintiff's complaint on the merits, but without costs."

The court expressed the reasons for its judgment in an opinion of such circumstantial care and consideration that makes unnecessary an elaborate discussion by us. 154 Fed. 263. It stated the primary issue to be "whether the Indian allottees under the Stockbridge and Munsee treaty of 1856 (11 Stat. at L. 663) and the act of Congress of 1871 (16 Stat. at L. 404, chap. 38) were vested with sufficient title in their allotments to authorize the cutting of timber for sale, and not by way of improvements, without the approval of the Department of the Interior." And stating the purpose of the treaty and its provisions, the court said:

*"The Stockbridge and Munsee treaty of [471] 1856 was entered into to provide for relocation of the remnant of the tribe in Wisconsin, as they were unwilling to remove to a reservation in Minnesota theretofore provided. It recites valuable retrocessions and releases to the United States and reserves a tract 'near the south boundary of the Menominee reservation' of sufficient extent to furnish individual allotments. The terms of the grant were substantially these: After survey into the usual subdivisions the council of the tribes, under the direction of the superintendent, shall 'make a fair and just allotment among the individuals and families of their tribes,' in 80-acre tracts to heads of families and other classes named, and 40 acres to others. The allottees 'may take immediate possession thereof, and the United States will henceforth and until the issuing of "patents" hold the same in trust for such persons;' certificates are to be issued 'securing to the holders their possession and an ultimate title to the land;' but 'such certificates shall not be assignable, and shall contain a clause expressly prohibiting the sale or transfer by the holder' of such land. After ten years, upon application of the holder and consent of the council, 'and when it shall appear prudent and for his or her welfare, the President of the United States may direct that such restriction on the power of sale shall be withdrawn and a patent issued in the usual form.' In the event of the death of an allottee without heirs, before patent, the allotment was not to revert to the United States but to the tribe for disposition by the council. It is further declared (art. 11): 'The object of this instrument being to advance the welfare and improvement of said Indians, it is agreed, if it prove insufficient, from causes that cannot now be foreseen, to effect these ends, then the President of the United States may, by and with the advice and consent of the Senate, adopt such policy in the management of their affairs as in his judgment may be most beneficial to them; or Congress may, hereafter, make such provisions of law as experience shall prove necessary.'"

*And another act should be mentioned, as [472] it has induced a concession by the plaintiff of the right of Gardner to cut the timber upon his allotment. It is provided by the act of March 3, 1893 (27 Stat. at L. 744, chap. 219), that all members of the tribe "who entered into possession of lands under the allotments of eighteen hundred and fifty-six and of eighteen hundred and seventy-one, and who by themselves or by their

lawful heirs have resided on said lands continuously since, are hereby declared to be owners of such lands in fee simple, in severalty, and the government shall issue patents to them therefor."

It is contended that Davids is not within the act of 1893, and "that his title is only such as can be read out of the treaty of 1856 and the act of 1871." Granting this to be so, it hardly needs to be said that the allotments were intended to be of some use and benefit to the Indians. And it will be observed that on that use there is no restraint whatever. A restraint, however, is deduced from the provision against alienation, the supervision to which, it is asserted, the Indians are subject, and the character of their title. It is contended that the right of the Indians is that of occupation only, and that the measure of power over the timber on their allotments is expressed in United States v. Cook, 19 Wall. 592, 22 L. ed. 211. We do not regard that case as controlling. The ultimate conclusion of the court was determined by the limited right which the Indians had in the lands from which the timber there in controversy was cut.

Certain parties of the Oneida Indians ceded to the United States all the lands set apart to them, except a tract containing 100 acres for each individual, or in all about 65,000 acres, which they reserved to themselves, *to be held as other Indian lands are held.* Some of the lands were held in severalty by individuals of the tribe with the consent of the tribe, but the timber sued for was cut by a small number of the tribe from a part of the reservation not occupied in severalty. It was held, citing Johnson v. M'Intosh, 8 Wheat. 574, 5 L. ed. 688, that the right of the Indians in the land from which the logs were taken was that of occupancy only. Necessarily the *timber, when [473] cut, "became the property of the United States absolutely, discharged of any rights of the Indians therein." It was hence concluded "the cutting was waste, and, in accordance with well-settled principles, the owner of the fee may seize the timber cut, arrest it by replevin, or proceed in trover for its conversion." If such were the title in the case at bar, such would be the conclusions. But such is not the title. We need not, however, exactly define it. It is certainly more than a right of mere occupation. The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple. Libby v. Clark, 118 U. S. 250, 30 L. ed. 133, 6 Sup. Ct. Rep. 1045. The title is held by the United States, it is true, but it is held "in trust for individuals and their heirs to whom the same were allotted." The considerations, therefore, which determined the decision in United States v. Cook, do not exist. The land is not the land of the United States, and the timber when cut did not become of the property of the United States. And we cannot extend the restraint upon the alienation of the land to a restraint upon the sale of the timber consistently with a proper and beneficial use of the land by the Indians,—a use which can in no way affect any interest of the United States. It was recognized in United States v. Cook that "in theory, at least," that land might be "better and more valuable with the timber off than with it on." Indeed, it may be said that arable land is of no use until the timber is off, and it was of arable land that the treaty contemplated the allotments would be made. We encounter difficulties and baffling inquiries when we concede a cutting for clearing the land for cultivation, and deny it for other purposes. At what time shall we date the preparation for cultivation and make the right to sell the timber depend? Must the axe immediately precede the plow and do no more than keep out of its way? And if that close relation be not always maintained, may the purpose of an allottee be questioned and referred to some advantage other than the cultivation of the land, and his title or that of his vendee to the timber be denied? Nor does the argument *which makes the occupation of [474] the land a test of the title to the timber seem to us more adequate to justify the qualification of the Indians' rights.

It is based upon the necessity of superintending the weakness of the Indians and protecting them from imposition. The argument proves too much. If the provision against alienation of the land be extended to timber cut for purposes other than the cultivation of the land it would extend to timber cut for the purpose of cultivation. What is there in the former purpose to protect from imposition that there is not in the other? Shall we say such evil was contemplated and considered as counterbalanced by benefit? And what was the benefit? The allotments, as we have said, were to be of arable lands useless, may be, certainly improved by being clear of their timber, and yet, it is insisted that this improvement may not be made, though it have the additional inducement of providing means for the support of the Indians and their families. We are unable to assent to this view.

Judgment affirmed.

Mr. Justice Moody took no part in the decision of this case.

COPPER QUEEN CONSOLIDATED MINING COMPANY, Appt.,

v.

TERRITORIAL BOARD OF EQUALIZATION OF THE TERRITORY OF ARIZONA.

(See S. C. Reporter's ed. 474–482.)

Statutes—construction—re-enactment.

1. The re-enactment in the same words of a statute which has notoriously received a construction in practice from those whose duty it is to carry it out gives rise to the presumption that such construction is satisfactory to the legislature, unless it is plainly erroneous.

Taxes—equalization.

2. The Arizona board of equalization, in exercising its power under Ariz. Rev. Stat. § 3880, to increase or diminish the valuation of property in any county in order to produce a just relation between all the valuations of property in the territory, is not bound to deal with the valuation of each county as a whole, but may increase or diminish the valuations of particular classes of property within the county.

Statutes—adopted construction.

3. The construction given by the Colorado courts to a statute of that state which is alleged to have served as the model for Ariz. Rev. Stat. § 3880, defining the powers of the board of equalization, need not be followed by the Arizona courts when construing the territorial statute, where the Colorado decision turned partly on the notion, inapplicable to Arizona, that the board of equalization had no function of assessment, and in part on the Constitution of the state.

Taxes—equalization.

4. The total valuation of the property in the territory may be increased by the Arizona board of equalization beyond the sum of the returns of the board of supervisors of the several counties, since Ariz. Rev. Stat. § 3880, empowering the board to increase or diminish the valuation of property in any county in order to produce a just relation between all the valuations of property in the territory, only prohibits the board from reducing the aggregate valuation below that as returned by the clerks of the several counties, which implies that the board has the power of change, and, but for the prohibition, might reduce the total.

[No. 280.]

Argued April 26, 1907. Decided May 27, 1907.

NOTE.—On the effect of re-enactment of statute which has received judicial construction—see note to Sanders v. St. Louis & N. O. Anchor Line, 3 L.R.A. 390.

On the duties and powers of state board of equalization—see note to Cass County v. Chicago, B. & Q. R. Co. 2 L.R.A. 188.

On the construction of adopted statute—see note to Ryalls v. Mechanics Mills, 5 L.R.A. 667.

APPEAL from the Supreme Court of the Territory of Arizona to review a judgment sustaining a demurrer to an application for a writ of certiorari to vacate proceedings of the board of equalization by which the total valuation of property in the territory, as well as the valuation of particular classes of property, was increased. Affirmed.

See same case below (Ariz.) 84 Pac. 511.

The facts are stated in the opinion.

Mr. William Herring argued the cause, and, with Mr. Everett E. Ellinwood and Sarah Herring Sorin, filed a brief for appellant:

The territorial board of equalization is wholly a creature of statute and is of special and limited jurisdiction. It is essential to the validity of its acts that they should be authorized by some express provision of the statute, otherwise they are absolutely null and void.

Central P. R. Co. v. Evans, 111 Fed. 79; 1 Cooley, Taxn. 3d ed. 772.

A judicial interpretation given the statute in the state of its origin, prior to the adoption thereof, becomes a part of the statute itself, with the same force and to the same extent as though the decision was written into the law.

Henrietta Min. & Mill. Co. v. Gardner, 173 U. S. 123, 43 L. ed. 637, 19 Sup. Ct. Rep. 327; Goldman v. Sotelo, 7 Ariz. 23, 60 Pac. 696.

Furthermore, upon the adoption of a statute where the law antecedently to the adoption was settled by judicial interpretation thereof, the mere change of phraseology will not be construed a change of the law unless such phraseology evidently purports an intention in the legislature to work a change.

McDonald v. Hovey, 110 U. S. 619, 28 L. ed. 269, 4 Sup. Ct. Rep. 142; Metropolitan R. Co. v. Moore, 121 U. S. 558, 30 L. ed. 1022, 7 Sup. Ct. Rep. 1334; Willis v. Eastern Trust & Bkg. Co. 169 U. S. 295, 42 L. ed. 752, 18 Sup. Ct. Rep. 347.

All that the territorial board of equalization may do under the authority conferred upon it by the Arizona statute is to adjust and equalize the valuation of real and personal property among the several counties of the territory.

Territory v. Yavapai County (Ariz.) 84 Pac. 522.

The territorial board of equalization may, for the purpose of adjusting and equalizing, increase the aggregate value of one county and decrease that of another; but it has no power to increase the aggregate valuation of property in the territory above the valuations returned by the boards of supervisors of the several counties.

People ex rel. Crawford v. Lothrop, 3 Colo. 462; Ames v. People, 26 Colo. 83, 56 Pac. 656. Reaffirmed in 27 Colo. 126, 60 Pac. 346; State ex rel. Wallace v. State Board, 18 Mont. 473, 46 Pac. 266; State ex rel. State Board v. Fortune, 21 Mont. 154, 60 Pac. 1086; Poe v. Howell (N. M.) 67 Pac. 62; Missouri, K. & T. R. Co. v. Miami County, 67 Kan. 434, 73 Pac. 103; Chamberlain v. Cleveland, 34 Ohio St. 551.

If an assessment is contrary to a statute, it is just as invalid as if inhibited by the Constitution.

Pilgrim Consol. Min. Co. v. Teller County, 32 Colo. 334, 76 Pac. 364.

Of what avail to the tax payer is a limitation upon the rate of taxation, if the basis of the tax—the valuation of his property—may be increased at the will of the territorial board of equalization to an unlimited extent?

People ex rel. Crawford v. Lothrop, 3 Colo. 467.

The territorial board of equalization, in equalizing and adjusting property valuations between the several counties, has no power to increase or diminish the valuations of certain kinds, classes, sub-classes, or grades of property within any county. The territorial board must deal with the respective valuations as returned by the counties as entireties, by making such changes in each county valuation as a whole as will relatively equalize the entire property values in the different counties.

San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 722; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 385; People v. Ames, 27 Colo. 126, 60 Pac. 346; People ex rel. Crawford v. Lothrop, 3 Colo. 428; People ex rel. Merritt v. Lawrence, 6 Hill, 244; Wells, F. & Co. v. State Board, 56 Cal. 194; State ex. rel. Wyatt v. Vaile, 122 Mo. 33, 26 S. W. 672; State ex rel. Cunningham v. Thomas, 16 Utah, 86, 50 Pac. 615; State ex rel. State Board v. Fortune, supra; Hacker v. Howe (Neb.) 101 N. W. 260; Orr v. State Board, 3 Idaho, 190, 28 Pac. 416.

The doctrine of practical construction is wholly inapplicable to the case at bar.

Studebaker v. Perry, 184 U. S. 258, 269, 46 L. ed. 528, 533, 22 Sup. Ct. Rep. 463; Westbrook v. Miller, 56 Mich. 152, 22 N. W. 256; Black, Constr. & Interpretation of Laws, p. 221; Cooley, Const. Lim. 7th ed. p. 106.

Messrs. Elias S. Clark and Wm. C. Prentiss argued the cause, and, with Mr. Horace F. Clark, filed a brief for appellee:

The Supreme Court of the United States will not disturb a decision of the supreme court of a territory, construing a local statute, unless manifest error appear.

Sweeney v. Lomme, 22 Wall. 208, 22 L. ed. 727; Northern P. R. Co. v. Hambly, 154 U. S. 349, 38 L. ed. 1003, 14 Sup. Ct. Rep. 983; Salina Stock Co. v. Salina Creek Irrig. Co. 163 U. S. 109, 41 L. ed. 90, 16 Sup. Ct. Rep. 1036; Whitney v. Fox, 166 U. S. 637, 41 L. ed. 1145, 17 Sup. Ct. Rep. 713.

Revenue laws are not to be regarded as penal in the sense that requires them to be strictly construed, though they impose penalties and forfeitures.

Sutherland, Stat. Constr. § 535; Wood v. United States, 16 Pet. 342, 10 L. ed. 987; Taylor v. United States, 3 How. 197, 11 L. ed. 559; Cliquot's Champagne (125 Baskets of Champagne v. United States), 3 Wall. 114, 18 L. ed. 116; Re 28 Cases of Wine, 2 Ben. 63, Fed. Cas. No. 14,281; United States v. Willetts, 5 Ben. 220; Fed. Cas. No. 16,699; United States v. Hodson, 10 Wall. 395, 19 L. ed. 937; State ex rel. Poe v. Raine, 47 Ohio St. 455, 25 N. E. 54; Haskel v. Burlington, 30 Iowa, 232; Hudler v. Golden, 36 N. Y. 446; Cornwall v. Todd, 38 Conn. 443; State, Paulison, Prosecutor, v. Taylor, 35 N. J. L. 184; Bacon v. State Tax Comrs. 126 Mich. 22, 60 L.R.A. 321, 86 Am. St. Rep. 524, 85 N. W. 307; Salisbury v. Lane, 7 Idaho, 370, 63 Pac. 383; Aztec Land & Cattle Co. v. Navajo County (Ariz.) 80 Pac. 318; Western Invest. Bkg. Co. v. Murray, 6 Ariz. 224, 56 Pac. 728; Cochise County v. Copper Queen Consol. Min. Co. (Ariz.) 71 Pac. 946.

Under the power conferred on the board to equalize, and, with the cash value as a standard, it may, as incidental to that power, raise the sum of all the valuations as returned by the various assessors and local boards of equalization.

State ex rel. Thompson v. Nichols, 29 Wash. 159, 69 Pac. 775; State ex rel. Cunningham v. Thomas, 16 Utah, 86, 50 Pac. 615; Wallace v. Bullen, 6 Okla. 17, 52 Pac. 954; Kittle v. Shervin, 11 Neb. 66, 7 N. W. 861; Webb v. Renfrew, 7 Okla. 198, 54 Pac. 449; Bardrick v. Dillon, 7 Okla. 535, 54 Pac. 785; Weber v. Dillon, 7 Okla. 568, 54 Pac. 894; Hacker v. Howe (Neb.) 101 N. W. 256; Orr v. State Board, 3 Idaho, 190, 28 Pac. 416; People v. Dunn, 59 Cal. 328; Braden v. Union Trust Co. 25 Kan. 363; Territory v. First Nat. Bank, 10 N. M. 283, 65 Pac. 172; State ex rel. Poe v. Raines, 47 Ohio St. 447, 25 N. E. 54; State ex rel. Hasbrook v. Lewis, 64 Ohio St. 228, 60 N. E. 198.

The only limitation upon the manner or extent of raising or lowering is that it shall not reduce the [illegible]gregate. The [illegible]clusion of this power [illegible]he inclusion of all other things.

Hankins v. People, 106 Ill. 633.

What is implied in a statute is as much a part of it as what is expressed.

United States v. Babbitt, 1 Black, 58, 17 L. ed. 95.

The board of equalization has the power to increase or decrease the valuation of a class of property.

Territory v. First Nat. Bank and State ex rel. Thompson v. Nichols, supra; Salt Lake City v. Armstrong, 15 Utah, 472, 49 Pac. 641; Wells, F. & Co. v. State Board, 56 Cal. 196.

Intention of the legislature, when discovered, must prevail in the construction of statutes.

Sutherland, Stat. Constr. ¶ 358; Brown v. Barry, 3 Dall. 367, 1 L. ed. 639; Jones v. New York Guaranty & I. Co. 101 U. S. 625, 25 L. ed. 1034; Beley v. Naphtaly, 169 U. S. 360, 42 L. ed. 777, 18 Sup. Ct. Rep. 354.

A provision which is special, by pointing to a particular act and declaring for what definite purpose it was enacted, or defining certain words or phrases, has the fullest effect. It is a part of the law, must be construed and applied accordingly, and the act will have a construction, and the words and phrases a meaning, in harmony with the defining provisions, even though otherwise they would have a different effect.

Sutherland, Stat. Constr. ¶ 360.

The words and meaning of one part of a statute may lead to and furnish an explanation of the sense of another.

Sutherland, Stat. Constr. ¶ 368, note 55.

The legislature, in re-enacting the language of the act of 1887 in the revision of 1901, recognized and adopted the practical construction by successive boards of equalization.

Re Guggenheim Smelting Co. 121 Fed. 153; Sessions v. Romadka, 145 U. S. 29, 36 L. ed. 609, 12 Sup. Ct. Rep. 799; Fisk v. Henarie, 142 U. S. 459, 35 L. ed. 1079, 12 Sup. Ct. Rep. 207; Sutherland, Stat. Constr. ¶ 403, note 98, ¶ 474, notes 77, 78; Bloxham v. Consumers' Electric Light & Street R. Co. 36 Fla. 519, 29 L.R.A. 507, 51 Am. St. Rep. 44, 18 So. 444; Com. v. Grand Central Bldg. & L. Asso. 97 Ky. 325, 30 S. W. 626; State ex rel. Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 88, 61 Am. St. Rep. 538, 69 N. W. 373; Price v. Lancaster County, 189 Pa. 95, 41 Atl. 987.

The practical construction given the statute by successive boards of equalization is of itself controlling.

Stuart v. Laird, 1 Cranch, 299, 2 L. ed. 115; Hahn v. United States, 107 U. S. 402, 27 L. ed. 527, 2 Sup. Ct. Rep. 494; Opinion of the Justices, 126 Mass. 551; Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257; Fairbank v. United States, 181 U. S. 311, 45 L. ed. 874, 21 Sup. Ct. Rep. 648; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; United States v. Philbrick, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 417; M'Keen v. Delancy, 5 Cranch, 22, 3 L. ed. 25; United States v. State Bank, 6 Pet. 39, 8 L. ed. 311; Surgett v. Lapice, 8 How. 68, 12 L. ed. 990; Union Ins. Co. v. Hoge, 21 How. 66, 16 L. ed. 68; Havemeyer v. Iowa County, 3 Wall. 302, 18 L. ed. 41; Blake v. National City Bank, 23 Wall. 321, 23 L. ed. 121; United States v. Alger, 152 U. S. 397, 38 L. ed. 488, 14 Sup. Ct. Rep. 635; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 34, 39 L. ed. 610, 15 Sup. Ct. Rep. 508; Hewitt v. Schultz, 180 U. S. 156, 45 L. ed. 472, 21 Sup. Ct. Rep. 309; United States v. Finnell, 185 U. S. 252, 46 L. ed. 896, 22 Sup. Ct. Rep. 633; Schell v. Fauche, 138 U. S. 572, 34 L. ed. 1043, 11 Sup. Ct. Rep. 376; Sutherland, Stat. Constr. ¶ 478; Houston & T. C. R. Co. v. State (Tex. Civ. App.) 62 S. W. 114; United States v. Barringer, 188 U. S. 583, 47 L. ed. 605, 23 Sup. Ct. Rep. 405; Potter v. Hall, 189 U. S. 300, 47 L. ed. 820, 23 Sup. Ct. Rep. 545; United States v. Alabama G. S. R. Co. 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306; Robertson v. Downing, 127 U. S. 607, 32 L. ed. 269, 8 Sup. Ct. Rep. 1328; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; Packard v. Richardson, 17 Mass. 143, 9 Am. Dec. 123; Bloxham v. Consumers' Electric Light & Street R. Co. supra; State ex rel. Torreyson v. Grey, 21 Nev. 378, 19 L.R.A. 134, 32 Pac. 192; Kelly v. Multnomah County, 18 Or. 356, 22 Pac. 1110; Auditor v. Cain, 22 Ky. L. Rep. 1888, 61 S. W. 1017; People v. Adelphi Club, 149 N. Y. 5, 31 L.R.A. 514, 52 Am. St. Rep. 700, 43 N. E. 410; Re Warfield, 22 Cal. 71, 83 Am. Dec. 49; Rogers v. Goodwin, 2 Mass. 475; Bureau County v. Chicago, B. & Q. R. Co. 44 Ill. 239; Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 302; Cincinnati Southern Co. v. Guenther, 19 Fed. 399; Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 162, 25 L. ed. 903, 906.

There must be some evidence of adoption aside from mere similarity of language.

Texas & P. R. Co. v. Humble, 181 U. S. 57, 65, 45 L. ed. 747, 751, 21 Sup. Ct. Rep. 526.

A deliberate or material change of expression must be taken prima facie to import a change of intention.

23 Am. & Eng. Enc. Law, p. 373.

The natural presumption is that the phraseology of the statute was changed in order to change its meaning. The very **fact that the prior act is amended demon-**

strates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act.

United States v. Bashaw, 1 C. C. A. 653, 4 U. S. App. 360, 50 Fed. 754.

If the legislature uses words which have received a judicial interpretation, they are presumed to be used in the same sense unless the contrary intent can be gathered from the statute. But where the same language is not preserved, but is substantially varied, it shows a different intention.

Lewis's Sutherland, Stat. Constr. ¶ 399; Rutland v. Mendon, 1 Pick. 154; Wills v. Russell, 100 U. S. 621, 25 L. ed. 607; Pingree v. Snell, 42 Me. 53.

It is only where the statute is adopted without change that the former construction is ever followed.

Goldman v. Sotelo (Ariz.) 68 Pac. 558; Henrietta Min. & Mill. Co. v. Gardner, 173 U. S. 123, 43 L. ed. 637, 19 Sup. Ct. Rep. 327.

The construction in the Lothrop Case would not be binding upon this court even if our statute had been adopted verbatim from that state.

The rule that construction should follow the courts in the state from which the statute is adopted is not an absolute one. The proper construction is always the one required by the obvious meaning of the statute.

Coulam v. Doull, 133 U. S. 216, 33 L. ed. 596, 10 Sup. Ct. Rep. 253; Whitney v. Fox, 166 U. S. 647, 41 L. ed. 1148, 17 Sup. Ct. Rep. 713.

The construction placed upon the Colorado statute in the Lothrop Case was based upon the ground that the Constitution of that state lodged the power of fixing valuations solely in the assessor.

State ex rel. State Board v. Fortune, 24 Mont. 154, 60 Pac. 1086; State ex rel. Wallace v. State Board, 18 Mont. 473, 46 Pac. 266.

In Arizona not only had the interpretation placed upon our statute by the board of equalization and other executive officers been acquiesced in for eighteen years, but our legislature in 1901 re-enacted that statute without change, with full knowledge of the interpretation theretofore placed upon it, thereby recognizing and adopting such construction and making it a part of the law itself.

Gilbert v. Craddock, 67 Kan. 346, 72 Pac. 872; Frost v. Pfeiffer, 26 Colo. 338, 58 Pac. 151.

Other decisions following the Lothrop Case are equally inapplicable.

People v. Ames, 27 Colo. 126, 60 Pac. 346; Hacker v. Howe (Neb.) 101 N. W. 256; Poe v. Howell (N. M.) 67 Pac. 62.

Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from a judgment on demurrer to a petition for a writ of certiorari. The object of the petition was to vacate proceedings of the board of equalization in 1905, by which the board added very largely to the assessed valuation of patented mines and, in a less degree, of work horses and saddle horses, in Cochise county and other counties in Arizona. It was alleged that by these proceedings the board increased the total valuation of property in the territory and increased the valuation of the petitioner's property of the above-mentioned kinds. The writ had been issued by a single justice, returnable before the full bench, but the case was heard on the demurrer by consent, and by the judgment the demurrer was sustained and the writ was quashed.

The errors alleged are two: First, that while the board, for purposes of equalizing, might add to the total value of the property in one county and diminish that of property in another, it had no power to increase the total valuation of property in the territory above the sum of the returns from the boards of supervisors of the several counties; and second, that the board was bound to deal with the valuation of each county as a whole, and could not increase or diminish the valuations of particular classes of property within a county. The power of the board depends, of course, upon statute, and it is said that the statute of Arizona was taken almost verbatim from one of Colorado, which had been construed by the supreme court of that state in accordance with the first of the petitioner's above contentions before it was adopted by Arizona. People ex rel. Crawford v. Lothrop, 3 Colo. 428. The construction, it is said, goes with the act. Henrietta Min. & Mill. Co. v. *Gardner, 173 U. S. 123, 130, 43 L. ed. 637, 640, 19 Sup. Ct. Rep. 327. The second contention is based on an interpretation of the statutes, the supposed absence of an express grant of power, and later decisions in Colorado and other states. [479]

On the other hand, while this court cannot refuse to exercise its own judgment, it naturally will lean toward the interpretation of a local statute adopted by the local court. Sweeney v. Lomme, 22 Wall. 208, 22 L. ed. 727; Northern P. R. Co. v. Hambly, 154 U. S. 349, 361, 38 L. ed. 1009, 1014, 14 Sup. Ct. Rep. 983; Fox v. Haarstick, 156 U. S. 674, 679, 39 L. ed. 576, 578, 15 Sup. Ct. Rep. 457. And again, when, for a considerable time, a statute notoriously has received a construction in practice from

those whose duty it is to carry it out, and afterwards is re-enacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed. New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 402, 50 L. ed. 515, 525, 526, 26 Sup. Ct. Rep. 272. The statute of Arizona was re-enacted in 1901 and was said by the supreme court to have been construed by the board against the petitioner's contention ever since the board was created, eighteen years before. Even apart from the re-enactment a certain weight attaches to this fact. United States v. Finnell, 185 U. S. 236, 243, 244, 46 L. ed. 890, 893, 22 Sup. Ct. Rep. 633; United States v. Sweet, 189 U. S. 471, 47 L. ed. 907, 23 Sup. Ct. Rep. 638. The presumption that the codifiers of 1901 knew and approved the practice of the board certainly is as strong as the presumption that the original enactors of the statute knew a single decision in another state; and it is more important, since it refers to a later time.

As an original question the construction adopted by the supreme court appears to us at least as reasonable as the opposite one contended for, and the variations in the Arizona act from the prototype, if Colorado furnished the prototype, and the different background against which it was to be construed, seem to us to have warranted the refusal to be bound by the Colorado case.

We give a section of the General Laws of Colorado, 1877, and of the Revised Statutes of Arizona side by side.

30] *2282. Sec. 43. Said board shall ascertain whether the valuation of real estate in each county bears a fair relation or proportion to the valuation in all other counties of the state, and on such examination they may increase or diminish the aggregate valuation of real estate in any county as much as, in their judgment, may be necessary to produce a just relation between all the valuations of real estate in the state; but in no instance shall they reduce the aggregate valuation of all the counties below the aggregate valuation as returned by the clerks of the several counties.	3880. (Sec. 50.) The said board shall ascertain whether the valuation of property in each county bears a fair relation or proportion to the valuation in all other counties in the territory, and on such examination they may increase or diminish the valuation of property in any county as much as, in their judgment, may be necessary to produce a just relation between all the valuations of property in the territory; but in no instance shall they reduce the aggregate valuation of all the counties below the aggregate valuation as returned by the boards of supervisors of the several counties. And said board shall, at the same time, fix the rate of taxes for territorial purposes which is to be levied and collected in each county.

For convenience we take up the second of the alleged errors first. It will be seen that the word "property" takes the place of "real estate" at the beginning, and that the power given, instead of being only a power to increase or diminish the aggregate valuation of real estate in any county, is to increase or diminish the valuation of property (not the property) in (not of) any county. The word "aggregate" is left out, and the fact that it was left out favors the construction that apart from that fact would be reasonable, that the power extends to the valuation of any property, and is not confined to the valuation of all the property as one whole. This construction *is [481] further favored by the purpose of the changes in valuation, which is to "produce a just relation between all the valuations of property in the territory." This phrase is interstitial in its working. It does not confine the equality to the valuations by county, but extends it to all the valuations of property. Yet a further argument may be drawn from the language of § 3874: "No assessor, board of supervisors, or the territorial board of equalization shall assess any real estate at a less valuation than 75 cents per acre." This recognizes the power of the board to deal with a special class of property, and we may add, by way of anticipation, by also recognizing a function of assessment, does much to make inapplicable the reasoning of the Colorado decision upon the other point.

It seems to have been argued below that at least the board was confined to dealing with property by the classes mentioned in other sections of the statutes, especially §§ 3849, 3861, 3877. But the classifications and specifications provided for in those sections do not affect the power expressly given by § 3880, as we have construed the latter, and further, by § 3877 the territorial board is given power in very broad terms to change the list. It is not necessary to rely on this power to change the list for the power of the board to change valuations of a particular class of property. It is mentioned simply to show that the powers given by 3880 are not diminished by other provisions.

The first contention of the petitioner needs but a few words in addition to what we have said. The power to increase the valuation of property in any county is as power to increase it in all, or, at least, to increase the valuation of some kinds of property in all, so as to produce a just relation between them and the other valuations left undisturbed. We find nothing in the statute that requires the increase to be so adjusted that the total valuation shall be unchanged. On the contrary, the prohibition against reducing it implies that the

board has the power of change, and, but for [482] the prohibition, might reduce *the total. Therefore it may add to the total since the law does not forbid that. The Colorado decision to the contrary turned partly on the notion, which has been shown to be inapplicable to Arizona, that the board of equalization had no function of assessment. It also turned in part, at least, on the Constitution of the state, to which, of course, the statute was subject. There was no Constitution to be conformed to in Arizona, and therefore the construction of the statute depends on the meaning of the words alone, and the supreme court of the territory, in construing them, was left at large.

Judgment affirmed.

IOWA RAILROAD LAND COMPANY, Plff. in Err.,
v.
CLAUDE F. BLUMER.

(See S. C. Reporter's ed. 482–496.)

Adverse possession—lands within congressional land grant.

1. A railway company which has complied with all the terms and conditions of a congressional land grant, as fixed by Congress and by the act of the state legislature after the acceptance of the grant by the state, has such a title to lands within the place limits of the grant that the statute of limitations will run against it in favor of one who occupies the premises by adverse possession under color of title, notwithstanding the want of final certification and issue of patent.

Adverse possession—color of title—good faith.

2. Knowledge of the rejection of his first timber culture entry of land within the place limits of a railway land grant does not require the imputation of bad faith to the entryman in going into possession on the advice of counsel under a second entry, afterwards summarily canceled without his knowledge, so as to prevent his open, notorious, and continuous possession from ripening into full title as against the railway company if the latter fails to assert its rights within the period prescribed by the statute of limitations.

[No. 207.]

Argued and submitted February 26, 27, 1907. Decided May 27, 1907.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment which affirmed a decree of the District Court of Woodbury County, in that state, quieting title as against a railroad company to land within the place limits of a congressional land grant. Affirmed.

See same case below, 129 Iowa, 32, 113 Am. St. Rep. 444, 105 N. W. 342.

Statement by Mr. Justice Day:

*This is a writ of error to the supreme [483] court of the state of Iowa, seeking reversal of its judgment affirming the decree of the district court of Woodbury county, quieting the land title of Claude F. Blumer, defendant in error, as against the Iowa Railroad Land Company, plaintiff in error. 129 Iowa, 32, 105 N. W. 342. The record discloses that Blumer brought his action by a petition in equity under the Iowa Code, claiming to be owner in fee simple of 40 acres of land in Woodbury county, Iowa, being the N. E. ¼ of the N. E. ¼ of section 1, township 89 north, range 46 west, containing about 40 acres; averring that the plaintiff and his immediate grantor had been in open, notorious, continuous, and adverse possession for more than ten years under a claim of title, and that the plaintiff was then in the possession of the same; and that defendant made some claim to the said estate, and prayed that he be quieted in his title, and that defendant be estopped from setting up any claim adverse to his own.

Defendant answered and set up general denials and that the defendant was the owner of the premises by virtue of an act of Congress of May 15, 1856 [11 Stat. at L. 9, chap. 28], making a grant of lands to the state of Iowa in alternate sections in aid of the construction of certain railways in that state, whereby the lands were granted to the state of Iowa in trust for the railway companies; that the act and trust were duly accepted by the state of Iowa, by act of its legislature, approved July 14, 1856; that thereafter, by the act of April 7, 1868, of the same state legislature, the Iowa Falls & Sioux City Railroad Company was designated to construct and complete the portion of the railroad west of Iowa Falls, and the state granted, on conditions contained in said act, the unearned portions of said lands west of Iowa Falls to the said Iowa Falls & Sioux City Railroad Company, and that all the terms of the act had been complied with, and that the same were rightfully subject to the certification and conveyance to the said railway company, which was the grantor of the defendant.

A reply and amendment were filed, and also a supplemental *answer setting forth [484] that the lands, on the 24th of January, 1903, since the former answer in the case, had been duly certified to the state of Iowa in trust for the Iowa Falls & Sioux City Railroad Company, and had been subsequently patented to the railroad company

by the governor of the state on February 2, 1903, and that all the rights and title of the railway company had been succeeded to by the defendant, the Iowa Railroad Land Company, and prayed to be quieted in its title as against the plaintiff. By an amended reply the plaintiff reiterated that for more than ten years prior to the commencement of the suit, plaintiff and his immediate grantor had been in open, notorious, continuous, and adverse possession of the premises under a claim of right and color of title, and that plaintiff was then in possession of the same.

The lands in question are within the place limits of the grant to the state of Iowa by the act of May 15, 1856. 11 Stat. at L. chap. 28. By the act of the legislature of Iowa, passed July 14, 1856, the lands were granted to the Dubuque & Pacific Railroad Company. The map of definite location of the line of the road was filed in the office of the Commissioner of the General Land Office of the United States on October 11, 1856, and accepted on October 13, 1856.

The legislature of Iowa, on April 7, 1868, passed a statute (Iowa Laws 1868, chap. 124, pp. 164-167) designating the Iowa Falls & Sioux City Railroad Company (grantor of the plaintiff in error) to construct and complete the uncompleted portion of the road west of Iowa Falls. Sec. 1 of the act legalized and confirmed the contract between the Dubuque & Sioux City Railroad Company and the Iowa Falls & Sioux City Railroad Company "transferring so much of the Dubuque & Sioux City [successor of the Dubuque & Pacific] Railroad as remains to be constructed, together with the franchises, right of way, depot grounds, and other appurtenances of said road to be completed, also transferring all right and title of the said Dubuque & Sioux City Railroad Company to so much of the lands [485] granted by Congress to aid *in the construction of said road as shall appertain to, or be legally applicable to the construction of, the uncompleted part of the Dubuque & Sioux City Railroad, as aforesaid, except as to the lands hereinafter granted to the Dubuque, Bellevue, & Sabula Railroad Company." Sec. 4 of that act provides "that so much of land grant as is applicable to the uncompleted portion of the road aforesaid, west of Iowa Falls . . . is hereby conferred upon the said Iowa Falls & Sioux City Railroad Company, subject to the terms and conditions of the act of Congress granting the said lands, dated the 15th day of May, A. D. 1856, and the act amendatory thereto and the act of Congress passed the present session" (subject to certain conditions as to the time and manner of construction).

The railroad company complied with this act as to the completion of the road, having done so by January 1, 1872, also complying with the act of Congress of March 2, 1868 (15 Stat. at L. 38, chap. 16), requiring the completion of the road by that date. The tract of land in controversy was again selected and designated by the Iowa Falls & Sioux City Railroad Company, on June 19, 1884, and on April 24, 1885, as lands to which the company was entitled under said land grants, and said last-named selection was accepted by the register and receiver, and certified to the Commissioner of the General Land Office at Washington, May 13, 1885.

In December, 1858, the lands were listed for the benefit of the Dubuque & Pacific (since Iowa Falls & Sioux City) grant under the act of May 15, 1856, but afterwards, on February 21, 1859, the tract was included in a selection of the state of Iowa under the swamp land grant. Under the order of the Secretary of the Interior the lands were stricken from the certified list with a view of determining the claim of the state under the swamp land grant, which claim was finally rejected on February 16, 1878.

The lands were certified pending the suit, January 20, 1903, and on February 2, 1903, the lands were patented by the *governor of [486] Iowa to the Iowa Falls & Sioux City Railroad Company.

On October 2, 1883, John Carraher (predecessor in title of the defendant in error) made application to the local land office at Des Moines, Iowa, to enter the lands under the timber culture act (20 Stat. at L. 113, chap. 190). His application was rejected and Carraher appealed. The rejection was because of conflict with the railroad grant. On December 3, 1883, the Commissioner affirmed this action. Carraher appealed to the Secretary of the Interior. Afterwards, June 17, 1891, the Secretary approved the decisions and rejected the claim of Carraher. Pending his appeal, on May 31, 1888, Carraher made another timber culture entry (No. 607). When the Secretary's decision of June 17, 1891, finally rejecting the first application of Carraher, was promulgated by the Commissioner (July 11, 1891), it was also directed that the second timber culture entry (of May 31, 1888) be canceled on the ground that it had been allowed without authority.

The delay in certifying the lands after the final decision against Carraher is thus accounted for by Mr. Samuel S. Burdett, at one time Commissioner of the General Land Office, and attorney for the plaintiff in error from June, 1888.

"On July 15, 1891, my firm advised the

Iowa Railroad Land Company of the Commissioner's action of July 11, 1891, in which the Carraher entry had been canceled, and received in reply the letter thereto attached and marked 'Exhibit B' from P. E. Hall, president, dated July 28, 1891, in which he asked that we 'take such steps as will result in the tract in question being certified to the state for our benefit.'

"Thereafter, by personal application by myself and other members of my firm, effort was made to secure the due certification of the land under the grant, resulting in a promise from the proper officials of the General Land Office, given on or about October 1, 1891, that the tract would be included in a patent which was then about to be prepared. . . .

"The duty of certifying the tract rested [487] with the proper *officials of the General Land Office, and was in fact a mere clerical duty. No rule required the filing of an application in writing for the certification of lands embraced in a pending selection, and the practice of my firm in such matters was to urge, by personal request, the proper officials of the General Land Office to take up such lists and prepare the necessary certificate for the action of the Commissioner and Secretary. This was what was done with respect to the tract in question here, and our requests in the matter resulted in the promise that the land would be included in a patent, such as set out in my firm's letter of that date, to P. E. Hall, president, Exhibit 'C.' In the multitude of business transacted by my firm in the years succeeding the action referred to, it is impossible for me to recollect the details of this particular matter, nor do I recollect the circumstances under which the promise referred to in said letter was given, but that it was made to me or to some member of my firm, as a result of urgent requests for proper action, is certain, or the said letter of my firm, of October 1, 1891, Exhibit 'C,' would not have been written. It was the practice of my firm, in all matters in our hands, from time to time to call them up by personal application, with a view to securing action. When the certification finally issued, on January 22, 1903, it was in response to a personal and urgent request from my firm.

"I know of no delay whatever caused by either the Iowa Railroad Land Company or its predecessors in interest, or by any of its agents or attorneys, and certainly none by myself or my firm in securing the final issuance of title by the United States to the tract of land in question. The delay in certifying the said land, after the Secretary's action of June 17, 1891, was wholly due to the want of action by the General Land Office, the company and its agents having performed every duty in timely manner required by the rules of the Department.

"The first cause of delay in final certification of said tract under the aforesaid railroad grant of May 15, 1856, was the selection by the state of Iowa, under the swamp land grant *of 1850, which was filed [48 February 21, 1859, and embraced said tract, which selection was not finally disposed of by the Land Department until 1878.

"The next cause of delay was the appeal of John Carraher from the decision of the Commissioner of the General Land Office, dated December 3, 1883, to make entry of said tract under the provision of the timber culture law. Delay was next caused by the loss of Carraher's application papers in the General Land Office, which is mentioned in the letter of the Commissioner to Mr. Van Deventer, dated September 6, 1887, Doc. No. 1, of this deposition, and that of the Commissioner to Geo. W. Wakefield, Esq., Doc. No. 4, of this deposition. The next cause of delay appears to have grown out of the contention made in behalf of Carraher in support of his appeal, that the railroad grant had been fully satisfied, and that this tract was not needed to fill up the quota of lands due under the grant. This made necessary the adjustment of the grant which took place on April 9, 1891, as already detailed.

"Thereafter the Secretary disposed of Carraher's appeal on June 17, 1891. The delay in certifying the land under grant which subsequently ensued, occurred in the General Land Office. As to the causes of this last delay, I have no certain knowledge, but I can state it as a fact, that between the date of the Secretary's final decision on the Carraher application, down to a very recent date, the railroad division of the General Land Office has been overburdened with work consequent upon the duty of adjusting all of the railroad land grants made by Congress in aid of railroads, which was cast upon the Land Department by the provisions of the act of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595). For the most of the time during that period the force of clerks in that division was insufficient to promptly perform the necessary labor attendant upon such adjustments and the conveyance of lands under the grants. The delay in certifying the tract in question may have been due to these conditions."

Mr. Charles A. Clark argued the cause, and, with Mr. William G. Clark, filed a brief for plaintiff in error:

Carraher's claim under the timber culture

entry was not a claim to title in fee, which **alone can furnish the basis** for title by prescription.

Ricard v. Williams, 7 Wheat. 59, 5 L. ed. 398.

Nor can a prescriptive title arise with **no claim of right.**

Harvey v. Tyler, 2 Wall. 328, 17 L. ed. 871; **Society for Propagation of Gospel v. Pawlet, 4 Pet. 480, 7 L.** ed. 937.

A claim under a sheriff's deed, void for **want of jurisdiction, will** not support title **by prescription.**

Den ex dem. Walker v. Turner, 9 Wheat. 541, 6 L. ed. 155.

There can be no color of title in an occupant of land who does not hold under an instrument or proceeding or law purporting to transfer the title or to give the right of possession. **Nor can** good faith be affirmed of a party in holding adversely where he knows he has no title, and that, under the law, he can acquire none.

Deffeback v. Hawke, 115 U. S. 392–407, 29 L. ed. 423–427, 6 Sup. Ct. Rep. 95; Sparks v. Pierce, 115 U. S. 412, 29 L. ed. 429, 6 Sup. Ct. Rep. 102; Litchfield v. Sewell, 97 Iowa, 251, 66 N. W. 104; Hays v. United States, **175 U. S. 260, 44** L. ed. 155, 20 Sup. Ct. Rep. 80.

It is the settled construction of the statute of limitations of Iowa relating to lands, that title by prescription cannot be acquired in the absence of an honest, bona fide good faith claim of title.

Litchfield v. Sewell, 97 Iowa, 247, 66 N. W. 104; Wright v. Keithler, 7 Iowa, 92; Smith v. Young, 89 Iowa, 340, 56 N. W. 506; Clark v. Sexton, 122 Iowa, 313, 98 N. W. 127; Snell v. Mechan, 80 Iowa, 55, 45 N. W. 398.

Courts cannot interfere while title is withheld by Land Department in administration of the grant.

Humbird v. Avery, 195 U. S. 498, 49 L. ed. 294, 25 Sup. Ct. Rep. 123; Oregon v. Hitchcock, 202 U. S. 70, 50 L. ed. 938, 26 Sup. Ct. Rep. 568.

The statute of limitations will not run while government withholds title. Nor can the statute of limitations run, or title by prescription have its inception, while the Land Department withholds the title in the administration of the grant.

Gibson v. Chouteau, 13 Wall. 92, 20 L. ed 534; Redfield v. Parks, 132 U. S. 246, 33 L. ed. 330, 10 Sup. Ct. Rep. 83; Morrow v. Whitney, 95 U. S. 557, 24 L. ed. 458; Northern P. R. Co. v. Traill County (Northern P. R. Co. v. Rockne) 115 U. S. 600, 29 L. ed. 477, 6 Sup. Ct. Rep. 201; Kansas P. R. Co. v. Prescott, 16 Wall. 603, 21 L. ed. 373; Union P. R. Co. v. McShane, 22 Wall. 444, 22 L. ed. 747; Churchill v. Sowards, 78 Iowa, 473, 43 N. W. 271; Durham v. Hussman, 88 Iowa, 36, 55 N. W. 11; Dickerson v. Yetzer, 53 Iowa, 681, 6 N. W. 41; Grant v. Iowa Railroad Land Co. 54 Iowa, 673, 7 N. W. 113; United States v. Montana Lumber & Mfg. Co. 196 U. S. 577, 49 L. ed. 605, 25 Sup. Ct. Rep. 367.

The cancelation of a timber culture entry cannot be collaterally assailed.

Brown v. Gurney, 201 U. S. 193, 50 L. ed. 722, 26 Sup. Ct. Rep. 509; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875.

Where lands have not been certified under the railroad grant of 1856 as amended, the legal title does not pass.

Dickerson v. Yetzer and Grant v. Iowa Railroad Land Co. supra; Iowa Railroad Land Co. v. Fitzpatrick, 52 Iowa, 244, 3 N. W. 40; Iowa Homestead Co. v. Webster County, 21 Iowa, 221; Iowa Railroad Land Co. v. Davis, 102 Iowa, 132, 71 N. W. 229; Doe v. Iowa Railroad Land Co. 54 Iowa, 657, 7 N. W. 118.

The grant of inchoate right may be *in præsenti* and the legal title may never pass.

McCormick v. Hayes, 159 U. S. 332, 40 L. ed. 171, 16 Sup. Ct. Rep. 37; Rogers Locomotive Mach. Works v. American Emigrant Co. 164 U. S. 570, 41 L. ed. 557, 17 Sup. Ct. Rep. 188.

Contemporaneous and long-continued construction as to whether the legal title passed under the acts of Congress of 1856 and 1864, acquiesced in and acted upon for practically half a century by the state of Iowa and by the Land Department of the government, ought not lightly to be disturbed, even if this court should think it might take a different view of the question as an original proposition.

Rogers v. Goodwin, 2 Mass. 477; Stuart v. Laird, 1 Cranch, 299, 2 L. ed. 115; Clinton v. Englebrecht, 13 Wall. 434, 20 L. ed. 659; Ferris v. Higley, 20 Wall. 375, 22 L. ed. 383; United States v. State Bank, 6 Pet. 29, 8 L. ed. 308; Union Ins. Co. v. Hoge, 21 How. 35, 16 L. ed. 61; Edwards v. Darby, 12 Wheat. 206, 6 L. ed. 603; The Laura (Pollock v. Bridgeport S. B. Co.) 114 U. S. 411, 29 L. ed. 147, 5 Sup. Ct. Rep. 881.

Certification of the land in suit was withheld in the face of the demand for it, and in connection with the administration of the grant. While it was so withheld the courts could not interfere to determine the legal title one way or the other.

Humbird v. Avery, 195 U. S. 502, 503, 49 L. ed. 296, 297, 25 Sup. Ct. Rep. 123; Oregon v. Hitchcock, 202 U. S. 70, 50 L. ed. 938, 26 Sup. Ct. Rep. 568. See also Mc-

Cormick v. Hayes, supra; Rogers Locomotive Mach. Works v. American Emigrant Co. 164 U. S. 559, 41 L. ed. 552, 17 Sup. Ct. Rep. 188.

A claim under a void sheriff's deed or a void tax deed will not support title by prescription.

Den ex dem. Walker v. Turner, 9 Wheat. 541, 6 L. ed. 155; Redfield v. Parks, 132 U. S. 250, 33 L. ed. 331, 10 Sup. Ct. Rep. 83.

If the party claim only a limited estate, and not a fee, the law will not, contrary to his intentions, enlarge it to a fee.

Ricard v. Williams, 7 Wheat. 108, 109, 5 L. ed. 410.

Presumptions of a grant from long possession may be encountered and rebutted by contrary presumptions, and can never fairly arise where all the circumstances are perfectly consistent with the nonexistence of a grant; *a fortiori*, they cannot arise where the claim is of such a nature as is at variance with the supposition of a grant.

Ibid.

Where one takes possession of land without title, or claim or color of title (which does not mean color of some supposed right to acquire the title), such occupancy is not adverse to the true title, but subservient thereto. An entry by one upon land in possession, actual or constructive, of another, in order to operate as an ouster and gain possession of the parties entering must be accompanied by a claim of title.

Harvey v. Tyler, 2 Wall. 349, 17 L. ed. 876.

Mr. Constant R. Marks submitted the cause for defendant in error. Mr. Henry C. Gardiner was on the brief:

The grant under which defendant claimed title in this case was a grant *in præsenti* under which title passed from the government to the railroad company upon the filing of the map of definite location.

Chicago, R. I. & P. R. Co. v. Grinnell, 51 Iowa, 476, 1 N. W. 712; Sioux City & I. F. Town Lot & Land Co. v. Griffey, 72 Iowa, 505, 34 N. W. 304, 143 U. S. 32, 36 L. ed. 64, 12 Sup. Ct. Rep. 362; Burlington & M. River R. Co. v. Lawson, 58 Iowa. 145, 12 N. W. 229; Iowa Falls & S. C. R. Co. v. Beck, 67 Iowa, 421, 25 N. W. 686; Chicago, B. & Q. R. Co. v. Lewis, 53 Iowa, 101, 4 N. W. 842; Courtright v. Cedar Rapids & M. River R. Co. 35 Iowa, 386.

To hold in subservience to the government, invoking the aid of its Land Department, and then, when the railroad company obtained title, to use that holding as an honest claim of right in sustaining adverse possession against the railroad company, was upheld in Cole v. Des Moines Valley R. Co. 76 Iowa, 185, 40 N. W. 711.

To obtain color of title and enter into possession while the title was in the government, and, when the title passed to the railroad company, to hold adversely against the latter until the statute had run, under the same color of title and possession, is just what was upheld in Chicago, R. I. & P. R. Co. v. Allfree, 64 Iowa, 500, 20 N. W. 779; and Sater v. Meadows, 68 Iowa, 507, 27 N. W. 481.

The statute of limitations will begin to run against one claiming title from the government from the date of his compliance with the requirements of the government, in favor of one holding adverse possession of the real estate.

Dolen v. Black, 48 Neb. 688, 67 N. W. 760; Udell v. Peak, 70 Tex. 547, 7 S. W. 786; Patten v. Scott, 118 Pa. 115, 4 Am. St. Rep. 576, 12 Atl. 292; Hayes v. Martin, 45 Cal. 559; Tremaine v. Weatherby, 58 Iowa, 621, 12 N. W. 609.

The doctrine of adverse possession is applicable to the land in controversy before certification by the Land Department and Secretary of the Interior.

Iowa Homestead Co. v. Webster County, 21 Iowa, 221; Dubuque & P. R. Co. v. Webster County, 21 Iowa, 235; Chicago, B. & Q. R. Co. v. Lewis, 53 Iowa, 115, 4 N. W. 842; Whitehead v. Plummer, 76 Iowa, 181, 40 N. W. 709; Cole v. Des Moines Valley R. Co. supra.

The claim of one entering land for the purpose of ultimately acquiring title from the government by compliance with its laws is just as hostile to all others as though the patent had been issued, although it is subservient to the government. The great weight of authority is that the claim of one who thus enters land may be subservient to the government if hostile to everybody else.

Clemens v. Runckel, 34 Mo. 41, 84 Am. Dec. 69; Mather v. Walsh, 107 Mo. 121, 17 S. W. 755; Moore v. Bronfield, 7 Wash. 23, 34 Pac. 199; Lord v. Sawyer, 57 Cal. 65; Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 So. 43; Francœur v. Newhouse, 43 Fed. 236; Northern P. R. Co. v. Kranich, 52 Fed. 911; Northern P. R. Co. v. Townsend, 84 Minn. 152, 87 Am. St. Rep. 342, 86 N. W. 1007.

As between individuals the statute of limitations begins to run from the time the party entering the land did all required of him to perfect his purchase. The claim thus becomes one of ownership and lacks only the paper title to make the claim complete. It then ceases to be subservient to, and becomes adverse to, the government. If the title is in fact earned, the government retains nothing but the naked legal title and the claimant is the real owner. The land

becomes segregated from the public domain and is private property.

Carroll v. Patrick, 23 Neb. 834, 37 N. W. 671; Nichols v. Council, 51 Ark. 26, 14 Am. St. Rep. 20, 9 S. W. 305; Cavender v. Smith, 3 G. Greene, 349, 56 Am. Dec. 541; Cady v. Eighmey, 54 Iowa, 615, 7 N. W. 102; Steele v. Boley, 6 Utah, 308, 22 Pac. 311; Wirth v. Branson, 98 U. S. 118, 25 L. ed. 86; Stark v. Starr, 6 Wall. 402, 18 L. ed. 925.

This court has frequently announced the same conclusions as applied to the grant in this case and similar grants.

Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158; Toltec Ranch Co. v. Cook, 191 U. S. 532, 48 L. ed. 291, 24 Sup. Ct. Rep. 166; Van Wyck v. Knevals, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; Kansas P. R. Co. v. Dunmyer, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; New Orleans P. R. Co. v. Parker, 143 U. S. 42, 36 L. ed. 66, 12 Sup. Ct. Rep. 364; Sioux City & I. F. Town Lot & Land Co. v. Griffey, 72 Iowa, 505, 34 N. W. 304, 143 U. S. 32, 36 L. ed. 64, 12 Sup. Ct. Rep. 362; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; Sharon v. Tucker, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720.

Mr. Justice Day delivered the opinion of the court:

The original grant of May, 1856, was *in præsenti*. The title passed from the United States and vested in the state of Iowa on October 13, 1856, when the map of definite location was lodged in the General Land Office, and the right of the company then attached. Sioux City & I. F. Town Lot & Land Co. v. Griffey, 143 U. S. 32, 36 L. ed. 64, 12 Sup. Ct. Rep. 362.

Under the decisions made by this court in Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158, and Toltec Ranch Co. v. Cook, 191 U. S. 532, 48 L. ed. 291, 24 Sup. Ct. Rep. 166, notwithstanding the patent had not been issued, the railway company, grantor of the plaintiff in error, having succeeded to the right and title of the original company, and complied with all the terms and conditions of the grant, as required in the legislation of Congress and the acts of the Iowa legislature after the acceptance of the grant by the state, was in a position and clothed with the requisite title in order to transmit the same to another who might have recovered possession of the lands, and it could itself have brought an action in ejectment to oust one holding adverse possession thereof, and, being clothed with these rights, was in such position that the statute of limitations would run against it in favor of one who occupied the premises by adverse possession under color of title. This was distinctly decided in the Toltec Ranch Company Case, wherein it was held that the statute *of limitations would run against [492] the railroad company, thus situated toward the lands, although the patent had not issued.

It is sought to withdraw this case from the application of the doctrine of Deseret Salt Co. v. Tarpey, and Toltec Ranch Co. v. Cook. It is argued that § 4 of the act of May, 1856, provided that if the roads were not completed in ten years the unsold lands should revert to the United States; that on March 10, 1868, the state of Iowa resumed the grant of lands as made to the original grantees; that by act of June 2, 1864, Congress provided in § 8:

"That no lands hereby granted shall be certified to either of said companies until the governor of the state of Iowa shall certify to the Secretary of the Interior that the said company has completed, ready for the rolling stock, within one year from the first day of July next, a section of not less than twenty miles from the present terminus of the completed portion of said railroad, and in each year thereafter an additional section of twenty miles; but the number of sections per mile originally authorized shall be certified to each company, upon proof, as aforesaid, of the completion of the aditional sections of the road as aforesaid; and upon the failure of either company to complete either section as aforesaid, to be annually built, the portion of the land remaining uncertified shall become subject to the control and disposition of the legislature of the state of Iowa, to aid in the completion of such road." [13 Stat. at L. 98, chap. 103.]

And it is argued that the effect of this section was to hold the legal title until the railways were built and completed, as therein specified, and that the Iowa Falls & Sioux City Railroad Company never took the legal title to the lands in controversy until certified under § 8 of the act of 1864, which, it is alleged, was not until January 20, 1903, followed by the governor's patent of February 2, 1903.

But when the grant is *in præsenti*, and nothing remains to be done for the administration of the grant in the Land Department, and the conditions of the grant have been complied *with and the grant fully [493] earned, as in this case, notwithstanding the want of final certification and the issue of the patent, the railroad company had such title as would enable it to maintain ejectment against one wrongfully on the lands, and title by prescription would run against it in favor of one in adverse possession un-

der color of title.. Deseret Salt Co. v. Tarpey and Toltec Ranch Co. v. Cook, supra.

Applying and giving weight to the decisions thus recently rendered in this court, we think the debatable proposition in the case concerns not the title of the railway company, or its right to have maintained an action to recover the premises, but involves the right of Carraher, and the defendant in error as his successor, to claim the title to the premises by adverse possession.

We think the record discloses that for more than ten years required by the Iowa statute to ripen such title, Carraher was in possession of the premises. He had planted a large number of trees; caused the lands to be cultivated; had raised crops; had rented the lands to others, and was understood to be claiming the ownership. The answer of plaintiff in error to this claim of title is that Carraher was not in possession of the premises claiming title in good faith.

The record shows that in 1883, by an entry under the timber culture act, Carraher claimed this 40-acre tract. As we have seen in the statement preceding this opinion, his application was rejected by the register of the General Land Office, whose decision was affirmed by the Commissioner and ultimately by the Secretary of the Interior. Pending his appeal, Carraher made a second application for the lands to the register of the land office, and a receiver's receipt was issued to him. This receiver's receipt was dated May 31, 1888, and is as follows:

Application No. 607.
Receiver's Receipt No. 607.
Receiver's Office, Des Moines, Iowa,
May 31st, 1888.

Received of John Carraher the sum of [494]Nine Dollars —— *cents, being the amount of fee and compensation of register and receiver for the entry of northeast —— of N. E. quarter of section 1, in township 89 of range 46, under the 1st section of the act of Congress approved June 14th, 1878, entitled "An Act to Amend an Act Entitled an Act to Encourage the Growth of Timber on the Western Prairies."

$9.00. M. V. McHenry, Receiver.

Indorsed: State of Iowa, Woodbury county, filed for record this 9th day of Dec., 1891, at 2 o'clock P. M., and recorded in book 40, Lands, page 162, C. A. DeMun, Recorder. P. Shontz, Deputy.

It was inclosed to Carraher in a letter, of which the following is a copy:

Sioux City, Iowa, June 2, 1888.

Mr. John Carraher,

My Dear Sir:—

I have the pleasure of handing you herewith your timber culture entry receiver's receipt No. 607 for N. E. ¼ of N. E. ¼, 1, 89, 46.

Respectfully,
Geo. W. Wakefield.

P. S. You can take possession and proceed to comply with the timber culture laws.

After this receiver's receipt and letter, Carraher went into possession in the manner we have already stated and held it until 1901, when, shortly before his death, he conveyed the premises to the defendant in error. The contention is that this possession could not have been in good faith, with any expectation of obtaining title from the government at the conclusion of the eight years required by law in which to earn it; that Carraher knew that his first application under the timber culture act had been rejected, and afterwards that decision was affirmed on appeal in 1891, and that he could not have continued in the occupation of the premises in good faith under claim of title.

The record shows that when the Secretary of the Interior (July 11, 1891) affirmed the decision against Carraher's first *timber [495] culture entry, the Commissioner, in advising the register and receiver at Des Moines by letter of July 13, 1891, of that decision, added: "It appears that on May 31, 1888, more than three years after the rejection of his application, and while his case was pending before the Secretary of the Interior on appeal, your office allowed Carraher to make timber culture entry 607 of the land. The action was without authority and the entry has this day been canceled." It does not appear that Carraher was notified that this entry 607 had been canceled, nor was he ever called upon to appear in reference to the same, and the letter of the Commissioner discloses that the register of the land office at Des Moines should not have allowed the entry to be made, and that it was summarily canceled without notice or hearing. Carraher had been advised by the letter from his counsel, who had become a judge of a court in Iowa, that he might take possession and proceed to comply with the timber culture law. As far as the record shows, he heard nothing further from his entry, knew nothing of its summary cancelation, and no attempt was made to disturb his possession of the premises.

The supreme court of Iowa held that

there was nothing in these facts to show that Carraher was not acting in good faith, and with the belief that he would acquire title under the last entry under the timber culture act, and we are not prepared to disturb this holding.

After 1891, as we have seen, the railway company was in position to have ousted him from the premises and asserted its superior title and right. It did not attempt to do this, and, so far as the record discloses, made no objection to Carraher planting and cultivating the trees required by the act of Congress to perfect his title under the second application. His possession was certainly open, notorious, continuous, and adverse, and, unless he was acting in bad faith, was such as would ripen into full title as against the railway company, it failing to assert its rights within the period of the statute of limitation. While, until the time had run required by the 96]*timber culture act, Carraher would have been in no position to claim title as against the government, he was occupying a hostile attitude toward the railway company, and, while recognizing title in the United States, he expected to acquire title from it, had excluded all others from the use and occupation of the land, and held under no other title. The supreme court of Iowa has held that, under such circumstances, the statute of limitations of Iowa would run in his favor as against the railroad company, and we find no reason to disturb that conclusion. And for more than ten years that company was in such position under its grant that it might have maintained an action in ejectment and asserted its title to the premises as against Carraher.

We find no error in the judgment of the Supreme Court of Iowa and it will be affirmed.

Mr. Justice Brewer concurs in the judgment.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, Appt.,
v.
VICKSBURG WATERWORKS COMPANY.

(See S. C. Reporter's ed. 496-516.)

Judgment—res judicata.

1. A decree enjoining a municipality, at the suit of a waterworks company, from building its own waterworks, or denying liability, or refusing to pay the water rentals contracted for, is not conclusive as to the right of the municipality to regulate water rates charged to private consumers under a law passed long after the bill was filed, even if it could be said that the pleadings put in issue the reasonableness of the rates then charged.

Constitutional law—contract exemptions—regulation of water rates.

2. A contract with a waterworks company, fixing maximum water rates to private consumers for thirty years, which, unless so grossly unreasonable as to suggest fraud or corruption, is binding, and, as such, is protected against impairment by the contract clause of the Federal Constitution, could be made by the city of Vicksburg under the authority of Miss. Laws 1886, chap. 358, § 5, empowering it to provide for the erection and maintenance of a system of waterworks to supply that city with water, and, to that end, to contract with a party or parties who shall build and operate waterworks.

[No. 275.]

Argued April 24, 1907. Decided May 27, 1907.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi to review a decree enjoining a municipality from impairing contract obligations by interfering with the water rates charged to private consumers. Modified so as to enjoin the city from interfering with the right to charge the rates fixed by the contract, and, as so modified, affirmed.

Statement by Mr. Justice Day:

Cases involving the rights of the Vicksburg Waterworks Company, under the contract made between the city of Vicksburg and the company, for furnishing the water supply of the city, have been before this court in two preceding actions, *viz.:* Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585, and 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660.

Owing to the previous statements of the case, it is only necessary to set out enough of the facts involved in the controversy now before us to make plain the conclusions at which we arrive.

NOTE.—On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

On contract exemptions from legislative power to fix tolls, rates, and prices—see notes to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177, and Detroit v. Detroit Citizens' Street R. Co. 46 L. ed. U. S. 592.

The city of Vicksburg, by act of the legislature of Mississippi (Laws of 1886, chap. 358, § 5, p. 695), was authorized "to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties, who shall build and operate waterworks."

Acting under this authority conferred by the legislature, the city of Vicksburg made a contract with Samuel R. Bullock & Company, their associates and assigns, for the supply of water to the city and its inhabitants, which was contained in the ordinance of November 18, 1886, § 13 thereof providing that—

"The said Samuel R. Bullock & Company, their associates, successors, or assigns, shall have the right to make all needful rules and regulations governing the consumption of water, the tapping of pipes, and general operation of the works, and to make such rates and charges for the use of said water as they may determine, provided that such rates and charges shall not exceed 50 cents for each thousand gallons of water."

The ordinance, by its terms, ran for thirty years, and Bullock & Company, as provided in § 5 of the ordinance, assigned the contract to the Vicksburg Water Sup-[498]ply Company, *and it was duly accepted by that company. The supply company put in the works and operated until August, 1900, when the mortgage upon the property, including all the franchises and contract rights, was foreclosed and purchased by a Mr. Crumpler, who assigned all his rights and title to the Vicksburg Waterworks Company, the appellee herein, which company has operated the works since.

The contract contained an agreement to pay a stipulated rental for certain hydrants for public use.

The legislature of Mississippi, on March 18, 1900, passed an act authorizing the city to issue bonds and build a waterworks system of its own for the supply of the city and its inhabitants, and on the 3d of July, 1900, an election was held in the city under the statute, which resulted in a vote to build or buy a waterworks plant of its own.

The city repudiated any contract relations with the company. Thereupon the company filed its bill in the United States circuit court for the district of Mississippi on the 14th day of February, 1901, the objects of which were thus stated by Mr. Justice Shiras, in delivering the opinion of the court (185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585):

"The bill prays for an injunction to restrain the defendant from assuming to abrogate and take away the franchises and contract rights of the complainant, and from attempting to coerce the company to sell its works to the defendant for an inadequate price, and that said act of the legislature of Mississippi, adopted on March 9, 1900, and said resolution and ordinance adopted and passed by said city on the 7th day of November, 1900, be declared to impair the obligations of said contract between said city and said Bullock & Company and their assigns, and to cast a cloud upon the title, franchises, and rights of complainant, and said act, ordinance, and resolution, and each of them, are alleged to be in contravention of the Constitution of the United States in this: that they impair the obligations of said contract between said city and said Bullock & Company and their assigns."

*In the court of original jurisdiction the[499] bill was dismissed for want of jurisdiction. On appeal, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585, the judgment was reversed, and this court held that there was jurisdiction, and the cause was remanded. The case went to trial upon its merits, and on May 18, 1904, a final decree was rendered, which was affirmed on appeal to this court in the case reported in 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660. The decree in that case, known in the record as No. 41, is given in the margin.†

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†Equity, No. 1.

Vicksburg Waterworks Company
vs.
Mayor and Aldermen of the City of Vicksburg, Mississippi.

This day this cause came to be heard in accordance with the motion of complainant and defendant filed January 12th, 1904, upon the original bill, amended and supplemental bill, exhibits, answer of defendant, proof, and exhibits, and the court, after hearing and attending the evidence and the arguments of counsel, and being fully advised in the premises, and being satisfied that the complainant is entitled to the relief prayed for in its original and amended and supplemental bills, and for full relief, it is thereupon hereby ordered, adjudged, and decreed:

First. That the defendants, the Mayor and Aldermen of the city of Vicksburg, be and are hereby perpetually enjoined from abrogating and taking away, or from assuming to abrogate or take away, the franchises or contract rights of complainant under and by virtue of the ordinances, franchises, or contract of said defendants entitled, "An Ordinance to Provide for a Supply of Water to the City of Vicksburg, in Warren County, Mississippi, and to Its Inhabitants, Contracting with Samuel R. Bullock & Company, their Associates, Successors, and Assigns for a Supply of Water for Public Use,

00] *During the pendency of the orginal action the legislature of Mississippi passed an act authorizing the cities and villages of the state to prescribe, by ordinance, maximum rates and charges for the supply of water, electric light, and gas furnished to cities and the inhabitants thereof. Laws of Mississippi 1904, p. 231. Section 1 of this act is inserted in the margin.†

01] *On April 20, 1904, about one month before the rendition of the final decree in the original case, the city adopted two ordinances fixing the maximum charge for the use of water, one by what is known as the "flat rate" and the other for water measured by meters.

On December 7, 1903, the city passed an ordinance prohibiting the water company and gas company from charging damages and other penalties for failure to pay bills, until ten days after presenting the same, and giving an opportunity for the payment thereof.

On the 7th of January, 1905, the water company, in view of this action by the city, filed another bill, which is the original bill in this case, and was numbered 79, in which it set forth the preceding history of the litigation, the decree of May 18, 1904, the city ordinance of December 7, 1903, and the two of April 20, 1904, and in that bill alleged its contract under the ordinance of 1886

†Section 1. Be it enacted by the legislature of the state of Mississippi, That the corporate authorities of any city, town, or village now or hereafter incorporated under any general or specific laws of this state, in which any individual, company, or corporation has been, or hereafter may be, authorized by said city, town, or village to supply water, electric light, or gas to said city, town, or village, or the inhabitants thereof, be, and they are hereby, empowered to prescribe by ordinance maximum rates and charges for the supply of water, electric light, or gas furnished by such individual, company, or corporation to such city, town, or village or the inhabitants thereof, such rates and charges to be just and reasonable. And in case the corporate authorities of any such city, town, or village shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the circuit court of the county in which said city, town, or village may be; provided, that this act shall not be construed so as to impose (impair) the effect or obligation of any valid or binding contract with any waterworks company, electric light company, or gas company, now existing, or heretofore made with any individual or water company, electric light or gas company.

and Giving the Said City of Vicksburg an Option to Purchase the Said Works," ordained the 19th day of November, 1886, approved by John W. Powell, mayor, November 19th, 1886, being the ordinance, contract, and franchise marked exhibit B to the original bill of complaint, and said ordinance, contract, and franchise being specifically and accurately set out in words and figures in the pleadings, which ordinance, contract, and franchise was acquired by and is the sole and exclusive property of said complainant.

Second. That said ordinance, contract, and franchise be and is hereby declared and held to be in every respect legal, valid, and enforceable and binding upon said defendant, and said defendant is hereby perpetually enjoined from infringing, ignoring, rescinding, or denying liability under said ordinance, contract, and franchise in any of its parts, or from in any manner disturbing or interfering with the rights, privileges, and benefits acquired by complainant thereunder.

Third. That said defendant be, and he is hereby, directed to rescind its resolution and ordinance adopted the 7th day of November, 1900, which is in words and figures as follows: "Resolved, that the mayor be and is hereby instructed to notify the Vicksburg Waterworks Company that the mayor and aldermen deny any liability upon any contract for the use of the waterworks hydrants. That from and after August, 1900, they will pay reasonable compensation for the use of said hydrants. That the city attorney take such action as shall be necessary to determine the rights of the city in the premises."

And also to rescind the ordinance or resolution of said defendant adopted the 7th day of February, 1901, when said defendant adopted the report of the committee on waterworks, as set out in the pleadings.

Fourth. That the said defendant refrain from in any manner accepting the benefits of or proceeding under the act of the legislature of the state of Mississippi approved March 9, 1900, and from issuing bonds under and by virtue of said act, or any other act or ordinance, for the purpose of erecting waterworks of its own during the period prescribed by ordinance, contract, and franchise.

Fifth. That the said defendant refrain from constructing waterworks of its own until the expiration of the period prescribed in said ordinance, contract, and franchise, dated the 16th day of November, 1886.

Sixth. That the said defendant be, and is hereby, required to pay all moneys due or owing, or that *may* hereafter be due and owing to said complainant under and by virtue of said ordinance, contract, and franchise.

Seventh. That the said defendant be, and is hereby, perpetually enjoined from making or adopting any resolutions or ordinance refusing to pay the contract price of water fixed by said ordinance, contract, and franchise until the expiration of the period prescribed in said ordinance, contract, and franchise.

Eighth. (Relates to certain sewers.)

Ninth. That said defendant pay the costs of this cause to be taxed.

and the former decree, and that the enforcement of the ordinances was in violation of that decree and the company's contract of 1886, and would be destructive of its business, and they prayed for an injunction. A temporary injunction was allowed, and afterwards, the case standing on the bill, answer, and exhibits attached thereto, a final decree was rendered in the case, which final decree is set forth in the margin.†

From this decree the present appeal has been prosecuted.

Mr. Hannis Taylor argued the cause, and, with Mr. George Anderson, filed a brief for appellant:

The first appeal involved only a question of jurisdiction.

Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585.

When the result of the second appeal is tested by the contents of the final decree in which it culminated, it appears that the only adjudication ever made in favor of the waterworks company by this court is embodied in the declaration that it is entitled to a decree "enjoining the city from erecting its own works during the terms of the contract."

The city of Vicksburg was not authorized to create a monopoly or to confer special privileges of any kind.

Dill. Mun. Corp. §§ 362 (296), 443, 457, 695 (550), 727 (578); Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921; Ruggles v. Illinois, 108 U. S. 536, 27 L. ed. 816, 2 Sup. Ct. Rep. 832; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 469, 50 L. ed. 1111, 26 Sup. Ct. Rep. 660; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224.

There was no contract exemption from legislative power to fix tolls, rates, or prices.

Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Freeport Water Co. v. Freeport, 180

†This case coming on to be finally heard at this January term, 1906, of this court, upon the original bill of complaint and the answer of the defendant thereto, and all the exhibits which are made such, to said original bill of complaint and said answer, and all of the other pleas and proceedings in this cause, together with a certified copy of the charter of the said Vicksburg Waterworks Company, which is filed in the record as evidence in the cause, also the petition of the defendant for a modification of the temporary injunction granted in this cause, so that the complainant shall not be authorized to cut off water from its patrons who refuse to pay the rates of complainant, claiming the right to have the injunction modified by virtue of the ordinances of the defendant, fixing water rates; and the motion of complainant to have said injunction granted heretofore made perpetual. And the court having heard the arguments of counsel, and being fully advised in the premises, and being satisfied that the complainant is entitled to the relief prayed for in its bill of complaint for full relief, it is thereupon finally ordered, adjudged, and decreed:

First. That the defendant, the mayor and aldermen of the city of Vicksburg, is hereby denied the relief prayed for in its petition, to wit, that the injunction be modified so that the mayor and aldermen of the city of Vicksburg shall not be restrained from enforcing the ordinances passed by them fixing the water rates and prescribing rules and regulations of the Vicksburg Waterworks Company, and that the Vicksburg Waterworks Company shall not be permitted to cut off patrons' water, providing patrons pay the rates fixed in said ordinances.

Second. That said defendant be, and is hereby, enjoined from enforcing the said three ordinances described in said bill, to wit: An ordinance entitled "An Ordinance to Fix and Prescribe Maximum Rates and Charges for Water Supplied to the Inhabitants of the City of Vicksburg, Whether Measured by Meters, and for Other Purposes," approved the 20th of April, 1904, an ordinance entitled "An Ordinance to Fix and Prescribe the Maximum Flat Rates and Charges for the Supply of Water to Consumers in the City of Vicksburg, and for Other Purposes," approved the 20th day of April, 1904; and an ordinance entitled "An Ordinance to Require Waterworks, Gas, and Electric Companies to Present Bills before Charging Damages for a Failure to Pay Them When Due," approved the 8th day of December, 1903, so far as the latter relates to complainant.

Third. That the restraining order heretofore granted in this cause on the 11th day of January, 1905, be and the same is hereby made permanent.

Fourth. That the said defendant be, and is hereby, enjoined from in any manner interfering with the complainant's contract rights under its said contract with the city of Vicksburg, entered into between Samuel R. Bullock & Company and said city, under the ordinance of November 19th, 1886.

Fifth. That the defendant be, and is hereby, enjoined from interfering with the rules and regulations of complainant, the Vicksburg Waterworks Company, and the water rates for the inhabitants of the city of Vicksburg, now in force, established by the Vicksburg Waterworks Company.

Sixth. That said defendant be, and is hereby, enjoined from interfering with the water rates known as the flat rates, now in force, established by the Vicksburg Waterworks Company.

It is further ordered, adjudged, and decreed that the defendant pay all costs of this cause.

Finally ordered, adjudged, and decreed this the 3d day of Jan. A. D. 1906.

U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490; Joplin v. Southwest Missouri Light Co. 191 U. S. 150, 48 L. ed. 127, 24 Sup. Ct. Rep. 43; Owensboro v. Owensboro Waterworks Co. 191 U. S. 358, 48 L. ed. 217, 24 Sup. Ct. Rep. 82; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed 406, 24 Sup. Ct. Rep. 241.

If an exemption from state regulation of water rates was vested in Bullock & Company, and the corporation to which it was authorized by the original contract to assign, no such exemption passed by the foreclosure sale to appellee, a corporation organized thirteen years after the making of such original contract.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860; Wilson v. Gaines, 103 U. S. 417, 26 L. ed. 401; Chesapeake & O. R. Co. v Miller, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; Norfolk & W. R. Co. v. Pendleton, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. Rep. 413; Covington & L. Turnp Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Matthews v. Corporation Comrs. 97 Fed. 400; Chicago Union Traction Co. v. Chicago, 199 Ill. 533, 59 L.R.A. 631, 65 N. E. 451; San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. Rep. 261.

As the entire equity of the bill has been destroyed by a sworn answer whose responses have not been overcome by opposing testimony the bill should, in any event, be dismissed.

Foster, Fed. Pr. 1, 236; Vigel v. Hopp, 104 U. S. 441, 26 L. ed. 765.

There are no facts before the court even tending to show that the enforcement of the ordinances in question will amount to a taking of appellee's property without due process of law, or a denial of the equal protection of the laws.

Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. supra.

The water company, being a quasi public corporation and undertaking to furnish to the public a supply of water, is bound to furnish it to them at reasonable rates, irrespective of any contract it may have made with the city.

Griffin v. Goldsboro Water Co. 122 N. C. 206, 41 L.R.A. 240, 30 S. E. 319.

Mr. J. Hirsh argued the cause, and, with Mr. Murray F. Smith, filed a brief for appellee:

The questions now at issue have been heretofore conclusively adjudicated and are no longer open for investigation and determination here again.

24 Am. & Eng. Enc. Law, 2d ed. pp. 781, 782; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Fayerweather v. Ritch, 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58; Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252; Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co. 68 C. C. A. 577, 136 Fed. 27; Dowell v. Applegate, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; Howard v. Huron, 5 S. D. 539, 26 L.R.A. 493, 59 N. W. 833.

Under the laws of the state of Mississippi, as construed by the highest court, and under the Constitution of 1890, the contract of the waterworks company is unassailable.

Mahon v. Columbus, 58 Miss. 326, 38 Am. Rep. 327; Reid v. Trowbridge, 78 Miss. 542, 29 So. 167; Light, Heat, & Water Co. v. Jackson, 73 Miss. 598, 19 So. 771; Griffith v. Vicksburg Waterworks Co. (Miss.) 40 So. 1011; Spring Valley Waterworks v. San Francisco, 124 Fed. 602.

Mr. Justice Day delivered the opinion of the court:

It is contended on behalf of the appellee that the original decree of May 18, 1904, finally disposed of all the issues between the parties, including the right of the city to make rates for water consumption to private consumers under the authority of the act of March 19, 1904, and that the present controversy is foreclosed by the decree in the former case.

While it is true that the decree is very broad, we cannot agree to the contention of the appellee that it finally disposed of the matter now in controversy. When the case was first here, reported in 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585, while there are expressions in the opinion affirming the validity of the contract and the authority of the city to make it, the issue really decided was as to the jurisdiction of the court as a Federal court, which was sustained, and the cause remanded for further proceedings. Upon the second hearing of the case, and the appeal here, the opinion shows that the adjudication was regarded as settling the right of the Vicksburg Waterworks Company, under the contract, to carry on its business without the competition of works to be built by the city itself, as the city had lawfully excluded itself from the right of competition; and it was further held, as incidental to that controversy, in passing upon an issue made in the suit, that the Vicksburg Waterworks Company had succeeded to all the right, title, and interest of the original contracting party, and that the contract, having been made prior to

the Constitution of 1890, was not controlled by its provisions. The right to recover for rentals was also directly involved, as the city had denied its liability therefor, and an accounting was prayed in the original bill, and the decree specifically disposed of that issue. It is true that in the answer it was averred that the alleged contract imposed upon the inhabitants of Vicksburg an [507]onerous *and extortionate burden; "that no such contract would now be made with the Vicksburg Waterworks Company or any other company; that the rates authorized in said ordinance far exceeded the rates charged in other cities under like circumstances, and, in general terms," the city denied that it was bound to the complainant by contract; "that, for the many reasons therein set forth, no liability existed on the part of the city by reason of the contract."

An examination of the record in the former case shows that the only testimony taken in the case, as to the reasonableness of the rates charged to private consumers, was on behalf of the company, and tended to show that the rates charged were reasonable, and if it could be said that the pleadings put in issue the reasonableness of the rates then charged, was the right of the city to regulate rates under a subsequent law of the state necessarily involved and concluded? The determination of issues as to the right of injunction against the city building its own works, or denying liability or refusing to pay the rentals contracted for, and a finding that existing rates were reasonable, did not necessarily conclude a controversy which might thereafter arise, as to the right of the city to fix rates when the legislature of Mississippi should pass a law for that purpose, giving the city the right to regulate the same. It is to be remembered that when the bill was filed in the original case no such law had been passed; that when the act of March, 1904, went into effect the case was nearly ready for final decree, and the city passed its ordinances long after the beginning of the suit, and shortly before that decree. No supplemental bill was filed, but after the decree, in January, 1905, the present independent suit was brought, with a view to enjoining the proposed action of the city in enforcing ordinances regulating the rates by charges other than those contained in the contract.

Upon the appeal, the question seems to have been argued by the city as though made in the case, though the brief on behalf of the appellee contends that the act [508]of 1904 was not *involved. But a decree must be read in the light of the issues involved in the pleadings and the relief sought, and we are of opinion that the matters now litigated were not involved in or disposed of in the former case, and that, when properly construed, the decree does not finally dispose of the right of the city to regulate rates under a law passed after the contract went into effect, and long after the bill was filed in the case.

Holding, then, that the plea of *res judicata* must be denied, had the city authority, under the charter of Vicksburg, passed in 1886, to make a binding contract, fixing maximum rates for water supply to private consumers for a definite period, thirty years in the present case? The grant of legislative power upon its face is unrestricted, and authorizes the city "to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks."

That a state may, in matters of proprietary rights, exclude itself from the right to make regulations of this kind, or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt. Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; Walla Walla v. Walla Walla Water Co. 172 U. S. 1–7, 43 L. ed. 341–344, 19 Sup. Ct. Rep. 77; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; Freeport Water Co. v. Freeport, 180 U. S. 587–593, 45 L. ed. 679–686, 21 Sup. Ct. Rep. 493.

In the latter case this court, following the construction of the supreme court of Illinois, held that where a city council was authorized to contract with any person or corporation to construct and maintain waterworks at such a rate as may be fixed by ordinance for a period not exceeding thirty years, the words "fixed by ordinance" being capable of application so as to make one ordinance endure for the period of thirty years, for which the contract was made, or to give the right to pass ordinances from time to time regulating rates, the latter construction was adopted.

*In the cases generally in this court it will [509] be found that, in determining the matter of contract, the local decisions have been given much weight and, ordinarily, followed. As this is a Mississippi contract, and the power was exercised under the authority of an act of the legislature of that state, we naturally look to the decisions of the courts of that state, particularly to such as had given construction to similar charters at the time the contract was made, with a view to determining the extent of the power conferred.

While the case now before us was pending,

Griffith and others, citizens of Vicksburg, filed a bill, setting forth the city ordinances of 1903 and 1904, and asking to have them established and maintained and an injunction granted against enforcing charges for higher rates, and, upon appeal, the case went to the supreme court of Mississippi, and is reported in 40 So. 1011. In that case the supreme court of Mississippi held that the municipal corporation represented the citizens and taxpayers of the city, and that, where a right had been adjudged as between the company and the city, it would conclude private citizens; and while the court declined to pass directly upon the question here involved, because of its pendency in the Federal courts, it used this pertinent and suggestive language:

"We decline to follow the decision in Griffin v. Goldsboro Water Co. 122 N. C. 206, 41 L.R.A. 240, 30 S. E. 319, in holding that while a water company which accepts an ordinance by which a maximum rate is fixed is bound, and cannot exceed the same because of its contract, yet such rates are not binding upon consumers, who have a right to litigate against unreasonable charges. This holding, it seems to us, practically denies the power of a company, under a contract embodied in its charter giving the power, so to fix a rate as to bind a private consumer at all. It opens a never-ending and limitless field of litigation. It is well settled that the courts cannot fix a rate; and if, proceeding duly under statutes enacted for that purpose, the municipality [510] cannot do so, or authorize the company *by contract to do so, and thereby bind the citizens, then there is no authority by which it can be done.

"It is not a matter open to serious discussion in this state, since the decision by this court in the case of Stone v. Yazoo & M. Valley R. Co. 62 Miss. 607, 52 Am. Rep. 193, decided at the April term, 1885, and before the act of 1886 (Laws 1886, p. 694, chap. 358), amending the charter of Vicksburg, was enacted, that a quasi-public corporation may have a contract right to fix rates within a certain designated maximum, and that the rates so fixed are matter of contract, guaranteed by the contract clauses of the United States Constitution. In that decision the court was manifestly directing it observations to the binding character of the rates as between the company and the shippers; otherwise, the decision was practically meaningless and without point. The philosophy of the situation is simple. Granting that the company is lawfully invested with authority to fix its rate, then such rate being so fixed by it within the maximum limit allowed by the charter, or allowed by the duly authorized ordinance, is by the courts presumed to be reasonable; and it is not permissible for each individual citizen, in every controversy that may arise, to have that question, once passed upon by the lawfully constituted public authorities charged with power in the premises, reopened and litigated anew."

The case to which the court refers in the preceding extract, Stone v. Yazoo & M. Valley R. Co. supra, as having been decided prior to the enactment of the charter of Vicksburg under which the contract in question was made, did not directly involve the question of authorizing municipal corporations to make such contracts, but did maintain, after an exhaustive consideration of the subject, that a grant to a railroad company, in the charter, of a right to fix rates within maximum limits named, was a contract, within the meaning of the Federal and state Constitutions, which could not be violated by a subsequent attempt to prescribe different rates, and held that the railroad company's grant was not a renunciation *of the legislative power to secure rea- [511] sonable rates, but rather an exercise of that power, and, when rights were thus conferred, to that extent there was a renunciation of the right of the state to control the subject. In the course of the discussion the learned judge, speaking for the court, said:

"The power to contract is an essential attribute of sovereignty and is of prime importance. Its exercise has been productive of incalculable benefits to society, however great may be the evils incident to its injudicious employment. It cannot be denied merely because of its liability to abuse. The power to contract implies the power to make a valid contract. . . . The right to grant charters includes the right to grant such as will be upheld. Conferring power on the grantee of the franchise to fix rates of compensation at discretion, or within prescribed limits fixed by the charter, has been the common practice of the legislatures of the states of the United States from an early period of their history. The right of the corporators to exercise the powers conferred by the act of incorporation, whether to fix rates themselves or to take those fixed by their charter, and to rest securely on its provisions in this respect, has hitherto been generally regarded as indisputable.

"A grant in general terms of authority to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation which shall be just and reasonable.

. . . . . .

"If the grant can be interpreted without ascribing to the legislature an intent to part with any power, it will be done. Only

what is plainly parted with is gone. Fixing rates in a charter is a specification of what is reasonable,—an exclusion of tacit or implied conditions on the subject. It is an essential part of the contract of incorporation, the most important condition of its existence, the inducing cause of its acceptance."

[512] *We are referred to other cases in Mississippi which deal directly with the extent of the power conferred upon municipal corporations in charters in general terms, some of which we may notice.

In Light, Heat, & Water Co. v. Jackson, 73 Miss. 598, 19 So. 771, the city of Jackson had filed its bill, undertaking to annul a contract binding the city to pay for water for a period of twenty years at a price and rate fixed in a certain ordinance, on the ground that it was *ultra vires* and without authority from the legislature. In that case the authority conferred was in general terms, authorizing the city to contract with any reliable corporation, association, or individual for supplying the city of Jackson with water and electric or gas lights from year to year. Under authority of this general power the city undertook to make a contract with the Light, Heat, & Power Company of Jackson, contracting for the furnishing of water to the public at certain annual rentals for a period of twenty years, and fixing a certain rate for annual rentals to private consumers. The supreme court of Mississippi dealt directly with the question: Was the contract made between the city and company, and set forth in the bill, invalid for want of power in the city to contract for a series of years? And the court said:

"In view of the nature and character of the subject-matter of the contract which the board of mayor and aldermen of the city of Jackson was authorized to make by the 3d section of the act of February 29th, 1888, we think the contract entered into with the appellant was within the delegation of power, so far as the time of its duration is involved. . . . We know that the machinery, mains, and appliances required for supplying the city with water are costly to begin with, and are relatively of little value if removed when once located. Permanency of the plant is essential to the realization of any profit in the enterprise, and in cities having no greater population than that of Jackson the use of water for municipal purposes would probably be a prerequisite to [513] secure the investment *of the capital necessary to the construction of the plant. The words from 'year to year' relied upon by the appellee as limiting the power of the officers of the city to the making of the annual contracts, derived much of their significance from the subject and nature of the thing contracted for, the character of the body on which the power is conferred, the end to the attainment of which the power is to be exercised, and the extent to which such powers for such purposes are usually conferred. . . .

"A few days after the act was passed, a commission was appointed by the legislature to contract for water for the state institutions, situated in and near the city, for the term of twenty-five years. In this act power was conferred upon all municipalities to enter into contracts for a term not exceeding twenty-five years, for supplies of water, on a two-thirds affirmative vote of the qualified electors, but the act provided that it should not apply to municipalities whose charters already conferred the power of making contracts for water."

"A contract made by the authorities of a municipality with a water company for supplying the city with water for a period of twenty years is within the power conferred on them by an act of the legislature authorizing them to contract with any reliable corporation for supplying the city with water from year to year, in view of the purpose of the delegation of power, the nature of the body on which it was conferred, the subject-matter of the contract, the large outlay for machinery and appliances, the profit of which was dependent upon the permanency of the enterprise, and the cotemporaneous legislation, from which the intent to authorize a contract of as great duration as twenty-five years is deducible."

Again, in the case of Reid v. Trowbridge, 78 Miss. 542, 29 So. 167, the mayor and aldermen of the city of Vicksburg had been authorized, in general terms, to provide for the lighting of said city by electric light or other method. Under this general power the city made a contract with the Vicksburg Railroad, *Power, & Manufacturing Com- [514] pany for lighting the streets by electricity, at a given rental per annum, for 125 lights, for a period of ten years. The taxpayers of the city of Vicksburg filed a bill to enjoin the carrying out of the contract, alleging that the city had no authority to make such a contract without submitting it to a vote of the people, under the act of March, 1888, passed subsequent to the charter, requiring submission to a vote of the people, that the contract was unreasonable and oppressive, and that the council had acted arbitrarily and without exercising discretion in awarding it. The court held that the act of 1888 had no application to the case, and, speaking of the general terms of the charter authorizing a contract for lighting purposes, said:

"The intent of the legislature to confer the power without restriction appears to us

to be too plain, from the collocation and order and sequence of the sections and article of the charter act, to admit of obscuration by learned argument about original power. The very last legislative action on the subject, that in the municipal charter of the Code of 1892, shows that the lawmakers thought the power to be one to be conferred or prohibited, because it expressly confers it on cities and towns and prohibits its exercise by villages.

. . . . . .

"It is claimed now that the last clause of § 1 of the first quoted of the above acts (that approved March 10, 1888) applied to and modified the charter of the city of Vicksburg so as to make the contract here in controversy void because not submitted to vote. In order to this result it is claimed that, in the charter of Vicksburg, it is not 'otherwise provided,' . . . because the charter expressly confers the power, without restriction, on the municipal board at any 'regular or special meeting.' Besides, in construing the section of the act secondly above quoted, this court expressly so held in the case of Light, Heat, & Water Co. v. Jackson, 73 Miss. 644, 19 So. 771. If the precise point was not made, the omission is quite significant of the opinion of the eminent counsel [515] for appellee in that case *that there was nothing in it. Aside from this, the question was at the very root of the cause, and was considered and decided, and it is the exact question in the case at bar, except that this case is somewhat stronger in favor of the power than the case decided.

"By § 3 of the act of February 29, 1888, the Jackson board was 'hereby authorized and empowered to contract,' etc., while, by the Vicksburg charter act, the board was authorized to so contract 'at any regular or special meeting.' We presume that no charter then existent 'otherwise provided' by an express prohibition of electric lighting without vote. The grant of the power without restriction is to 'otherwise provide.'"

And the court held that, under this power, the municipal authorities had the right to make the contract for electric lights without advertising for bids, and without submitting the matter to a popular vote, and the power was not taken away by the act of March, 1888.

In this case the learned judge, speaking for the court, further said:

"Within its charter powers, the board has a discretion independent of courts, and no exercise of it will be held void for unreasonableness, unless so gross as to strongly suggest fraud or corruption. The people elect their council, and the courts are not chosen members of it."

In the light of these decisions, and others might be cited, we reach the conclusion that, under a broad grant of power, conferring, without restriction or limitation, upon the city of Vicksburg, the right to make a contract for a supply of water, it was within the right of the city council, in the exercise of this power, to make a binding contract, fixing a maximum rate at which water should be supplied to the inhabitants of the city for a limited term of years; and, in the absence of a showing of unreasonableness "so gross," as the court of Mississippi has said, "as to strongly suggest fraud or corruption," this action of the council is binding, and for the time limited puts the *right be- [516] yond legislative or municipal alteration to the prejudice of the other contracting party.

While we, therefore, reach the conclusion that the former case did not adjudicate the matter, we think the contract in this respect was within the power of the council, and cannot be violated consistently with the contract rights of the company by the subsequent ordinances of the city.

In this case the circuit court rendered a final decree practically upon the bill and answer. No testimony was taken, and all that was before the court was the bill, answer, and exhibits. We think the decree goes too far in enjoining the city from interfering with the contract right of the company to charge the rates fixed thereby, in view of the allegations of the answer, that the rates charged by the company exceeded those named in § 13 of the ordinance of 1886.

The decree should be modified, so as to enjoin interference on the part of the city during the term of this contract, with the right of the company to charge rates not in excess of 50 cents a thousand gallons to private consumers, as set forth in the ordinance.

With this modification, the decree will be affirmed.

MEYER S. BERNHEIMER and Lorin S. Bernheimer, Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased, Plffs. in Err.,

v.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company, Deft. in Err. (No. 278.)

MAX DREY, Charles D. Bernheimer, and Meyer A. Bernheimer, Executors of the Last Will and Testament of Isaac Bernheimer, Deceased, Plffs. in Err.,

v.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company, Deft. in Err. (No. 279.)

(See S. C. Reporter's ed. 516-535.)

Corporations—stockholder's liability.

1. A domestic corporation formed for the purchase of the capital stock, evidences of indebtedness, and assets of another domestic corporation, and for the further purpose of manufacturing and selling implements and machinery, is one organized for a purpose other than that of carrying on any kind of manufacturing or mechanical business, and is therefore not within the exception as to the liability of stockholders made by Minn. Const. art. 10, § 3, in favor of corporations of that kind.

Constitutional law—impairing contract obligations—change of remedy.

2. The contractual obligations arising out of Minn. Gen. Stat. 1894, chap. 76, adopted to enforce the liability of stockholders prescribed by Minn. Const. art. 10, § 3, are not impaired by Minn. Gen. Laws 1899, chap. 272, enacted to make the remedy more effectual, because, while under the old law stockholders who could not be reached by personal service were immune from liability, under the new law they need not necessarily be served with process in the action in which the assessment is made, or because the expenses incident to the enforcement of the liability in other states and against other parties are taken into consideration in estimating the amount of the assessment.

Constitutional law—due process of law—enforcing stockholder's liability—service of process.

3. Due process of law is not denied a stockholder in a domestic corporation by Minn. Gen. Laws 1899, chap. 272, enacted to make more effectual the constitutional liability of stockholders for the debts of the corporation, because stockholders need not necessarily be served with process in the action in which the assessment is made.

Receivers—suits in foreign jurisdiction.

4. A chancery receiver of a domestic corporation upon whom, as a quasi assignee and representative of the creditors, is conferred by Minn. Gen. Laws 1899, chap. 272, the authority to maintain an action to enforce the liability of stockholders, may sue in a foreign jurisdiction.

Limitation of actions—enforcing stockholder's liability in foreign jurisdiction.

5. The limitation of the right to bring an action against a stockholder for a debt of the corporation to two years after he has ceased to be a stockholder, which is made by N. Y. Laws 1892, chap. 688, § 55, is not applicable to a suit to enforce the liability of a stockholder in a foreign corporation.

Limitation of actions—enforcing stockholder's liability in foreign jurisdiction.

6. A cause of action to enforce the liability of a stockholder under the Minnesota Constitution and laws does not accrue so as to start the running of the six years' limitation prescribed by N. Y. Code Civ. Proc. § 382, until the receiver of the corporation can sue upon the assessment after the stockholder has failed to pay as required by an order of court.

[Nos. 278, 279.]

Argued April 25, 26, 1907. Decided May 27, 1907.

TWO WRITS of error to the Circuit Court of the United States for the Southern District of New York to review judgments enforcing the liability of stockholders in a foreign corporation. Affirmed.

Statement by Mr. Justice Day:

These are writs of error to the circuit court of the United States for the southern district of New York.

The actions were brought (January 28, 29, 1904) by Theodore R. Converse as receiver of the Minnesota Thresher Manufacturing Company, a corporation of the state of Minnesota, to enforce an alleged stockholders' liability under the Constitution and laws of the state of Minnesota. The court below held the executors of Simon Bernheimer and Isaac Bernheimer, both having died before the suits were brought, liable as such stockholders.

NOTE.—On change of remedy to enforce liability of stockholders as impairing contract obligations—see notes to Myers v. Knickerbocker Trust Co. 1 L.R.A.(N.S.) 1171, and Harrison v. Remington Paper Co. 3 L.R.A.(N.S.) 954.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

That impairing the remedy impairs the obligation of contract—see notes to Best v. Baumgardner, 1 L.R.A. 356; Louisiana ex rel. Ranger v. New Orleans, 26 L. ed. U. S. 132; and Phinney v. Phinney, 4 L.R.A. 348.

As to what service of process is sufficient to constitute due process of law—see note to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 577.

On the right of a receiver to sue out of the jurisdiction of his appointment—see case note to Fowler v. Osgood, 4 L.R.A. (N.S.) 824.

On the right of receiver to enforce liability of corporate stockholders outside of the state of his appointment—see note to Hale v. Allinson, 47 L. ed. U. S. 380.

On conflict of laws as to limitation of actions to enforce liability of stockholder—see notes to Brunswick Terminal Co. v. National Bank, 48 L.R.A. 625, and Platt v. Wilmot, 48 L. ed. U. S. 809.

[18] *The record discloses that the Minnesota Thresher Manufacturing Company was incorporated under the laws of the state of Minnesota on the 5th of December, 1884, the objects for which the corporation was formed being the purchase of the capital stock, evidences of indebtedness, and assets of the Northwestern Manufacturing & Car Company, also a corporation under the laws of the state of Minnesota, and for the further purpose of manufacturing and selling steam engines, farm implements, machinery, etc., and the manufacture and sale of articles, implements, and machinery of which wood and iron form the principal parts.

The Northwestern Manufacturing & Car Company was in the hands of a receiver, carrying on its business under the orders of a court, and, on October 27, 1887, the property and plant of that company, including all its bills receivable, farmers' notes, and assets were sold under decree and purchased by the Minnesota Thresher Manufacturing Company. The last-named company continued in business until December, 1900. On December 14 of that year the property and business of the thresher company were placed in the hands of a receiver by the order of the circuit court of the United States for the district of Minnesota, in a suit for the foreclosure of a mortgage upon its property, and this receiver carried on the business until the mortgaged property was sold under a decree of foreclosure on May 25, 1901.

On May 6, 1901, the Merchants' National Bank of St. Paul obtained a judgment in the district court of Ramsey county, Minnesota, against the thresher company, and executions thereon having been returned unsatisfied, the judgment creditor brought suit against the thresher company for the appointment of a receiver and the enforcement of the individual liability of its stockholders in the district court of Washington county, Minnesota. In that suit Theodore R. Converse, defendant in error in these cases, was appointed receiver. On the petition of the receiver, for the purpose of providing funds for the payment of the ex-
[19] penses of the receivership *in the enforcement of the stock liability and payment of indebtedness, an order was made, December 22, 1902, reciting, among other things, that copies of an order of April 16, 1902 (not in the record), had been published, mailed, and served as therein required, and that due notice of the hearing had been given to the defendant company and to each stockholder of record, as directed by the order, and, on a hearing duly had, an order of assessment of 36 per cent of the par value of each share of the capital stock of the thresher company, to wit, $18 per share, was assessed against each and every share of the capital stock, and against each and every person, corporation, or party liable as such stockholder, and each such person, corporation, or party was directed to pay to the said receiver, at his office in the city of Stillwater, Minnesota, within thirty days after the date of the order, the said sum of $18 a share; and, further, upon failure to pay said sums, the receiver was authorized to prosecute actions or proceedings against the persons liable in any court having jurisdiction in the state of Minnesota or elsewhere. On appeal to the supreme court of the state of Minnesota this order was affirmed. 90 Minn. 144, 95 N. W. 767. Subsequently, as stated, these actions were brought and judgment rendered against the executors of the Bernheimers.

Mr. Laurence Arnold Tanzer argued the cause and filed a brief for plaintiffs in error:

The liability now in question is a contractual liability.

Hanson v. Davison, 73 Minn. 460, 76 N. W. 254; Flash v. Conn, 109 U. S. 371, 377, 27 L. ed. 966, 969, 3 Sup. Ct. Rep. 263; Hawthorne v. Calef, 2 Wall. 10, 17 L. ed. 776; Whitman v. National Bank, 176 U. S. 559, 563, 44 L. ed. 587, 590, 20 Sup. Ct. Rep. 477; Knickerbocker Trust Co. v. Myers, 133 Fed. 764, Affirmed in 1 L.R.A. (N.S.) 1171, 71 C. C. A. 199, 139 Fed. 114; Carrol v. Green, 92 U. S. 509, 513, 23 L. ed. 738, 739.

The terms of the stockholder's contract are embodied in the Constitution and statutes in force at the time when he acquired his stock.

Von Hoffman v. Quincy (United States ex rel. Von Hoffman v. Quincy) 4 Wall. 535, 550, 18 L. ed. 403, 408; Webster v. Bowers, 104 Fed. 627.

The Constitution and the statute are to be construed together.

Allen v. Walsh, 25 Minn. 551; Whitman v. National Bank, supra; Middletown Nat. Bank v. Toledo, A. A. & N. M. R. Co. 197 U. S. 394, 405, 49 L. ed. 803, 810, 25 Sup. Ct. Rep. 462.

The provisions creating the liability are to be strictly construed, and cannot be extended beyond the words used.

Brunswick Terminal Co. v. National Bank, 192 U. S. 386, 390, 48 L. ed. 491, 493, 24 Sup. Ct. Rep. 314; Converse v. Ætna Nat. Bank, 79 Conn. 163, 64 Atl. 344.

The statute of 1899 added to the liability of the stockholders the costs and expenses of the receivership; whereas before, they had been liable only for the deficiency in assets to pay the debts owing to creditors.

Richmond v. Irons, 121 U. S. 27, 65, 66,

30 L. ed. 864, 876, 877, 7 Sup. Ct. Rep. 788; Re Thompson, 184 N. Y. 45, 76 N. E. 870; Converse v. Ætna Nat. Bank, supra.

It added to the liability of the stockholders' claims against the corporation other than its debts, and liabilities incurred after the corporation has been put into liquidation by the court.

1 Cook, Corp. 5th ed. § 217; Taylor, Priv. Corp. 5th ed. § 734; Child v. Boston & F. Iron Works, 137 Mass. 516, 50 Am. Rep. 328; Bohn v. Brown, 33 Mich. 257; Zimmer v. Schlechauf, 115 Mass. 52; Doolittle v. Marsh, 11 Neb. 243, 9 N. W. 54; Cable v. Gaty, 34 Mo. 573, 86 Am. Dec. 126; Danforth v. National Chemical Co. 68 Minn. 308, 71 N. W. 274; Richmond v. Irons, 121 U. S. 27, 60, 61, 30 L. ed. 864, 875, 7 Sup. Ct. Rep. 788; Schrader v. Manufacturers' Nat. Bank, 133 U. S. 67, 77, 33 L. ed. 564, 568, 10 Sup. Ct. Rep. 238; Moss v. Whitzel, 108 Fed. 579.

It added to the liability of the stockholders such amounts as the court might estimate as "probably" required to meet a probable deficiency in the amount which may be realized "within a reasonable time" from the "probable amount" of assets, for the payment of the "probable indebtedness."

Harper v. Carroll, 66 Minn. 495, 69 N. W. 610, 1069; Godfrey v. Terry, 97 U. S. 171, 176, 177, 24 L. ed. 944-946.

It added further the "probable expenses of collecting the assessment" from other stockholders, taking into account the "probable solvency or insolvency of stockholders."

Palmer v. Bank of Zumbrota, 72 Minn. 280, 75 N. W. 380; Richmond v. Irons, 121 U. S. 27, 66, 30 L. ed. 864, 877, 7 Sup. Ct. Rep. 788; Converse v. Ætna Nat. Bank, supra; Converse v. Stewart, 105 App. Div. 486, 94 N. Y. Supp. 310.

It changed the entire nature of the liability from a liability to all the creditors, generally, enforceable only in an action in equity at the corporate domicil, with all stockholders and creditors as parties, to a liability which can, at least as to nonresident stockholders, be fixed by proceedings to which they are not parties, and of which they have received no notice, and permits the liability so fixed to be enforced by an action against any one stockholder by a receiver in a court of law at the domicil of the stockholder.

The stockholders' contract here in question can be appropriately enforced only by an action in equity at the corporate domicil, to which all creditors and all stockholders are parties; and this is so not only because so provided by statute, but because of the very nature of the liability; so that, even in the absence of the statute, that remedy would be the only appropriate and exclusive remedy for enforcing a liability of this character.

Hanson v. Davison, 73 Minn. 461, 76 N. W. 254; Re Martin, 56 Minn. 423, 57 N. W. 1065; Patterson v. Stewart (Patterson v. Minnesota Mfg. Co.) 41 Minn. 91, 4 L.R.A. 745, 16 Am. St. Rep. 671, 42 N. W. 926; Winnebago Paper Mills v. Northwestern Printing & Pub. Co. 61 Minn. 373, 63 N. W. 1024; National New Haven Bank v. Northwestern Guaranty Loan Co. 61 Minn. 392, 63 N. W. 1079; Pollard v. Bailey, 20 Wall. 520, 22 L. ed. 376; Terry v. Tubman, 92 U. S. 156, 161, 23 L. ed. 537, 539; Carrol v. Green, 92 U. S. 509, 512, 23 L. ed. 738; Godfrey v. Terry, 97 U. S. 171, 176, 177, 24 L. ed. 944, 946; Terry v. Little, 101 U. S. 216, 25 L. ed. 864; Flash v. Conn, 109 U. S. 371, 380, 27 L. ed. 966, 970, 3 Sup. Ct. Rep. 263; Finney v. Guy, 189 U. S. 335, 340, 341, 47 L. ed. 839, 843, 844, 23 Sup. Ct. Rep. 558; Umsted v. Buskirk, 17 Ohio St. 113; Harris v. Dorchester, 23 Pick. 112; Jones v. Jarman, 34 Ark. 340; Coleman v. White, 14 Wis. 700, 80 Am. Dec. 797.

The mere fact that the change in the liability was made under the guise of a change in the remedy does not justify it. The remedy existing at the time when a contract is entered into constitutes a material part of the contract.

Green v. Biddle, 8 Wheat. 1, 76, 5 L. ed. 547, 566; Bronson v. Kinzie, 1 How. 311, 319, 11 L. ed. 143, 146; McCracken v. Hayward, 2 How. 608, 612, 11 L. ed. 397, 399; Gantly v. Ewing, 3 How. 707, 717, 11 L. ed. 794, 798; Von Hoffman v. Quincy (United States ex rel. Von Hoffman v. Quincy) 4 Wall. 535, 550, 552, 18 L. ed. 403, 409; Gunn v. Barry, 15 Wall. 610, 21 L. ed. 212; Walker v. Whitehead, 16 Wall. 316, 21 L. ed. 357; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 637, 24 L. ed. 858, 862; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 294, 30 L. ed. 1161, 1165, 7 Sup. Ct. Rep. 1190; Barnitz v. Beverly, 163 U. S. 118, 122, 41 L. ed. 93, 98, 16 Sup. Ct. Rep. 1042.

A contract may be just as effectually impaired by changing the remedy as by expressly creating a new contract; and such impairment is equally within the constitutional prohibition.

Green v. Biddle, 8 Wheat. 1, 84, 5 L. ed. 547, 568; Bronson v. Kinzie, 1 How. 311, 316-318, 11 L. ed. 143, 145, 146; McCracken v. Hayward, 2 How. 608, 612-614, 11 L. ed. 397, 399, 400; Gantly v. Ewing, 3 How. 707, 11 L. ed. 794; Planters' Bank v. Sharp, 6 How. 301, 330, 332, 12 L. ed. 447, 458, 459;

Howard v. Bugbee, 24 How. 461, 16 L. ed. 753; Von Hoffman v. Quincy (United States ex rel. Von Hoffman v. Quincy) 4 Wall. 535, 552-554, 18 L. ed. 403, 409, 410; Gunn v. Barry, supra; Walker v. Whitehead, 16 Wall. 314, 21 L. ed. 357; Edwards v. Kearzey and Brine v. Hartford F. Ins. Co. supra; Louisiana v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; McGahey v. Virginia, 135 U. S. 662, 693, 34 L. ed. 304, 314, 10 Sup. Ct. Rep. 972; Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042.

These principles have been repeatedly applied to statutes changing the contracts of stockholders.

Dexter v. Edmands, 89 Fed. 467; State Nat. Bank v. Sayward, 33 C. C. A. 564, 63 U. S. App. 20, 91 Fed. 443; Western Nat. Bank v. Reckless, 96 Fed. 78; Evans v. Nellis, 101 Fed. 920, Affirmed in 187 U. S. 271, 47 L. ed. 173, 23 Sup. Ct. Rep. 74; Webster v. Bowers, 104 Fed. 627; Knickerbocker Trust Co. v. Myers, 133 Fed. 765, Affirmed in 1 L.R.A.(N.S.) 1171, 71 C. C. A. 199, 139 Fed. 117; Knickerbocker Trust Co. v. Cremen, 140 Fed. 973; Harrison v. Remington Paper Co. 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 385; Converse v. Ætna Nat. Bank, 79 Conn. 163, 64 Atl. 341; Converse v. Stewart, 105 App. Div. 478, 94 N. Y. Supp. 310.

Changes even in the remedy cannot be made which substantially affect the rights of the parties; but if this is avoided, the forms or modes of proceeding can be altered at the will of the legislature. The distinction, in other words, is not between right and remedy, but between substance and form. The legislature can make changes in the form of proceeding; but it cannot make any change, whether in the remedy or in any other feature of the contract, which detrimentally affects either party to the contract.

Bronson v. Kinzie, 1 How. 311, 318, 11 L. ed. 143, 145; Von Hoffman v. Quincy (United States ex rel. Von Hoffman v. Quincy) 4 Wall. 535, 554, 18 L. ed. 403, 409; Tennessee v. Sneed, 96 U. S. 69, 74, 24 L. ed. 610, 612; Edwards v. Kearzey, 96 U. S. 596, 603, 604, 24 L. ed. 793, 797, 798; Brine v. Hartford F. Ins. Co. supra; Allis v. Northwestern Mut. L. Ins. Co. 97 U. S. 144, 146, 24 L. ed. 1008; Louisiana v. New Orleans, 102 U. S. 203, 206, 207, 26 L. ed. 132, 133; Penniman's Case (Vial v. Penniman) 103 U. S. 714, 720, 26 L. ed. 602, 605; Antoni v. Greenhow, 107 U. S. 769, 774, 27 L. ed. 468, 471, 2 Sup. Ct. Rep. 91; Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51, 62, 63, 27 L. ed. 648, 652, 653, 2 Sup. Ct. Rep. 236; Poindexter v. Greenhow, 114 U. S. 270, 298-300, 29 L. ed. 185, 195, 196, 5 Sup. Ct. Rep. 903, 962; Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 755, 30 L. ed. 825, 828, 7 Sup. Ct. Rep. 757; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 297, 299, 30 L. ed. 1161, 1166, 1167, 7 Sup. Ct. Rep. 1190; Swinburne v. Mills, 17 Wash. 622, 61 Am. St. Rep. 932, 50 Pac. 489; Second Ward Sav. Bank v. Schranck, 97 Wis. 266, 39 L.R.A. 569, 73 N. W. 31.

Changes in remedy which have been sustained are, it is believed, confined to changes in form, which did not affect the substance.

Terry v. Anderson, 95 U. S. 628, 633, 24 L. ed. 365, 366; Tennessee v. Sneed; Louisiana v. New Orleans; Penniman's Case; and Fourth Nat. Bank v. Francklyn,—supra; Hill v. Merchants' Mut. Ins. Co. 134 U. S. 515, 33 L. ed. 994, 10 Sup. Ct. Rep. 589; Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 439, 444, 47 L. ed. 249, 250, 252, 23 Sup. Ct. Rep. 234.

In permitting the indebtedness of the corporation to be fixed without making the stockholders parties, the statute deprives them of the opportunity of testing or questioning any claim against the corporation that may be presented, or having it determined whether it is a claim of such a nature as to make the stockholders liable for it.

National German-American Bank v. St. Anthony Park N. R. E. Improv. Co. 61 Minn. 359, 63 N. W. 1068; Pioneer Fuel Co. v. St. Peter Street Improv. Co. 64 Minn. 386, 67 N. W. 217; Oswald v. Minneapolis Times Co. 65 Minn. 249, 68 N. W. 15; Palmer v. Bank of Zumbrota, 72 Minn. 266, 75 N. W. 380; Helm v. Smith-Fee Co. 76 Minn. 331, 79 N. W. 313; Chestnut v. Pennell, 92 Ill. 55.

The double liability of stockholders is a liability to the creditors, and not to the corporation. It follows, and it had repeatedly been held before the statute of 1899, that the liability is not an asset of the corporation, and cannot be enforced by a receiver.

Re People's Live Stock Ins. Co. 56 Minn. 185, 57 N. W. 468; Palmer v. Bank of Zumbrota, 65 Minn. 98, 67 N. W. 893; Minneapolis Baseball Co. v. City Bank, 66 Minn. 446, 38 L.R.A. 415, 69 N. W. 331; Richardson v. Merritt, 74 Minn. 362, 77 N. W. 234, 407, 968; Hale v. Allinson, 188 U. S. 56, 67, 47 L. ed. 380, 388, 23 Sup. Ct. Rep. 244. See also Converse v. Ætna Nat. Bank, 79 Conn. 163, 64 Atl. 344.

Due process of law requires personal service of process, or a voluntary appearance.

Mason v. Eldred, 6 Wall. 231, 18 L. ed.

783, 785; Pennoyer v. Neff, 95 U. S. 714, 733, 734, 24 L. ed. 565, 572, 573; Haddock v. Haddock, 201 U. S. 562, 567, 50 L. ed. 867, 868, 26 Sup. Ct. Rep. 525; Clark v. Wells, 203 U. S. 164, 170, ante, 138, 140, 27 Sup. Ct. Rep. 43.

Whether the subscription to shares in a Minnesota corporation involved an authorization to the corporation to represent the stockholder in assessment proceedings, and a waiver of notice of such proceedings, obviously depends on the law of Minnesota at the time of the subscription. Both the Minnesota supreme court and this court have held that stockholders not parties to the proceedings were not bound by them.

Commercial Bank v. Azotine Mfg. Co. 66 Minn. 416, 69 N. W. 217; Hale v. Allinson, 188 U. S. 56, 80, 81, 47 L. ed. 380, 393, 394, 23 Sup. Ct. Rep. 244.

That holding is sound on principle, and conforms to the rule prevailing generally with regard to the relation between a corporation and its shareholders. The stockholder, by becoming such, impliedly authorizes the corporation to represent his interests in the conduct of the corporate affairs.

Holland v. Duluth Iron Min. & Development Co. 65 Minn. 331, 60 Am. St. Rep. 480, 68 N. W. 50.

Obviously, he does not authorize the corporation to represent him as to matters that are not part of the corporate business. The double liability of stockholders is such a matter.

Hale v. Allinson, 188 U. S. 56, 67, 47 L. ed. 380, 388, 23 Sup. Ct. Rep. 244.

How, then, could the corporation represent the stockholders with regard to it? Clearly, as to liabilities such as this, to which the corporation is not a party and which are not assets of the corporation, it has no implied authority to represent the stockholders, any more than it would have implied authority to represent the indorsers on its corporate notes.

Willius v. Mann, 91 Minn. 494, 98 N. W. 341, 867; Andrews v. National Foundry & Pipe Works, 36 L.R.A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 172; Converse v. Ætna Nat. Bank, supra; Converse v. Stewart, 105 App. Div. 478, 94 N. Y. Supp. 310; Stephens v. Fox, 83 N. Y. 317; Great Western Teleg. Co. v. Barker, 56 Ill. App. 402, Affirmed in 166 Ill. 150, 46 N. E. 1153.

The double liability is in no sense a corporate asset, and is not governed by the principles applicable to stock subscriptions, premium notes, and other assets of the corporation.

Hale v. Allinson, 188 U. S. 56, 64, 47 L. ed. 380, 387, 23 Sup. Ct. Rep. 244; Minneapolis Baseball Co. v. City Bank, 66 Minn. 441, 38 L.R.A. 415, 69 N. W. 331; Re People's Live Stock Ins. Co. supra; Palmer v. Bank of Zumbrota, 65 Minn. 98, 67 N. W. 893; Richardson v. Merritt, supra.

A defunct corporation like this can no longer represent its stockholders, even as to the corporate affairs and assets.

Danforth v. National Chemical Co. 68 Minn. 308, 71 N. W. 274; Schrader v. Manufacturers' Nat. Bank, 133 U. S. 67, 76, 77, 33 L. ed. 564, 567, 568, 10 Sup. Ct. Rep. 238; Covell v. Fowler, 144 Fed. 539.

The statute of 1899 authorizes the district court to proceed in the manner therein prescribed, in certain cases. Unless one of those cases or states of fact existed, the court had no jurisdiction to proceed.

Thatcher v. Powell, 6 Wheat. 119, 127, 5 L. ed. 221, 223; East Tennessee, V. & G. R. Co. v. Southern Teleg. Co. 112 U. S. 306, 310, 28 L. ed. 746, 747, 5 Sup. Ct. Rep. 168; Griffith v. Frazier, 8 Cranch, 9, 23, 3 L. ed. 471; Hatch v. Ferguson, 33 L.R.A. 759, 15 C. C. A. 201, 29 U. S. App. 651, 68 Fed. 45; Murray v. American Surety Co. 17 C. C. A. 138, 44 U. S. App. 43, 70 Fed. 346.

Where there are no corporate assets, it is not a case for the appointment of a receiver.

International Trust Co. v. American Loan & T. Co. 62 Minn. 501, 65 N. W. 78, 632.

The statute of 1899 requires "such notice of such hearing to be given by publication or otherwise as the court, in its discretion, may deem proper." Assuming, for the moment, that compliance with this requirement would constitute due process of law, the burden of proof was upon plaintiff to show such compliance; in default of which he has failed to show jurisdiction over the persons of the defendants, and the assessment order is a nullity.

Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; Windsor v. McVeigh, 93 U. S. 274, 283, 284, 23 L. ed. 914, 917, 918; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 18, ante, 345, 27 Sup. Ct. Rep. 236.

Stockholders were, under the former law, entitled to be heard as to the claims of creditors, before they were allowed.

National German-American Bank v. St. Anthony Park N. R. E. Improv. Co. 61 Minn. 359, 63 N. W. 1068; Pioneer Fuel Co. v. St. Peter Street Improv. Co. 64 Minn. 388, 67 N. W. 217; Oswald v. Minneapolis Times Co. 65 Minn. 249, 68 N. W. 15; Palmer v. Bank of Zumbrota, 72 Minn. 286, 75 N. W. 380; Helm v. Smith-Fee Co. 76 Minn. 331, 79 N. W. 313.

This rule the new statute assumed to change, in so far as it substituted notice by publication or otherwise for the personal service formerly required. It did not change

the rule that whatever notice was given must be given before the hearing on claims. It requires "notice of such hearing." Of what hearing? Of the hearing at which the court is required to hear the receiver, and any creditor, officer, or stockholder, as to the indebtedness, the expenses, the assets, the liabilities of stockholders, and the necessity for and amount of an assessment.

Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 138, 83 N. W. 36; London & N. W. American Mortg. Co. v. St. Paul Improv. Co. 84 Minn. 146, 86 N. W. 872.

A receiver cannot, by virtue of the authority conferred upon him by his appointment, maintain an action in the Federal courts in any jurisdiction other than that in which he was appointed.

Booth v. Clark, 17 How. 322, 15 L. ed. 164; Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770.

Only two exceptions to this rule are recognized:

1. Where the receiver has title to the cause of action. This is not a real exception, but only an apparent one, because in such a case he sues, not as receiver at all, but as the owner of the property or the chose in action which is the subject-matter of the litigation.

Relfe v. Rundle (Life Asso. of America v. Rundle) 103 U. S. 222, 225, 26 L. ed. 337, 339; Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 576, 577, 49 L. ed. 1163, 1168, 1169, 25 Sup. Ct. Rep. 770.

2. Where the stockholders have contracted with reference to an existing statute authorizing an assessment to be sued upon by a receiver, whether having title or not, and have thereby agreed to respond to a suit brought by a receiver. In such a case, they are held to their contract, and cannot question the receiver's right to sue.

Relfe v. Rundle (Life Asso. of America v. Rundle) 103 U. S. 222, 226, 26 L. ed. 337, 339; Howarth v. Lombard, 175 Mass. 576, 49 L.R.A. 301, 56 N. E. 888; Howarth v. Angle, 162 N. Y. 187, 47 L.R.A. 725, 56 N. E. 489; Howarth v. Ellwanger, 86 Fed. 54; Fish v. Smith, 73 Conn. 381, 84 Am. St. Rep. 161, 47 Atl. 711; King v. Cochran, 76 Vt. 150, 104 Am. St. Rep. 922, 56 Atl. 667.

If the statute of 1899 assumed to give the receiver title, it could not effectuate its object, because the legislature had no power to take the rights of the creditors and transfer them to a receiver.

See Hilliker v. Hale, 54 C. C. A. 252, 117 Fed. 224.

The Minnesota Thresher Manufacturing Company was a corporation organized for the purpose of carrying on a manufacturing business, and its stockholders are exempt from liability under the provisions of § 3 of article 10 of the Constitution of the state of Minnesota.

First Nat. Bank v. Converse, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. Rep. 306.

The law does not allow contracts to be changed by subsequent judicial decisions, any more than by subsequent legislation; and where, at the time of making a contract, there has been no judicial construction of it, this court, while leaning to an agreement with state decisions subsequently construing it, is not bound by them, but will determine for itself what the contract was.

Burgess v. Seligman, 107 U. S. 20, 33, 34, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; Brunswick Terminal Co. v. National Bank, 192 U. S. 386, 396, 48 L. ed. 491, 495, 24 Sup. Ct. Rep. 314; Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 542–548, 48 L. ed. 778, 784–787, 24 Sup. Ct. Rep. 576.

The actions were barred by limitation because not brought within two years after the defendants ceased to be stockholders in the Minnesota Thresher Manufacturing Company, within the meaning of § 55 of the stock corporation law of the state of New York.

Adams v. Wallace, 82 App. Div. 117, 81 N. Y. Supp. 848; Adams v. Slingerland, 87 App. Div. 312, 84 N. Y. Supp. 323; Sanford v. Rhoads, 113 App. Div. 782, 99 N. Y. Supp. 407.

The limitation is applicable to actions against stockholders in all corporations, foreign as well as domestic.

Platt v. Wilmot, 193 U. S. 602, 48 L. ed. 809, 24 Sup. Ct. Rep. 542; Hobbs v. National Bank, 37 C. C. A. 513, 96 Fed. 396.

When did the defendants cease to be stockholders within the meaning of this statute? This is a question of local law, upon which the decisions of the state courts are controlling.

Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 339, 40 L. ed. 986, 991, 16 Sup. Ct. Rep. 810.

When a corporation ceased to do business, and went into the hands of a receiver in sequestration proceedings, its existence was practically terminated, and its stockholders ceased to be such within the meaning of the statute.

Hollingshead v. Woodward, 107 N. Y. 96, 13 N. E. 621.

The double liability imposed by the Constitution of Minnesota is one to the creditors of the corporation.

Re People's Live Stock Ins. Co. 56 Minn. 185, 57 N. W. 468; Minneapolis Baseball Co. v. City Bank, 66 Minn. 446, 38 L.R.A.

415, 69 N. W. 331; Hale v. Allinson, 188 U. S. 56, 67, 47 L. ed. 380, 388, 23 Sup. Ct. Rep. 244.

The liability exists for the payment of debts.

Willis v. Mabon (Willis v. St. Paul Sanitation Co.) 48 Minn. 148, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110; McKusick v. Seymour, S. & Co. 48 Minn. 167, 50 N. W. 1114; Richardson v. Merritt, 74 Minn. 362, 77 N. W. 234, 407, 968.

The liability extends only to the making up of any deficiency in payment of debts, after the corporate assets are exhausted.

Richardson v. Merritt, 74 Minn. 362, 77 N. W. 234, 407, 968; Re Martin, 56 Minn. 423, 57 N. W. 1065.

Each stockholder's liability is limited to his share of a common fund amounting to the sum actually required to make up such deficiency.

Re Martin, 56 Minn. 422, 57 N. W. 1065; National New Haven Bank v. Northwestern Guaranty Loan Co. 61 Minn. 392, 63 N. W. 1079.

Any stockholder's share of the amount necessary to meet the deficiency in corporate debts can be ascertained, and his liability fixed, only by a proceeding in equity, to which all the creditors and all the stockholders are parties.

Allen v. Walsh, 25 Minn. 543; Patterson v. Stewart (Patterson v. Minnesota Mfg. Co.) 41 Minn. 91, 4 L.R.A. 745, 16 Am. St. Rep. 671, 42 N. W. 926; Pollard v. Bailey, 20 Wall. 525, 22 L. ed. 377; Terry v. Little, 101 U. S. 216, 25 L. ed. 864.

A substantial change in the contract in any of these respects impairs its obligation.

Green v. Biddle, 8 Wheat. 1, 84, 5 L. ed. 547, 568.

In determining whether the obligation of the contract has been impaired, the question is not whether or not the new law is wiser or more beneficial than the old,—a question upon which the parties differ. That is a proper consideration in legislating for the future; but with regard to existing contracts, the only question is whether any material change is made in the contract.

Webster v. Bowers, 104 Fed. 628; Myers v. Knickerbocker Trust Co. 1 L.R.A.(N.S.) 1171, 71 C. C. A. 199, 139 Fed. 117.

The double liability is not to be regarded, like that for stock subscriptions, as corporate assets, with regard to which the corporation represents the stockholders. The two liabilities rest upon an entirely different footing.

Re People's Live Stock Ins. Co. and Minneapolis Baseball Co. v. City Bank, supra; Morse, Banks & Banking, § 696; Thompson, Liability of Stockholders, § 342; Cook, Corp. Law, § 216; Morawetz, Priv. Corp. § 869; Richardson v. Merritt, supra; Willius v. Mann, 91 Minn. 503, 98 N. W. 341, 867; Hale v. Allinson, supra.

The last decision of the state court upon the very point now presented to this court for its determination cannot be regarded as binding on this court, or as effective to change the rule established by the prior decisions of the courts of Minnesota and of this court.

Burgess v. Seligman, 107 U. S. 20, 33, 34, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; Douglass v. Pike County, 101 U. S. 677, 25 L. ed. 968; Great Southern Fire-Proof Hotel Co. v. Jones, 193 U. S. 532, 548, 48 L. ed. 778, 787, 24 Sup. Ct. Rep. 576.

Mr. William G. Wilson argued the cause, and, with Mr. C. A. Severance, filed a brief for defendant in error:

The Minnesota Thresher Company, the corporation of which the plaintiff is receiver and the defendants are stockholders, is not within the class excepted by the terms of the Constitution.

State ex rel. Clapp v. Minnesota Thresher Mfg. Co. 40 Minn. 213, 3 L.R.A. 510, 41 N. W. 1020; Merchants' Nat. Bank v. Minnesota Thresher Mfg. Co. 90 Minn. 144, 95 N. W. 767; First Nat. Bank v. Winona Plow Co. 58 Minn. 167, 59 N. W. 997; Anderson v. Anderson Iron Co. 65 Minn. 281, 33 L.R.A. 510, 68 N. W. 49; Nicollet Nat. Bank v. Frisk-Turner Co. 71 Minn. 413, 70 Am. St. Rep. 334, 74 N. W. 160; Senour Mfg. Co. v. Church Paint & Mfg. Co. 81 Minn. 294, 84 N. W. 109.

The interpretation of the Constitution of a state by the highest court of the state is regarded as binding upon this court when no Federal question is involved.

Middletown Nat. Bank v. Toledo, A. A. & N. M. R. Co. 197 U. S. 394, 404, 49 L. ed. 803, 809, 25 Sup. Ct. Rep. 462; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 166, 36 L. ed. 925, 928, 13 Sup. Ct. Rep. 54; Forsyth v. Hammond, 166 U. S. 506, 518, 41 L. ed. 1095, 1100, 17 Sup. Ct. Rep. 665; Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. 173 U. S. 99, 107, 43 L. ed. 628, 631, 19 Sup. Ct. Rep. 341; First Nat. Bank v. Converse, 200 U. S. 425, 438, 50 L. ed. 537, 542, 26 Sup. Ct. Rep. 306; Richmond v. Irons, 121 U. S. 27, 50, 30 L. ed. 864, 871, 7 Sup. Ct. Rep. 788.

The plaintiff, as receiver, is entitled to maintain actions in New York and elsewhere to enforce the individual liabilities of the defendants' testators and other stockholders, inasmuch as those liabilities are made assets for the payment of corporate obligations and are vested in the receiver.

Howarth v. Angle, 162 N. Y. 167, 47

L.R.A. 725, 56 N. E. 489; Howarth v. Lombard, 175 Mass. 579, 49 L.R.A. 301, 56 N. E. 888; Burget v. Robinson, 59 C. C. A. 260, 123 Fed. 262; Kennedy v. Gibson, 8 Wall. 506, 19 L. ed. 479.

The corporation is identical with its members and the stockholders must be conclusively presumed to be citizens of the state of the corporation.

Bank of United States v. Deveaux, 5 Cranch. 61, 3 L. ed. 38; Marshall v. Baltimore & O. R. Co. 16 How. 314, 14 L. ed. 953; Muller v. Dows, 94 U. S. 444, 445, 24 L. ed. 207, 208.

The charter is a contract to which the stockholders are the contracting parties on the one side, and the state which grants the charter is the other contracting party.

Dartmouth College v. Woodward, 4 Wheat. 518, 656, 657, 4 L. ed. 629, 664; Farrington v. Tennessee, 95 U. S. 679, 684, 24 L. ed. 558, 559.

When, then, the stockholders of the Minnesota Thresher Manufacturing Company accepted the grant of incorporation from the state of Minnesota, they contracted to subject themselves to the jurisdiction of that state in all matters touching the rights and obligations of the corporation, which drew its existence solely from that grant, and in all matters touching their individual rights and obligations as members of that corporation. In respect of all such matters they contracted that, whatever might be their actual residence, they should be conclusively presumed to be citizens of Minnesota. To this extent they agreed to be subject to its laws, and to the process and orders and decrees of its courts, and waived any right to question their jurisdiction or the validity of their proceedings, other than by the ordinary modes of appeal and review.

Where the new remedy was equally beneficial with the old to the party entitled to enforce the contract, the obligation of the contract was not impaired.

Sturges v. Crowninshield, 4 Wheat. 122, 197, 4 L. ed. 529, 549; Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 755, 30 L. ed. 825, 828, 7 Sup. Ct. Rep. 757; Evans v. Nellis, 187 U. S. 271, 47 L. ed. 173, 23 Sup. Ct. Rep. 74; Western Nat. Bank v. Reckless, 96 Fed. 70; Hawthorne v. Calef, 2 Wall. 10, 17 L. ed. 776; Com. v. Cochituate Bank, 3 Allen, 42; Walker v. Crain, 17 Barb. 119; Hill v. Merchants' Mut. Ins. Co. 134 U. S. 515, 526, 33 L. ed. 994, 10 Sup. Ct. Rep. 589; Story v. Furman, 25 N. Y. 214.

In the present case the stockholders' contract is that they will be liable, in the terms of the Constitution. They agree to assume the liability to that extent. That is the obligation of their contract. No change in the law which does not make them liable to any greater extent can be said to impair the obligation of their contract.

Bronson v. Kinzie, 1 How. 315, 11 L. ed. 144; Terry v. Anderson, 95 U. S. 633, 24 L. ed. 366; Campbell v. Holt, 115 U. S. 627, 29 L. ed. 486, 6 Sup. Ct. Rep. 209; New Orleans City & Lake R. Co. v. Louisiana, 157 U. S. 224, 39 L. ed. 681, 15 Sup. Ct. Rep. 581; Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 439, 47 L. ed. 249, 23 Sup. Ct. Rep. 234; Cooley, Const. Lim. 356; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36.

The perfection of the remedy is to the advantage of the creditors, and does not impair the obligation of the contract as regards them.

Allen v. Walsh, 25 Minn. 543; Arthur v. Willius, 44 Minn. 409, 46 N. W. 851; Merchants' Nat. Bank v. Bailey Mfg. Co. 34 Minn. 323, 25 N. W. 639.

The assessment made by the Minnesota court under the Minnesota statute is conclusive upon the stockholders.

Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 336, 40 L. ed. 986, 990, 16 Sup. Ct. Rep. 810; Kennedy v. Gibson, 8 Wall. 498, 505, 19 L. ed. 476, 478; Howarth v. Lombard, 175 Mass. 575, 49 L.R.A. 301, 56 N. E. 888; Upton v. Hansbrough, 3 Biss. 426, Fed. Cas. No. 16,801; Re Republic Ins. Co. 3 Biss. 452, Fed. Cas. No. 11,704; Bushnell v. Leland, 164 U. S. 684, 41 L. ed. 598, 17 Sup. Ct. Rep. 209; Bailey v. Sawyer, 4 Dill. 463, Fed. Cas. No. 744; Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 643, 44 L. ed. 619, 621, 20 Sup. Ct. Rep. 506.

It is no objection to the assessment that the expense of realizing and administering the fund is taken into account and provided for.

Clevenger v. Moore, 12 Am. Bankr. Rep. 738; Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co. 57 N. J. Eq. 627, 42 Atl. 585; Harper v. Carroll, 66 Minn. 508, 69 N. W. 610, 1069; Richmond v. Irons, 121 U. S. 27, 65, 30 L. ed. 864, 876, 7 Sup. Ct. Rep. 788; Frost v. St. Paul Bkg. & Invest. Co. 57 Minn. 325, 59 N. W. 308; First Nat. Bank v. Winona Plow Co. 58 Minn. 167, 59 N. W. 997.

The stockholder's liability is statutory as well as contractual.

Walker v. Crain, 17 Barb. 119; Christopher v. Norvell, 201 U. S. 216, 228, 229, 50 L. ed. 732, 737, 738, 26 Sup. Ct. Rep. 502; McDonald v. Thompson, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. Rep. 297.

[524] *Mr. Justice Day delivered the opinion of the court:

Before entering upon a discussion of the objections urged against the validity of the assessment upon stockholders which is the subject of controversy here, we may say we find no reason to disagree with the judgment of the supreme court of Minnesota in holding the Minnesota Thresher Manufacturing Company to be a corporation organized for other than the purpose of carrying on any kind of manufacturing or mechanical business, and therefore not within the exception as to stockholders' liability in favor of corporations of that kind. State ex rel. Clapp v. Minnesota Thresher Mfg. Co. 40 Minn. 215, 3 L.R.A. 510, 41 N. W. 1020; Merchants' Nat. Bank v. Minnesota Thresher Mfg. Co. 90 Minn. 144, 95 N. W. 767.

The questions made in these cases involve the right to recover upon a stockholder's liability in a Federal court in a state other than the one in which the original proceedings in liquidation were had, and under whose laws the corporation was formed, and wherein it carried on business, against stockholders in such corporate companies as the Thresher Company, where the stock had been acquired before the passage of the statute of 1899. General Laws of Minnesota, chap. 272, being "An Act to Provide for the Better Enforcement of the Liability of Stockholders of Corporations."

A former statute had been for some years in force in Minnesota and was the statute law of the state when the stock which concerns the controversy here was acquired by the Bernheimers. This statute was before this court in the cases of Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244, and Finney v. Guy, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558. It was the act of 1894, General Statutes of Minnesota of that year, chap. 76, p. 1595, and is set forth in full in the margin (188 U. S. p. 60, 47 L. ed. p. 385, 23 Sup. Ct. Rep. p. 245).

Under that act it was held, in a series of decisions in the state of Minnesota, which were reviewed in Hale v. Allinson, that an action could only be maintained under the [525] laws of *Minnesota when brought by a creditor or creditors for the benefit of all creditors of the corporation, and the recovery was had for the purpose of making good any deficiency in the corporate assets for the payment of corporate debts; that the receiver could not maintain such an action outside of the jurisdiction of the court appointing him, and that the only remedy was, as stated, in a creditor's action, bringing in all the stockholders, for the realization of a fund to be proportionately distributed among the creditors in one suit.

The principal contentions in these cases are that the act of 1899, above referred to, works such a change in the contract theretofore existing by virtue of the acquisition of stock in a Minnesota corporation as to impair the obligation thereof, and, in ways to be hereafter noticed, undertakes to hold a stockholder by judgment rendered without due process of law.

The act of 1899 was before this court in the case of the First Nat. Bank v. Converse, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. Rep. 306, and its principal parts are set forth in the margin of the report of that case on page 428, L. ed. page 538, Sup. Ct. Rep. page 307. The act, for our purposes, may be summarized as follows:

"Sec. 1. Whenever any corporation created or existing by or under the laws of the state of Minnesota, whose stockholders or any of them are liable to it or to its creditors . . . upon or on account of any liability for . . . the stock or shares at any time held or owned by such stockholders, respectively, whether under or by virtue of the Constitution and laws of said state of Minnesota, or any statute of said state or otherwise, has heretofore made or shall hereafter make an assignment for the benefit of its creditors under the insolvency laws of this state; or whenever a receiver for any such corporation has heretofore been or shall hereafter be appointed by any district court of this state, whether under or pursuant to . . . any other statute of this state, or under the general equity powers and practice of such court, the district court appointing such receiver or having jurisdiction of the matter of said assignment may proceed as in this act provided."

*Section 2 provides that upon the petition [526] of the assignee or receiver, or any creditor of the corporation who has filed his claim, the district court shall appoint a time for hearing not less than thirty days nor more than sixty days from the time of filing said petition, and direct notice of the hearing to be given by publication or otherwise, in the discretion of the court; but if the petition be filed by a creditor, other than the assignee or receiver, the court shall direct notice of the hearing to be personally served on the assignee or receiver.

Section 3 provides that the court shall consider the proofs offered by the assignee or receiver, or by any creditor or stockholder who may appear in person or by attorney as to the probable indebtedness of the corporation and the expenses of the assignment or receivership and the probable amount of assets available for the payment of such indebtedness and expenses; also as

to what parties are or may be liable as stockholders, and the nature and extent of such liability. And if it shall appear to the satisfaction of such court that the ordinary assets, or such amount as may be realized therefrom in a reasonable time, will not be sufficient to pay the expenses of such assignment or receivership and the indebtedness, and it is necessary to resort to the liability of stockholders, the court shall, by order, direct and levy a ratable assessment upon all parties liable as stockholders, or upon or on account of any stock or shares of such corporation for such amount as the court, in its discretion, may deem proper, taking into account the probable solvency or insolvency of stockholders, and the probable expenses of collecting the assessment, and shall direct the payment of the amount so assessed to the assignee or receiver within such time as the court may specify in said order.

Section 4 provides for an order to the assignee or receiver to proceed to collect the amount so assessed, unless it be paid within the time specified in the order, and, in default of payment, the receiver is to bring suit.

Section 5 provides that the assessment [527] levied shall be conclusive *upon and against all parties liable upon or on account of any shares of said stock of such corporation, whether appearing or having notice thereof or not, as to all matters relating to the amount of and the necessity for said assessment, which provision shall also apply to any subsequent assessment levied by order of the court.

Section 6 makes it the duty of the assignee or receiver, upon failure to pay as required by the order, to institute and maintain an action against any party liable upon or on account of any such shares of stock, and that actions may be maintained against each stockholder in Minnesota or in any other state or country where such stockholder or any property subject to attachment, garnishment, or other process may be found, and provides that if the assignee or receiver shall believe any such stockholder to be insolvent, or that the expense of prosecuting such action will work to the disadvantage of the estate, he shall not be required to prosecute the same, unless specifically directed so to do by the court.

Section 7 provides for further assessments in case the first proves inadequate.

Section 8 extends the provisions of the act to such subsequent assessments.

Section 9 provides where two or more assessments are levied or directed, the assignee or receiver may join the causes of action against any stockholder on two or more such assessments.

Section 10 provides that if the assignee or receiver fails to institute or prosecute the action, the creditors may petition the court to compel him to proceed under certain conditions.

Section 11 provides for the return of the surplus, if any remain, in the hands of the assignee or receiver after paying the expenses of the assignment or receivership and the claims of the creditors, and that stockholders who have paid assessments shall, in addition to the remedy provided in the statute, be entitled to enforce contributions from stockholders who have not paid assessments.

*Section 12 provides for additional judg- [528] ments in case of the inadequacy of former assessments.

Section 13 excludes certain stockholders in pending actions from the operation of the act.

This statute came before the supreme court of Minnesota in Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36. In that case it was given full consideration and its constitutionality sustained, and it was held that while the assessments upon the outstanding shares of stock in an amount necessary to meet the deficiency in the assets of the corporation was conclusive upon the stockholders as members of the corporation, yet the statute, properly construed, did not have the effect to deprive a person, when sued for the amount assessed on shares of stock under the provision of the act, from showing that he was not a stockholder, or that he was not the holder of so large an amount of stock as was alleged, or that he had a claim against the corporation which, in law or equity, he might be enabled to set off as against a claim for assessments, or from making any other defense personal to himself; and that the order of assessment was conclusive upon stockholders only in so far as it decided the amount of assets or liabilities of the insolvent corporation and the necessity of making an assessment upon the stock to the extent and in the amount ordered.

The constitutionality of the act was again affirmed in the same court in the later case of London & N. W. American Mortg. Co. v. St. Paul Park Improv. Co. 84 Minn. 144, 86 N. W. 872.

The stockholders' liability in Minnesota, as in some other states, has its origin in a constitutional provision, and arises under § 3, article 10, of the Constitution of that state. The language is:

"Liabilities of stockholders.

"Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or

mechanical business) shall be liable to the amount of stock held or owned by him."

[529] *The courts of Minnesota have held that a stockholders' liability is, therefore, fixed and measured by the Constitution. Willis v. Mabon (Willis v. St. Paul Sanitation Co.) 48 Minn. 140, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110; McKusick v. Seymour, S. & Co. 48 Minn. 158, 50 N. W. 1114. It is apparent from a consideration of this constitutional provision that its purpose was to make a stockholder liable to the creditors of the corporation in an amount not exceeding the par value of the stock held by him, and thus secure, for the benefit of such creditors, in addition to the assets and property which the corporation might possess, the liability of those who hold its stock in a sum necessary to make good any deficiency between the amount of the assets and the debts within the limitation stated. It is evident from the general language used in this constitutional provision that while a remedy might have been worked out in the courts of equity in the state, it was proper, if not necessary, that a statute should be passed to make more effectual the liability thus secured by the Constitution.

In pursuance of that power the legislature passed the act of 1894, which remained in force until the passage of the act of 1899.

The fundamental contention upon which the argument of the plaintiffs in error against the constitutionality of this subsequent act rests is that the statute created a contract into which the stockholder entered upon subscribing to or obtaining his stock, which the legislature had no power to change without running counter to the constitutional requirement invalidating laws impairing the obligation of contracts. Constitution, art. 1, § 10.

It may be regarded as settled that, upon acquiring stock, the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature, and, as such, capable of being enforced in the courts not only of that state, but of another state and of the United States (Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477), although the obligation is not entirely contractual, and springs primarily from the law creating the obligation (Christopher v. Norwell, 201 U. S. 216, 50 L. ed. 732, 26 Sup. Ct. Rep. 502).

[530] *Is there anything in the obligation of this contract which is impaired by subsequent legislation as to the remedy, enacting new means of making the liability more effectual? The obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. That is his contract, and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution. But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, preventing the legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged. There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made.

This principle was stated by Mr. Chief Justice Marshall in Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529, as follows:

"The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation . . . exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."

The same rule is recognized in Hill v. Merchants' Mut. Ins. Co. 134 U. S. 515, 33 L. ed. 994, 10 Sup. Ct. Rep. 589, wherein a statute was sustained changing the character of the remedy against stockholders in common to one giving a direct remedy against an individual stockholder. The principle was clearly enunciated in Waggoner v. Flack, 188 U. S. 595-603, 47 L. ed. 609-613, 23 Sup. Ct. Rep. 345-348, in which Mr. Justice Peckham, speaking for the court, said:

"To enact laws providing remedies for a violation of contracts, 'to alter or enlarge [illegible] those remedies from time to time as to the legislature may seem appropriate, is an exercise of sovereignty, and it cannot be supposed that the state, in a case like this, contracts in a public act of its legislature to limit its power in the future, even if it could do so, with or without consideration, unless the language of the act is so absolutely plain and unambiguous as to leave no room for doubt that its true meaning amounts to a contract by it to part with its power to increase the effectiveness of existing reme[illegible]s."

See, also, Wi[illegible] v. [illegible]andefer, 194 U. S. 309, 46 L. ed. 6[illegible], [illegible]up. Ct. Rep. 2[illegible]; New Orleans City [illegible] R. Co. v. Louis-

iana, 157 U. S. 219, 39 L. ed. 679, 15 Sup. Ct. Rep. 581.

The liability arising under the Constitution of Minnesota was such that legislation was appropriate to make it effectual. We can find nothing in the fact that one legislature has passed an act which would conclude a subsequent law-making body of equal power from passing new and additional measures to make the remedy more effectual. That the first act did not accomplish its purpose is evident. Under it stockholders in another state, who could not be reached by personal service, were immune from liability, and the entire burden was cast upon local stockholders. There was no provision for a receiver or assignee beginning action outside the state, and it was held by this court in Hale v. Allinson, supra, that a chancery receiver was powerless to enforce the rights of creditors beyond the borders of the state. In this condition of affairs the state of Minnesota has undertaken to provide a proceeding for the settlement of insolvent corporations which shall ascertain the assets of the corporation, the extent of the indebtedness of the corporation, the amount to which it is necessary, if at all, to call upon the stockholders' liability. It is obviously an act intended to make effectual the liability which is incurred by stockholders under the Constitution of the state, and it ought not to be rendered nugatory unless substantial objection exists against its enforcement. It operates equally upon all stockholders, at home and abroad, and assesses all by a uniform rule.

[2] *We shall proceed to notice some of the specific objections which are urged against the validity of this legislation by stockholders who acquired stock before the act of 1899 went into effect.

It is said that the stockholder is held liable in a proceeding to which he is not a party. Under the prior act he could only be held where service could be had upon him personally, but, if we are right in the proposition just announced, that additional remedies may be provided by legislation, then the validity of such additional enactments depends not necessarily upon the personal service upon the stockholders, but upon the fact whether the remedy provided is a well-recognized means of enforcing such obligations, and not in violation of constitutional rights. It is true that the stockholder is not necessarily served with process in the action wherein the assessment is made under the act of 1899, but no personal judgment is rendered against him in that proceeding, and it has reference to a corporation of which he is a member by virtue of his holding stock therein, and the proceeding has for its purpose the liquidation of the affairs of the corporation, the collection and application of its assets and other liabilities which may be administered for the benefit of creditors. In such case it has been frequently held that the representation which a stockholder has by virtue of his membership in the corporation is all that he is entitled to. It was so held in a well-considered case in Massachusetts (Howarth v. Lombard, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888). And it has been held in cases in this court that when an assessment is necessary to be made upon unpaid stock subscriptions for the benefit of creditors, the court may make the assessment without the presence or personal service of stockholders. Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 336, 40 L. ed. 986, 990, 16 Sup. Ct. Rep. 810.

Nor can we see any substantial difference in this respect between a liability to be ascertained for the benefit of creditors upon a stock subscription and the liability for the same purpose which is entailed by becoming a member of a corporation *through the purchase of stock, whereby a [533] contract is implied in favor of creditors. The object of the enforcement of both liabilities is for the benefit of creditors, and while it is true that one promise is directly to the corporation and the other does not belong to the corporation, but is for the benefit of its creditors, either liability may be enforced through a receiver acting for the benefit of creditors, under the orders of a court in winding up the corporation in case of its insolvency.

It is sought to distinguish between the Massachusetts case of Howarth v. Lombard, supra, and kindred cases, and the one at bar, in the fact that when the stock was acquired in that case a statutory provision was already in existence which made the stockholder liable to an assessment in a proceeding in which the stockholder was represented by the corporation. But, as we have said, keeping within the constitutional measure of liability, it was within the power of the legislature of Minnesota to make provisions, within the limits of due process of law, for the liquidation of the affairs of the corporation in a proceeding in the state of its origin, wherein members of the corporation should be sufficiently represented by the presence of the corporation itself. This practice has the sanction of the courts, as we have already shown. It is substantially the procedure authorized by the national banking act, except that the Comptroller of the Currency takes the place of the court, and, without the presence of the stockholders, makes a conclusive assess-

ment. We cannot find any constitutional right belonging to the stockholder which is violated by this change in the character and nature of the remedy against him.

By becoming a member of a Minnesota corporation, and assuming the liability attaching to such membership, he became subject to such regulations as the state might lawfully make to render the liability effectual.

It is further urged that in imposing upon the stockholder the additional expense in a proceeding where the expenses incident to the enforcement of the liability in other [534] states, *and against other parties, are taken into consideration and included in the estimate, there is an unwarranted increase in the amount which could be recovered against the stockholder under the former statute. But remembering at all times that the obligation of the shareholder was the creature of the Constitution of Minnesota, we think the fact that the additional expenses were included in the assessment cannot operate to defeat it. Such expenses are incident to the ascertainment of the trust fund, which it is necessary to realize from the liability of stockholders, and as long as these expenses are kept within the amount of the original liability no legal right is violated. League v. Texas, 184 U. S. 156, 46 L. ed. 478, 22 Sup. Ct. Rep. 475; Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; King v. Pomeroy, 58 C. C. A. 209, 121 Fed. 287.

It is objected that the receiver cannot bring this action, and Booth v. Clark, 17 How. 322, 15 L. ed. 164; Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; and Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770, are cited and relied upon. But in each and all of these cases it was held that a chancery receiver, having no other authority than that which would arise from his appointment as such, could not maintain an action in another jurisdiction. In this case the statute confers the right upon the receiver, as a quasi assignee, and representative of the creditors, and, as such, vested with the authority to maintain an action. In such case we think the receiver may sue in a foreign jurisdiction. Relfe v. Rundle (Life Asso. of America v. Rundle) 103 U. S. 222, 226, 26 L. ed. 337, 339; Howarth v. Lombard, supra; Howarth v. Angle, 162 N. Y. 179, 182, 47 L.R.A. 725, 56 N. E. 489.

It is also contended that the action is barred by the statute of the state of New York, limiting to two years the right to bring an action for a debt of a corporation after the defendant ceased to be a stockholder. We do not think the provision of the statute (N. Y. Laws 1892, chap. 688, § 55) relied upon covers these cases. It evidently refers to domestic corporations provided for in reference to the stockholder's liability created by the preceding section of the same chapter. The cause of action did not accrue until the receiver could sue *upon the assess- [5 ment after the stockholder had failed to pay, as required by the order of the Minnesota court of December 22, 1902. King v. Pomeroy, supra. Under the New York statute of limitations there was six years in which to bring the action after it accrued, under § 382 of the Code, the Minnesota Thresher Manufacturing Company not being a "moneyed corporation or banking association" within § 394. Platt v. Wilmot, 193 U. S. 603, 48 L. ed. 809, 24 Sup. Ct. Rep. 542.

The present suits were brought a little more than one year after the causes of action accrued.

Other objections are urged as to the nature of the proceedings in the court of Washington county, Minnesota, in which the original order was made. We have examined them and think none of them go to the jurisdiction and authority of the court, or are such as would invalidate the order of assessment made therein when sued upon in another jurisdiction.

In what we have said we have noticed the principal objections made to the enforcement of the order of the Minnesota court in another jurisdiction, and, finding no error in the judgment of the court below, it is affirmed.

Mr. Justice Holmes:

I regret that the court has thought it unnecessary to state specifically what contract the stockholder is supposed to have made, as different difficulties beset the different views that might be taken. It seems to me hard to reconcile the construction adopted with that given to the stronger words of § 5151 of the national bank act (U. S. Rev. Stat. § 5151, U. S. Comp. Stat. 1901, p. 3465) in McClaine v. Rankin, 197 U. S. 154, 161, 49 L. ed. 702, 705, 25 Sup. Ct. Rep. 410. But, under the circumstances, I shall say no more than that I doubt the result.

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*LOUISA SAUER, Gertrude Crane, Individ- [5 ually and as Administratrix of George W. Sauer, Deceased, et al., Plffs. in Err.,

v.

CITY OF NEW YORK.

(See S. C. Reporter's ed. 536-560.)

Error to state court—following state court decisions.

1. The decisions of the highest court of

a state that an owner of land abutting on a city street has no easement of light, air, and access as against the public use of the street, or any structure which may be erected thereon to subserve and promote that public use, are conclusive upon the Supreme Court of the United States, when determining, on writ of error to the state court, whether such abutting owner has been deprived of his property without due process of law by the erection in the street of an elevated iron viaduct for general public use under the authority of a statute which makes no provision for compensation to abutting owners.

Constitutional law—due process of law—erection of viaduct in city street.

2. An abutting owner is not deprived of his property without due process of law by the erection by a municipality in a city street, under the authority of a statute which makes no provision for compensation to abutting owners, of an elevated iron viaduct for general public use, by which travelers are enabled to use such street in connection with other streets from which it has previously been disconnected, where, under the law of the state as laid down by its highest court, abutting owners have no easement of light, air, or access as against any improvement of the street for the purpose of adapting it to public travel.

Constitutional law—impairment of contract obligations—change of judicial decision.

3. Contract rights are not unconstitutionally impaired by a decision of the state court which denies compensation to an abutting owner for the erection by a municipality in a city street of an elevated iron viaduct for general public use, by which travelers are enabled to use such street in connection with other streets from which it had previously been disconnected, where that court, although it had held before such abutting owner acquired his title that the contract of the owner of land abutting on city streets entitled him to the right of unimpaired access and uninterrupted circulation of light and air as against an elevated structure erected for the exclusive use of a private corporation, had carefully refrained from holding that he had the same right as against a similar structure erected for the purpose of public travel, and had pointed out plainly the essential distinction between the two cases.

[No. 130.]

Argued December 12, 13, 1906. Ordered for reargument January 7, 1907. Reargued March 21, 1907. Decided May 27, 1907.

IN ERROR to the Supreme Court of the State of New York to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which had affirmed a judgment of the Appellate Division of the Supreme Court, First Department, which had in turn affirmed a judgment of a Special Term of the Supreme Court held in and for the county of New York, dismissing the complaint in an action by an abutting owner to enjoin the city of New York from maintaining an elevated iron viaduct in a city street, or, in the alternative, for the recovery of damages. Affirmed.

See same case below in Appellate Division, 90 App. Div. 36, 85 N. Y. Supp. 636; in Court of Appeals, 180 N. Y. 27, 70 L.R.A. 717, 72 N. E. 579.

Statement by Mr. Justice **Moody**:

George W. Sauer, the intestate of the plaintiffs in error (hereafter called the plaintiff), became, on July 1, 1886, the owner in fee simple of a parcel of land on the corner of One Hundred and Fifty-fifth street and Eighth avenue, in the city of New York. There was then upon the land a building used as a place of public resort. The city of New York was and is the owner of the fee of One Hundred and Fifty-fifth street and Eighth avenue, which it holds in trust for the public for highways.

Before the passage of the act hereinafter referred to One Hundred and Fifty-fifth street had been graded from Eighth *avenue [537] in a westerly direction, until it reached a high, and, for street sues, impassable, bluff, on the summit of which ran St. Nicholas

NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to State ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to state decisions and laws as rules of decision in Federal courts—see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553; Griffin v. Overman Wheel Co. 9 C. C. A. 548; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508, and Mitchell v. Burlington, 18 L. ed. U. S. 351.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to what use of a street or highway constitutes an additional burden—see note to Western R. Co. v. Alabama G. T. R. Co. 17 L.R.A. 474.

On impairment of contract obligations by change of judicial decision—see notes to Allen v. Allen, 16 L.R.A. 646; Swanson v. Ottumwa, 5 L.R.A.(N.S.) 860; Mitchell v. Burlington, supra; and Los Angeles v. Los Angeles City Water Co. 44 L. ed. U. S. 886.

place, a public highway. The street, as laid out on the records, ascends the bluff, and continues westerly to the Hudson river. It extends easterly to the Harlem river at a point where the river is bridged by McComb's Dam bridge.

In 1887 the legislature of the state of New York enacted a law which authorized the city of New York, for the purpose of improving and regulating the use of One Hundred and Fifty-fifth street, to construct over said street from St. Nicholas place to McComb's Dam bridge an elevated iron viaduct for the public travel, with the proviso that no railways should be permitted upon it. There was no provision for damages to the owners of land abutting on the street. Subsequently the viaduct was constructed, resting upon iron columns placed in the roadway. The surface of the viaduct consisted of asphalt and paving blocks laid on iron beams. Opposite the plaintiff's land it is 63 feet wide and about 50 feet above the surface of the original street, which, except as interfered with by the viaduct, remains unobstructed for public travel. At the junction of the street with Eighth avenue it is widened into a quadrangular platform, 80 by 160 feet in extent. Near the plaintiff's land the viaduct may be reached by a stairway. By the construction and maintenance of the viaduct the plaintiff's access to his land and the free and uninterrupted use of light and air have been impaired, and the value of his property has been decreased by reason of the dust, dirt, and noise occasioned by the structure. This action was brought to enjoin the defendant from maintaining the viaduct, or, in the alternative, for the recovery of damages caused by it. There was judgment for the defendant by the supreme court, affirmed by the appellate division and the court of appeals. 180 N. Y. 27, 70 L.R.A. 717, 72 N. E. 579. After the last decision the case was remitted to the supreme court, where there was final judgment for the defendant, and it is now here on writ of error under the claim that—

[538] *First. Plaintiff has been deprived of his property without due process of law, in violation of § 1 of the 14th Amendment to the Constitution of the United States; and

Second. That the act under which the viaduct was constructed, as construed by the court, impairs the obligation of a contract, in violation of § 10, article 1, of the Constitution of the United States.

Mr. Abram I. Elkus argued the cause, and, with Mr. Carlisle J. Gleason, filed a brief for plaintiffs in error:

The New York courts have repeatedly declared that the proceedings under which streets in New York city have been opened constitute a contract with the abutting owners.

Story v. New York Elev. R. Co. 90 N. Y. 160, 43 Am. Rep. 146; Lahr v. Metropolitan Elev. R. Co. 104 N. Y. 268. 10 N. E. 528.

The plaintiffs are entitled to enforce this contract.

United States v. Illinois C. R. Co. 154 U. S. 225, 238, 38 L. ed. 971, 973, 14 Sup. Ct. Rep. 1015; Fisk v. Jefferson, 116 U. S. 132, 29 L. ed. 587, 6 Sup. Ct. Rep. 329.

By the law of New York, the owner of premises abutting upon the public street has easements of light, air, and access in the street, and these easements are property within the protection of the Constitution.

Story v. New York Elev. R. Co. 90 N. Y. 122; Lahr v. Metropolitan Elev. R. Co. supra; Kane v. New York Elev. R. Co. 125 N. Y. 164, 11 L.R.A. 640, 26 N. E. 278; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522.

By the law of New York the building of an elevated railroad is a use of the streets inconsistent with the covenant that they shall be maintained as open public streets, and is also a taking of plaintiffs' property.

Story v. New York Elev. R. Co. and Muhlker v. New York & H. R. Co. supra.

It was not the railroad, but the permanent structure, which formed the basis of the elevated railroad decisions.

This is completely established by the decisions in the case of railroad tracks laid in the surface of the street, where it is held that an abutter cannot recover.

Kellinger v. Forty-second Street & G. Street Ferry R. Co. 50 N. Y. 206; Fobes v. Rome, W. & O. R. Co. 121 N. Y. 505, 8 L.R.A. 453, 24 N. E. 919.

The purpose of the structure is immaterial; it is the permanent interference with the abutter's easements which is decisive.

Fobes v. Rome, W. & O. R. Co. 121 N. Y. 517, 8 L.R.A. 453, 24 N. E. 919; Muhlker v. New York & H. R. Co. 197 U. S. 544, 568, 49 L. ed. 872, 877, 25 Sup. Ct. Rep. 522.

The conceded facts, repeated in the trial court's findings of fact, recognized by both the appellate division and the court of appeals, together with the physical character of the viaduct, show an unparalleled destruction of the abutter's easements of light, air, and access.

The elevated railroad decisions declare such an injury to be a taking of property, as well as a breach of the contract to maintain the streets as open streets. This court has in three recent cases directly sustained this view.

Muhlker v. New York & H. R. Co. 197

U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; Birrell v. New York & H. R. Co. 198 U. S. 390, 49 L. ed. 1096, 25 Sup. Ct. Rep. 667.

The obligation to compensate plaintiffs for the destruction of these easements cannot be avoided upon the ground that the viaduct is a proper street use.

Knox v. New York, 55 Barb. 404; Manhattan R. Co. v. New York, 89 Hun, 429, 35 N. Y. Supp. 505; Muhlker v. New York & H. R. Co. and Birrell v. New York & H. R. Co. supra.

The construction of a statute by a state court becomes a part of the statute, and rights acquired under it may not be impaired by a change of construction.

Ohio Life Ins. & T. Co. v. Debolt, 16 How. 416, 14 L. ed. 997; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Louisiana v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090.

Messrs. Henry B. Anderson and Chandler P. Anderson filed a brief on behalf of certain property owners similarly situated to plaintiffs in error.

Mr. Theodore Connoly argued the cause, and, with Mr. Terence Farley, filed a brief for defendant in error:

Consequential damages caused by the construction or maintenance of a public improvement authorized by statute does not constitute a "taking" within the meaning of the constitutional provision.

Radcliff v. Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Uppington v. New York, 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91; Northern Transp. Co. v. Chicago, 99 U. S. 635-642, 25 L. ed. 336-338; Gibson v. United States, 166 U. S. 269, 275, 41 L. ed. 996, 1002, 17 Sup. Ct. Rep. 578; Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748; Bauman v. Ross, 167 U. S. 548, 587, 42 L. ed. 270, 287, 17 Sup. Ct. Rep. 966; Meyer v. Richmond, 172 U. S. 82, 97, 43 L. ed. 374, 380, 19 Sup. Ct. Rep. 106; Scranton v. Wheeler, 179 U. S. 141, 155, 45 L. ed. 126, 134, 21 Sup. Ct. Rep. 48; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 583, 50 L. ed. 596, 605, 26 Sup. Ct. Rep. 341; West Chicago Street R. Co. v. Illinois, 210 U. S. 506-526, 50 L. ed. 845-853, 26 Sup. Ct. Rep. 518; 2 Dill. Mun. Corp. 4th ed. p. 1233; Cooley, Const. Lim. 7th ed. 800; Selden v. Jacksonville, 28 Fla. 558, 14 L.R.A. 370, 29 Am. St. Rep. 278, 10 So. 457; Garrett v. Lake Roland Elev. R. Co. 79 Md. 277, 24 L.R.A. 396, 29 Atl. 830; Willis v. Winona City, 59 Minn. 27, 26 L.R.A. 142, 60 N. W. 814; Brand v. Multnomah County, 38 Or. 79, 50 L.R.A. 389, 84 Am. St. Rep. 772, 60 Pac. 390, 62 Pac. 209; Mead v. Portland, 45 Or. 1, 76 Pac. 347, Affirmed in 200 U. S. 148, 50 L. ed. 413, 26 Sup. Ct. Rep. 171; Home Bldg. & Conveyance Co. v. Roanoke, 91 Va. 61, 27 L.R.A. 551, 20 S. E. 895; Colclough v. Milwaukee, 92 Wis. 182, 65 N. W. 1039; Walish v. Milwaukee, 95 Wis. 16, 69 N. W. 818.

In solving the question as to what is a proper and public use of the streets, regard must be had to the changing conditions of city life.

Sun Printing & Pub. Asso. v. New York, 152 N. Y. 257, 37 L.R.A. 788, 46 N. E. 499; Sears v. Crocker, 184 Mass. 586, 100 Am. St. Rep. 577, 69 N. E. 327.

The use made of the viaduct is strictly a street use, and, so far as the public is concerned, it differs in no respect from the ordinary use of a public street.

DeLucca v. North Little Rock, 142 Fed. 603.

The difference in character of a viaduct used as a public street and of a viaduct used for railroad purposes is well illustrated by an examination of two New York cases.

Reining v. New York, L. & W. R. Co. 128 N. Y. 157, 14 L.R.A. 133, 28 N. E. 640; Talbot v. New York & H. R. Co. 151 N. Y. 155, 45 N. E. 382.

While the interpretation of a local ordinance or a statute by the highest court of the state is not indisputable, and, even though it may conflict with other decisions of the courts of the state, if it does not conflict with any decision made prior to the inception of the rights involved, this court will lean to an agreement with the state court.

Mead v. Portland, 200 U. S. 148, 163, 50 L. ed. 413, 420, 26 Sup. Ct. Rep. 171; Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.

Mr. Justice Moody, after making the foregoing statement, delivered the opinion of the court:

The acts of the defendant for which the plaintiff sought a remedy in the courts of New York may be simply stated. The plaintiff owned land with buildings thereon situated at the junction of One Hundred and Fifty-fifth street and Eighth avenue, two public highways, in which the fee was vested in the city upon the trust that they should be forever kept open as public streets. As One Hundred and Fifty-fifth street was graded at the time the plaintiff acquired his title, it was isolated to a considerable extent from the street system of the city. Its west end ran into a high and practically impassable bluff, which rendered further progress in that direction impossible. The east end ran to the bank of the Harlem river at a grade which rendered

access to McComb's Dam bridge, which crossed the river at that point, impossible. Under legislative authority the city constructed, solely for public travel, a viaduct over One Hundred and Fifty-fifth street, [542] beginning at *the bridge and thence running with gradual ascent to the top of the bluff. This viaduct enabled travelers to use One Hundred and Fifty-fifth street, in connection with other streets of the city, from which it had previously been disconnected. The viaduct rested upon columns planted in the street, and they, and the viaduct itself, to a material extent, impaired the plaintiff's access to his land and the free admission to it of light and air. The plaintiff, in his complaint, alleged that this structure was unlawful, because the law under which it was constructed did not provide for compensation for the injury to his private property in the easements of access, light, and air, appurtenant to his estate. The court of appeals denied the plaintiff the relief which he sought, upon the ground that, under the law of New York, he had no easements of access, light, or air, as against any improvement of the street for the purpose of adapting it to public travel. In other words, the court in effect decided that the property alleged to have been injured did not exist. The reasons upon which the decision of that court proceeded will appear by quotations from the opinion of the court, delivered by Judge Haight. Judge Haight said:

"The fee of the street having been acquired according to the provisions of the statute, we must assume that full compensation was made to the owners of the lands through which the streets and avenues were laid out, and that thereafter the owners of lands abutting thereon hold their titles subject to all of the legitimate and proper uses to which the streets and public highways may be devoted. As such owners they are subject to the right of the public to grade and improve the streets, and they are presumed to have been compensated for any future improvement or change in the surface or grade rendered necessary for the convenience of public travel, especially in cities where the growth of population increases the use of the highways. The rule may be different as to peculiar and extraordinary changes made for some ulterior purposes other than the improvement of [543] the street, as, for instance, *where the natural surface has been changed by artificial means, such as the construction of a railroad embankment, or a bridge over a railroad, making elevated approaches necessary. But as to changes from the natural contour of the surface, rendered necessary in order to adapt the street to the free and easy passage of the public, they may be lawfully made without additional compensation to abutting owners, and for that purpose bridges may be constructed over streams and viaducts over ravines, with approaches thereto from intersecting streets. . . . In the case under consideration, as we have seen, One Hundred and Fifty-fifth street continued west to Bradhurst avenue. There it met a steep bluff 70 feet high, on the top of which was St. Nicholas place. The title of the street up the bluff had been acquired and recorded, but it had never been opened and worked as a street. The bluff was the natural contour of the surface, and, for the purpose of facilitating easy and safe travel of the public from St. Nicholas place to other portions of the city, the legislature authorized the construction of the viaduct in question. It is devoted to ordinary traffic by teams, vehicles, and pedestrians. It is prohibited for railroad purposes. It is one of the uses to which public highways are primarily opened and devoted. It was constructed under legislative authority, in the exercise of governmental powers, for a public purpose. It is not, therefore, a nuisance, and the plaintiff is not entitled to have its maintenance enjoined or to recover in this action the consequential damages sustained."

The plaintiff now contends that the judgment afterwards rendered by the supreme court of New York, in conformity with the opinion of the court of appeals, denied rights secured to him by the Federal Constitution. This contention presents the only question for our determination, and the correctness of the principles of local land law applied by the state courts is not open to inquiry here, unless it has some bearing upon that question. But it may not be inappropriate to say that the decision of the court of appeals seems to be in full accord *with the decisions of all other courts [544] in which the same question has arisen. The state courts have uniformly held that the erection over a street of an elevated viaduct, intended for general public travel, and not devoted to the exclusive use of a private transportation corporation, is a legitimate street improvement, equivalent to a change of grade; and that, as in the case of a change of grade, an owner of land abutting on the street is not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it. Selden v. Jacksonville, 28 Fla. 558, 14 L.R.A. 370, 29 Am. St. Rep. 278, 10 So. 457; Willis v. Winona City, 59 Minn. 27, 26 L.R.A. 142, 60 N. W. 814; Colclough v. Milwaukee, 82 Wis. 182, 65 N. W. 1039; Walsh v. Milwaukee, 95 Wis. 16, 69 N. W. 818; Ennis

Bldg. & Conveyance Co. v. Roanoke, 91 Va. 52, 27 L.R.A. 551, 20 S. E. 895 (cited with apparent approval by this court in Meyer v. Richmond, 172 U. S. 82-95, 43 L. ed. 374-379, 19 Sup. Ct. Rep. 106); Willets Mfg. Co. v. Mercer County, 62 N. J. L. 95, 40 Atl. 782; Brand v. Multnomah County, 38 Or. 79, 50 L.R.A. 389, 84 Am. St. Rep. 772, 60 Pac. 290, 62 Pac. 209; Mead v. Portland, 45 Or. 1, 76 Pac. 347 (Affirmed by this court in 200 U. S. 148, 50 L. ed. 413, 26 Sup. Ct. Rep. 171); Sears v. Crocker, 184 Mass. 588, 100 Am. St. Rep. 577, 69 N. E. 327; (*Semble*) DeLucca v. North Little Rock, 142 Fed. 597.

The case of Willis v. Winona is singularly like the case at bar in its essential facts. There, as here, a viaduct was constructed, connecting by a gradual ascent the level of a public street with the level of a public bridge across the Mississippi. An owner of land abutting on the street over which the viaduct was elevated was denied compensation for his injuries, Mr. Justice Mitchell saying:

"The bridge is just as much a public highway as is Main street, with which it connects; and, whether we consider the approach as a part of the former or of the latter, it is merely a part of the highway. The city having, as it was authorized to do, established a new highway across the Mississippi river, it was necessary to connect it, for purposes of travel, with Main and the other streets of the city. This it has done, in the only way it could have been done, by what, in effect, amounts merely to raising the grade of the center of Main street in front of plaintiff's lot. It can [545] make no difference in principle *whether this was done by filling up the street solidly, or, as in this case, by supporting the way on stone or iron columns. Neither is it important if the city raise the grade of only a part of the street, leaving the remainder at a lower grade. . . .

"The doctrine of the courts everywhere, both in England and in this country (unless Ohio and Kentucky are exceptions), is that so long as there is no application of the street to purposes other than those of a highway, any establishment or change of grade made lawfully, and not negligently performed, does not impose an additional servitude upon the street, and hence is not within the constitutional inhibition against taking private property without compensation, and is not the basis for an action for damages, unless there be an express statute to that effect. That this is the rule, and that the facts of this case fall within it, is too well established by the decisions of this court to require the citation of authorities from other jurisdictions. . . .

"The New York elevated railway cases cited by plaintiff are not authority in his favor, for they recognize and affirm the very doctrine that we have laid down (Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146), but hold that the construction and maintenance on the street of an elevated railroad operated by steam, and which was not open to the public for purposes of travel and traffic, was a perversion of the street from street uses, and imposed upon it an additional servitude, which entitled abutting owners to damages."

The cases cited usually recognized the authority of the New York elevated cases, hereinafter to be discussed, and approved the distinction from them made by Mr. Justice Mitchell.

But, as has been said, we are not concerned primarily with the correctness of the rule adopted by the court of appeals of New York and its conformity with authority. This court does not hold the relation to the controversy between these parties which the court of appeals of New York had. It was *the duty of that court to as- [546] certain, declare, and apply the law of New York, and its determination of that law is conclusive upon this court. This court is not made, by the laws passed in pursuance of the Constitution, a court of appeal from the highest courts of the states, except to a very limited extent, and for a precisely defined purpose. The limitation upon the power of this court in the review of the decisions of the courts of the states, though elementary and fundamental, is not infrequently overlooked at the Bar, and unless it is kept steadily in mind much confusion of thought and argument result. It seems worth while to refer to the provisions of the Constitution and laws which mark and define the relation of this court to the courts of the state. Article 3, § 2 of the Constitution ordains, among other things, that "the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," and that the appellate jurisdiction of the Supreme Court shall be exercised under such regulations as Congress shall make.

It was from this provision of the Constitution that Marshall in Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257, derived the power of this court to review the judgments of the courts of the states, and, in defining the appellate jurisdiction, the Chief Justice expressly limited it to questions concerning the Constitution, laws, and treaties of the United States, commonly called Federal questions, and excluded alto-

gether the thought that, under the congressional regulation, the jurisdiction included any power to correct any supposed errors of the state courts in the determination of the state law. Such was the expressed limitation of the original judiciary act, in its present form found in § 709 of the Revised Statutes, U. S. Comp. Stat. 1901. p. 575, which has been observed by this court in so many cases that the citation of them would be an idle parade. It is enough to refer to Murdock v. Memphis, 20 Wall. 590, 22 Wall. 429, where, after great consideration, it was held that under the judiciary act, as amended to its present form, this court was limited to the consideration of [547] *the Federal questions named in the Constitution. This court, whose highest function it is to confine all other authorities within the limits prescribed for them by the fundamental law, ought certainly to be zealous to restrain itself within the limits of its own jurisdiction, and not be insensibly tempted beyond them by the thought that an unjustified or harsh rule of law may have been applied by the state courts in the determination of a question committed exclusively to their care.

In the case at bar, therefore, we have to consider solely whether the judgment under review has denied to the plaintiff any right secured to him by the Federal Constitution. He complains:

First. That he was denied the due process of law secured to him by the 14th Amendment, in that his property was taken without compensation; and

Second. That the law which authorized the construction of the viaduct, as interpreted by the court of appeals of New York, impaired the obligation of the contract with the city of New York, which is implied from the laying out of the street, in violation of article 1, § 10, paragraph 1, of the Constitution. The contentions may profitably be considered separately.

Has the plaintiff been deprived of his property without due process of law? The viaduct did not invade the plaintiff's land. It was entirely outside that land. But it is said that appurtenant to the land there were easements of access, light, and air, and that the construction and operation of the viaduct impaired these easements to such an extent as to constitute a taking of them. The only question which need here be decided is whether the plaintiff had, as appurtenant to his land, easements of the kind described; in other words, whether the property which the plaintiff alleged was taken existed at all. The court below has decided that the plaintiff had no such easements; in other words, that there was no property taken. It is clear that, under the law of New York, an owner of land abutting on the street has easements of access, light, *and air as against the erection of an [548] elevated roadway by or for a private corporation for its own exclusive purposes, but that he has no such easements as against the public use of the streets, or any structures which may be erected upon the street to subserve and promote that public use. The same law which declares the easements defines, qualifies, and limits them. Surely such questions must be for the final determination of the state court. It has authority to declare that the abutting landowner has no easement of any kind over the abutting street; it may determine that he has a limited easement; or it may determine that he has an absolute and unqualified easement. The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the states, and the decisions have been conflicting, and often in the same state irreconcilable in principle. The courts have modified or overruled their own decisions, and each state has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various states to a uniform rule which it shall announce and impose. Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed and that therefore there was no property taken, we hold that no violation of the 14th Amendment is shown.

The remaining question in the case is whether the judgment under review impaired the obligation of a contract. It appears from the cases to be cited that the courts of New York have expressed the rights of owners of land abutting upon public streets to and over those streets in terms of contract rather than in terms of title. In the city of New York the city owns the fee of the public streets (whether laid out under the civil law of the Dutch *régime*, or as the result of conveyances between the city and the owners of land, or by *condemnation proceedings under the [549] statutory law of the state) upon a trust that they shall forever be kept open as public streets, which is regarded as a covenant running with the abutting land. Accepting, for the purposes of this discussion, the view that the plaintiff's rights have their origin in a contract, then it must be that the terms of the trust and the extent of the resulting covenant are for the courts

of New York finally to decide and limit, providing that in doing so they deny no Federal right of the owner. The plaintiff asserts that the case of Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146, decided in 1882, four years before he acquired title to the property, interpreted the contract between the city of New York and the owners of land abutting upon its streets as assuring the owner easements of access, light, and air, which could not lawfully be impaired by the erection on the street of an elevated structure designed for public travel; that he is entitled to the benefit of his contract as thus interpreted, and that the judgment of the court denying him its benefits impaired its obligation. If the facts upon which this claim is based are accurately stated, then the case comes within the authority of Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522, which holds that, when the court of appeals has once interpreted the contract existing between the landowner and the city, that interpretation becomes a part of the contract, upon which one acquiring land may rely, and that any subsequent change of it to his injury impairs the obligation of the contract. It will be observed that it is an essential part of the plaintiff's case that he should show that his contract had been interpreted in the manner he states. It therefore becomes necessary to examine the Story Case, wherein, he asserts, such an interpretation was made. In order to ascertain precisely what that case decided we may consider other decisions of the court of appeals, though they are later in time than the acquisition of the plaintiff's title.

The plaintiff in the Story Case held the title to land injuriously affected by the con-
[O]struction of an elevated railroad, *as a successor to a grantee from the city. In the deed of the city the land was bounded on the street and contained a covenant that it should "forever thereafter continue and be for the free and common passage of, and as public streets and ways for, the inhabitants of the said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are, or lawfully ought to be." It was held that by virtue of this covenant, which ran with the land, the plaintiff was entitled to easements in the street of access, and of free and uninterrupted passage of light and air; that the easements were property within the meaning of the Constitution of the state, and could not lawfully be taken from their owner without compensation, and that the erection of the elevated structure was a taking. The decision rested upon the view that the erection of an elevated structure for railroad purposes was not a legitimate street use. "There is no change," said Judge Danforth (p. 156), "in the street surface intended; but the elevation of a structure useless for general street purposes, and as foreign thereto as the house in Vesey street (Corning v. Lowerre, 6 Johns. Ch. 439) or the freight depot (Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224)."

"The question here presented," said Judge Tracy (p. 174, Am. Rep. p. 156), "is not whether the legislature has the power to regulate and control the public uses of the public streets of the city, but whether it has the power to grant to a railroad corporation authority to take possession of such streets and appropriate them to uses inconsistent with and destructive of their continued use as open public streets of the city."

In the case of Lahr v. Metropolitan Elev. R. Co. 104 N. Y. 268, 10 N. E. 528, decided in 1887, the plaintiff held title by mesne conveyances from the owner, from whom the land for the street had been acquired by condemnation under a statute which provided that the land thus taken should be held "in trust, nevertheless that the same be appropriated and kept open for and as a part of a public street . . . forever, in like manner as the other public streets . . . in the said city are, *and of right ought to be." It was [551] contended that the principle of the Story Case should be confined to those who, like Story, held title under a grant from the city with a covenant that the street should be kept open. But the court held that there was no legal difference between the two cases, and that from the condemnation statute a covenant running with the land was implied for the benefit of its owners, and that the plaintiff was entitled to recover damages for the injury to his easements of access, light, and air. But, as in the Story Case, the extent of the decision was carefully limited. "The logical effect of the decision in the Story Case," said Chief Judge Ruger (p. 292, N. E. p. 533), "is to so construe the Constitution as to operate as a restriction upon the legislative power over the public streets opened under the act of 1813, and confine its exercise to such legislation as shall authorize their use for street purposes alone. Whenever any other use is attempted to be authorized, it exceeds its constitutional authority. Statutes relating to public streets which attempt to authorize their use for additional street uses are obviously within the power of the legislature to enact."

In the case of Kane v. New York Elev. R. Co. 125 N. Y. 164, 11 L.R.A. 640, 26 N. E.

278, decided in 1891, it appeared that the street there in question was laid out during the Dutch *régime*, when the town had absolute title to the fee of the streets, with no easement over them in favor of the abutting land. But it was held by the court that by virtue of certain legislation, not necessary here to be stated, New York city owns the fee in all of its streets upon a trust, both for the public and the abutting land, that they shall forever be kept open as public streets, and that as to an abutting owner this trust cannot be violated without compensation. But in the opinion the limits of the principle were again carefully guarded. It was said by Judge Andrews (p. 175, L.R.A. p. 642, N. E. p. 278): "Under the decisions made there seems to be no longer any doubt in this state that streets in a city laid out and opened under charter provisions may, under legislative and municipal authority, be [552] used for any public use consistent with their preservation as public streets, and this, although the use may be new, and may seem to impose an additional burden, and may subject lot owners to injury. The mere disturbance of their rights of light, air, and access by the imposition of a new street use must be borne, and gives no right of action." And again (p. 185, L.R.A. p. 645, N. E. p. 282): "We conclude this part of the case with the remark that neither the Story nor the Lahr Case imposes any limitation upon the legislative power over streets for street uses. They simply hold that the trust upon which streets are held cannot be subverted by devoting them to other and inconsistent uses."

It would be difficult for words to show more clearly than those quoted from the opinions that such a case as that now before us was not within the scope of the decisions or of the reasons upon which they were founded. The difference between a structure erected for the exclusive use of a railroad and one erected for the general use of the public was sharply defined. It was only the former which the court had in view. That the structure was elevated, and for that reason affected access, light, and air, was an important element in the decisions, but it was not the only essential element. The structures in these cases were held to violate the landowners' rights, not only because they were elevated and thereby obstructed access, light, and air, but also because they were designed for the exclusive and permanent use of private corporations. The limitation of the scope of the decision to such structures, erected for such purposes, appears not only in the decisions themselves, but quite clearly from subsequent decisions of the court of appeals. In the case of Fobes v. Rome, W. & O. R. Co. 121 N. Y. 505, 8 L.R.A. 453, 24 N. E. 919, Judge Peckham, now Mr. Justice Peckham, made the following statement of the effect of the Story Case. Certain portions of it are italicized here for the purpose of emphasizing the point now under consideration:

"It was not intended in the Story Case to overrule or change the law in regard to steam surface railroads. The case embodied the application of what was regarded [5 as well-established principles of law to a new combination of facts, such facts amounting, as was determined, to an absolute and permanent obstruction in a portion of the public street, and in a *total and exclusive use of* such portion *by the defendant*, and such *permanent obstruction and total and exclusive use*, it was further held, amounted to a taking of some portion of the plaintiff's easement in the street for the purpose of furnishing light, air, and access to his adjoining lot. This *absolute* and *permanent obstruction of the street, and this total and exclusive use of a portion thereof by the defendant were accomplished by the erection of a structure for the elevated railroad of defendant;* which structure is fully described in the case as reported.

"The structure, by the mere fact of its existence in the street, permanently and at every moment of the day took away from the plaintiff some portion of the light and air which otherwise would have reached him, and, in a degree very appreciable, interfered with and took away from him his facility of access to his lot; such interference not being intermittent and caused by the temporary use of the street by the passage of the vehicles of the defendant while it was operating its road through the street, but caused by the iron posts and by the superstructure imposed thereon, and existing for every moment of the day and night. *Such a permanent, total, exclusive, and absolute appropriation of a portion of the street as this structure amounted to* was held to be illegal and wholly beyond any legitimate or lawful use of a public street. The taking of the property of the plaintiff in that case was held to follow upon the *permanent and exclusive nature of the appropriation by the defendant of the public street, or of some portion thereof.*"

The distinction between the erection of an elevated structure for the exclusive use of a private corporation and the same structure for the use of public travel is clearly illustrated in a contrast in the decisions of Reining v. New York, L. & W. R. Co. 128 N. Y. 157, 16 L.R.A. 123, 28 N. E. 640, and Talbot v. York & H. R. Co. 206 U. S.

151 N. Y. 155, 45 N. E. 382. In the first
[54] case *it was held that the abutting landowner had the right to compensation for the construction of a viaduct in the street for the practically exclusive occupation of a railroad. In the second case it was held that the abutting owner had no right of compensation for the erection of a public bridge with inclined approaches and a guard wall, to carry travel over a railroad, although the structure impaired the access to his land. We are not concerned with the question whether the distinction between an elevated structure for the exclusive use of a corporation and the same structure for the purposes of public travel is, so far as an abutting landowner is concerned, a just or harsh one, provided it is a clear distinction based upon real differences. We think that before the plaintiff had acquired his title the law of New York had plainly drawn this distinction. The highest court of the state had held that the contract of the owner of land abutting on streets entitled him to the right of unimpaired access and uninterrupted circulation of light and air as against an elevated structure erected for the exclusive use of a private corporation; had, with scrupulous care, refrained from holding that he had the same right as against an elevated structure of the same kind erected for the purpose of public travel; and had pointed out plainly the essential distinction between the two cases. This distinction, as we have already seen, has been made or approved by the courts of other states wherever the occasion to consider it arose, and it is a real and substantial distinction which arises out of the trust upon which the public owns the public highways.

The trust upon which streets are held is that they shall be devoted to the uses of public travel. When they, or a substantial part of them, are turned over to the exclusive use of a single person or corporation, we see no reason why a state court may not hold that it is a perversion of their legitimate uses, a violation of the trust, and the imposition of a new servitude. But the same court may consistently hold that with the acquisition of the fee, and in ac-
[55] cordance with the trust, *the city obtained the right to use the surface, the soil below, and the space above the surface, in any manner which is plainly designed to promote the ease, facility, and safety of all those who may desire to travel upon the streets; and that the rights attached to the adjoining land, or held by contract by its owner, are subordinate to such uses, whether they were foreseen or not when the street was laid out. In earlier and simpler times the surface of the streets was enough to accommodate all travel. But under the more complex conditions of modern urban life, with its high and populous buildings, and its rapid interurban transportation, the requirements of public travel are largely increased. Sometimes the increased demands may be met by subways and sometimes by viaducts. The construction of either solely for public travel may well be held by a state court to be a reasonable adaptation of the streets to the uses for which they were primarily designed. What we might hold on these questions where we had full jurisdiction of the subject, it is not necessary here even to consider.

In basing its judgment on the broad, plain, and approved distinction between the abandonment of the street to private uses and its further devotion to public uses, the court below overruled none of its decisions, but, on the contrary, acted upon the principles which they clearly declared. The plaintiff, therefore, has not shown that in his case the state court has changed, to his injury, the interpretation of his contract with the city, which it had previously made, and upon which he had the right to rely. The case at bar is not within the authority of the Muhlker Case. When Muhlker acquired his title the elevated railroad cases had declared the law of New York, and it was here held that he had the right to rely upon his contract as in them it had been interpreted. The structure complained of was in the Muhlker Case, as in the elevated railroad case, one devoted to the exclusive use of a private corporation. This court, in order to obtain jurisdiction and to declare that a Federal right was violated, was obliged to hold, and did hold, that the two cases were identical, and that *in deciding the Muhlker Case the court [556] of appeals had in effect overruled the elevated railroad cases, and this view was supported by the court of appeals itself in Lewis v. New York & H. R. Co. 162 N. Y. 202, 56 N. E. 540, where a plaintiff in like situation with Muhlker had obtained damages for exactly the same structure. The theory upon which the Muhlker Case stands and upon which it was put in the opinion of the court, is that, in deciding against Muhlker, the state court had overruled its own decisions, and changed the interpretation of the contract upon which he had the right to rely. But the fundamental fact upon which the decision in the Muhlker Case rested, present there, is absent in the case at bar. Here there was no overruling of decisions and no change in the interpretation of the contract. There was, therefore, no impairment of the obligation of a

contract, and the decision was merely on a question of local law with the soundness of which we have no concern.

The judgment is affirmed.

Mr. Justice **McKenna**, dissenting:

I am unable to agree with the opinion and judgment of the court. I think this case cannot be distinguished in principle from Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; Birrell v. New York & H. R. Co. 198 U. S. 390, 49 L. ed. 1096, 25 Sup. Ct. Rep. 667. On the authority of those cases the judgment in this case should be reversed. Those cases were determined by Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146, and Lahr v. Metropolitan Elev. R. Co. 104 N. Y. 268, 10 N. E. 528, known as the elevated railroad cases. The structures there described are what are known as elevated railroads, and may be presumed to be familiar, and a structure of substantially similar character was the subject of the controversy in Muhlker v. New York & H. R. Co. and Birrell v. New York & H. R. Co. Its characteristic was elevation above the *surface* of the street, and this was the point of the decisions. Let me quote from the Story Case: "But what," [557] said the court, "is *the extent of this easement? What rights or privileges are secured thereby? Generally, it may be said, it is to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the *open way*. The street occupies the *surface*, and to its uses the rights of the adjacent lots are subordinate, but *above the surface* there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner." And again, it was said that the agreement—grant from the city—was, "that if the grantee would buy the lot abutting on the street he might have the use of light and air *over the open space* [italics mine] designated as a street." And yet again (and the passage was quoted in the Muhlker Case, page 566, L. ed. p. 876, Sup. Ct. Rep. p. 526): "Before any interest passed to the city the owner of the land had from it the benefit of air and light. *The public purpose of a street requires of the soil the surface only.*" The Lahr Case repeated the principle. And it was said in the Muhlker Case, in effect, that the disregard of the distinction between the surface of a street and the space above the surface would leave "remaining no vital element of the elevated railroad cases."

It may be said there was a qualification made in those cases and recognized in the Muhlker Case, that it was not alone the elevation of a structure above the surface, but the elevation of one "useless for general street purposes." I may accept the limitation. The structure in the case at bar comes within the characterization. It is useless for general street purposes. It obstructs the frontage of abutting lots and affords no access to or from them in any proper sense. There is a descent by stairs from it to the street below, but for pedestrians only—necessarily not for vehicles. But there is a like descent by stairs from elevated railroads to streets below, but this did not save the roads from liability for abutting property.

It must be borne in mind that this case is not disposed of by making a contrast between the passage of a railroad and the traffic on a street. The contrast is catching and only seems important. In New York a railroad is a street use and can be *imposed on the surface of a street without [558] liability for consequential damages, and, this even if it be a steam railroad. Fobes v. Rome, W. & O. R. Co. 121 N. Y. 505, 3 L.R.A. 453, 24 N. E. 919. The distinction, therefore, was necessary to be made between the *surface* and the open space over the surface. And we have seen that this distinction was noted in the cases and determined their judgment. In other words, the use of a street by a railroad was decided to be a proper street use, and, therefore, whether put upon the surface or above the surface, retained that character. In either place it was a proper street use and damages could only have been consequent to the elevation of the road above the surface, to which, to quote again the Story Case, the "public purpose of a street" attached only.

The elevated railroad cases get significance from the arguments of counsel. Such arguments, of course, are not necessarily a test of the decision. But they may be. The opinion may respond accurately to them. We find from the report of the Story Case that the argument of Mr. Evarts for the plaintiff was that "a permanent structure above the street surface, and an encroachment thereby and by its use upon the appurtenant easement of the open frontage held by the abutting proprietors, was not covered by the original condemnation for the public easement, which was limited to a maintenance of such open streets and perpetual frontage. People v. Kerr, 27 N. Y. 188; Craig v. Rochester City & B. R. Co. 39 N. Y. 404."

Mr. Choate, also for the property owners, submitted the following: "The abutting owners on the streets have an interest in the nature of property for all time in the streets above their surface, and in having them kept open and unobstructed forever,

of which they cannot be deprived without being compensated." The contentions express the invocation of the property owner of the court, and the court responded to and sustained it. Is not that response rejected in the case at bar? The structure in the case towers as high as a house of five stories and is planted on columns, the size and strength and number of which can easi-
[559]ly be imagined. Does it need any *comment to describe its effect? The plaintiffs have really no access to it from their land or from any building that may be put upon their land, because they may not bridge the intervening gap. They have no other access to it but that which I have described. The public has no access from it to plaintiffs' property but that which I have described.

The buildings that stood upon the land when the structure was built were practically under its shadow.† Any buildings that may be erected will be equally so. "To get above it," plaintiffs' counsel asserts, "the abutter must build up five stories," and it is only from such elevation that he may contemplate the traffic that passes his premises. And even then, counsel also asserts, light can only reach the abutter "through a slit 10 feet wide between his eaves and the edge of the structure." And to this measure his right to an unobstructed frontage, his right to unobstructed light and air, has been reduced. Is it possible that the law can see no legal detriment in this, no impairment of the abutter's grant from the city, no right to compensation?

I am not insensible of the strength of the reasoning by which this court sustains that conclusion, but certainly all lawyers would not assent to it. Indeed, one must be a lawyer to assent to it. At times there seems to be a legal result which takes no account of the obviously practical result. At times there seems to come an antithesis between legal sense and common sense.

I say this in no reproach of the law and its judgments. I say it in no reproach to the opinion of the court. I recognize it proceeds upon distinctions which are intel-
[560]ligible, although *I do not assent to them. My purpose is only to express the view that the legal opinion which I hold has justification in the serious practical consequences that the plaintiffs in error have sustained by the violation of a right which this court said, in the Muhlker Case, citing Barnett v. Johnson, 15 N. J. Eq. 481, was founded in the "common practice and sense of the world."

From my standpoint, what the courts of states other than New York have decided is of no consequence to the pending controversy, and I take no time therefore to dispute the pertinence of their citation to justify the structure of which plaintiffs complain.

I am authorized to say that Mr. Justice Day concurs in this dissent.

†When the original plaintiff, George Sauer, became the owner of the property, there were standing upon it certain frame buildings which had been used as a pleasure resort. In 1890 he enlarged and improved the buildings at great expense and occupied them at the time of the erection of the structure in controversy. These buildings were destroyed in 1897 by fire, and the land is now vacant. And it may be noted that Sauer having died pending this writ of error, his administratrix and heirs have been substituted as parties plaintiff.

AMERICAN RAILROAD COMPANY OF PORTO RICO, Plff. in Err.,
v.
FELICIA CARDONA DE CASTRO and Julio Castro, Her Husband.

This case is governed by the decision in American Railroad Company v. Castro, ante, 564.

[No. 467.]

Argued January 14, 1907. Decided February 25, 1907.

IN ERROR to the District Court of the United States for the District of Porto Rico to review a judgment for plaintiffs in an action brought by husband and wife against a railroad company to recover damages for personal injuries sustained by the wife at a highway crossing. Dismissed for want of jurisdiction.

Messrs. Frederic D. McKenney, Francis H. Dexter, and John Spalding Flannery for plaintiff in error.

No appearance for defendants in error.

Mr. Justice White delivered the opinion of the court:

This case is similar in character to that of American R. Co. v. Castro, No. 151, this term, just decided [204 U. S. 453, ante, 564, 27 Sup. Ct. Rep. 466], having been brought to recover for damages resulting from injuries sustained by the wife in the same accident which occasioned the death of the daughter, Eloisa. The right of this court in the case at bar to review a judgment for the plaintiffs below, entered upon the verdict of a jury, is based upon an objection to the jurisdiction of the trial court, similar to that which was made in No. 151. For the reasons stated in the opinion in that case the writ of error in this case must also be dismissed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

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[561] *EX PARTE: IN THE MATTER OF GEORGE H. CRAWFORD, *Petitioner*. [No. —, Original.]

Motion for Leave to File Petition for a Writ of Habeas Corpus.

Mr. Henry M. Hoyt for petitioner.

May 13, 1907. *Denied.*

IN THE MATTER OF CHARLES UGHBANKS, *Petitioner*. [No. —, Original.]

Motion for Leave to File Petition for a Writ of Habeas Corpus.

Mr. John B. Chaddock for petitioner.

May 13, 1907. *Denied.*

EX PARTE: IN THE MATTER OF THE ST. LOUIS MINING & MILLING COMPANY OF MONTANA, *Petitioner*. [No. 17, Original.]

Mr. Jackson H. Ralston for petitioner.

Messrs. Chas. J. Hughes, Jr., W. E. Cullen, A. B. Browne, and *Alex. Britton* for respondents.

May 27, 1907. *Per Curiam:* Rule discharged and petition for writ of mandamus dismissed. *Re Rice*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; *Re Pollitz* (May 27, 1907), 206 U. S. 323, ante, 1081, 27 Sup. Ct. Rep. 729.

EXPANDED METAL COMPANY *et al.*, *Petitioners*, *v.* EUGENE S. BRADFORD *et al.* [No. 713.]

562] Petition for *a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Ernest Howard Hunter for petitioners.

Mr. E. Hayward Fairbanks for respondents.

May 13, 1907. *Granted.*

SAMUEL B. HARTMAN, *Petitioner*, *v.* JOHN D. PARK & SONS CO. [No. 719.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Frank F. Reed for petitioner.

No appearance for respondent.

May 13, 1907. *Granted.*

THOMAS B. CLEMENT, *Petitioner*, *v.* UNITED STATES. [No. 655.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 149 Fed. 305.

Mr. George N. Baxter for petitioner.

The Attorney General and *Solicitor General Hoyt* for respondent.

May 13, 1907. *Denied.*

FREDERICK HERBERT RAMSDEN, *Petitioner*, *v.* HENRY M. KNOWLES. [No. 685.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 151 Fed. 721.

Mr. Wm. Reed Bigelow for petitioner.

Mr. Felix Rackemann for respondent.

May 13, 1907. *Denied.*

ARMOUR & COMPANY, *Petitioners*, *v.* AGNES SKENE. [No. 695.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. Roland Gray and *John C. Gray* for petitioners.

Messrs. Charles H. Fiske, Andrew Fiske, and *Charles H. Fiske, Jr.*, for respondent.

May 13, 1907. *Denied.*

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*ALASKA TREADWELL GOLD MINING COMPANY, *Petitioner*, *v.* Z. R. CHENEY, Administrator, etc. [No. 697.] [563]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 148 Fed. 808.

Mr. Charles J. Faulkner for petitioner.

Messrs. J. J. Darlington and *R. W. Jennings* for respondent.

May 13, 1907. *Denied.*

JOCK B. HENDERSON, *Petitioner*, *v.* JAMES M. HENBIE *et al.* [No. 711.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 76 C. C. A. 196, 145 Fed. 316.

Mr. V. B. Archer for petitioner.

Messrs. *John G. McCluer* and *James S. McCluer* for respondents.

May 13, 1907. *Denied.*

JAMES L. BRADFORD *et al.*, *Petitioners*, *v.* UNITED STATES. [No. 717, 718.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 152 Fed. 616, 617.

Mr. Edgar H. Farrar and *Mr. F. L. Richardson* for petitioners.

The Attorney General, Solicitor General Hoyt, and *Mr. W. W. Howe* for respondent.

May 13, 1907. *Denied.*

LEEDS & CATLIN COMPANY, *Petitioner*, *v.* VICTOR TALKING MACHINE COMPANY *et al.* [Nos. 742, 743.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 152 Fed. 605.

Mr. Louis Hicks for petitioner.

Mr. Horace Pettit for respondent.

May 27, 1907. *Granted.*

TROY WAGON WORKS COMPANY, *Petitioner*, *v.* HOWARD L. HANCOCK, Trustee. [No. 641.]

[564] Petition *for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case bleow, 152 Fed. 605.

Messrs. Almon W. Bulkley and *Charles Martindale* for petitioner.

Mr. James W. Noel for respondent.

May 27, 1907. *Denied.*

NATIONAL EXCHANGE BANK OF PROVIDENCE, R. I., *Petitioner*, *v.* CITY OF SUPERIOR. [No. 716.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 148 Fed. 11.

Mr. J. H. Caldwell for petitioner.

No brief for respondent.

May 27, 1907. *Denied.*

TOWN OF CENTERVILLE STATION, ST. CLAIR COUNTY, ILL., *Petitioner*, *v.* NORTHWESTERN SAVINGS BANK. [No 731.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Edward C. Kramer for petitioner.

Mr. B. H. Canby for respondent.

May 27, 1907. *Denied.*

SEYMOUR W. BONSALL, *Petitioner*, *v.* ARTHUR C. PLATT. [No. 734.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 153 Fed. 126.

Mr. Louis Lowenstein for petitioner.

Mr. John M. Coit for respondent.

May 27, 1907. *Denied.*

CHARLES M. WARD *et al.*, Admrs. etc., *Petitioners*, *v.* MARIA E. G. McK. WARD *et al.* [Nos. 735, 736.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 74 C. C. A. 146, 145 Fed. 1023.

*Messrs. Henry M. *Ward* and *Austen G.* [56 *Fox* for petitioners.

Mr. Wm. G. Wilson for respondents.

May 27, 1907. *Denied.*

NORTH CHICAGO STREET RAILROAD COMPANY *et al.*, *Petitioners*, *v.* CHICAGO CONSOLIDATED TRACTION COMPANY *et al.* [No. 737]; WEST CHICAGO STREET RAILROAD COMPANY *et al.*, *Petitioners*, *v.* CHICAGO CONSOLIDATED TRACTION COMPANY *et al.* [No. 738.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Henry S. Robbins for petitioners.

Messrs. James F. Meagher, Nathaniel C. Sears, Clarence A. Knight, and *A. J. Hopkins* for respondents.

May 27, 1907. *Denied.*

AMERICAN NEWS COMPANY, *Petitioner*, *v.* UNITED STATES. [No. 740.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 148 Fed. 1017.

Mr. Albert H. Washburn for petitioner.

The Attorney General and *Solicitor General Hoyt* for respondent.

May 27, 1907. *Denied.*

OXFORD & COAST LINE RAILROAD COMPANY, *Petitioner*, *v.* UNION BANK OF RICHMOND, VA. [No. 744.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Thomas B. Womack for petitioner.

Mr. Wm. L. Royall for respondent.

May 27, 1907. *Denied.*

STANLEY FRANCIS, *Petitioner*, *v.* UNITED STATES. [No. 745.]

[566] Petition for a Writ of Certiorari to *the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 152 Fed. 155.

Mr. Charles L. Frailey for petitioner.

The Attorney General and *Solicitor General Hoyt* for respondent.

May 27, 1907. *Denied.*

EMMA L. KAIPU in behalf of Mikala Kaipu, *Appellant*, *v.* L. E. PINKHAM, President of the Board of Health, etc. [No. 172.]

Appeal from the District Court of the United States for the Territory of Hawaii.

Mr. A. G. M. Robertson for appellant.

Mr. Lorrin Andrews for appellee.

May 13, 1907. Death of Mikala Kaipu having been suggested, and the case abated, appeal *dismissed.*

CANDIDO ACOSTA *et al.*, *Appellants*, *v.* PEOPLE OF PORTO RICO. [No. 781.]

Appeal from the Supreme Court of Porto Rico.

Solicitor General Hoyt for appellee.

May 27, 1907. Docketed and *dismissed* with costs, on motion of *Mr. Solicitor General Hoyt* on behalf of counsel for appellees.

SUSAN E. PORTERFIELD, *Petitioner*, *v.* GERARD D. MOORE, Trustee, etc., *et al.* [No. 728.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Forrest W. Brown for petitioner.

No appearance for respondent.

May 27, 1907. *Dismissed*, on motion of counsel for petitioner.

A. B. BALLARD *et al.*, *Plaintiffs in Error*, *v.* CHARLES W. HUNTER *et al.* [No. 123.]

Motion for Writ of Certiorari.

Messrs. William M. Randolph and *Wassell Randolph* for plaintiffs in error.

Mr. James K. Jones in behalf of *Mr. L. P. Berry* for defendants in error.

November 12, 1906. *Granted without prejudice*, the alleged record presented with the application to stand as a return to the writ.

MONTANA MINING COMPANY, LIMITED, *Plaintiff in Error*, *v.* ST. LOUIS MINING & MILLING COMPANY OF MONTANA. [No. 402.]

Motion for Writ of Certiorari.

Mr. Charles J. Hughes, Jr., for plaintiff in error.

Mr. Melton S. Gunn for defendant in error.

November 19, 1906. *Granted without prejudice*, the record accompanying the application to stand as a return to the writ.

DAVID H. MILLER, Trustee etc., *et al.*, *Petitioners*, *v.* E. O. MCCORMICK *et al.* [No. 696.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 152 Fed. 619.

Messrs. Henry W. Taft, John W. Boothby, Edward H. Blanc, Henry Wollman, George S. Graham, and *F. W. M. Cutcheon* for petitioners.

Messrs. Julien T. Davis, Abram I. Elkus, and *Garrard Glenn* for respondents

April 22, 1907. *Denied.*

UNITED STATES, *Petitioner*, *v.* MARION TRUST COMPANY, Trustee, etc. [No. 505.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 74 C. C. A. 439, 143 Fed. 301.

The Attorney General, Solicitor General, and *Mr. J. C. McReynolds* for petitioner.

Messrs. Morris M. Townley and *E. W. Bradford* for respondent.

April 22, 1907. Judgment *affirmed*, by a divided court, and cause remanded to the District Court of the United States for the District of Indiana.

JOHN A. CURTIN, Trustee, *Appellant*, *v.* GERTRUDE F. TUCKER. [No. 317.]

Petition for a Writ of Certiorari.

Messrs. Lee M. Friedman and *Robert K. Dickerman* for appellant.

Mr. John H. Sherburne, Jr., for appellee.

April 22, 1907. *Denied.*

MAMMOTH MINING COMPANY, *Plaintiff in Error*, *v.* GRAND CENTRAL MINING COMPANY *et al.* [No. 774.]

Mr. R. N. Baskin for plaintiff in error.

May 27, 1907. Writs of error and certiorari *granted*, on motion of *Mr. R. N. Baskin* for plaintiff in error.

APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1906.

ORDER.

There having been an Associate Justice of this court appointed since the commencement of this term,

It is ordered, That the following allotment be made of the Chief Justice and Associate Justices of this Court among the Circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, *viz.:*

For the First Circuit, Oliver Wendell Holmes, Associate Justice;
For the Second Circuit, Rufus W. Peckham, Associate Justice;
For the Third Circuit, William H. Moody, Associate Justice;
For the Fourth Circuit, Melville W. Fuller, Chief Justice;
For the Fifth Circuit, Edward D. White, Associate Justice;
For the Sixth Circuit, John M. Harlan, Associate Justice;
For the Seventh Circuit, William R. Day, Associate Justice;
For the Eighth Circuit, David J. Brewer, Associate Justice;
For the Ninth Circuit, Joseph McKenna, Associate Justice.

December 24, 1906.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1906.

ORDER.

The Reporter having represented that owing to the number of decisions at the present term it would be impracticable to put the reports in one volume, it is therefore now here ordered that he publish an additional volume in this year, pursuant to section 681 of the Revised Statutes.

March 25, 1907.

APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1906.

ORDER.

It is now here ordered by the court that all the cases on the docket not decided and all the other business of the term not disposed of be, and the same are hereby, continued until the next term.

May 27, 1907.

APPENDIX IV.

Supreme Court of the United States.

OCTOBER TERM, 1906.

On Monday, April 29, 1907, at the meeting of the Supreme Court of the United States, when were present the Chief Justice, Mr. Justice Harlan, Mr. Justice Brewer, Mr. Justice White, Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Day, and Mr. Justice Moody, the following proceedings, among others, were had:

Mr. Solicitor General Hoyt:

May it please the Court, on behalf of the Bar Association of the District of Columbia, and in the name of the Attorney General, I have the honor to present to the Court the resolutions adopted by the Bar of the District in commemoration of the late Mr. J. Hubley Ashton, whose distinguished official and personal career at this Bar is well known to the Court, and I beg to ask that the Court will direct that an appropriate minute be made of those proceedings upon its record.

The Chief Justice:

The Court recognizes that the long and eminent labors of Mr. Ashton, and particularly while connected with the Department of Justice, justify the Court in making this an exception to the general rule, and render it eminently proper that the request of the Bar Association be granted. The resolutions, therefore, will be placed on the files of this Court. Those resolutions were as follows:

Minute and Resolutions.

The Bar of the District of Columbia have met to give expression to their sorrow and to their sensibility of the loss occasioned to them and to the profession by the death of

J. HUBLEY ASHTON,

and to pay a tribute to his eminent abilities and virtues.

Mr. Ashton was admitted to the Bar of the Supreme Court of the United States in December, 1864, and to this Bar in the month of October, 1869.

He was Assistant Attorney General of the United States from May, 1864, continuously, with the exception of a few months, until his resignation in April, 1869.

During that period he argued on behalf of the government a great number of important causes, more than seventy in all, which originated in the events of the Civil War and in the execution of the laws and policy relating to reconstruction, and which involved grave questions of constitutional and international law. Many of these cases as they are reported in volumes 2 to 8 of Wallace related to the law of prize, and his arguments therein greatly contributed to the elucidation of the doctrines stated in the decisions of the Court. He served under and was associated with Attorneys General Bates, Speed, Stanbery, Evarts, and Hoar, and was several times appointed Acting Attorney General.

From the time he was admitted to this Bar to the day of his death his home was in Washington, and until recently he was actively engaged in the practice of his profession.

After he severed his connection with the Law Department, he was frequently employed by the government in litigation involving great responsibility and in matters relating to international intercourse and obligation.

He seldom appeared in the local courts. His practice continued to be in the Supreme Court of the United States, and he was the adviser of many corporations and had professional charge of important business interests.

Mr. Ashton's long career made conspicuous his varied learning and profound knowledge of the fundamental principles of jurisprudence, his intellectual vigor, alertness, and acumen, his power in legal controversy, and his capacity for persuasive and convincing argument and exposition. His briefs were made of exceptional value and usefulness by his habit of exhaustive research and preparation and his faculty for lucid statement and logical reasoning.

The conduct of his professional life, and in all the relations of life, was in conformity with the highest and most ennobling standards of duty, of rectitude, and of honor.

His character and the simplicity, refinement, and kindliness of his nature secured and firmly held the confidence, the respect, the admiration, and the sincere friendship of the Bench and of the members of the Bar. Therefore, be it

Resolved, That we bear testimony to and hold in honor the rare attainments of our deceased brother, his fidelity to justice and to law, his great services to the profession and to the community, and the nobility and purity of the spirit in which he devoted his great abilities to the duties and labors of his profession.

Resolved, That the unalterable purpose evinced by Mr. Ashton from the beginning to the end of his laborious and useful life, to accept and fully meet the moral responsibilities and obligations that devolve upon the Bar as well as upon the Bench, deserves our special recognition and a permanent record of our remembrance, in the desire that the influence of his example may be thereby preserved, strengthened, and extended.

Resolved, That the President of the Bar Association be requested to present this minute and these resolutions to the Court of Appeals and to the Supreme Court of the District of Columbia, with the request that they be entered on their minutes, and that a copy be communicated to the family of the deceased with the expression of the sincere sympathy of the members of the Bar.

APPENDIX V.

Supreme Court of the United States.

OCTOBER TERM, 1906.

The Chief Justice said: "It gives me pleasure to announce to the gentlemen of the bar that William H. Moody of Massachusetts, appointed to a seat upon this bench, is present and prepared to take the oath of office. The clerk will read his commission, to be afterwards recorded, and administer the oath accordingly."

The commission was then read and the oath administered by the clerk, and Mr. Justice Moody took his seat on the bench.

December 17, 1906.

GENERAL INDEX

TO THE

FOUR VOLUMES CONTAINED IN THIS BOOK,

203, 204, 205, 206.

OCTOBER TERM, 1906.

ABANDONMENT.

Of writ of error, see Appeal and Error, 67.

By assignees in bankruptcy of bankrupt's interest under testamentary trust. see Bankruptcy, 3.

Sale of homestead claim before patent as abandonment, see Public Lands, 5, 6.

ABDUCTION.

As violating extradition laws, see Extradition, 1.

Relief to person illegally extradited, see Habeas Corpus, 1.

ACCIDENT.

As ground for equitable relief against forfeiture of lease, see Landlord and Tenant, 3, 4.

ACTION OR SUIT.

Appearance, see Appearance.

Election of remedies, see Election of Remedies.

Venue of criminal trial, see Venue.

ADMIRALTY.

Enforcing lien on vessel as regulation of commerce, see Commerce, 1.

1. A court of admiralty has jurisdiction of a libel brought by one of two vessels, which were both adjudged to be in fault for a collision, to enforce contribution on account of its payment of the entire damage to the cargo of the other vessel. Erie R. Co. v. Erie & W. Transp. Co. 450

2. The question whether a state statute giving a lien upon a vessel, enforceable in a state court, for materials and supplies furnished on the credit of the vessel, is an unconstitutional infringement upon the exclusive admiralty jurisdiction of the Federal courts of liens of a maritime character, is not open in a case in which no maritime lien is asserted. Iroquois Transp. Co. v. De Laney Forge & Iron Co. 836

3. The enforcement of a lien given by a state statute upon a vessel for materials furnished after she was launched is within the jurisdiction of a state court, where such materials were really furnished for the completion of the vessel, and were fairly a part of her original construction. Iroquois Transp. Co. v. De Laney Forge & Iron Co. 836

4. A contract to build a ship, not being a maritime contract, which can only be enforced in a court of admiralty, a lien given by a state statute for materials furnished in her construction may be enforced against the vessel in a state court. Iroquois Transp. Co. v. De Laney Forge & Iron Co. 836

ADOPTION.

Into Indian tribe, see Indians, 4.

ADVERSE POSSESSION.

1. A railway company which has complied with all the terms and conditions of a congressional land grant, as fixed by Congress and by the act of the state legislature after the acceptance of the grant by the state, has such a title to lands within the place limits of the grant that the statute of limitations will run against it in favor of one who occupies the premises by adverse possession under color of title, notwithstanding the want of final certification and issue of patent. Iowa R. Land Co. v. Blumer, 1148

2. Knowledge of the rejection of his first timber culture entry of land within the place limits of a railway land grant does not require the imputation of bad faith to the entryman in going into possession on the advice of counsel under a second entry, afterwards summarily canceled without his knowledge, so as to prevent his open, notorious, and continuous possession from ripening into full title as against the railway company if the latter fails to assert its rights within the period prescribed by the statute of limitations. Iowa R. Land Co. v. Blumer, 1148

AGENCY.
See Principal and Agent.

ALIENS.
An alien minor child who has never dwelt in the United States, is not, when coming to join a naturalized parent, exempt from the provision of the act of March 3, 1903 (32 Stat. at L. 1213, chap. 1012, U. S. Comp. Stat. Supp. 1903, p. 170, U. S. Comp. Stat. Supp. 1905, p. 274), § 2, debarring aliens from landing if they are afflicted with a dangerous contagious disease, on the theory that she was invested with citizenship by virtue of the declaration of U. S. Rev. Stat. § 2172, U. S. Comp. Stat. 1901, p. 1334, that minor children of naturalized citizens shall, if "dwelling in the United States," be considered as citizens thereof. Zartarian v. Billings, 428

ALIMONY.
Allowance of, in proceeding by divorced wife to obtain liquidation of community property, see Husband and Wife, 5.

ALLOTMENT.
Of Justices among circuit courts, 1193.

AMUSEMENTS.
Due process of law in regulating admission, see Constitutional Law, 5.
Equal protection of the laws in statute regulating admission, see Constitutional Law, 46.

ANIMALS.
Validity of quarantine regulations, see Commerce, 14.

ANTI-TRUST ACT.
Limitation to recover three-fold damages, see Limitation of Actions, 2, 3.
Right of action for three-fold damages, see Monopolies.

APPEAL AND ERROR.
I. Appellate jurisdiction generally.
a. In general.
b. Mode of review.
c. Finality of decision.
d. Moot case.
II. Jurisdiction of particular courts.
a. Of circuit courts of appeals.
b. Of Supreme Court.
1. Over Federal courts.
2. Over state courts.
III. Proceedings to transfer cause.
IV. The record.
V. Hearing and determination.
VI. Judgment.
VII. Liability on appeal bond.

I. Appellate jurisdiction generally.

a. In general.

Appeal from decision of primary examiner, see Patents, 3.

1. No appeal lies from an order denying a petition for rehearing. Conboy v. First Nat. Bank, 128

2. The claims of a creditor against a bankrupt estate have been rejected so as to give the right to appeal where he insisted that his claims were for a definite amount, *viz.*, the amount stated in the proofs of debt, less the sum derived from the sale of collateral, and the referee declined to allow the claims as established as the proof stood, and the bankruptcy court approved and affirmed the ruling of the referee as a disallowance of the claims, and entered an order accordingly. Hiscock v. Varick Bank, 945

b. Mode of review.

3. Errors alleged to have been committed in an action at law can be reviewed in the Supreme Court of the United States only by writ of error. Behn, Meyer & Co. v. Campbell & Go Tauco, 857

4. Writ of error, and not appeal, is the only method of reviewing an adjudication of bankruptcy entered on a directed verdict on a jury trial demanded as of right by the alleged bankrupt under the bankrupt act of July 1, 1898 (30 Stat. at L. 551, chap. 541, U. S. Comp. Stat. 1901, p. 3429), § 19, for the determination of the issues as to insolvency and the commission of acts of bankruptcy. Frederick L. Grant Shoe Co. v. W. M. Laird Co. 282

5. Writ of error is the proper method of reviewing a judgment of the supreme court of the territory of Oklahoma, affirming a judgment of the court below in an action of replevin tried by the court upon waiver of a jury. National Live Stock Bank v. First Nat. Bank, 182

6. Appeal, and not writ of error, is the proper method of obtaining a review in the Supreme Court of the United States of a final order of the supreme court of the Philippine Islands in a habeas corpus case, under the act of July 1, 1902 (32 Stat. at L. chap. 1369, pp. 691, 695, U. S. Comp. Stat. Supp. 1905, p. 154), § 10, providing that judgments and decrees of the latter court can only be reviewed "in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts." Fisher v. Baker, 148

c. Finality of decision.

7. The circuit court of appeals cannot, in advance of the final decree in the suit, review an or[illegible] of a [illegible]eral circuit court which adj[illegible] the d[illegible]dants in such suit guilty of [illegible] in [illegible]obeying an order for the p[illegible] of certain books and papers for h[illegible] the benefit of the [illegible], 205, 206 U. S.

plaintiff, and imposes a fine or imprisonment in the event of failure to produce such books or papers by a specified date, since this is not a final order rendered in a proceeding criminal in its nature, and, as such, within the appellate jurisdiction of the circuit court of appeals, under the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550), § 6, but was intended to secure the rights of the party to the suit for whose benefit the original order was made. Doyle v. London Guarantee & Acci. Co. 641

8. A judgment of a Federal circuit court, rendered after the plaintiff, having unsuccessfully moved to remand the cause to the state court whence it was removed, had elected to stand upon his motion to remand, and refused to recognize the jurisdiction of the Federal court, that plaintiff take nothing by the suit, and that the defendants go hence without day and recover their costs against the plaintiff, is final for the purpose of appeal. Wecker v. National Enameling & Stamping Co. 430

d. Moot case.

9. The validity of the action of the Philippine authorities in suspending the writ of habeas corpus is a moot question, which does not call for determination by the Supreme Court of the United States on writ of error, where the suspension was revoked on the day when copy of the petition for the writ of error was served on opposing counsel, and more than two months before the writ was issued. Fisher v. Baker, 142

II. Jurisdiction of particular courts.

a. Of circuit courts of appeals.

10. An appeal lies to the appropriate circuit court of appeals in a case where the jurisdiction of the circuit court attached both on the ground of diverse citizenship and on a separate and independent constitutional ground. Mississippi R. Commission v. Illinois C. R. Co. 209

b. Of Supreme Court.

1. Over Federal courts.

Over district and circuit courts.

Appeal from circuit court of appeals in bankruptcy case, see infra, 65, 66.

See also infra, 76.

11. A case in which the contention is made that the decree which is the basis of suit is void as violating the right, under the Federal Constitution, to a jury trial and to due process of law, does not involve the construction or application of such Constitution, within the meaning of the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 5, authorizing direct appeals from the circuit or district courts to the Federal Supreme Court, where the real issue as to such prior decree was whether it was *res judicata* between the parties, or, as is contended by the appellants, was rendered without jurisdiction. Empire State-Idaho Min. & D. Co. v. Hanley, 779

12. A case cannot be brought up to the Supreme Court of the United States by direct appeal from a Federal circuit court, under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 5, as one in which the jurisdiction of the court is in issue, where the jurisdiction challenged is not that of the court rendering the decree from which the appeal is taken, but is that of the court which rendered a former decree, which is set up in the bill as the basis of the title in suit. Empire State-Idaho Min. & D. Co. v. Hanley, 779

13. The certificate of a Federal circuit court may be considered by the Supreme Court on the direct review authorized by the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), for the purpose of supplying the failure of the record to show when and how the question of jurisdiction was raised, if the elements necessary to decide the question are in the record, although it is the better practice to make apparent on the record, by a bill of exceptions or other appropriate mode, the fact that the question of jurisdiction was raised and passed upon, and the elements upon which the decision of the question was based. C. H. Nichols Lumber Co. v. Franson, 181

14. The failure of the certificate of a Federal circuit court to show the exact nature of the jurisdictional question relied upon to sustain a direct appeal to the Supreme Court does not defeat the jurisdiction of the latter court, where an examination of the record, aided by the opinion of the circuit court, contained therein and made part thereof, distinctly shows the nature of the question of jurisdiction passed upon. Chicago v. Mills, 504

15. The appeal required by the act of June 22, 1860 (12 Stat. at L. 85, 87, chap. 188), § 11, to be taken to the Supreme Court of the United States if the decree of the district court in certain private land claim cases is against the United States, is "otherwise provided by law" within the meaning of the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550), § 6, making the circuit court of appeals the proper tribunal for the review of final decisions of the district court in other than certain excepted cases, which include those where it is otherwise provided by law. United States v. Dalcour, 248

Over territorial courts.

See also supra, 5.

Sufficiency of statement of facts, see infra, 69, 70.

Questions reviewable, see infra, 75.

16. A controversy as to the constitu-

tional right of a territorial legislature to pass a specified law under the broad legislative power conferred by U. S. Rev. Stat. § 1851, involves the validity of an authority exercised under the United States within the meaning of the act of March 3, 1885 (23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572), § 2, defining the appellate jurisdiction of the Supreme Court of the United States over the supreme courts of the territories. New Mexico ex rel. McLean v. Denver & R. G. R. Co. 78

17. Some sum or value must be in dispute in order to sustain the appellate jurisdiction of the United States Supreme Court over the supreme courts of the territories which is conferred by the act of March 3, 1885 (23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572), § 2, without regard to the sum or value in dispute, in cases involving the validity of a treaty or statute of, or authority exercised under, the United States. New Mexico ex rel. McLean v. Denver & R. G. R. Co. 78

18. A suit in which the matter in dispute is the right of consignors to have a consignment shipped by a common carrier to its destination involves a valuable right, measurable in money, and therefore satisfies the requirements of the act of March 3, 1885 (23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572), conferring upon the Supreme Court of the United States appellate jurisdiction over the supreme courts of the territories without regard to the sum or value in dispute, where the validity of a treaty or statute of, or authority exercised under, the United States is involved. New Mexico ex rel. McLean v. Denver & R. G. R. Co. 78

19. A determination by the supreme court of the territory of Arizona in a habeas corpus case as to which custodian a child of tender years shall be committed is not appealable to the Supreme Court of the United States under U. S. Rev. Stat. § 1909, as a case "involving the question of personal freedom" within the meaning of that section. New York Foundling Hospital v. Gatti, 254

Over District of Columbia courts.

20. A judgment convicting a chancery receiver of embezzling money which had come into his possession in his official capacity is not reviewable on a writ of error from the Federal Supreme Court to the court of appeals of the District of Columbia, on the theory that the forfeiture by defendant, under D. C. Code (31 Stat. at L. 1189, chap. 854), § 841, defining the offense, of all right or claim to any commissions, was determined by the judgment, and that therefore the jurisdictional amount prescribed by § 233 of such Code was involved, since the forfeiture of commissions does not follow the judgment, but follows the wrongful conversion or appropriation of the moneys. Fields v. United States, 807

21. The validity of an authority exercised under the United States was not drawn in question so as to sustain the appellate jurisdiction of the Supreme Court of the United States over the court of appeals of the District of Columbia, under D. C. Code (31 Stat. at L. 1189, 1227, chap. 854), § 233, by a petition for mandamus to compel the restoration to her position in the classified civil service of a clerk whose contention is not that the President and his representatives were without authority to dismiss her, but that her dismissal was illegal because the requisite formalities prescribed by the civil service regulations were not observed. United States ex rel. Taylor v. Taft, 269

Over Porto Rican courts.

22. An appeal lies to the Supreme Court of the United States from a decree of the district court for the district of Porto Rico in a suit brought by a wife to obtain liquidation of the community, in which the matter in dispute exceeds the sum of $5,000. Garrozi v. Dastas, 369

23. The contention that, because the district court of the United States for the district of Porto Rico is required, by the act of April 12, 1900 (31 Stat. at L. 77, chap. 191), § 34, to proceed in the same manner as a Federal circuit court, a term of that court held at Mayaguez, under the authority of the further provision of that section that regular terms of such court shall be held at stated times in San Juan and Ponce, and special terms at Mayaguez at such other times as the judge may deem expedient, is a "special," as contradistinguished from a "regular," term, within the meaning of U. S. Rev. Stat. § 670, U. S. Comp. Stat. 1901, p. 545, forbidding jury trials at special terms of the circuit courts, except in certain specified districts, is too clearly lacking in merit to sustain a writ of error from the Federal Supreme Court, in view of the substantially uniform requirement of U. S. Rev. Stat. §§ 664-669, U. S. Comp. Stat. 1901, pp. 543-545, that special terms of the circuit courts are to be held where the regular sessions are held. American R. Co. v. Castro, 564
American R. Co. v. Cardona de Castro, 1157

Over Hawaiian courts.

24. A writ of error from the Federal Supreme Court to the supreme court of the territory of Hawaii which would not lie when final judgment was entered cannot be sustained as an exercise of the appellate jurisdiction conferred by the act of March 3, 1905 (33 Stat. at L. 1035, chap. 1451, § 3, amending the act of April 30, 1900, 31 Stat. at L. 141, 158, chap. 339), § 86, because a petition for rehearing, which the territorial supreme court entertained and acted upon, was not denied by that court until after the later statute went into effect. Harrison v. Magoon, 900

2. Over state courts.

Scope of review, see infra, 77–93.

25. The citizenship of the parties is **immaterial as affecting the** jurisdiction of the **Federal Supreme Court,** under U. S. Rev. **Stat. § 709, U. S. Comp.** Stat. 1901, p. 575, **of a writ of error to a** state court. Barrington v. Missouri, 890

26. An inferior state court is the final **court of the state where** the Federal question **involved can be decided,** and therefore **is the court to which a** writ of error from **the Supreme Court of** the United States **must be directed, where** the highest state **court, although discussing** the Federal question **in its opinion, and** declaring it to be **without merit, dismissed** a writ of error to **the inferior court solely** and expressly for **want of jurisdiction.** Western U. Teleg. **Co. v. Hughes,** 294

Federal questions.

See also infra, 81.

27. The claim of a right under the Fed**eral Constitution to prove** the truth of cer**tain published articles held** to constitute a **contempt of court is too** clearly unfounded **to serve as the basis of a** writ of error from **the Federal Supreme Court** to a state court. **Patterson v. Colorado ex** rel. Atty. Gen. 879

28. A decision of the highest state court that the defendant in a criminal case has been tried in accordance with the local procedure, although the names of all the witnesses were not indorsed on the indictment, cannot be reviewed in the Supreme Court of the United States on the theory that a meritorious Federal question was involved in the claim that the accused was a subject of Great Britain, and, by virtue of treaties, the law of nations, the laws and Constitution of the United States, and the laws of the state, was entitled to know who were the witnesses against him. Barrington v. Missouri, 890

29. Demurring to an indictment in a state court on the ground that by reason of the inconsistency, multiplicity, and repugnancy of the different counts in such indictment the defendant is being proceeded against in violation of the state and Federal guaranty of due process of law, and in violation of his constitutional right to be specifically informed of the nature and cause of the accusation against him, does not raise a Federal question of sufficient merit to sustain a writ of error from the Supreme Court of the United States. Barrington v. Missouri, 890

30. The admission of evidence in a criminal case which the highest state court decides did not violate the rights of the accused under the state Constitution and laws cannot involve a question of due process of law of sufficient merit to sustain a writ of error from the Supreme Court of the United States. Barrington v. Missouri, 890

31. The refusal of a state court to grant, for local prejudice, the change of venue asked for in a criminal case, cannot involve a Federal question of sufficient merit to sustain a writ of error from the Federal Supreme Court, where the highest state court, after reviewing the testimony, decided that such refusal was not an abuse of the discretion vested in the trial court. Barrington v. Missouri, 890

32. The question whether the California legislature could enact the act of April 2, 1866, ratifying conveyances made by the corporate authorities of the city of Monterey of pueblo lands confirmed to that city by the United States, and afterwards patented to it, its successors and assigns, is not so far unsubstantial as to justify dismissal of a writ of error to a state court. Monterey v. Jacks, 220

33. The contention that the proceedings taken under Conn. Pub. Laws, §§ 3694, 3695, by a railway company which is the lessee of another railway, and the owner of three fourths of its stock, to condemn the outstanding shares owned by a person who refuses to agree to the terms of purchase, violate the due process of law clause of the 14th Amendment to the Federal Constitution, and impair contract obligations, is not so frivolous as to require the dismissal of a writ of error from the Supreme Court of the United States to a state court. Offield v. New York, N. H. & H. R. Co. 231

34. Color for defendant's contention that the requirements of the Illinois mining act of April 18, 1899, as to licensed employees, are repugnant to the Federal Constitution, when applied to the first count in the declaration, will sustain a writ of error from the Supreme Court of the United States to a circuit court, as against a motion to dismiss, based on the theory that the first count in the declaration charges a violation of duty imposed by the statute directly upon the mine owner, irrespective of the statutory requirements as to licensed employees. Wilmington Star Min. Co. v. Fulton, 708

35. The question whether a state court, consistently with the act to regulate commerce, can grant relief to a shipper because of the exaction by a common carrier of an alleged unreasonable freight rate for an interstate shipment, when such rate has been filed with the Interstate Commerce Commission and promulgated as provided by the act to regulate commerce, and has not been found to be unreasonable by the Commission, will sustain a writ of error from the Federal Supreme Court to a state court, where such question was presented by the pleadings, was passed upon by the trial court, was expressly and necessarily decided by the highest state court, and is essentially involved in the case. Texas & P. R. Co. v. Abilene Cotton Oil Co. 553

36. The judgment of the highest court of **a state, sustaining, as a legitimate exertion**

of the police power of the state, a statute the validity of which was challenged as repugnant to the Federal Constitution, is reviewable in the Supreme Court of the United States by writ of error. Western Turf Asso. v. Greenberg, 520

37. A decision of a state court in a case in which rights under a statute of the United States were claimed by the defendant is reviewable in the Supreme Court of the United States, where that statute was referred to by the highest state court and was an element in its decision. Hammond v. Whittredge, 606

38. The express denial of an immunity claimed in both the trial and appellate courts, under U. S. Rev. Stat. § 5239, U. S. Comp. Stat. 1901, p. 3515, by officers and directors of a national bank in respect to the rule of liability applied for making false official reports as to the bank's financial condition, is sufficient to sustain the exercise by the Supreme Court of the United States of its appellate jurisdiction over state courts. Yates v. Jones Nat. Bank, 1002

39. The claim of a right under an "authority exercised under the United States," within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, defining the appellate jurisdiction of the Supreme Court of the United States over state courts, is presented by a contention that a Montana statute was authorized by the enabling act of Feb. 22, 1889 (25 Stat. at L. 676, chap. 180), and was therefore valid, even if repugnant to the Constitution of that state. Montana ex rel. Haire v. Rice, 490

40. No Federal question which will sustain a writ of error from the Supreme Court of the United States to a state court is involved in the contention that the defendant in a criminal case was compelled to be a witness against himself, contrary to the 5th Amendment to the Federal Constitution, since this amendment does not operate as a restriction of the powers of the state, but was intended to operate solely upon the Federal government. Barrington v. Missouri, 890

41. A decision of a state court upon a question of law cannot be reviewed in the Federal Supreme Court as presenting a question of the violation of the 14th Amendment to the Federal Constitution because such decision is asserted to be wrong, and contrary to previous decisions of the same court. Patterson v. Colorado ex rel. Atty. Gen. 879

42. No Federal question respecting the impairment of contract obligations which will sustain a writ of error from the Supreme Court of the United States to a state court is presented by the contention that the obligation of the contract made by bonds of the state is impaired by a joint resolution of the state legislature directing the state treasurer to write off of the books in his office certain of such bonds, and to carry no longer such bonds on the books as a debt of the state, since such law merely directed a change of entries in the books of the treasurer, and could in no respect impair or affect the rights of the holders. Smith v. Jennings, 1061

43. A contest over a state office, dependent for its solution exclusively upon the application of the Constitution of the state or upon a mere construction of a provision of a state law, involves no possible Federal question which will sustain a writ of error from the Supreme Court of the United States to a state court. Elder v. Colorado ex rel. Badgley, 361

44. The conformity with the state Constitution of the proceedings of the state legislature in the enactment of a law is not a Federal question, which will sustain a writ of error from the Supreme Court of the United States to a state court, but is a question upon which the determination of the state court is final. Smith v. Jennings, 1061

45. Whether or not a state court exceeded its functions under the state Constitution cannot give rise to a question respecting due process of law which will sustain the appellate jurisdiction of the Supreme Court of the United States. Burt v. Smith, 121

46. The objections that the information in contempt was not supported by an affidavit until after it was filed, and that the suits referred to in the published articles complained of as constituting the contempt were not then pending, present questions of local law, which will not sustain a writ of error from the Federal Supreme Court to a state court. Patterson v. Colorado ex rel. Atty. Gen. 879

47. The objection that certain published articles did not constitute a contempt of court does not present a question which will sustain a writ of error from the Federal Supreme Court to a state court; at least where there is no showing that innocent conduct has been laid hold of as an arbitrary pretense for an arbitrary punishment. Patterson v. Colorado ex rel. Atty. Gen. 879

48. A decision of a state court, in a suit to quiet title, that the grantee from the United States, through the state of Arkansas and other grantors, took no title by virtue of riparian rights to lands lying between the government meander line and the main channel of a river, which lands the court finds to be swampy, checked by bayous, subject to inundation, but reclaimable to some extent for agricultural purposes, is not reviewable in the Supreme Court of the United States. Chapman & D. Land Co. v. Bigelow, 868

49. The decisions of state courts upon questions of fact are not reviewable by writ of error to those courts from the Supreme Court of the United States. Chapman & D. Land Co. v. Bigelow, 868

50. The exclusion from evidence in a suit to quiet title of a letter written by the Secretary of the Interior to the Commissioner of the General Land Office, which is clearly *res inter alios acta*, can present no Federal question which will sustain a writ of error from the Supreme Court of the United States to a state court. Chapman & D. Land Co. v. Bigelow, 953

Presentation of Federal question to state court..

See also infra, 77, 78.

51. A right claimed under an authority exercised under the United States will be regarded as "specially set up or claimed," within the meaning of U. S. Rev. Stat. § 709 U. S. Comp. Stat. 1901, p. 575, defining the appellate jurisdiction of the Supreme Court of the United States over state courts, where it clearly and unmistakably appears from the opinion of the state court that the Federal question was assumed to be in issue, that the decision was against the Federal claim, and that the decision of the question was essential to the judgment rendered. Montana ex rel. Haire v. Rice, 490

52. A carrier's denial that "it was bound by law," as alleged by complainant, to receive, as a connecting and ultimate carrier, a certain interstate shipment and forward and deliver it to its ultimate destination, does not amount to the assertion of a right under the act to regulate commerce, so as to sustain a writ of error from the Supreme Court of the United States to review a judgment of a state court adverse to such contention. Louisville & N. R. Co. v. Smith, Huggins, & Co. 612

53. A decision of a state court that there was probable cause for beginning a trademark infringement suit in the Federal courts in which a final decree was entered dismissing the bill on the merits after a temporary injunction had been dissolved is not reviewable in the Supreme Court of the United States, where the record does not show that any claim of right under the Federal Constitution or laws was made in the state court, on the theory that such court, by its reasoning, implies that it finds probable cause, in its own opinion, that the decree of the Federal court was wrong, whereas not to assume it to be correct is to fail to give it the full faith and credit which U. S. Rev. Stat. § 905, U. S. Comp. Stat. 1901, p. 677, requires. Burt v. Smith, 121

54. References to the Dartmouth College Case in the opinions of the state courts in discussing the question whether a certain educational institution is public or private, the decision of which question would determine the validity of state legislation under the state Constitution, do not show that the contract clause of the Federal Constitution was relied upon to invalidate such legislation, so as to sustain a writ of error from the Supreme Court of the United States. Osborne v. Clark, 619

55. The question as to the validity of a state law under the Federal Constitution is not necessarily involved so as to sustain a writ of error from the Supreme Court of the United States to a state court merely because the state law logically might have been assailed as invalid under the Federal Constitution upon grounds more or less similar to those actually taken. Osborne v. Clark, 619

56. A decision of the Michigan supreme court that a foreign mutual insurance company which had not been authorized to do business in the state as provided by the state statutes could not maintain a suit to collect assessments due on a policy issued by one of its agents in another state on request of an insurance broker in Michigan who was unable to place the whole line in his own authorized companies cannot be reviewed in the Supreme Court of the United States, where the only showing of a Federal question raised before judgment is made by a request for a finding as matter of law that the state statutes do not, and could not, under the Federal Constitution, prohibit the insured from going or sending outside the state and there procuring insurance on its property located in the state from an insurance company not authorized to do business therein, which is entirely inadequate for the purpose. Swing v. Weston Lumber Co. 799

57. A claim of immunity from suit in the state court under the laws of the United States is in time to sustain a writ of error from the Federal Supreme Court, though first claimed in a petition for rehearing in the state court, if necessarily involved, expressly considered, and decided adversely by such court. McKay v. Kalyton, 566

58. The suggestion of a Federal question, first made in a petition for rehearing, filed in the highest state court, is too late to sustain a writ of error from the Supreme Court of the United States. Barrington v. Missouri, 890

Decision of Federal question by state court.

59. There has been no decision of the Federal question in the highest court of the state in which a decision in the suit could be had, which is essential to sustain a writ of error from the Supreme Court of the United States, where the highest state court dismissed an appeal in the suit because of a defect in the parties to such appeal. Newman v. Gates, 385

60. A judgment of the highest state court in favor of a trustee in bankruptcy in an action brought by him to recover the value of an alleged voidable preference may be reviewed by the Federal Supreme Court as a decision against a Federal right or immunity, specially set up or claimed, where the state court answered some of the de-

fendant's contentions by the construction which it gave to the bankrupt act. Eau Claire Nat. Bank v. Jackman, 596

Decision on non-Federal grounds.

61. The judgment of the Ohio supreme court upholding the validity of the provisions of the free banking act of March 21, 1851, § 30, as amended April 24, 1879, under which an indictment had been found against the cashier of a bank incorporated under that act, in the face of the objection that such section, by subjecting officers of institutions so incorporated to criminal liability, when officers of other banking institutions guilty of similar acts are not so subjected, denies the equal protection of the laws, cannot be reviewed by the Federal Supreme Court, where the failure of the state court to file an opinion leaves it doubtful whether that court may not have held that the words "any banking company," as used in the section in question, embrace all banking institutions in the state, whether incorporated under the free banking act or not. Bachtel v. Wilson, 357
Bachtel v. Wilson, 360

62. A state court, by deciding that a railway employee who was killed while attempting to make a coupling with a car not equipped with an automatic coupler, as required by the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, was, as a matter of law, guilty of contributory negligence in lifting his head a little too high after he had been warned of the danger, cannot defeat the appellate jurisdiction of the Federal Supreme Court, where § 8 of that statute was specially invoked as excluding the defense of assumption of risk. Schlemmer v. Buffalo, R. & P. R. Co. 681

Effect of certificate of state court.

63. The certificate of a state court that the defendant railway company, in a suit to recover damages for the infection of cattle because of a violation of the quarantine regulations promulgated by the Secretary of Agriculture under cover of the act of February 2, 1903 (32 Stat. at L. 791, chap. 349, U. S. Comp. Stat. Supp. 1905, p. 613), insisted that such statute was unconstitutional, and that, even if constitutional, did not authorize such regulations or give a remedy in damages, removes any doubt as to whether a Federal question was raised within the meaning and intent of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, chap. 575, governing writs of error to state courts, where, after a demurrer to the answer of the railway company setting forth the unconstitutionality of the law and the action of the Secretary thereunder had been sustained, verdict and judgment were rendered against the defendant. Illinois C. R. Co. v. McKendree, 298
Illinois C. R. Co. v. Edwards, 305

64. The certificate of the chief justice of the highest court of a state cannot help out the total failure of the record to show that a Federal question was raised which would sustain a writ of error from the Supreme Court of the United States. Louisville & N. R. Co. v. Smith, Huggins, & Co. 612

III. Proceedings to transfer cause.

Liability on supersedeas bond, see infra, 107.

65. The allowance of an appeal from a circuit court of appeals in a bankruptcy case on certificate of a justice of the Supreme Court cannot operate as an adjudication that such appeal is taken within the thirty days allowed by general order in bankruptcy No. 36. Conboy v. First Nat. Bank, 128

66. The thirty days' limitation prescribed by general order in bankruptcy No. 36 for taking an appeal from a final order of a circuit court of appeals in a bankruptcy case cannot be extended by filing a petition for rehearing after the thirty days have expired, although there may be but one term of that court, and, by its rules of practice, petitions for rehearing may be presented at any time during the term. Conboy v. First Nat. Bank, 128

67. The prosecution of a writ of error sued out apparently on behalf of all the defendants below will be deemed abandoned by those who have furnished no bond for costs and are not represented by counsel, especially where the bill of exceptions does not contain the answers of those defendants nor the pertinent evidence relating to their case. Yates v. Jones Nat. Bank, 1002

IV. The record.

68. An appellate court cannot assume that an amended instruction was not taken out by the jury when it retired, in the absence of any statement to that effect in the record. Cunningham v. Springer, 662

69. There is a finding of facts upon which a review can be had in the Supreme Court of the United States by writ of error to the Oklahoma supreme court, where the latter court states in its opinion that on a prior appeal it had made "a full statement and findings of facts," and had enunciated the law as applied thereto, and that finding the record the same as stated in its former opinion, and being satisfied with the law as therein declared, no new question being raised; the judgment of the trial court is affirmed. National Live Stock Bank v. First Nat. Bank, 192

70. The statement of facts made by the territorial supreme court will not be held defective on appeal to the Supreme Court of the United States because it may be confused and may give a mass of unnecessary details, if a sufficient statement finally emerges therefrom. Crowe v. Trickey, 454
Crowe v. Harmon. 461

71. The failure of the bill of exceptions on appeal to state in express terms that it contains all the evidence does not prevent the appellate court from considering or determining the case upon questions of fact if the record shows that all the evidence was contained in such bill. Crowe v. Trickey, 454
Crowe v. Harmon, 461

72. A general statement in a bill of exceptions in an action on a bond to secure performance of a building contract, that the plaintiff gave evidence by several witnesses that the buildings were not completed according to the plans and specifications, in the particulars set forth in the assignment of breaches of such contract, and that the value, by reason of the omissions, structural defects, and defective materials, was from $2,000 to $3,000 less on each building than if they had been so completed, furnishes no basis for the assertion that there was no evidence of the amount of damage sustained from each of the breaches of the contract, but only of the total damage. Mercantile Trust Co. v. Hensey, 811

73. Alleged errors of law in the opinion of the court below, which was engaged with a discussion of evidence and the inferences which might properly be drawn from it, will not be considered by the Supreme Court of the United States on a writ of error if they are not contained in the assignment of errors filed with the petition for the writ, where, on the whole, it is clear that the facts found justify the judgment rendered. Behn, Meyer, & Co. v. Campbell & Go Tauco, 857

V. Hearing and determination.

Due process of law in criminal appeal, see Constitutional Law, 36.

74. One who succeeds, on a bill of review, in having upheld as to her alone a trust declared void by the original decree, cannot, on appeal, where she does not herself appeal, go beyond supporting the modified decree and opposing every assignment of error. Landram v. Jordan, 88

75. The jurisdiction of the Supreme Court of the United States on an appeal from a territorial supreme court is limited to determining whether the findings of fact support the judgment, where the exceptions to rulings of the trial court in the admission or rejection of evidence were not insisted upon in the territorial supreme court, and were not considered by that tribunal. Crowe v. Trickey, 454
Crowe v. Harmon, 461

76. In deciding the question of the jurisdiction below, which is shown by the certificate of the Federal circuit court to have been raised, the Supreme Court cannot resort to the statements in the certificate for the purpose of supplying elements of decision which it could not properly consider in an action at law without a bill of exceptions. C. H. Nichols Lumber Co. v. Franson, 181

Error to state court.

77. Raising the Federal question for the first time in the petition for a writ of error to a state court and in the accompanying assignment of errors is not sufficient to enable the Supreme Court of the United States to consider that question, even though another Federal question has been properly raised and brought up by the same writ of error. Montana ex rel. Haire v. Rice, 490

78. The objection that the trustee in bankruptcy had no right to attack the validity of a chattel mortgage given by the bankrupt, because it did not appear that he represented any but simple contract creditors, is too late to be available on a writ of error from the Federal Supreme Court to a state court, when the point was not made in the trial court. Frank v. Vollkommer, 911

79. Findings of fact upon which depends the answer to the question whether or not certain transactions were invalid under the bankrupt act as operating to give a creditor an unlawful preference are conclusive upon the Supreme Court of the United States, in reviewing, by writ of error, the judgment of a state court. Eau Claire Nat. Bank v. Jackman, 596

80. The decision of a state court upon questions of local law is not subject to review in the Federal Supreme Court on writ of error to the state court. Iroquois Transp. Co. v. De Laney Forge & Iron Co. 836

81. Whether an order of the North Carolina Corporation Commission regulating the train service of connecting carriers was arbitrary and unreasonable, as being beyond the scope of the authority delegated to the commission by the state laws, is a local, and not a Federal, question, and cannot be reviewed on writ of error to a state court. Atlantic Coast Line R. Co. v. North Carolina Corporation Commission, 933

82. Rulings of the highest court of the state on questions involving the powers of corporations under the laws of that state are conclusive on the Federal Supreme Court when reviewing the judgment of the state court. Stone v. Southern Illinois & M. Bridge Co. 1057

83. Whether a given corporation comes within the scope of the statutes of a state conferring the right of eminent domain, and is entitled to assert such right, presents only a question of state law, which cannot be reviewed by the Federal Supreme Court on writ of error to a state court. Stone v. Southern Illinois & M. Bridge Co. 1057

84. The decision of the highest court of a state, that a state statute is repugnant to the Constitution of that state, is conclusive upon the Supreme Court of the United States in reviewing the judgment of the

state court. Montana ex rel. Haire v. Rice, 490

85. The construction given by the highest state court to a statute of that state is conclusive on the Supreme Court of the United States in determining, on writ of error to the state court, whether such statute is repugnant to the Federal Constitution. Gatewood v. North Carolina, 305

86. The decisions of the highest court of a state that an owner of land abutting on a city street has no easement of light, air, and access as against the public use of the street, or any structure which may be erected thereon to subserve and promote that public use, are conclusive upon the Supreme Court of the United States, when determining, on writ of error to the state court, whether such abutting owner has been deprived of his property without due process of law by the erection in the street of an elevated iron viaduct for general public use under the authority of a statute which makes no provision for compensation to abutting owners. Sauer v. New York, 1176

87. The construction given by the highest court of a state to a conveyance of mining property, as not including the portion of a vein beneath the surface and within the converging lines, produced, of the grantor's location, will be followed by the Federal Supreme Court, on writ of error to the state court. East Central Eureka Min. Co. v. Central Eureka Min. Co. 476

88. A Federal question respecting the validity of a paving assessment against a street railway company is not open on writ of error from the Supreme Court of the United States to a state court, where the latter court based its ruling that the question had no standing in the case upon its view as to the scope of the application of the railway company for relief from the assessment, and of the pleadings, and it is not contended that such view is erroneous. Fairhaven & W. R. Co. v. New Haven, 237

89. Any unconstitutional discrimination in N. C. Laws 1905, chap. 538, enacted to prevent dealing in futures, which may be produced by provisions raising a prima facie presumption of guilt from the proof of certain acts when done by persons generally and not when done by those engaged in manufacturing or wholesale merchandising, cannot be considered on writ of error from the Supreme Court of the United States to review a conviction under that act, where, from the state of the record, it cannot be affirmed that the finding of the jury as to the keeping of a place for gambling in futures was not based upon independent evidence, wholly irrespective of any presumption authorized by that act. Gatewood v. North Carolina, 305

90. The power of the state, consistently with the due process of law clause of the 14th Amendment to the Federal Constitution, to enact the provisions of N. C. Laws 1905, chap. 538, enacted to prevent dealing in futures, which raise a presumption of guilt on proof of the doing of certain acts specified in that statute, cannot be considered by the Supreme Court of the United States on writ of error to review a conviction under that act, where, from the state of the record, it cannot be affirmed that the finding of the jury as to the keeping of a place for gambling in futures was not based upon independent evidence, wholly irrespective of any presumption authorized by the statute. Gatewood v. North Carolina, 305

91. The question whether a schedule of interstate freight rates filed with the Interstate Commerce Commission was posted as required by the act to regulate commerce is not open in the Supreme Court of the United States on writ of error to a state court, where the latter court in effect declared that such schedule was conceded to have been filed and published in conformity with the statute, and it does not appear that if the court, having the evidence before it, had not treated the case as presented, it might not have considered the facts in relation to the publication of the schedule, and affirmatively found facts compelling the conclusion that the statute had been complied with, even if such inference was not sufficiently sustained by the findings of the trial court which the appellate court adopted. Texas & P. R. Co. v. Abilene Cotton Oil Co. 553

92. If it was necessary for a trustee in bankruptcy to represent judgment as well as simple contract creditors when attacking the validity of a chattel mortgage given by the bankrupt, it will be presumed, on a writ of error from the Federal Supreme Court to review a judgment of a state court setting aside the mortgage as in fraud of creditors, that the trial court, in passing upon all the evidence, found that he did represent both classes of creditors, where the record shows that the entire record of the proceedings in the bankruptcy court, though not returned to the Federal Supreme Court, was in evidence before the trial court. Frank v. Vollkommer, 911

93. A judgment of the highest court of a state, which, reversing the trial court, upholds as against a pre-emptor a patent from the United States under the Dalles military wagon road grant made by the act of February 25, 1867 (14 Stat. at L. 403, chap. 77), resting its conclusion upon the general proposition that there was no competent proof to impeach the records of the Land Department or to overthrow the presumption of validity which attends a patent from the United States, will not be reversed upon any presumption as to what might have been the testimony upon which the trial court made its finding that the land was situated entirely outside the limits of the grant, where such testimony, though taken and reported by a referee, is not preserved in the record. Andrews v. Eastern Oregon Land Co. 119

Questions not raised below.

94. The objection that a Federal circuit court, on motion to remand a cause to the state court whence it had been removed, should not have determined, upon affidavits, the question of the good faith of the plaintiff in suing jointly in tort a resident employee and his nonresident employer, is not open to the plaintiff in error, who made no objection to the consideration of affidavits in support of the petition for the removal, and himself filed a counter affidavit. Wecker v. National Enameling & Stamping Co. 430

95. The objection that there was no evidence of the particular damage for which alone a recovery was permitted by the trial court, but only evidence as to the total damage, cannot be first raised in an appellate court. Mercantile Trust Co. v. Hensey, 811

Review of facts.

On error to state court, see supra, 79, 91, 93.

96. Only questions of law apparent on the record can be considered by the Supreme Court of the United States on a writ of error, and there can be no inquiry whether there was error below in dealing with questions of fact. Behn, Meyer, & Co. v. Campbell & Go Tauco, 857

97. Whether the supreme court of the Philippine Islands, acting under the authority of the P. I. Code of Procedure, § 497, subd. 3, erred in setting aside the conclusion of the court of first instance as being plainly and manifestly against the weight of evidence, is a question which is not open on a writ of error from the Federal Supreme Court. Behn, Meyer, & Co. v. Campbell & Go Tauco, 857

98. The determination of the jury, approved by the trial court and by the circuit court of appeals, respecting the negligence of the captain of a steamer in running into and injuring an uncompleted extension of a government breakwater in a harbor, and respecting the contributory negligence of the government, cannot be disturbed by the Federal Supreme Court if there is any evidence upon which it can be rested. Davidson S. S. Co. v. United States, 764

99. Findings of fact made by the Interstate Commerce Commission, when concurred in by a Federal circuit court, will not be disturbed unless the record establishes that clear and unmistakable error has been committed. Illinois C. R. Co. v. Interstate Commerce Commission, 1128

100. Findings of the Interstate Commerce Commission that a classification of freight rates adopted to govern in official classification territory produces preferences and discriminations will not be interfered with on appeal when concurred in by a Federal circuit court unless the record establishes that clear and unmistakable error has been committed. Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 995

What errors warrant reversal.

101. Permitting the jury, over objections raised by a motion to strike, to take into consideration, in reaching the verdict, counts in a declaration which had not been supported by any evidence, is prejudicial error, where it is impossible from the record to say upon which counts of the declaration the verdict was based, notwithstanding the provision of the Illinois practice act, § 57, that when an entire verdict is given on several counts it will not be set aside or reversed because of any defective count, if one or more of the counts be sufficient to sustain the verdict. Wilmington Star Min. Co. v. Fulton, 708

102. Charging the jury that, unless an accident to a railway brakeman was caused solely by the negligence of the conductor, the defendant railway company was liable, even if erroneous in that "the sole cause" is not synonymous with "proximate cause," does not prejudice the defendant, where further instructions, given at its request, were to the effect that, if the conductor's negligence was the proximate cause of the accident, there could be no recovery, and the court's attention was not specifically drawn to the objection to the word "sole." Gila Valley, G & N. R. Co. v. Lyon, 276

103. The refusal to appoint an interpreter when the defendant in a criminal case is testifying is not prejudicially erroneous where it does not appear from the answers made by the witness that there was any abuse of the discretionary power lodged in the trial court. Perovich v. United States, 722

Harmless errors.

104. Error, if any, in refusing to strike out expert testimony as to the reasonable value of legal services, because, on cross-examination, it appeared that such testimony was based upon an assumption of fact not disclosed to the jury, is not prejudicial, where the jury, by its verdict, finds that the amount of compensation to be paid for such services was fixed by contract, and each witness testified upon the assumption that the compensation was not so fixed, and it was upon that assumption alone that their testimony was submitted to the jury. Cunningham v. Springer, 662

105. Even if error could be attributed to the Interstate Commerce Commission in deciding that expenditures for permanent improvements and equipment should not be charged to the current or operating expenses of a single year for the purpose of testing the reasonableness of an increased freight rate, such error would not require the reversal of a decree enforcing an order of the Commission requiring carriers to desist from enforcing such rate, where the findings show that the old rates were profitable and that dividends were declared even when permanent improvements and equip-

ment were charged to operating expenses. Illinois C. R. Co. v. Interstate Commerce Commission, 1128

VI. Judgment.

106. Costs on the affirmance by the Federal Supreme Court of a decree of the court of appeals of the District of Columbia which affirmed a decree of the supreme court of the District in a suit to construe a will, upholding all the disputed provisions, will be taxed against the unsuccessful appellants, where the executor did not appeal from the original decree nor from the decree of affirmance by the court of appeals. Iglehart v. Iglehart, 575

VII. Liability on appeal bond.

107. A party who, on appeal from a decree for the recovery of possession of real property unless the balance of the purchase price should be paid before January 1, 1899, secures an extension of the time for such payment until November 1, 1899, has so prosecuted his appeal to effect, within the meaning of a supersedeas bond to secure the adverse party from loss in the use and possession of the premises, as to preclude any recovery on such bond for the use and occupation of the property between those dates. Crane v. Buckley, 260

APPEARANCE.

1. A defendant in a suit in a state court does not, by special appearance for the sole purpose of removing the cause to a Federal circuit court, before service of summons, submit himself to the jurisdiction of the state court, nor, upon removal to the Federal court, deprive himself of the right to object to the manner of service upon him in that court. Clark v. Wells, 138

2. The exercise of the right of removing a cause from a state to a Federal circuit court before service of summons by a defendant who appeared specially for that sole purpose does not amount to a general appearance. Clark v. Wells. 138

3. The benefit of the qualified appearance by defendants at the time of filing pleas to the jurisdiction is not waived by arguing the merits of the case as disclosed by the bill on the hearing as to the sufficiency of such pleas, where there was no motion for the dismissal of the bill for want of equity, and the discussion of the merits was permitted or invited by the court in order that it might be informed on that question if it concluded to consider the merits along with the question of the sufficiency of the pleas. Citizens' Sav. & T. Co. v. Illinois C. R. Co. 703

APPROPRIATIONS.

Congressional appropriation in favor of colleges of agriculture and mechanic arts, see Colleges.

ARMY.

Set-off against claim for extra pay, see Set-Off and Counterclaim.

Courts-martial, see Courts-Martial.

1. The refusal of a certificate of honorable discharge to a volunteer officer as of the date when his regiment was mustered out, on the mistaken ground that he had already legally been dishonorably discharged, cannot be regarded as an active retention of such officer in the service, so as to entitle him to pay after that date, in view of the provision of the act of March 2, 1899 (30 Stat. at L. 977, 981, chap. 352), § 15, for the mustering out of officers and men of the Volunteer Army, and of the requirement of the act of January 12, 1899 (30 Stat. at L. 784, chap. 46), that, as far as practicable, the discharge of officers and men should take effect at the muster out of the organization to which they belonged. United States v. Brown, 1046

2. A volunteer officer who has been given the two months' extra pay for service outside the United States allowed by the act of January 12, 1899 (30 Stat. at L. 784, chap. 46), on muster out and discharge, is not entitled to the one month's extra pay authorized by that act for service within the United States. United States v. Brown, 1046

3. Special orders purporting to appoint and to confirm the appointment to the command of a cavalry troop, in the absence of its captain, of the senior subaltern present, on whom such command would regularly devolve, "unless otherwise specially directed," under the Army Regulations of 1895, § 253, can give such officer no right to the increased pay provided for by the act of April 26, 1898 (30 Stat. at L. 365, chap. 191, U. S. Comp. Stat. 1901, p. 895), § 7, when an officer is exercising, "under assignment in orders issued by competent authority," a command above that pertaining to his grade. United States v. Mitchell, 782

ASHTON.

J. Hubley, resolutions on death of, 1194

ASSESSMENTS.

For public improvement, see Public Improvements.

ASSETS.

Of bankrupt estate, see Bankruptcy, 5–8.

ASSIGNMENT.

Recording assignment of chattel mortgage, see Chattel Mortgage.

ASSUMPTION OF RISK.

See Master and Servant, 2.

ATTACHMENT.
Enforcing attachment in cause removed to Federal court, see Removal of Causes, 5.

ATTORNEYS.
Allowance of counsel fees in suit by divorced wife to obtain liquidation of community property, see Husband and Wife, 6.

AUTOMATIC COUPLERS.
Burden of proof to bring carrier within exception from automatic coupler act, see Evidence, 5.
See also Master and Servant, 1, 2.

BANKRUPTCY.
Appeals in bankruptcy cases, see Appeal and Error, 2, 4.
Time for taking appeal, see Appeal and Error, 65, 66.
Interference by state court with court of bankruptcy, see Courts, 16.
Burden of proving unfairness in sale by pledgee of bankrupt's property, see Evidence, 6.
Limitation of actions in bankruptcy cases, see Limitation of Actions, 1.

1. The validity of all other claims against the bankrupt, and the question whether others have received voidable preferences and have not been required to surrender them, cannot be litigated in a suit in a state court to avoid an alleged unlawful preference, since this would, in effect, transfer the administration of the bankrupt's estate from the Federal district court to the state court. Eau Claire Nat. Bank v. Jackman, 596

2. The power of sale may be exercised by a pledgee conformably to the contract of pledge during the time between the filing of the petition in bankruptcy against his pledgeor and the adjudication in bankruptcy, since the title of the bankrupt is, by the act of July 1, 1898 (30 Stat. at L. 560, chap. 541, U. S. Comp. Stat. 1901, p. 3443), § 70a, e, vested in the trustee by operation of law only as of the date of the adjudication. Hiscock v. Varick Bank, 945

3. Assignees in bankruptcy cannot be deemed to have abandoned the interest in remainder of the bankrupt under a testamentary trust because they did not sell such interest, where, apparently as soon as they learned of the existence of the trust fund and of the fact that creditors of the bankrupt were seeking to reach and apply this interest in satisfaction of his debts, they brought a bill in equity in the nature of a bill *quia timet* to compel the transfer to them of the bankrupt's interest, and to enjoin the trustee from paying any part of the trust fund to the bankrupt or those claiming under him. Hammond v. Whittredge, 606

4. Holders of so-called warehouse receipts under a pledge which was invalid for want of a change of possession have no equitable lien which takes precedence of the title of the trustee in bankruptcy of the pledgeor, by virtue of the special provisions of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 70a, vesting in the trustee the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which, prior to the filing of the petition, might have been levied upon and sold by judicial process against him, and of § 70e, giving the trustee power to avoid transfers by the bankrupt which a creditor of the latter might avoid, and to recover the property so transferred or its value. Security Warehousing Co. v. Hand, 1117

Assets.
See also Pledge, 2.

5. The words "cash surrender value," as used in the proviso to § 70 of the bankrupt act of July 1, 1898 (30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3451), which permits a bankrupt to redeem a policy of insurance on his life from the claims of creditors by paying or securing to the trustees the cash surrender value, embrace policies which, by their terms, or by the practice or concession of the company issuing them, have such value. Hiscock v. Mertens, 771

6. The investment feature of so-called tontine policies of life insurance does not exclude them from the proviso to § 70 of the bankrupt act of July 1, 1898 (30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3451), which permits the bankrupt to redeem a policy of insurance on his life from the claims of creditors by paying or securing to the trustee its cash surrender value. Hiscock v. Mertens, 771

7. Life insurance policies which had not lapsed either when the petition to have the insured declared a bankrupt was filed, or when the bankruptcy was adjudged, have a cash surrender value within the meaning of the proviso to § 70 of the bankrupt act of July 1, 1898 (30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3451), which permits a bankrupt to redeem a policy of insurance on his life from the claims of the creditors by paying or securing to the trustee the cash surrender value within thirty days after such value has been ascertained and stated to the trustee by the company issuing the policy, although it may be the practice of the company not to accept a surrender until the policy has lapsed. Hiscock v. Mertens, 771

8. Policies insuring the life of one member of a bankrupt partnership, payable, one to him or his legal representatives, and the other to his wife or children or to him, in the event of their death before his, which have been individually pledged by him, do not belong to the partnership estate, although the partnership may have pledged the policies in connection with his separate individual pledge. Hiscock v. Varick Bank, 945

Claims and distribution.
See also Pledge, 3.

9. The Supreme Court of the United

States was empowered by the provision of the bankrupt act of July 1, 1898 (30 Stat. at L. 554, chap. 541, U. S. Comp. Stat. 1901, p. 3434), § 30, that all necessary rules, forms, and orders as to procedure and for carrying the act into force and effect shall be prescribed, and may be amended from time to time, by that court, to provide by general orders in bankruptcy No. 21, that proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred. J. B. Orcutt Co. v. Green, 390

10. The presentation and delivery of proof of claim to the trustee in bankruptcy within a year after the adjudication is a sufficient filing within the meaning of the bankrupt act of July 1, 1898 (30 Stat. at L. 554, chap. 541, U. S. Comp. Stat. 1901, p. 3434), § 57, when read in connection with general orders in bankruptcy No. 21, providing that proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred. J. B. Orcutt Co. v. Green, 390

11. A trustee in bankruptcy cannot file with himself his proof of his own claim against the bankrupt estate, nor will the delivery of such claim to his attorney, to be filed with the referee, be deemed the equivalent of a delivery to such referee. J. B. Orcutt Co. v. Green, 390

12. Only when the collateral held by secured creditors of the bankrupt has not been disposed of by the creditor in accordance with the contract of pledge can a court of bankruptcy exercise its power, under the bankrupt act of July 1, 1898 (30 Stat. at L. 560, chap. 541, U. S. Comp. Stat. 1901, p. 3443), § 57h, to determine the value of such securities, and to direct their disposition. Hiscock v. Varick Bank, 945

Priorities.

13. The priority of payment of wages "due to workmen, clerks, or servants" given by the bankruptcy act of July 1, 1898 (30 Stat. at L. 563, chap. 541, U. S. Comp. Stat. 1901, p. 3447), § 64, when earned within three months before the commencement of the bankruptcy proceedings extends to claims which had been assigned before the bankruptcy proceedings were begun. Shropshire, Woodliff, & Co. v. Bush, 436

14. The claim of the state of New Jersey against the estate of a bankrupt corporation organized under the laws of that state, but doing no business and having no property there, for the "annual license fee or franchise tax" on its outstanding capital stock, imposed under N. J. Gen. Stat. 1895, §§ 251, 252, 257, 258, 260, is for a tax legally due and owing to the state, which, under the bankrupt act of July 1, 1898 (30 Stat. at L. 563, chap. 541, U. S. Comp. Stat. 1901, p. 3447), § 64a, must be paid in advance of dividends to creditors. New Jersey v. Anderson, 284

15. The finding of the state board of assessors as to the amount of outstanding capital stock of a corporation, made for the purpose of fixing the amount of the annual license fee or franchise tax imposed by N. J. Gen. Stat. 1895, §§ 251, 252, 257, 258, 260, is not conclusive on the bankruptcy court, in view of the provisions of the bankrupt act of July 1, 1898 (30 Stat. at L. 563, chap. 541, U. S. Comp. Stat. 1901, p. 3447), § 64a, that, in case any question arises as to the amount or legality of any tax entitled to priority of payment under that section, the same shall be heard and determined by the court. New Jersey v. Anderson, 284

16. The franchise tax assessed under N. J. Gen. Stat. 1895, §§ 251, 252, 257, 258, 260 on the basis of the capital stock of a corporation issued and outstanding on the 1st of January preceding the making of the return, is "legally due and owing" within the meaning of the bankrupt act of July 1, 1898 (30 Stat. at L. 563, chap. 541, U. S. Comp. Stat. 1901, p. 3447), § 64a, providing that taxes must be paid in advance of the payment of dividends to creditors, although such tax may not have been collectible until after the corporation was adjudged a bankrupt. New Jersey v. Anderson, 284

Discharge.

17. Claims for damages arising out of false and fraudulent representations inducing sales of merchandise might have been proved under the bankrupt act of July 1, 1898 (30 Stat. at L. 550, 562, chap. 541, U. S. Comp. Stat. 1901, pp. 3428, 3447), § 63a, as debts "founded upon an open account or upon a contract, expressed or implied," if the sellers had chosen to waive the tort and take their places with the other creditors of the bankrupt estate, and are therefore barred by a discharge in bankruptcy. Tindle v. Birkett, 762

18. The words "while acting as an officer or in any fiduciary capacity," as used in the bankrupt act of July 1, 1898 (30 Stat. at L. 550, 562, chap. 541, U. S. Comp. Stat. 1901, pp. 3428, 3447), § 17, subd. 4, making an exception from the operation of a discharge in bankruptcy in favor of debts created by the bankrupt's "fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity," extend to "fraud, embezzlement, misappropriation," as well as to "defalcation." Tindle v. Birkett, 762

BANKS.

1. The stockholders of record at the time of the reduction of the capital stock of a national bank, and not those of record at the expiration of its charter, are entitled to the proceeds of the bad or doubtful assets set apart at the time of such reduction in compliance with the requirement of the Comptroller of the Currency that such assets should be charged off or set aside for the benefit of those who were then stockholders, the bank, after such reduction, being left with its capital stock, as reduced, unimpaired, and a surplus exclusive of the assets in question. Jerome v. Cogswell, 363

2. Directors of a national bank who merely negligently participated in or assented to

the false representations as to the bank's financial condition contained in the official report to the Comptroller of the Currency, made and published conformably to U. S. Rev. Stat. § 5211, U. S. Comp. Stat. 1901, p. 3498, cannot be held civilly liable to anyone deceived to his injury by such report, since the exclusive test of such liability is furnished by U. S. Rev. Stat. § 5239, U. S. Comp. Stat. 1901, p. 3515, which makes a knowing violation of the provisions of the title relating to national banks a prerequisite to such liability. Yates v. Jones Nat. Bank, 1002

Stockholder's liability.

3. The pledgee of national bank stock as collateral security for a note, with power of public or private sale for the liquidation of the pledge, becomes the beneficial owner of such stock, and, as such, subject to the liability of a stockholder under U. S. Rev. Stat. § 5151, U. S. Comp. Stat. 1901, p. 3465, where, after the death of the pledgeor, it causes the stock to be registered in the name of an employee with no beneficial interest, and afterwards indorses upon the note the supposed value of the stock as of the date of the credit, and presents the note, as reduced by the amount of such valuation, to the pledgeor's administrator, who allows the claim in this form. Ohio Valley Nat. Bank v. Hulitt, 423

BEADS.
Duties on metal beads, see Duties, 3.

BILL OF EXCEPTIONS.
See Appeal and Error, 71, 72.

BILL OF REVIEW.
See Review.

BILL OF RIGHTS.
In Philippine Islands, see Constitutional Law, 36.

BILLS AND NOTES.
Given for patent rights, see Patents, 4, 5.

BONDS.
Liability on appeal bond, see Appeal and Error, 107.
Presumption as to performance of condition precedent, see Evidence, 2.
Pleadings in action on, see Pleading, 1–3.

Sales of merchandise for which the purchasers have not been called upon to pay until four months have elapsed are covered, whether made on four months' credit or not, by a bond conditioned that the purchasers will pay the moneys due and to become due on merchandise sold and to be sold by the obligees which the purchasers "have bound and hereby bind themselves to pay for in four months after the date of each respective purchase." McGuire v. Gerstley, 581
Clark v. Gerstley, 589

BOUNDARIES.
Sufficiency of evidence to show boundary between states, see Evidence, 13.

BRIDGES.
Authority of Secretary of War over, see Constitutional Law, 2.
Over navigable stream, see Eminent Domain.

BROKERS.
A broker who finds a person who takes an option on the purchase of a certain mining property, which is never carried out, cannot, where the owner dies before the option expires, recover his agreed commission from the administrator, when the latter, after the expiration of the option, sells the property to the same person and at the same price.
Crowe v. Trickey, 454
Crowe v. Harmon, 461

BUILDING CONTRACT.
See Contracts.

BURDEN OF PROOF.
See Evidence, 4–6.

CANALS.
See Panama Canal Zone.

CARRIERS.
State regulation as affecting interstate commerce, see Commerce, 2–5, 8–10, 12.
Due process of law in state regulation of connecting carriers, see Constitutional Law, 21.
Equal protection of the laws in state regulation of connecting carriers, see Constitutional Law, 21.
Burden of proof to bring carrier within exception from automatic coupler act, see Evidence, 5.
Duty under automatic coupler act, see Master and Servant, 1.

1. A clause in a bill of lading exempting a carrier from liability for loss by fire is valid although the regular freight rates were charged and no option was given to the shipper to receive any other form of bill of lading. Arthur v. Texas & P. R. Co. 590

2. A carrier which issues bills of lading to a shipper in return for receipts given by a compress company for cotton in the latter's custody is liable for loss by fire due to the negligence of the servants of the compress company in caring for the cotton while awaiting the compression and loading which the railway company had ordered done for its own convenience and at its own cost, where such company, if it did not regard the presentation of the receipts as a tender of the cotton, or if it were not a valid tender, could, notwithstanding the rules of the Texas state railroad commission as well as its own rules, have refused to sign the bills of lading. Arthur v. Texas & P. R. Co. 590

3. The power of the state to regulate railroads extends to securing to the public

reasonable facilities for making connections between different carriers. Atlantic Coast Line R. Co. v. North Carolina Corporation Commission, 933

Rates..

Due process of law in state regulation of rates, see Constitutional Law, 19, 20.

Sufficiency of evidence on question of reasonableness of state regulation, see Evidence, 14.

4. The state of Mississippi may, so far as the Federal Constitution is concerned, establish a flat rate of 3½ cents per 100 pounds on grain and grain products carried from Vicksburg to Meridian over the road of the Alabama & Vicksburg Railway Company, where that company, under the guise of a "rebilling rate," gives any Vicksburg merchant receiving a car load of grain or grain products over the Vicksburg, Shreveport, & Pacific Railroad a rate of 3½ cents per 100 pounds on any grain he may ship to Meridian. Alabama & V. R. Co. v. Mississippi Railroad Commission, 289

5. Expenditures for permanent improvements and equipment should not be charged to the current or operating expenses of a single year, for the purpose of testing the reasonableness of an increased freight rate. Illinois C. R. Co. v. Interstate Commerce Commission, 1128

6. Interstate freight rates are established when a schedule thereof is filed by a carrier with the Interstate Commerce Commission and copies are furnished by the railway company to its freight offices, although such rates may not be "posted" as required by § 6 of the act to regulate commerce, as amended March 2, 1889 (25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158), which is not made a condition precedent to the establishment and putting in force of the tariff of rates, but is a provision based upon the existence of an established rate, which has for its object the affording of special facilities to the public for ascertaining the rates actually in force. Texas & P. R. Co. v. Cisco Oil Mill, 562

7. No presumption of law that a freight rate upon a particular commodity is reasonably low exists because such rate has been duly published and filed by the carrier with the Interstate Commerce Commission. Illinois C. R. Co. v. Interstate Commerce Commission, 1128

8. The disturbance in the relations between freight rates for soap in car-load and less than car-load lots created by advancing the former from class 6 to class 5, and the latter from class 4 to class 3 in a new classification adopted to govern in official classification territory, was not cured by classifying soap in less than car-load lots at 20 per cent. less than third class, but not less than fourth class, where the result of applying this modified percentage classification to the varying rates is to leave soap in less than car-load lots in the fourth class in portions of the territory and in a higher class in other portions. Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 995

9. Unlawful preferences and discriminations are created by fixing the freight rate for common soap in less than car-load lots in a new classification adopted to govern in official classification territory at 20 per cent. less than third class, but not less than fourth class, at which that commodity had previously been rated, where the result of applying this classification to the varying rates is to leave soap in less than car-load lots in the fourth class to a considerable extent in one of the subdivisions of such classification territory, and in a higher class in the other subdivision. Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 995

10. A shipper cannot maintain an action against a common carrier to obtain relief from an alleged unreasonable freight rate exacted from him for an interstate shipment, without reference to any previous action by the Interstate Commerce Commission, where such rate has been filed with that Commission and promulgated as provided by the act to regulate commerce, and is the rate which it is the duty of the carrier, under that act, to enforce against shippers until changed in accordance with the provisions of that statute, since the independent right of an individual originally to maintain actions to obtain pecuniary redress for violations of the act, conferred by § 9, must be confined to such wrongs as can, consistently with the context of the act, be redressed without previous action by the Commission, and the provision of § 22, that nothing therein "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," cannot be construed as continuing in shippers a common-law right the continued existence of which would be absolutely inconsistent with the provisions of the statute. Texas & P. R. Co. v. Alilene Cotton Oil Co. 553

11. The rule that an action at law to recover excessive interstate freight charges cannot be maintained in advance of action by the Interstate Commerce Commission will not prevent a Federal circuit court which has suspended proceedings on a bill seeking relief from an advance in freight rates, pending action by the Commission, from granting relief in the exercise of its powers under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 16, as a court of equity, on a petition filed after the Commission has acted, stating the substance of the findings of the Commission, and containing a copy of its report and opinion, where defendants have stipulated in open court that, in case complainants prevailed, decree of restitution might be made. Southern R. Co. v. Tift, 1124

CASES CERTIFIED.

1. A question of mixed law and fact, upon

the decision of which the whole case turns, cannot be certified by a circuit court of appeals to the Federal Supreme Court for determination. Chicago, B. & Q. R. Co. v. Williams, 875

2. A question containing more than a single question or proposition of law cannot be certified by a circuit court of appeals to the Supreme Court of the United States for determination. Quinlan v. Green County, 860

CERTIFICATE.
Of circuit court as aiding appellate jurisdiction of Supreme Court, see Appeal and Error, 13, 14, 76.
Of state court as aiding appellate jurisdiction of Federal Supreme Court, see Appeal and Error, 63, 64.
Conclusiveness of architect's certificate of completion, see Contracts, 2.

CERTIORARI.
1. Certiorari to review a judgment of the court of appeals of the District of Columbia in a criminal case will not be granted by the Federal Supreme Court, where such case, however important it may be to the petitioner, does not involve a question of gravity and general importance, there being no conflict between the decisions of state and Federal courts, or between those of Federal courts of different circuits, and nothing affecting international relations. Fields v. United States, 807

2. Certiorari to the circuit court of appeals will be allowed by the Federal Supreme Court, where the importance of the case demands it, to avoid any question as to the jurisdiction of the Supreme Court of a writ of error duly allowed, where an application for certiorari was made after a motion to dismiss the writ of error was filed. Montana Min. & Mill. Co. v. St. Louis Min. & Mill. Co. 444

CESSION.
Of Indian lands, see Indians, 3.

CHATTEL MORTGAGE.
1. The provision for recording the satisfaction of a chattel mortgage by the mortgagee, his assigns or personal representative, which is made by Kan. Gen. Stat. 1901, § 4251, ¶ 36, does not make it necessary to record or file the assignment of a chattel mortgage in order to protect the assignee. National Live Stock Bank v. First Nat. Bank, 192

2. The failure of the Kansas laws to prohibit the recording of the assignment of a chattel mortgage given to secure a negotiable note does not make such action necessary in order to protect the assignee, but, in order to compel such action, there must be a law which provides for such record, either in express terms or by plain and necessary implication. National Live Stock Bank v. First Nat. Bank. 192

CHEROKEE NATION.
Rights of intermarried whites, see Indians, 6, 7, 9-12.
Rights adopted whites, see Indians, 8.
Rights of married out and abandoned whites, see Indians, 12.
Effect of compilation on original law, see Statutes, 7.

CHIPPEWA NATION.
Cession of lands to United States, see Indians, 3.

CHOCTAW AND CHICKASAW CITIZENSHIP COURT.
Powers, see Indians, 1.
Effect as to persons not parties of judgment in test case, see Judgment, 4.

CHOCTAW NATION.
Ratification of illegal judicial sale, see Judicial Sale.

CIRCUIT COURTS.
Appellate jurisdiction over, see Appeal and Error, 11-14.
Equitable relief against exaction of unreasonable interstate rate, see Carriers, 11.
Original jurisdiction of, see Courts.
Judicial enforcement of order of Interstate Commerce Commission, see Interstate Commerce Commission, 3, 4; Judgment, 2.
Removal of cause to, see Removal of Causes.

CIRCUIT COURTS OF APPEALS.
Appellate jurisdiction of, see Appeal and Error, 7, 10.
Certifying question to Federal Supreme Court, see Cases Certified.
Certiorari from Supreme Court, see Certiorari, 2.

CITIZENS.
Effect of citizenship of parent on status of minor child, see Aliens.
Citizenship as affecting appellate jurisdiction of Supreme Court over state courts, see Appeal and Error, 25.
Corporation not entitled to privileges and immunities of citizens of United States, see Constitutional Law, 52.
Citizenship as ground for jurisdiction, see Courts, 3, 4.
Review in Indian citizenship cases, see Indians, 1.
Review of final judgment in Indian citizenship cases, see Indians, 1.
Citizenship as ground for removal of cause, see Removal of Causes, 2.

CIVIL RIGHTS.
Fees of United States commissioner, see Costs and Fees.

Congress was not empowered by U. S. Const., 13th Amend., to make it an offense against the United States, cognizable in the

Federal courts, for private individuals to compel negro citizens, by intimidation and force, to desist from performing their contracts of employment, but the remedy must be sought through state action and in state tribunals, subject to the supervision of the Supreme Court of the United States by writ of error in proper cases. Hodges v. United States, 65

CLAIMS.
What claims against United States are included in release, see Release.

The enactment by Congress of the provision of the Indian appropriation act of March 3, 1903 (32 Stat. at L. 1010, 1011), § 13, for the presentation to, and decision on the merits by, the court of claims of a claim by a register of the land office for commissions for selling the lands ceded by the Osage Indians to the United States by the treaty of September 29, 1865 (14 Stat. at L. 687), to be sold for their benefit, does not imply any admission that there is anything due the claimant. Stewart v. United States 1017

CLERKS.
1. Separate trials under one indictment against several defendants are separate causes, within the meaning of U. S. Rev. Stat. § 828, U. S. Comp. Stat. 1901, p. 635, prescribing the docket fees which the clerk of a Federal court may charge in a cause. United States v. Keatley, 618

2. The services of a clerk of a Federal court for recording abstracts of judgments, as required by a rule of court, are not covered by the docket fees prescribed by U. S. Rev. Stat. § 828, ¶ 10 (U. S. Comp. Stat. 1901, p. 635), and separate charges therefor are justified by ¶ 8 of that section, prescribing the fees which such clerk may receive for "making any record." United States v. Keatley, 618

COLLATERAL ATTACK.
On judgment, see Judgment, 9, 10, 15.

COLLEGES.
No particular institutions are entitled to the grants and appropriations made respectively by the act of July 2, 1862 (12 Stat. at L. 503, chap. 130), granting lands or land scrip to the several states for the endowment, support, and maintenance of at least one college, where the leading object shall be to teach agriculture and the mechanic arts, and by the act of August 30, 1890 (26 Stat. at L. 417, chap. 841, U. S. Comp. Stat. 1901, p. 3214), appropriating annually certain sums to each state and territory for the more complete endowment and maintenance of such colleges, but the states take the property, charged with the duty to devote it to the purposes named. Wyoming ex rel. Wyoming Agri. College v. Irvine, 1063

COLLISION.
Enforcing contribution where both vessels in fault, see Admiralty, 1.
Contribution between vessels in fault, see Contribution.

A captain engaged in navigating the waters of Lake Superior cannot, as a matter of law, be said to be free from negligence in colliding with an uncompleted extension of a government breakwater in an important harbor in that lake, where he had the means of ascertaining the conditions, which, if known, would have prevented the collision. Davidson S. S. Co. v. United States, 764

COLORADO.
Rights of, in waters of Arkansas river, see Waters, 1, 2.
Right of Kansas to enjoin Colorado from diverting Arkansas river, see Injunction, 2.

COMBINATIONS.
See Monopolies.

COMITY.
Sustaining testamentary trust on principles of comity, see Conflict of Laws.

COMMERCE.
Necessity of compensation for requiring changes in bridge over interstate water way, see Eminent Domain, 1.
Interstate Commerce Commission, see Interstate Commerce Commission.
Construction of automatic coupler act, see Master and Servant, 1, 2.
Including property of interstate railway company lying outside of state in valuation for taxation, see Taxes, 1.

1. The exclusive control over interstate commerce vested in Congress by the Federal Constitution or laws is not infringed by the enforcement against a vessel engaged in interstate commerce of a lien given by a state statute for materials furnished for her construction. Iroquois Transp. Co. v. De Laney Forge & Iron Co. 836

2. The intention or purpose of the owners of an interstate shipment of a car load of grain to forward such car from the original terminal point to another point in the same state does not make the shipment between such two points, when performed by a connecting carrier to which the car was delivered by the original terminal carrier in obedience to the instructions of the owner, an interstate one, and, as such, exempt from the regulations of the state railroad commission. Gulf, C. & S. F. R. Co. v. Texas, 560

3. Applying to interstate transportation the provisions of Pa. act of April 4, 1868, restricting, as against a railway company, the rights of persons injured in the course of their employment in or about the railroad to those which an employee of the railway company would have under like circumstances, does not make such statute repugnant to the commerce clause of the 203, 204, 205, 206 U. S.

Federal Constitution. Martin v. Pittsburg & L. E. R. Co. 184

4. Interstate commerce is unconstitutionally interfered with by an order of the Mississippi railroad commission, made in the exercise of its discretionary authority, under Miss. Code 1892, §§ 3550, 4302, requiring a railway company to stop its interstate mail trains at a specified county seat, where proper and adequate railway passenger facilities are otherwise afforded that station. Mississippi R. Commission v. Illinois C. R. Co. 209

5. An unconstitutional interference with interstate commerce is not made by the tax on transfers of corporate stock imposed by N. Y. Laws 1905, chap. 241, as applied to a sale in New York, between two nonresidents, of the stock of foreign railway corporations. New York ex rel. Hatch v. Reardon, 415

6. Only articles imported from, or exported to, foreign countries, are within the purview of U. S. Const. art. 1, § 10, forbidding any state, without the consent of Congress to lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws. New Mexico ex rel. McLean v. Denver & R. G. R. Co. 78

7. Interstate commerce is unlawfully burdened by a municipal ordinance exacting a license fee from a person employed by a foreign corporation to solicit, within the municipality, orders for groceries, which the company fills by shipping goods to him for the delivery to, and collection of the purchase price from, the customer, who has the right to refuse the goods if not equal to sample, such goods always being shipped in distinct packages, corresponding to the several orders, except in the case of brooms, which, after being tagged and marked, like the other articles, according to the number ordered, are then tied together in bundles of about a dozen, wrapped up conveniently for shipment. Rearick v. Pennsylvania, 295

Intoxicating liquors.

Evidence of criminal prosecution of express company for violating local option law, see Evidence, 10.

8. Delivery of an interstate shipment of intoxicating liquors to the consignees is essential to constitute their arrival in the state within the meaning of the Wilson act of August 8, 1890 (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), subjecting all intoxicating liquors arriving in the state to the laws of such state enacted in the exercise of its police power. Heymann v. Southern R. Co. 178

9. The mere placing of an interstate shipment of intoxicating liquors in the carrier's warehouse to await delivery to the consignees does not constitute their arrival in the state within the meaning of the Wilson act of August 8, 1890 (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), subjecting all intoxicating liquors arriving in the state to the laws of such state enacted in the exercise of its police power. Heymann v. Southern R. Co. 178

10. The agreement of the local agent of an express company to hold for a few days a C. O. D. interstate shipment of intoxicating liquors, to suit the convenience of the consignee in paying for such liquor and taking it away, does not destroy the character of the transaction as interstate commerce, so as to render the express company amenable to prosecution for violating a state local option law. Adams Exp. Co. v. Kentucky, 987
Adams Exp. Co. v. Kentucky, 992
American Exp. Co. v. Kentucky, 993

11. The annual license charge imposed by a state law upon the business of selling or offering for sale intoxicating liquors within the state by any traveling salesman who solicits orders in quantities of less than 5 gallons cannot be regarded, when applied to interstate transactions, as repugnant to the commerce clause of the Federal Constitution, in view of the provisions of the Wilson act of August 8, 1890 (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), that intoxicating liquors coming into the state shall be as completely under its control as if manufactured therein. Delamater v. South Dakota, 724

Inspection and quarantine laws.

See also supra, 6.

12. The prohibition against the receipt by common carriers for transportation beyond the limits of the territory of hides which do not bear the evidence of inspection required by N. M. act of March 19, 1901, is a valid exercise of the police power, and does not—there being no congressional legislation covering the subject and making a different provision—violate the commerce clause of the Federal Constitution, although hides not offered for transportation are not required to be inspected after thirty days in slaughterhouses, and not at all outside of the slaughterhouses, and although the incidental effect of the statute may be to levy a tax upon this class of property. New Mexico ex rel. McLean v. Denver & R. G. R. Co. 78

13. The amount of the fee imposed by N. M. act of March 19, 1901, for the inspection of hides offered for transportation beyond the limits of the territory, does not render that statute—if otherwise valid—repugnant to the commerce clause of the Federal Constitution, where it is not so unreasonable and disproportionate to the services rendered as to challenge the good faith of the law. New Mexico ex rel. McLean v. Denver & R. G. R. Co. 78

14. Quarantine regulations promulgated by the Secretary of Agriculture acting under cover of the act of February 2, 1903 (32 Stat. at L. 791, chap. 349, U. S. Comp. Stat. Supp. 1905, p. 613), entitled "An Act to Enable the Secretary of Agriculture to More Effectually Suppress and Prevent the Spread of Contagious and Infectious Diseases of Live Stock, and for Other Purposes," are

void as in excess of the powers conferred by that act, where, on their face, they apply as well to intrastate as to interstate commerce. Illinois C. R. Co. v. McKendree, 298
Illinois C. R. Co. v. Edwards, 305

COMMISSIONERS.
Fees of, in civil rights cases, see Costs and Fees.
Set-Off against commissioner's claim for fees, see Set-Off and Counterclaim, 2.

COMMISSIONS.
Of broker, see Brokers.

COMMUNITY PROPERTY.
Rights of divorced wife in, see Husband and Wife.

COMPROMISE AND SETTLEMENT.
An adjustment of subsurface rights, and not merely the establishment of a surface boundary line between two conflicting lode mining claims, was accomplished by an agreement to compromise adverse proceedings, followed by the execution of a bond by the locator of one of such claims, by the terms of which he was to obtain a patent, and was then to execute a deed of certain of the disputed territory, "together with all the mineral therein contained," which deed, when executed, pursuant to a decree for specific performance, conveyed the tract described in the bond with "all the mineral therein contained," together with "all the dips, spurs, and angles, and also all the metals, ores, gold and silver-bearing quartz rock and earth therein." Montana Min. & Mill. Co. v. St. Louis Min. & Mill. Co. 444

CONCLUSIONS.
See Evidence, 8.

CONDITIONAL SALE.
See Sale.

CONDITIONS SUBSEQUENT.
See Real Property.

CONFESSIONS.
See Evidence, 9.

CONFLICT OF LAWS.
A testamentary trust in favor of the Greenwood Cemetery Company of Brooklyn, permitted by the laws of New York, for the perpetual maintenance of a cemetery lot and monument, will, on principles of comity, be upheld in the courts of the District of Columbia, although the testatrix was domiciled in the District at the time of her death, and the funds to be applied to such trust arose from property owned by her in the District at that time, since, under D. C. Code (31 Stat. at L. 1295, chap. 854), § 669, grants on similar trusts are permitted to domestic corporations. Iglehart v. Iglehart, 575

CONGRESS.
Power to protect against individual interference with civil rights, see Civil Rights.
Delegation of power by, see Constitutional law, 1, 2.
Power to construct Panama Canal, see Panama Canal Zone, 2.
Power over post roads, see Postoffice.

1. The reclamation of arid lands not the property of the United States, nor situated within the limits of a territory, was not comprehended in the grant to Congress by U. S. Const. art. 4, § 3, of the power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States. Kansas v. Colorado, 956

2. Congress has full power to legislate in respect to the arid lands in the territories by virtue either of the provision of U. S. Const. art. 4, § 3, that Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States, or by virtue of the power vested in the national government to acquire territory by treaty; and is subject to no other restrictions than those expressly named in the Constitution. Kansas v. Colorado, 956

3. State laws in respect of the general reclamation of arid lands cannot be overridden by Congress in the exercise of its power under U. S. Const. art. 4, § 3, to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States. Kansas v. Colorado, 956

CONSPIRACY.
See Monopolies.

CONSTITUTIONAL LAW.
Validity of state statute giving a lien upon a vessel enforceable in a state court, see Admiralty, 2–4.
Police power over shipments of intoxicating liquors, see Commerce, 8–11.
Necessity of compensation for taking private property for public use, see Eminent Domain, 1.
Right of state to protect national flag against illegitimate uses, see Flag.
Vested right in judgment in Indian citizenship cases, see Indians, 1.
As to full faith and credit, see Judgment, 17.
Validity of eight-hour law, see Master and Servant, 3.
Validity of state disposal of public lands under congressional authority, see public Lands, 2.
Effect of partial invalidity of statute on remainder, see Statutes.

Delegation of power.
1. Congress, in dealing with the Philippine Islands, may delegate legislative authority to such agencies as it may select. United States v. Heinszen, 1098
202, 204, 204, 206 U. S.

2. Legislative and judicial powers are not unconstitutionally delegated to the Secretary of War by the provision of the river and harbor act of March 3, 1899 (30 Stat. at L. 1121, 1153, chap. 425, U. S. Comp. Stat. 1901, p. 3545), § 18, empowering that official, when satisfied, after a hearing of the parties interested, that a bridge over a navigable water way of the United States is an unreasonable obstruction to navigation, to require such changes or alterations as will render navigation reasonably safe, easy, and unobstructed. Union Bridge Co. v. United States, 523

Due process of law.

State taxation of property of nonresident, see Taxes, 4, 5.

Sufficiency of evidence on question of due process of law in state regulation of railroad rates, see Evidence, 14.

Federal question respecting, see Appeal and Error, 45.

Reception of evidence as denial of, see Appeal and Error, 30.

3. Due process of law is denied by the action of a state court in according full faith and credit to a judgment *in personam* rendered by a court of a sister state against a nonresident who was not personally served with process within the state, and who made no appearance in the action. Old Wayne Mut. L. Asso. v. McDonough, 345

4. The liberty guaranteed by the 14th Amendment of the Federal Constitution against deprivation without due process of law is the liberty of natural, not artificial persons. Western Turf Asso. v. Greenberg, 520

5. Property rights of the lessee in possession of a race course are not taken without due process of law by a state statute compelling it to recognize its own tickets of admission in the hands of persons who are not, at the time, under the influence of liquor, or boisterous in conduct, or of lewd or immoral character. Western Turf Asso. v. Greenberg, 520

6. Property rights are not invaded without due process of law, in violation of U. S. Const., 14th Amend., by the provision of Neb. act July 3, 1903, making it a misdemeanor to use representations of the national flag upon articles of merchandise for advertising purposes. Halter v. Nebraska, 696

7. An owner of sheep is not deprived of his property without due process of law by Idaho Rev. Stat. §§ 1210, 1211, under which damages may be recovered from him for permitting his sheep to graze on the public domain within 2 miles of a dwelling house. Bacon v. Walker, 499
Bown v. Walling, 503

8. The decision of a state court involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim of ownership in such property. Tracy v. Ginzberg, 755

9. The police board of Boston, by issuing a liquor license, on a vacancy created by bankruptcy, to the nominee of the trustee in bankruptcy of the original licensees, does not deprive a co-licensee, to whom the original license had been assigned as security, of property without due process of law, where his so-called property right depends wholly upon the practice of the board to reissue licenses to the old holders until refused for cause, since such right, being of the board's creation, is subject to any limitations which the board may impose. Tracy v. Ginzberg, 755

10. The right to take possession of the property of a street railway company remaining in the streets at the expiration of its franchise cannot, consistently with due process of law, be conferred by municipal ordinance upon another street railway company. Cleveland Electric R. Co. v. Cleveland, 399

11. An abutting owner is not deprived of his property without due process of law by the erection by a municipality in a city street, under the authority of a statute which makes no provision for compensation to abutting owners, of an elevated iron viaduct for general public use, by which travelers are enabled to use such street in connection with other streets from which it has previously been disconnected, where, under the law of the state as laid down by its highest court, abutting owners have no easement of light, air, or access as against any improvement of the street for the purpose of adapting it to public travel. Sauer v. New York, 1176

12. The improvement of the New Haven & Derby Railroad is a public use for which the New York, New Haven, & Hartford Railroad Company, which is the lessee of the former road, and the owner of three fourths of its stock, may proceed under Conn. Pub. Laws, §§ 3694, 3695, without violating the due process of law clause of the 14th Amendment to the Federal Constitution, to condemn the outstanding shares owned by a person who refuses to agree to the terms of purchase. Offield v. New York, N. H. & H. R. Co. 231

13. A foreign life insurance company doing business in Missouri is neither deprived of its liberty or property without due process of law nor denied the equal protection of the laws by Mo. Rev. Stat. § 7890, which cuts off any defense by a life insurance company, domestic or foreign, based upon the false and fraudulent statements in the application, unless the matter misrepresented, in the judgment of the jury, actually contributed to the death of the insured. Northwestern Nat. L. Ins. Co. v. Riggs, 168

14. No existing property rights are taken without due process of law by a state statute, passed in the exercise of its power over foreign corporations, incorporating a local benevolent society with the same name as that of a voluntary state association whose

charter had been withdrawn by the foreign corporation that issued it, and conferring upon such society the exclusive right of granting subcharters in the state. National Council v. State Council, 132

15. A domestic corporation whose principal office and works are outside the state is not deprived of its liberty and property without due process of law by W. Va. Acts 1905, chap. 39, requiring every foreign and nonresident domestic corporation to appoint the state auditor to accept service of process, and exacting an annual fee of $10 for his services, although the prior laws left it to the corporaiton to appoint an attorney for that purpose. St. Mary's Franco-American Petroleum Co. v. West Virginia, 144

16. Due process of law is not denied a stockholder in a domestic corporation by Minn. Gen. Laws 1899, chap. 272, enacted to make more effectual the constitutional liability of stockholders for the debt of the corporation, because stockholders need not necessarily be served with process in the action in which the assessment is made. Bernheimer v. Converse, 1163

17. Due process of law is not denied a person injured in the course of his employment in or about a railroad by Pa. act of April 4, 1868, restricting his rights as against the railway company to those which an employee of such company would have under like circumstances. Martin v. Pittsburg & L. E. R. Co. 184

18. The imposition upon mine owners by the Illinois mining act of April 18, 1899, of responsibility for the defaults of mine managers and mine examiners, who are required by that act to be selected by the mine owners from those holding licenses issued by the state mining board created by such act, does not deprive them of their property without due process of law, in violation of U. S. Const. 14th Amendment, where it is not obligatory upon a mine owner to select a particular individual, or to retain one when selected if found incompetent. Wilmington Star Min. Co. v. Fulton, 708

19. State regulation of local freight rates for shipments to and from the Florida West Shore Railway and over the Seaboard Air Line Railway does not deprive the latter road of its property without due process of law, even if its total receipts from local freight rates are insufficient to meet what can properly be cast as a burden upon that business, where, so far as appears, such regulation may have no other effect than to make the rates on the Florida West Shore Railway the same as those obtaining generally in the state. Seaboard Air Line R. Co. v. Florida, 175

20. Carriers may be forbidden by the state railroad commission to make their local freight rate for phosphates more than 1 cent per ton per mile without denying due process of law to a railway company whose transportation of phosphates constitutes about one sixth of its local freight business, where the rates so authorized is nearly 2 mills per ton larger than that company's average local freight rate. Seaboard Air Line R. Co. v. Florida, 175

21. An order of the North Carolina Corporation Commission requiring the Atlantic Coast Line Railroad Company to restore the connection at Selma with a train of the Southern Railway Company which afforded the principal means of travel between the eastern and western parts of the state is not so arbitrary and unreasonable as to amount to a denial of due process of law, or to a deprivation of the equal protection of the laws, if other connections are inadequate for the public convenience, although compliance with the order may necessitate operating an extra train at a loss, or extending, with like result, the run of a local train, so long as the income of the railroad company, from its business in the state, affords adequate remuneration after allowing for any possible loss resulting from operating either of such trains. Atlantic Coast Line R. Co. v. North Carolina Corporation Commission, 933

22. The decree of sale rendered in a suit to enforce the payment of levee taxes does not deprive the owners of their property without due process of law because of mistakes in ascribing the ownership of the lands, which do not increase the taxation, or cast that which should have been paid by one tract of land upon another tract. Ballard v. Hunter, 461

23. An erroneous judgment as to what costs the law allows in a suit to enforce the payment of levee taxes does not deprive the defendants in that suit of their property without due process of law. Ballard v. Hunter, 461

24. Nonresident owners of lands within the levee district created by Ark. act of Feb. 15, 1893, who do not assert the existence of conditions which, under § 11 of that act, as amended in 1895, would entitle them to enforce the payment of levee taxes, cannot personal service of summons in a suit to enforce the payment of levee taxes, cannot object that they were deprived of their property without due process of law by a decree of sale because the verified complaint in a suit to collect such taxes was insufficient, by reason of its failure to deny the existence of such conditions, to sustain service by publication. Ballard v. Hunter, 461

25. The failure of the Kentucky statutes to require notice to be given of a special assessment for back taxes on omitted property, made by the regular assessor under Ky. Stat. § 3179, after the time provided by law for the making of the general assessment, does not deprive the taxpayer of his property without due process of law, where the state court has afforded him full opportunity to be heard on the question of the validity and the amount of the tax, and, on such hearing, has reduced the tax. Security Trust & S. V. Co. v. Lexington, 204

26. A decree for the sale of lands for un-

paid levee taxes based on constructive service cannot be deemed to deny due process of law because there was no sufficient proof of publication of a warning order or notice filed or produced in court when the decree was made, where, under the local procedure, the entry of a warning order, even if required, is not jurisdictional. Ballard v. Hunter, 461

27. Four weeks' notice given by publication to nonresident owners of lands within the levee district created by Ark. act of Feb. 15, 1893, of the pendency of the suit authorized by § 11 of that act, as amended in 1895, to enforce the collection of levee taxes, is adequate to afford due process of law. Ballard v. Hunter, 461

28. Due process of law does not require that the nonresident owners of lands within a levee district should have personal notice of the pendency of a suit to collect the levee taxes assessed upon their lands. Ballard v. Hunter, 461

29. A court which, acting under the erroneous belief that no action had been taken in a cause within a year, renders a judgment of dismissal, cannot, consistently with due process of law, set aside such judgment after the term, or the rule day which, under the local practice, is equivalent to the end of the term, without motion or proceedings to vacate the judgment, and without notice, and proceed to render a personal judgment against the defendant. Wetmore v. Karrick, 745

30. Even as applied to shares of a foreign corporation owned by nonresidents, the tax on transfers of corporate stock imposed by N. Y. Laws 1905, chap. 241, is not invalid under U. S. Constitution, 14th Amendment, as taking property without due process of law. New York ex rel. Hatch v. Reardon, 415

31. The adoption of the face value of the shares as the basis of the tax on transfers of corporate stock, imposed by N. Y. Laws 1905, chap. 241, does not deprive the owners of their property without due process of law. New York ex rel. Hatch v. Reardon, 415

32. Universal legatees under the will of a person who died before the enactment of the Louisiana inheritance tax law of June 28, 1904, are not deprived of their property without due process of law by subjecting their shares to the tax imposed by that statute, although, under the Louisiana Civil Code, the ownership of the property passed to such legatees upon the death of the testator. Cahen v. Brewster, 310

33. Property is not taken without due process of law, in violation of U. S. Constitution, 14th Amendment, by imposing a transfer tax, under the authority of the amendment of the general transfer-tax law by N. Y. Laws 1897, chap. 284, upon the exercise by will of the power of appointment conferred by a deed executed prior to the passage of such statute. Chanler v. Kelsey, 882

34. The ratification by Congress by the act of June 30, 1906 (34 Stat. at L. 636, chap. 3912), of the illegal collection of duties on imports to the Philippine Islands which were levied under the President's order of July 12, 1898, between the dates of the ratification of the treaty of peace with Spain and the passage of the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369), enacting a tariff of duties for those islands, does not deprive importers of their property without due process of law, in violation of U. S. Constitution, 5th Amendment, even though they had commenced an action to recover the amount of the duties so collected before the ratifying statute was enacted. United States v. Heinszen, 1098

35. A public officer convicted of embezzling public moneys, who has been afforded full opportunity to present every defense permitted by the laws of the state, is not denied due process of law by the imposition, as a part of the sentence, pursuant to Neb. Crim. Code § 124, entirely irrespective of the question whether restitution has been made, of a fine in double the amount of the embezzlement found by the jury, which, by the terms of that section, is to operate as a judgment against the estate of the convict. Coffey v. Harlan County, 666

36. The refusal of the supreme court of the Philippine Islands, on an appeal in a criminal case, to entertain an objection to the sufficiency of the complaint, because such objection was not raised before final judgment in the trial court, does not amount to a conviction of the accused without informing them of the nature and character of the offense charged, or to a conviction without due process of law, in violation of the Bill of Rights enacted by Congress for the Philippine Islands in the act of July 1, 1902 (32 Stat. at L. 691, 692, chap. 1369, U. S. Comp. Stat. Supp. 1905, p. 391), although that court, on appeal, has power to re-examine both the law and the facts, where, as a necessary consequence of the facts found, the testimony offered at the trial, without objection or exception in any form, established every ingredient of the crime. Serra v. Mortiga, 571

Equal protection of the laws.

Sufficiency of evidence as to denial of equal protection in state regulation of railroad rates, see Evidence, 14.

See also supra, 13; infra, 53.

37. An arbitrary and unreasonable discrimination against the sheep industry, prohibited by the guaranty in U. S. Constitution, 14th Amendment, of the equal protection of the laws, is not made by Idaho Rev. Stat. §§ 1210, 1211, under which damages may be recovered from one who permits his sheep to graze on the public domain within 2 miles of a dwelling house. Bacon v. Walker, 499

Bown v. Walling, 503

38. Nonresident owners of lands within the levee district created by Ark. act of **Feb. 15, 1893, are not denied the equal pro-**

tection of the laws or the privileges and immunities of citizens of the United States because § 11 of that act, as amended in 1895, while requiring personal service of summons upon resident owners or occupants for at least twenty days before rendering a decree of sale for unpaid levee taxes, provides for constructive service by publication upon nonresident owners of only four weeks. Ballard v. Hunter, 461

39. Successions which have been finally closed and administered upon may be exempted from the inheritance tax imposed by the Louisiana act of June 28, 1904, without rendering such statute void as making an arbitrary classification which amounts to a denial of the equal protection of the laws, where the highest state court makes the validity of the tax depend upon this classification by deciding that the state can tax the property until it has passed out of the succession of the testator. Cahen v. Brewster, 310

40. The exception in favor of those engaged in the business of manufacturing or wholesale merchandising, made by § 7 of N. C. Laws 1905, chap. 538, enacted to prevent dealing in futures, does not make that act void, as repugnant to the equal protection of the law clause of the 14th Amendment of the Federal Constitution, where such section is interpreted by the highest state court simply as a declaration that the courts shall not so construe the act as to prevent persons thus engaged from buying and selling, for future delivery, the necessary commodities required in their ordinary business, and not as relieving them from the operation of the provisions of the 1st section of that act prohibiting the carrying on of a "bucket shop" business, or from the prohibitions of N. C. Laws 1889, chap. 221, concerning the making of gambling contracts for future delivery. Gatewood v. North Carolina, 305

41. The tax on transfers of corporate stock imposed by N. Y. Laws 1905, chap. 241, is not invalid under U. S. Constitution, 14th Amendment, as making an arbitrary discrimination in favor of sales of other kinds of personal property, such as corporate bonds. New York ex rel. Hatch v. Reardon, 415

42. Restricting railway mail clerks and others whose employment in and about a railroad subjects them to greater peril than passengers in the strict sense to such right of action against the railway company for injuries received in the course of their employment as a railway employee would have under like circumstances is a reasonable classification, which sustains the provision of Pa. act of April 4, 1868, making it, as against the objection that such statute denies the equal protection of the laws. Martin v. Pittsburg & L. E. R. Co. 184

43. The equal protection of the laws is not denied to a domestic corporation whose principal office and works are outside the state, by W. Va. acts 1905, chap. 39, requiring every foreign and nonresident domestic corporation to appoint the state auditor to accept service of process, and exacting an annual fee of $10 for his services. St. Mary's Franco-American Petroleum Co. v. West Virginia, 144

44. The equal protection of the laws is not denied by a state statute, passed in the exercise of its power, over foreign corporations, incorporating a local benevolent society with the same name as that of a voluntary state association whose charter had been withdrawn by the foreign corporation that issued it, and conferring upon such society the exclusive right of granting subcharters in the state. National Council v. State Council, 132

45. The selection of mine owners as a class upon which to impose responsibility for the defaults of certain employees who are required by the Illinois mining act of April 18, 1899, to be selected from those holding licenses issued by the state mining board created by that act, does not render such legislation repugnant to U. S. Constitution, 14th Amendment, as denying the equal protection of the laws. Wilmington Star Min. Co. v. Fulton, 708

46. The lessee in possession of a race course is not denied the equal protection of the laws by a state statute under which it is compelled to recognize its own tickets of admission in the hands of persons who are not, at the time, under the influence of liquor, or boisterous in conduct, or of lewd or immoral character, where the statute is applicable alike to all persons, corporations, or associations conducting places of public amusement or entertainment. Western Turf Asso. v. Greenberg, 520

47. The exception in favor of newspapers, periodicals, books, pamphlets, etc., on which shall be printed representations of the national flag, disconnected from any advertisement, which is made by Neb. act of July 3, 1903, prohibiting the use of representations of the national flag for advertising articles of merchandise, does not make such statute repugnant to U. S. Constitution, 14th Amendment, as denying the equal protection of the laws. Halter v. Nebraska, 696

Personal liberty.

See also supra, 4.

48. The right of personal liberty guaranteed by U. S. Constitution, 14th Amendment, is not infringed by the provision of Neb. act July 3, 1903, making it a misdemeanor to use representations of the national flag upon articles of merchandise for advertising purposes. Halter v. Nebraska, 696

Privileges and immunities.

See also supra, 38.

49. Privileges and immunities of citizens of the United States are not denied by applying to interstate transportation the provisions of Pa. act of April 4, 1868, restricting, as against a railroad company, the rights of persons injured in the course of

their employment in or about the railroad to those which an employee of the railway company would have under like circumstances. Martin v. Pittsburg & L. E. R. Co 184

50. The privileges and immunities of a mine owner as a citizen of the United States are not invaded in violation of U. S. Constitution, 14th Amendment, by the provisions of the Illinois mining act of April 18, 1899, imposing upon mine owners responsibility for the defaults of mine managers and mine examiners, who are required by that act to be selected by the mine owners from those holding licenses issued by the state mining board created by such statute, where it is not obligatory upon the mine owner to select a particular individual, or to retain one when selected if found incompetent. Wilmington Star Min. Co. v. Fulton, 708

51. No privilege of American citizenship is denied by the provision of Neb. act of July 3, 1903, making it a misdemeanor to use representations of the national flag upon articles of merchandise for advertising purposes. Halter v. Nebraska, 696

52. A corporation cannot claim the protection of the clause of the 14th Amendment to the Federal Constitution which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a state. Western Turf Asso. v. Greenberg, 520

53. Excluding foreign corporations from the exemption from an inheritance tax in favor of property devised for educational or religious uses, which is made by Ill. act May 10, 1901, amending Ill. Laws, 1895, p. 301, does not abridge privileges or immunities of citizens of the United States or deny the equal protection of the laws. Board of Education v. Illinois, 314

Police power.

54. The exclusion of suicide as a defense in suits on policies of life insurance which is effected by Mo. Rev. Stat. 1879, § 5982, unless such suicide was contemplated at the time application was made for the policy, is a legitimate exertion of power by the state. Whitfield v. Ætna L. Ins. Co. 895

55. The police power of a state is not confined to the suppression of what is offensive, disorderly, or unsanitary, but embraces regulations designed to promote the public convenience or the general prosperity. Bacon v. Walker, 499
Bown v. Walling, 503

Impairing contract obligations.

Federal question respecting, see Appeal and Error, 33, 42.

56. A contract right to do business in the state during the corporate lifetime of domestic corporations without being subject to any greater liabilities than then were or might be imposed upon domestic corporations was acquired by a foreign corporation by virtue of its admission into the state of Colorado with the right to do business therein under the then-existing laws of that state which, *inter alia*, subjected foreign corporations coming into the state to the liabilities, restrictions, and duties which then were or might thereafter be imposed upon domestic corporations of like character, and such right was unconstitutionally impaired by Colo. act of March 22, 1902, § 65, exacting from such corporation an annual tax or license fee in double the amount of that imposed by § 64 upon domestic corporations. American Smelting & Ref. Co. v. Colorado ex rel. Lindsley, 393

57. A contract with a waterworks company, fixing maximum water rates to private consumers for thirty years, which, unless so grossly unreasonable as to suggest fraud or corruption, is binding, and, as such, is protected against impairment by the contract clause of the Federal Constitution, could be made by the city of Vicksburg under the authority of Miss. Laws 1886, chap. 358, § 5, empowering it to provide for the erection and maintenance of a system of waterworks to supply that city with water, and, to that end, to contract with a party or parties who shall build and operate waterworks. Vicksburg v. Vicksburg Waterworks Co. 1155

58. No contract obligations of a foreign benevolent society are impaired by a state statute incorporating a local society with the same name as that of a previously existing voluntary state association whose charter from the foreign corporation had been withdrawn, and conferring upon it the exclusive right of granting subcharters in the state. National Council v. State Council, 132

59. The imposition upon street railway companies by Conn. act of July 1, 1895, of the cost of paving and repaving that part of the streets occupied by their tracks, is a valid exercise of the power reserved by the state to alter or amend the charter of a street railway company, which required such company to keep the street between its tracks and 2 feet on each side in good and sufficient repair. Fairhaven & W. R. Co. v. New Haven, 237

60. Contract obligations are not impaired by the proceedings taken under Conn. Pub. Laws, §§ 3694, 3695, by the New York, New Haven, & Hartford Railroad Company, which is the lessee of the New Haven & Derby Railroad and the owner of three fourths of its stock, to condemn the outstanding shares owned by a person who refuses to agree to the terms of purchase. Offield v. New York, N. H. & H. R. Co. 231

61. The contractual obligations arising out of Minn. Gen. Stat. 1894, chap. 76, adopted to enforce the liability of stockholders prescribed by Minn. Const. art. 10, § 3, are not impaired by Minn. Gen. Laws 1899, chap. 272, enacted to make the remedy more effectual, because, while under the old law stockholders who could not be reached by personal service were immune from liability, under the new law they need not necessarily be served with process in

the action in which the assessment is made, or because the expenses incident to the enforcement of the liability in other states and against other parties are taken into consideration in estimating the amount of the assessment. Bernheimer v. Converse, 1163

62. The reduction of the estate resulting from the imposition of a transfer tax, under the authority of the amendment of the general transfer-tax law by N. Y. Laws 1897, chap. 284, upon the exercise by will of a power of appointment conferred by a deed executed prior to the passage of the statute, does not render such statute repugnant to U. S. Const. art. 1, § 10, as impairing contract obligations. Chanler v. Kelsey, 882

63. Contract rights are not unconstitutionally impaired by a decision of the state court which denies compensation to an abutting owner for the erection by a municipality in a city street of an elevated iron viaduct for general public use, by which travelers are enabled to use such street in connection with other streets from which it had previously been disconnected, where that court, although it had held before such abutting owner acquired his title that the contract of the owner of land abutting on city streets entitled him to the right of unimpaired access and uninterrupted circulation of light and air as against an elevated structure erected for the exclusive use of a private corporation, had carefully refrained from holding that he had the same right as against a similar structure erected for the purpose of public travel, and had pointed out plainly the essential distinction between the two cases. Sauer v. New York, 1176

CONTEMPT.

Review of contempt proceedings, see Appeal and Error, 7.

Right to prove truth of articles constituting contempt, see Appeal and Error, 27.

Federal question in contempt proceedings, see Appeal and Error, 46, 47.

1. Lack of jurisdiction in the Federal circuit court of a petition for habeas corpus, or in the Supreme Sourt of the appeal from the order denying the writ, does not enable persons to disregard, without liability to process for contempt, the order of the Supreme Court that "all proceedings against the appellant be stayed, and the custody of said appellant be retained pending this appeal," since that court necessarily has jurisdiction to decide whether the case is properly before it. United States v. Shipp, 319

2. Sworn answers denying any participation in the alleged murder of a prisoner under sentence of death in a state court, pending his appeal to the Federal Supreme Court from an order of a circuit court denying relief by habeas corpus, are not sufficient to purge the affiants of a charge of contempt of the Supreme Court by taking part in such murder after the appeal had been allowed and a stay of proceedings ordered. United States v. Shipp, 319

3. Participation in the murder of a prisoner under sentence of death in a state court, with intent to prevent the delay attendant upon an appeal to the Federal Supreme Court from an order of the circuit court denying relief by habeas corpus, and to prevent the hearing of such appeal, is a contempt of the Supreme Court, where such murder was committed after the appeal had been allowed and that court had ordered that "all proceedings against the appellant be stayed, and the custody of said appellant be retained pending this appeal." United States v. Shipp, 319

CONTRACTS.

Discrimination in law to prevent dealing in futures, see Constitutional Law, 40.

Impairing contract obligations, see Constitutional Law, 56–63.

Admissibility of extrinsic evidence of circumstances preceding grant, see Evidence, 7.

1. Recourse may be had to the prior negotiations between the parties, where it is doubtful whether a penalty or liquidated damages were meant by a clause in the written contract relating to the payment of damages for its nonfulfilment. United States v. Bethlehem Steel Co. 731

2. The architect's certificate of completion according to the contract and its plans and specifications is not conclusive, so as to bind the owner or relieve the contractor from performance, where the contract, although providing that the contractor must obtain such certificate before he is entitled to payment, contains no provision that such certificate shall be final and conclusive between the parties, but instead provides that such certificate shall not lessen the responsibility of the contractor, nor exempt him from liability to replace defective work, contains the positive agreement of the contractor to perform the work called for in the specifications in the best and most workmanlike manner, and provides that final payment is to be made only when the buildings are completed in accordance with the agreement and the plans and specifications. Mercantile Trust Co. v. Heasey, 811

CONTRIBUTION.

The right of one of two vessels which were both in fault for a collision to enforce contribution where it has paid the entire damage to the cargo of the other vessel is not affected by provisions in the latter vessel's bills of lading, giving her the benefit of insurance, and fixing the time within which claims for damage must be made and suits therefor instituted. Erie R. Co. v. Erie & W. Transp. Co. 489

CONTRIBUTORY NEGLIGENCE.

See Master and Servant, 2.

CORPORATIONS.
Liability of directors in national bank for false official reports, see Banks, 2.
Distribution of charged off assets on reduction of capital stock of national bank, see Banks, 1.
Tax on transfers of corporate stock as affecting interstate commerce, see Commerce, 5.
Due process of law in excluding foreign corporation, see Constitutional Law, 14.
Due process of law in appointing state auditor to accept service, see Constitutional Law, 15.
Validity of stock transfer tax, see Constitutional Law, 30, 31, 41.
Equal protection of the laws in excluding foreign corporations, see Constitutional Law, 44.
Not entitled to privileges and immunities of citizens of United States, see Constitutional Law, 52.
Validity of statute excluding corporations from inheritance tax, see Constitutional Law, 53.
Taxation of foreign corporation as impairing contract obligations, see Constitutional Law, 56.
Reserved right to amend or repeal charter, see Constitutional Law, 59.
Condemnation of corporate shares of stock as impairing contract obligations, see Constitutional Law, 60.
Injunction against taxation of railroad property, see Injunction, 3, 4.
Franchise of street railway, see Street Railways.
Service of process on foreign corporation, see Writ and Process, 2-6.

1. A contract exemption of a street railway company from paving obligations is not a "privilege" within the meaning of N. Y. Laws 1867, chap. 254, as amended by Laws 1879, chap. 503, empowering a railway company, being the lessee of the property of another railway company, to acquire the whole of the latter's capital stock, in which case its "estate, property, rights, privileges, and franchises" shall vest in and be held and enjoyed by the purchasing corporation "fully and entirely, and without change or diminution." Rochester R. Co. v. Rochester, 784

2. A street railway company incorporated under N. Y. Laws 1884, chap. 252, which imposed upon it the duty of paving a portion of the street, cannot claim the benefit of a contract exemption from paving obligations enjoyed by a predecessor in title. Rochester R. Co. v. Rochester, 784

3. A street railway company whose capital stock has been wholly acquired by a lessee corporation, pursuant to N. Y. Laws 1867, chap. 254, which, as amended by Laws 1879, chap. 503, provides that in such case the estate, property, rights, privileges, and franchises of the selling corporation shall vest in the purchasing corporation, to be thereafter controlled by the latter in its own name, cannot be regarded as still having a corporate existence which will enable the purchasing corporation to claim and enjoy, on behalf of the selling corporation, a contract exemption from paving obligations which the latter corporation enjoyed. Rochester R. Co. v. Rochester, 784

Stockholder's liability.
In national bank, see Banks, 3.
Due process of law in enforcing, see Constitutional Law, 16.
Change of remedy as impairing contract obligation, see Constitutional Law, 61.
Limitation of action to enforce, in foreign jurisdiction, see Limitation of Actions, 5, 6.
Right of receiver to sue for, in foreign jurisdiction, see Receivers.

4. A domestic corporation formed for the purchase of the capital stock, evidences of indebtedness, and assets of another domestic corporation, and for the further purpose of manufacturing and selling implements and machinery, is one organized for a purpose other than that of carrying on any kind of manufacturing or mechanical business, and is therefore not within the exception as to the liability of stockholders made by Minn. Const. art. 10, § 3, in favor of corporations of that kind. Bernheimer v. Converse, 1163

CORPUS DELICTI.
Proof of, see Trial, 2.

COSTS AND FEES.
On appeal, see Appeal and Error, 106.
Fees of clerk of Federal court, see Clerks.
Allowance of counsel fees in suit by divorced wife to obtain liquidation of community property, see Husband and Wife, 6.
Set-off against demand of commissioner for fees, see Set-Off and Counterclaim, 2.

1. A commissioner of a Federal circuit court is not entitled to compensation for services rendered in connection with complaints in civil-rights cases in which there has been no arrest and examination, since the fee of $10 allowed him by U. S. Rev. Stat. § 1986, U. S. Comp. Stat. 1901, p. 1265, "for his services in each case, inclusive of all services incident to the arrest and examination," when earned, covers all services, and, unless earned, he gets no other fee. Allen v. United States, 634

2. Fees cannot be allowed a commissioner of a Federal circuit court for certifying complaints in civil-rights cases, as required by U. S. Rev. Stat. § 2027, to himself as chief supervisor of elections. Allen v. United States, 634

COTTON CLOTH.
Duty on figured cotton cloth, see Duties, 4.

COUNTERCLAIM.
See Set-Off and Counterclaim.

COUNTIES.
Presumption as to performance of condition precedent to issue of bonds, see Evidence, 2.

COURT OF CLAIMS.
Set-offs in, set Set-Off and Counterclaim.

COURTS.
Admiralty jurisdiction, see Admiralty.
Habeas corpus in Federal courts, see Habeas Corpus.
Want of jurisdiction as ground for relief by habeas corpus, see Habeas Corpus, 3–5.
Judicial enforcement of order of Interstate Commerce Commission, see Interstate Commerce Commission, 3, 4; Judgment, 2.
Powers of Choctaw and Chickasaw citizenship court, see Indians, 1.
Validity of judgment *in personam* rendered without personal service, see Judgment, 1.
Effect as to persons not parties of judgment of Choctaw and Chickasaw citizenship court in test case, see Judgment, 4.
Mandamus to control judicial action, see Mandamus, 2.
Removal of cause to Federal court, see Removal of Causes.
Immunity of state from suit, see State.
Immunity of United States from suit, see United States.
Original jurisdiction of Federal Supreme Court, see Supreme Court of United States.
Jurisdiction as affected by service of process, see Writ and Process.

1. The entire judicial power of the nation granted to the Federal courts by U. S. Const. art. 3, § 1, is not limited by the declaration in § 2 that "the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States," etc. Kansas v. Colorado, 956

2. The judicial power of the United States, vested by U. S. Const. art. 3, § 1, in the Federal courts, embraces all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto, except so far as there are limitations expressed in the Constitution on the general grant of judicial power. Kansas v. Colorado, 956

Jurisdiction based on citizenship.
See also Removal of Causes, 1, 2.

3. The alienage of the plaintiff is sufficiently alleged to sustain the jurisdiction of a Federal circuit court by an averment in the complaint that "the plaintiff now is, and for more than one year last past has been, a resident of Washington and a citizen of Sweden," although, at the time the action was brought, Sweden was under a monarchial form of government, since the designation "citizen of Sweden" could only have been intended as a statement of the nationality of the plaintiff,—*viz.*, the country to which he bore allegiance. C. H. Nichols Lumber Co. v. Franson, 181

4. The jurisdiction of the circuit court of the United States for the northern district of Illinois of a suit brought by a California stockholder of an Illinois gas company, after the company's refusal to sue, to enjoin the city of Chicago from enforcing an ordinance regulating gas rates, on the ground of want of power in the municipality to pass the ordinance, cannot be regarded as collusively or fraudulently invoked because of complainant's motive in preferring a Federal tribunal, or because subsequent events made it to the interest of the company to make common cause with him against the enforcement of the ordinance, or because an officer and large stockholder in such company personally contributed to the expenses of the suit, or because complainant's counsel was afterwards retained in a suit then pending between the company and the municipality. Chicago v. Mills, 504

Jurisdiction based on nature of case.

5. A controversy arising under the Federal Constitution, of which a Federal circuit court has original jurisdiction without regard to the citizenship of the parties, is presented by a bill which asserts that the obligation of a contract for the exclusive privilege of supplying water to a city and its inhabitants is impaired by a subsequent municipal ordinance and a legislative enactment under which the municipality is proceeding to issue and market its bonds for the purpose of constructing its own waterworks system. Mercantile Trust & D. Co. v. Columbus, 198

6. An action for rent, brought against the agent for the shareholders of an insolvent national bank to whom the Comptroller of the Currency has released the estate of the bank, is one to wind up the affairs of the bank, and, as such, is within the jurisdiction of a Federal circuit court. International Trust Co. v. Weeks, 224

7. The United States is the real, and not merely the nominal, plaintiff, so as to sustain the original jurisdiction of a Federal circuit court under the judiciary acts of 1887, 1888 (24 Stat. at L. 552, chap. 373, 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), without regard to the amount in dispute, in a suit authorized by the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), to be brought in its name, for the use and benefit of a materialman, upon the bond of a contractor for a public work, which the statute requires shall contain the specific, special obligation directly to the United States that the contractor shall promptly make payments to all persons supplying him labor and materials in the prosecution of the work. United States Fidelity & G. Co. v. United States, 516

Amount in dispute.

Sufficiency of evidence respecting, see Evidence, 11.

8. Plaintiff's allegations of value govern in determining the jurisdiction of a Federal circuit court except where, upon the face of his own pleadings, it is not legally possible for him to recover the jurisdictional amount, or where such allegations are fraudulently made for the purpose of creating the jurisdiction. Smithers v. Smith, 656

9. The jurisdictional amount involved in a suit brought by the New York Cotton Exchange to enjoin the defendant from receiving and using quotations of sales on such exchange until he shall have acquired the right to receive them from the exchange, or, with its consent and approval, from one of the telegraph companies authorized to distribute them, is to be measured by the value to the exchange of the right to control the quotations, and not by the rate paid by the defendant under his contract with the telegraph company furnishing him with such quotations. Hunt v. New York Cotton Exchange, 821

10. A suit for the recovery of land of the alleged value of $5,000, and for $2,000 damages for its detention, cannot be dismissed by a Federal circuit court, acting under the authority of the act of March 3, 1875 (18 Stat. at L. 470, chap. 137), § 5, as not really and substantially involving a dispute or controversy properly within its jurisdiction, because, after hearing evidence, the court is satisfied that the defendants did not act jointly, as plaintiff alleged and defendants denied, and that the land taken and held by each defendant was of less value than $2,000, since in so deciding the court did not determine a jurisdictional fact, but an essential element of the merits, upon which the parties were entitled to the finding of a jury. Smithers v. Smith, 656

Mandamus.

11. The Federal circuit courts have no jurisdiction of an original action in mandamus to compel the return of a franchise tax collected under the authority of a state statute, although the basis of the relief sought is the alleged repugnancy of the tax to the commerce clause of the Federal Constitution. Covington & C. Bridge Co. v. Hager, 111

Federal courts following decisions of state courts.

See also Appeal and Error, 79-87.

12. Whether a repealable exemption from state taxation has been in fact repealed by a subsequent state statute is a question of state law, upon which the decisions of the highest courts of the state, in the absence of any contract rights, are binding on the Federal courts. Wicomico County Comrs. v. Bancroft, 112

13. Decisions of the courts of a state respecting the title acquired by individual Indians under the treaty of September 24, 1819 (7 Stat. at L. 203), with the Chippewa Nation, to the lands therein reserved for their use, will not be disturbed by the Supreme Court of the United States, where they have become a rule of property, and do not clearly involve a misinterpretation of the words of the treaty. Francis v. Francis, 165

Conflict of jurisdiction.

Federal interference with state administration of criminal law, see Habeas Corpus.

As between state courts and court of admiralty, see Admiralty, 2-4.

See also Bankruptcy 1.

14. State courts were not given jurisdiction of controversies necessarily involving a determination of the title, and, incidentally, of the right to the possession, of Indian allotments while the same were held in trust by the United States, by the provision of the act of August 15, 1894 (28 Stat. at L. 286, chap. 290), delegating to the Federal circuit courts the power to determine such questions, since the purpose of that act to continue the exclusive Federal control over disputes concerning allotments which, prior to that act, could only have been decided by the Secretary of the Interior, is manifested by its provision that a judgment or decree in any such controversy shall be certified by the court to the Secretary of the Interior, and by the provision of the act of February 6, 1901 (31 Stat. at L. 760, chap. 217), that in such suits "the parties thereto shall be the claimant as plaintiff and the United States as party defendant." McKay v. Kalyton, 566

15. State courts may enforce, against directors of a national bank who have made false representations as to the bank's financial condition in the official report to the Comptroller of the Currency, the civil liability prescribed by U. S. Rev. Stat. § 5239, U. S. Comp. Stat. 1901, p. 3515, which provides for the forfeiture of the charter of a national bank as the result of violations of the national bank act by the directors, such violations to be determined only by the Federal courts, and makes every director who participated in or assented to the same civilly liable to persons who have suffered damage in consequence thereof. Yates v. Jones Nat. Bank, 1002

16. The possession by a court of bankruptcy, of the proceeds of a sale of the chattels covered by a mortgage given by the bankrupt, which sale was had pursuant to an agreement, approved by that court, providing for the deposit of the net proceeds by a temporary receiver as a special fund to which the lien, if any, of the chattel mortgage was transferred, does not deprive a state court of its jurisdiction, under the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3431), § 23b, of a suit by the trustee in bankruptcy to set aside the mortgage as in fraud of creditors. Frank v. Vollkommer, 911

17. Enjoining, at the suit of the New York Cotton Exchange, the receipt and use by the defendant of quotations of sales on

such exchange, is not forbidden to a Federal circuit court by U. S. Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581, as enjoining proceedings in a state court, because an injunction has been granted by a state court in a pending suit between defendant and a telegraph company, restraining the latter from refusing to furnish him with such quotations. Hunt v. New York Cotton Exchange, 821

18. The Mississippi railroad commission is not a court within the meaning of U. S. Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581, forbidding the Federal courts to enjoin proceedings in a state court. Mississippi R. Commission v. Illinois C. R. Co. 209

19. A proceeding before the Mississippi railroad commission does not become a proceeding in a state court, within the meaning of U. S. Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581, so as to prevent a Federal court from enjoining the enforcement of an order of such commission which is claimed to violate the Federal Constitution, because the commission would have to resort to a state court to aid it in the enforcement of its order. Mississippi R. Commission v. Illinois C. R. Co. 209

Proper district for suit.

20. A suit to cancel and annul certain deeds and leases of the property of a railway company lying wholly within the eastern district of Illinois may be brought and maintained in the Federal circuit court for that district against defendants who are inhabitants of the northern district of Illinois, as being a suit to remove an "encumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought," within the meaning of the act of March 3, 1875 (18 Stat. at L. 470, 472, chap. 137, U. S. Comp. Stat. 1901, p. 513), § 8, authorizing the making of an order in such suits to bring in absent defendants who are not inhabitants of, or found within, the district, and who do not voluntarily appear. Citizens' Sav. & T. Co. v. Illinois C. R. Co. 703

COURTS-MARTIAL.

Acquittal by court-martial as former jeopardy, see Criminal Law, 3.

1. An officer of the Regular Army is within the provisions of U. S. Rev. Stat. § 1342, art. 77, U. S. Comp. Stat. 1901, p. 959, that "officers of the Regular Army shall not be competent to sit on courts-martial to try officers or soldiers of other forces," although such officer has been granted an indefinite leave of absence from the Regular Army in order to enable him to accept a commission in the volunteer forces. United States v. Brown, 1046

2. A general court-martial has jurisdiction under the 62d Article of War, as of a crime not capital, to try a soldier for a homicide punishable under the Penal Code of the Philippine Islands, art. 404, by imprisonment. Crafton v. United States, 1084

3. Civil tribunals cannot disregard the judgments of a general court-martial against an accused officer or soldier for mere errors, or for any reason not affecting the jurisdiction of the military court, even though the civil court, if it had first taken hold of the case, might have tried the accused for the same offense or even for one of higher grade arising out of the same facts. Grafton v. United States, 1084

CRIMINAL LAW.

Right of accused to know witnesses before grand jury, see Appeal and Error, 28.

Compelling accused to be witness against himself as involving Federal question, see Appeal and Error, 40.

When refusal to appoint interpreter is not prejudicial error, see Appeal and Error, 103.

Due process of law in criminal proceedings, see Constitutional Law, 35.

Evidence of confessions, see Evidence, 8.

Materiality of evidence under averments of indictment, see Evidence, 10.

Imprisonment after extradition under prior conviction of other offense, see Extradition, 2.

Federal interference with state administration of, see Habeas Corpus.

Want of jurisdiction as ground for relief by habeas corpus, see Habeas Corpus, 3–5.

Compelling accused to stand up and walk before jury as ground for relief by habeas corpus, see Habeas Corpus, 5.

Jurisdiction of Oklahoma over homicide committed in land not open to settlement, see Territories.

Directing verdict in criminal case, see Trial, 2.

1. A contractor for a public work of the United States, who intentionally permits laborers employed thereon to work more than eight hours a day, under the mistaken assumption that an extraordinary emergency exists, intentionally violates the provisions of the act of August 1, 1892 (27 Stat. at L. 340, chap. 352, U. S. Comp. Stat. 1901, p. 2521), prohibiting such action, except in case of extraordinary emergency, and punishing intentional violations of the act with fine or imprisonment. Ellis v. United States, 1067

Former jeopardy.

2. An acquittal of homicide, as defined in the Penal Code of the Philippine Islands, art. 404, is a bar to a subsequent conviction of the same offense arising out of the same facts, under an information charging the higher crime of assassination, as defined by art. 403, since, if not guilty of the lesser crime, the accused could not, for the same acts, be guilty of the offense of higher grade. Grafton v. United States, 1084

3. One acquitted by a military court of competent jurisdiction of the crime of hom-

icide, as defined by the Penal Code of the Philippine Islands, art. 404, cannot be tried a second time in a civil court of those islands for the same offense. Grafton v. United States, 1084

Removal to another district for trial.

4. The local practice under which one indicted for a crime is not entitled to a preliminary examination prior to the trial on the merits has no application to the proceedings under U. S. Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716, for the arrest and removal to another Federal district for trial of a person there charged with an offense against the United States. Tinsley v. Treat, 689
Kessler v. Treat, 695

5. Evidence tending to show that no offense, triable in the Federal district court to which the accused is sought to be removed pursuant to U. S. Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716, has been committed by him in that district, cannot be excluded in the removal proceedings, on the theory that a certified copy of the indictment and proof of the identity of the party accused furnish conclusive evidence of probable cause. Tinsley v. Treat, 689
Kessler v. Treat, 695

CUSTOMS DUTIES.
See Duties.

DAMAGES.
Recourse to prior negotiations to determine whether contract provides for penalty or liquidated damages, see Contracts, 1.
Limitation of action for three-fold damages under anti-trust act, see Limitation of Actions, 2, 3.
Three-fold damages under anti-trust act, see Monopolies.
Indefiniteness of allegation of damage, see Pleading, 1.

Liquidated damages, and not a penalty, must be deemed intended by the clause in a contract with the government for the construction of certain disappearing gun carriages, executed when war was imminent, providing for a deduction of $35 from the purchase price for each day's delay in delivery, where the government had accepted the proposal at the highest price for delivery in the shortest time, and the sum named was arrived at, to the knowledge of the bidder, by computing the average difference in time of delivery between the price bid for slow delivery of the carriages and the price under the accepted bid. United States v. Bethlehem Steel Co. 731

DEEDS.
No transfer of title was effected by an instrument which recites that the party of the first part "sells" certain mining claims to the party of the second part for a specified consideration, and "upon the terms and consideration following," and which, in its subsequent provisions, authorizes the party of the second part to sell and negotiate the mines for any sum above $45,000, and retain out of the purchase price seven eighths of the excess, the party of the first part agreeing to execute any conveyance thereafter necessary to convey a good title, and the party of the second part assuming no obligations except a general one by which both parties mutually agree to aid each other in the negotiation and sale; such document is not a deed, but simply a power of attorney, and, as such, subject to revocation. Taylor v. Burns, 116

DELEGATION OF POWER.
See Constitutional Law, 1, 2.

DEMURRER.
Conclusiveness of judgment rendered on, see Judgment, 13, 14.
See also Pleading.

DEPARTMENT OF AGRICULTURE.
Validity of quarantine regulations promulgated by Secretary of Agriculture, see Commerce, 14.

DISCHARGE.
In bankruptcy, see Bankruptcy, 17, 18.

DISTRICT COURTS.
Appellate jurisdiction over, see Appeal and Error, 11, 15.

DISTRICT OF COLUMBIA.
Appeals from courts of, to Federal Supreme Court, see Appeal and Error, 20, 21.
Certiorari from Federal Supreme Court to District of Columbia court of appeals, see Certiorari, 1.

DIVORCE.
Rights of divorced wife in community property, see Husband and Wife.

DRUMMERS.
State regulation of, as affecting interstate commerce, see Commerce, 7.

DUE PROCESS OF LAW.
See Constitutional Law, 3-36.

DUTIES.
On imports or exports, see Commerce, 6.
Due process of law in ratifying illegal collection of duties, see Constitutional Law, 34.

1. The Isle of Pines must be regarded as at least *de facto* under the jurisdiction of the Republic of Cuba, and hence, as a "foreign country" within the meaning of the Dingley tariff act of July 24, 1897 (30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1626), since the United States has never taken possession of such island as included in the territory ceded by Spain to the United States in the treaty of peace, but, instead, through its legislative and executive departments, has recognized the Cuban government as rightfully exercising sovereignty

over the Isle of Pines as a *de facto* government until the *de jure* status shall be determined. Pearcy v. Stranahan, 793

2. A growth on skins of Mocha sheep imported from Arabia which is commercially known, designated, and dealt in as Mocha hair, having none of the characteristics of wool, and which would not be accepted by dealers therein as a good delivery of wool, is not dutiable under the tariff act of July 24, 1897 (30 Stat. at L. 151, 183, chap. 11, U. S. Comp. Stat. 1901, pp. 1626, 1666), ¶ 360, as wool on the skin, but is entitled to free entry under ¶ 664, placing on the free list "skins of all kinds, raw (except sheepskins with the wool on), and hides not specially provided for in this act." Goat & Sheepskin Import Co. v. United States, 1022

3. Metal beads temporarily strung on cotton cords or strings for the purpose of facilitating transportation are not dutiable under the tariff act of July 24, 1897 (30 Stat. at L. 167, 189, chap. 11, U. S. Comp. Stat. 1901, pp. 1645, 1673), ¶ 408, at 35 per cent ad valorem as loose beads, but are subject to the 45 per cent ad valorem duty prescribed by ¶ 193 for articles or wares not specially provided for in the act, composed wholly or in part of metal, whether wholly or partly manufactured. Henry E. Frankenberg Co. v. United States, 1034

4. Figured cotton cloth valued at over 11, 12, and 12½ cents per square yard is liable, in addition to the specific duty imposed by the act of July 24, 1897 (30 Stat. at L. 175, 178, chap. 11, U. S. Comp. Stat. 1901, pp. 1655, 1659), ¶ 313, to the ad valorem tax imposed by ¶¶ 306, 307, upon similar plain cotton cloth above those values. United States v. George Riggs & Co. 127

5. The duty upon tobacco leaf which, when withdrawn from a bonded warehouse, has lost in weight through evaporation of moisture, must be assessed on the basis of weight at the time of the original entry, as prescribed by the proviso to the act of July 24, 1897 (30 Stat. at L. 213, chap. 11, U. S. Comp. Stat. 1901, p. 1701), § 33, which is general in its application, and not restricted to merchandise imported before the act took effect. United States v. G. Falk & Bro. 411

6. The duty on imports withdrawn from bonded warehouses must be assessed on the basis of weight at the time of original entry, as prescribed by the proviso to act of July 24, 1897 (30 Stat. at L. 213, chap. 11, U. S. Comp. Stat. 1901, p. 1701), § 33, notwithstanding the addition by the act of Dec. 15, 1902 (32 Stat. at L. 753, chap. 1, U. S. Comp. Stat. Supp. 1905, p. 419), of a proviso to § 20 of the customs administrative act of June 10, 1890 (26 Stat. at L. 140, chap. 407), that the same rate of duty shall be collected upon such merchandise as may be imposed by law upon like articles imported at the time of withdrawal, since this provision refers to the rate of duty, and not to the date at which the weight is to be taken as the basis of such duty. United States v. G. Falk & Bro. 411

7. Aside from any question of intervening rights, Congress could, by the act of June 30, 1906 (34 Stat. at L. 636, chap. 3912), ratify the illegal collection of duties on imports to the Philippine Islands which were levied under the President's order of July 12, 1898, between the dates of the ratification of the treaty of peace with Spain and the passage of the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369), enacting a tariff of duties for those islands. United States v. Heinszen, 1098

EASEMENTS.

Due process of law in erection of viaduct in city street without compensating abutting owners, see Constitutional Law, 11.

EIGHT-HOUR LAW.

See Master and Servant, 3-6.

ELECTION OF REMEDIES.

1. The seller in a contract of conditional sale does not, by instituting proceedings to enforce a materialman's lien, based upon the mistaken theory that the title has passed to the purchaser, make an election which prevents him from bringing suit in replevin, based on the theory that title still remains in the seller. Bierce v. Hutchins, 828

2. The prosecution of an action at law upon a policy of fire insurance to final judgment denying recovery, upon the ground that the policy could neither be recovered upon as it stood nor be helped out by any doctrine of the common law, is not an election which bars a suit in equity to reform the policy so that it will express consent to concurrent insurance, and to recover upon such policy as reformed. Northern Assur. Co. v. Grand View Bldg. Asso. 109

EMINENT DOMAIN.

Due process of law in condemnation of railway stock by lessee, see Constitutional Law, 12.

Condemnation of corporate shares of stock as impairing contract obligation, see Constitutional Law, 60.

Removal of condemnation proceeding to Federal court, see Removal of Causes, 2.

1. The making of the alterations or changes in a bridge erected under the sanction of a state over an interstate water way which the Secretary of War, acting under the authority of the act of March 3, 1899 (30 Stat. at L. 1121, 1153, chap. 425, U. S. Comp. Stat. 1901, p. 3545), § 18, requires to secure navigation against an unreasonable obstruction, is not a taking of private property for public use for which the Federal Constitution requires compensation to be made, but is merely incidental to the exercise by the government of its power to regulate commerce among the states. Union Bridge Co. v. United States, 523

2. The owner of property taken by eminent domain for the approaches and terminal facilities necessary to the use of a bridge erected, under the authority of the act of January 26, 1901 (31 Stat. at L. 741, chap. 181), over a navigable stream, is denied no Federal right because the erection of the bridge was not begun within the time limit set by Congress, where the bridge has been constructed without complaint by the Federal authorities, Congress having, by the act of January 18, 1904 (33 Stat. at L. 6, chap. 5), extended the time for its completion. Stone v. Southern Illinois & M. Bridge Co. 1057

3. The appropriation by eminent domain of land for the approaches and terminal facilities necessary to the use of a bridge erected, under the authority of the act of January 26, 1901 (31 Stat. at L. 741, chap. 181), over a navigable stream, is not forbidden by that act because the plans submitted to the Secretary of War, and specifically approved by him, although fully subserving the purpose of showing the extent to which navigation would be affected, do not include such terminal and connecting facilities, and cannot, under the act, be altered without his consent. Stone v. Southern Illinois & M. Bridge Co. 1057

EQUALIZATION.

State board of, see Taxes, 2, 8, 9.

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, 37–47.

EQUITY.

Remedy in equity for exacting unreasonable interstate rate, see Carriers, 11.

Injunctive relief, see Injunction.

Equitable relief against forfeiture of lease, see Landlord and Tenant, 2–6.

Equitable lien of mortgagee for improvements, see Mortgage, 3.

Lack of any adequate remedy at law justifies a court of equity in taking jurisdiction of a suit by the successful defendant in a patent infringement suit to enjoin the complainant in the prior suit from interfering with the former's business by suing his customers for an alleged infringement of the patent on account of the use or sale of the same article passed upon in the prior suit. Kessler v. Eldred, 1065

ERROR.

See Appeal and Error.

ESTOPPEL.

The assumption by the manufacturer of the defense of a patent infringement suit brought in a Federal circuit court against one of his customers does not deprive him of his right to proceed against the complainant in such suit in the state and district of the latter's residence for wrongfully interfering with the business of such manufacturer by instituting the suit after a final adjudication in a prior suit that the article in question did not infringe the patent. Kessler v. Eldred, 1065

EVIDENCE.

Harmless error in refusing to strike out expert testimony, see Appeal and Error, 104.

Reception of expert testimony, see Trial, 1.

Judicial notice.

1. Judicial notice will be taken by the Supreme Court of the United States of the fact that, in the territory of New Mexico and in other similar parts of the West, cattle are required to be branded in order to identify their ownership, and that they run at large in great stretches of country, with no other means of determining their separate ownership than by the brand or marks upon them. New Mexico ex rel. McLean v. Denver & R. G. R. Co. 78

Presumptions.

On appeal, see Appeal and Error, 68, 92.

2. A presumption, though not a conclusive one, that there has been a compliance with the condition precedent to the issuance of county bonds in payment of a subscription to the capital stock of a railway company that the county should first be exonerated from a prior subscription to the stock of another railroad company, arises from the mere fact of subscription and issuance by the officer charged with the duty of issuing the bonds upon the performance of the condition precedent. Quinlan v. Green County, 860

3. The presumption that a court of superior authority whose judgment is attacked collaterally for the want of jurisdiction acted within its jurisdiction when proceeding within the general scope of its powers cannot be indulged when it affirmatively appears from the pleadings or evidence that jurisdiction was wanting. Old Wayne Mut. L. Asso. v. McDonough, 345

Burden of proof.

4. The burden of proof is on the plaintiffs in an action on a judgment of a sister state, where the answer contains a general denial, which, under the local procedure, is sufficient to put plaintiffs upon proof of every fact essential in establishing the cause of action, to show by what authority the court of such other state could legally enter the judgment sued upon, which was one *in personam* against a corporation, which, according to the complaint itself, was a corporation of another state, and was not alleged to have appeared in person, or by an attorney of its own selection, or to have been personally served with process within the state. Old Wayne Mut. L. Asso. v. McDonough, 345

5. The burden of proof is upon a carrier to bring itself within the exception in favor of four-wheeled cars which is made by the proviso in § 6 of the automatic coupler act of March 2, 1893 (27 Stat. at L. 531, chap.

196, U. S. Comp. Stat. 1901, p. 3174). Schlemmer v. Buffalo, R. & P. R. Co. 681

6. The burden of proving that a sale by a pledgee of the property of a bankrupt, made conformably to the contract of pledge, was unfair, is on the trustee in bankruptcy of the pledgeor, who seeks to avoid the sale. Hiscock v. Varick Bank, 945

Extrinsic evidence concerning writings.

7. Extrinsic evidence of the circumstances preceding the agreement by which the American Board of Commissioners for Foreign Missions transferred to the Hawaiian government a Protestant mission, and of the immediate and long-continued practice under it, is admissible as an aid to the interpretation of the condition on which the transfer was made; *viz.*, that the government should continue the same as an institution for the cultivation of sound literature and solid science, and should teach no religious tenet or doctrine contrary to those theretofore inculcated by the mission, as set forth in a confession of faith. Lowrey v. Hawaii, 1026

Conclusions.

8. A statement that the principal chief of the Choctaw Nation ratified an illegal sheriff's sale, giving no facts upon which the alleged ratification was based, is a conclusion of law, and as such is inadmissible in evidence. Walker v. McLoud, 495

Confessions.

9. The deputy marshal may testify as to conversations between himself and the defendant in a criminal case which were not induced by duress, intimidation, or other improper influences, but were perfectly voluntary. Perovich v. United States, 722

Materiality.

10. Evidence that the express company knew that a C. O. D. interstate shipment of intoxicating liquors was not ordered by the consignee is immaterial on a criminal prosecution of the express company for violating a state local option law, where the indictment avers that the express company was engaged in the business of a common carrier of packages, and that the shipment and delivery were made and done in the usual course of its business. Adams Exp. Co. v. Kentucky, 987
Adams Exp. Co. v. Kentucky, 992
American Exp. Co. v. Kentucky, 993

Weight and sufficiency.

Review of facts on appeal, see Appeal and Error, 79, 80, 91, 93, 96–100.

Of proof that accused is fugitive from justice, see Extradition, 5.

11. The effect of testimony in a suit by the New York Cotton Exchange to enjoin the defendant from receiving and using quotations of sales on such exchange, that the value of the right to control these quotations is much greater than $2,000, is not impaired by evidence that the value of quotations of sales varies with the volume of business. Hunt v. New York Cotton Exchange, 821

12. Uncontradicted testimony that a resident employee sued jointly in tort with his nonresident employer was merely a draughtsman, whose work was confined to making the necessary drawings based on the plans and ideas of others, and that he had nothing to do with planning the apparatus which is alleged to have been so defectively constructed as to have caused the injury complained of, is sufficient to support a conclusion of law that such employee was made a defendant for the sole purpose of preventing the exercise of the right of removal by the nonresident defendant. Wecker v. National Enameling & Stamping Co. 430

13. Evidence which goes no further than to raise a doubt as to whether the main channel of the Mississippi river has not at different times varied from one side of Island No. 76 to the other will not support a finding that this channel ran to the west of the island when Mississippi was admitted to the Union, and was therefore a part of that state, where such finding is opposed by testimony from memory and tradition, by the presumption from the establishment of the channel on the east side for a time running back nearly or quite to the admission of Arkansas, and by consensus of action on the part of the two states concerned and the United States. Moore v. McGuire, 776

14. The evidence is insufficient to justify a refusal to enforce an order of a state railroad commission fixing local rates for carrying phosphates on any objection based on the due process of law and equal protection of the laws clauses of the 14th Amendment to the Federal Constitution, where there is no evidence from which a reasonable deduction can be made as to the cost of transportation, the amount of phosphates transported, or the effect which the rate established by the commission will have upon the income of the carrier. Atlantic Coast Line R. Co. v. Florida, 174

EXCEPTIONS.

Bill of, see Appeal and Error, 71, 72.

EXECUTIVE DEPARTMENTS.

Validity of quarantine regulations promulgated by Secretary of Agriculture, see Commerce, 14.

Validity of delegation of power to Secretary of War, see Constitutional Law, 2.

Necessity of compensation when Secretary of War requires alterations in bridge over interstate water way, see Eminent Domain, 1.

Mandamus to Secretary of Interior, see Mandamus, 3.

Control of Department of the Interior over Indians, see Indians, 4, 5.

Control of Land Department over public lands, see Public Lands.

EXEMPTIONS.

Validity of statute excluding corporations from inheritance tax, see Constitutional Law, 53.

Contract exemptions from regulation of water rates, see Constitutional Law, 57.
Effect of consolidation of street railways on contract exemption from paving obligation, see Corporations, 1.
Conditions of incorporation as affecting exemption from paving obligations enjoyed by predecessor in title of street railway, see Corporations, 2.
Effect of sale of capital stock on exemptions from paving obligations enjoyed by predecessor in title of street railway company, see Corporations, 3.
From taxation, see Taxes, 6, 7.

EXPORTS.
Duties on, see Commerce, 6.

EXPRESS COMPANIES.
State regulation on interstate shipment of intoxicating liquor, see Commerce, 10.

EXTRADITION.
Relief to person illegally extradited, see Habeas Corpus, 1.

1. Arranging and carrying out the arrest and deportation of the accused so as to leave him no opportunity to prove before the governor of the surrendering state that he was not a fugitive from justice, or to appeal to some court of that state to prevent his illegal deportation, does not violate the provisions of U. S. Const. art. 4, § 2, or U. S. Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597, relating to extradition proceedings. Pettibone v. Nichols, 148
Moyer v. Nichols, 160

2. The omission of the words "or be punished" from the provision of art. 3 of the extradition treaty of July 12, 1889 (26 Stat. at L. 1508), with Great Britain, that no person extradited "shall be triable or be tried" for any crime or offense committed prior to his extradition other than the offense for which he was surrendered until he shall have had an opportunity of returning to the country from which he was surrendered, does not justify the imprisonment, upon a former conviction for another and different offense, of a person extradited from Canada for an offense against the United States, until he has had an opportunity to return to Canada,—especially where extradition has been refused for the other offense,—since this omission is inadequate to overcome the positive provisions of U. S. Rev. Stat. §§ 5272, 5275, U. S. Comp. Stat. 1901, pp. 3595, 3596, and the otherwise manifest scope and object of the treaty, and the earlier Ashburton treaty of 1842 (8 Stat. at L. 572, 576, art. 10), which are to limit imprisonment as well as the trial to the crime for which extradition has been demanded and granted. Johnson v. Browne, 816

Fugitives from justice.

3. The belief of the accused, when leaving the demanding state, that he had not committed any crime against the laws of that state, does not prevent his being a fugitive from justice within the meaning of the provision of U. S. Const. art. 4, § 2, and U. S. Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597, relating to extradition proceedings. Appleyard v. Massachusetts, 161

4. To be a fugitive from justice within the meaning of the provisions of U. S. Const. art. 4, § 2, and U. S. Rev. Stat. § 5278 U. S. Comp. Stat. 1901, p. 3597, relating to extradition proceedings, it is only necessary that the accused, having been in the demanding state when the crime was committed, thereafter leave that state and be found within the territory of another. Appleyard v. Massachusetts, 161

5. Independent proof, apart from the requisition papers, that the accused was a fugitive from justice, need not be demanded by the governor of the surrendering state before issuing his warrant of arrest in extradition proceedings. Pettibone v. Nichols, 148
Moyer v. Nichols, 160

FEDERAL COURTS.
Appellate jurisdiction of, see Appeal and Error.
Habeas corpus in, see Habeas Corpus.
Judicial enforcement of order of Interstate Commerce Commission, see Interstate Commerce Commission, 3, 4; Judgment, 2.
Removal of cause to circuit court, see Removal of Causes.
Original jurisdiction of Federal Supreme Court, see Supreme Court of the United States.
Immunity of state from suit, see State.

FEDERAL QUESTION.
As sustaining direct review of circuit or district court decrees, see Appeal and Error, 11.
As sustaining review of territorial supreme court decisions, see Appeal and Error, 16–18.
As sustaining appellate jurisdiction over District of Columbia court of appeals, see Appeal and Error, 21.
As sustaining appellate jurisdiction over district court of Porto Rico, see Appeal and Error, 23.
As sustaining appellate jurisdiction over state courts, see Appeal and Error, II. b, 2.
As ground for original jurisdiction, see Courts, 5–7.

FEES.
See Costs and Fees.

FIRES.
Carrier's limitation of liability for, see Carriers, 1.
Carrier's liability for loss by, see Carriers, 2.

FLAG.
Due process of law in state statute prohibiting use of national flag for advertising purposes, see Constitutional Law, 6.
Equal protection of the laws in statute prohibiting use of national flag for advertising purposes, see Constitutional Law, 47.
Statute prohibiting use of national flag for advertising purposes as infringing personal liberty, see Constitutional Law, 48.
Statute prohibiting use of national flag for advertising purposes as denying privileges of citizens, see Constitutional Law, 51.

The protection of the national flag against illegitimate uses is not so exclusively intrusted to the Federal government as to prevent the state of Nebraska from making it a misdemeanor, by the act of July 3, 1903, to use representations of such flag upon articles of merchandise for advertising purposes. Halter v. Nebraska, 696

FORECLOSURE.
Sale on, see Mortgage, 1, 2.

FOREIGN CORPORATIONS.
Due process of law in excluding, see Constitutional Law, 14.
Equal protection of the laws in statute excluding, see Constitutional Law, 44.
Service of process on, see Writ and Process, 2–6.

FOREIGN COUNTRY.
Isle of Pines is, under tariff law, see Duties, 1.

FOREIGN JUDGMENT.
Burden of proof in action on, see Evidence, 4.
Conclusiveness of, as to jurisdiction, see Judgment, 15, 16.

FORFEITURE.
Judicial sale to enforce, see Judicial Sale.
Equitable relief against forfeiture of lease, see Landlord and Tenant, 2–6.

FORMER JEOPARDY.
See Criminal Law, 2, 3.

FRANCHISE.
Of street railway, see Street Railways.

FRAUD.
In recovering judgment, see Judgment, 5, 6.
As ground for equitable relief against forfeiture of lease, see Landlord and Tenant, 5, 6.
Effect of agent's fraud on doctrine of imputed knowledge, see Principal and Agent, 2.

FULL FAITH AND CREDIT.
See Judgment, 17.

FUTURES.
Discrimination in law preventing dealing in, see Constitutional Law, 40.

GAS.
Proximate cause of explosion of mine gas, see Proximate Cause.

GEORGIA.
Right to enjoin pollution of air by foreign corporation, see Injunction, 1.

GRAND JURY.
Illegal selection of grand jurors as ground for release by habeas corpus, see Habeas Corpus, 4–6.

GRANT.
Spanish land grant, see Private Land Claims, 2–5.

HABEAS CORPUS.
Mode of review in, see Appeal and Error, 6.
Appeal to Supreme Court, see Appeal and Error, 19.

1. A person held in actual custody by a state for trial in one of its courts under an indictment for a crime against its laws will not be released on habeas corpus by a Federal circuit court because the methods by which his personal presence in the state was secured may have violated the provisions of U. S. Const. art. 4, § 2, or U. S. Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597, relating to extradition proceedings. Pettibone v. Nichols, 148
Moyer v. Nichols, 169

2. Relief by habeas corpus should not be accorded by a Federal court to a person held in custody by the state authorities under an order of commitment entered by a state court after a jury had returned a verdict of "not guilty, by reason of insanity," although the prisoner may be so held in violation of the Federal Constitution, since he should be left to his remedy by writ of error from the Federal Supreme Court to review the final action of the highest court of the state. Urquhart v. Brown, 709

3. The failure to specify a building in the order of the supreme court of the territory of Oklahoma fixing Lawton as the place where the district court should be held in and for the county of Comanche, there being at the time of making the order and at the time of trial no county or court buildings in such county, did not go to the jurisdiction of such district court so as to justify relief by habeas corpus in favor of a person convicted of crime therein who makes no showing of any opportunities lost because no building was named. Re Moran, 165

4. Disobeying the law governing the selection of grand jurors does not affect the

jurisdiction of the court so as to justify the release by habeas corpus of a person convicted under an indictment found by such jurors. Re Moran, 105

5. Compelling the accused to stand up and walk before the jury, and stationing the jury during a recess so as to observe his size and walk, even if contrary to the 5th Amendment to the Federal Constitution, do not affect the jurisdiction of the court so as to justify relief by habeas corpus. Re Moran, 105

6. A person imprisoned under a conviction in an Oklahoma court is not entitled to his release on habeas corpus, under U. S. Rev. Stat. § 753, U. S. Comp. Stat. 1901, p. 592, because the grand jurors were summoned from the body of the county, which resulted in the selection as such jurors of persons who were not electors nor residents of the territory, since the Federal Constitution does not control the method of selection, and if any laws have been violated by this method they are territorial enactments, which are not laws of the United States. Re Moran, 105

HAWAII.

Appeals from courts of, to Federal Supreme Court, see Appeal and Error, 24.

As party defendant in foreclosure proceedings, see Mortgage, 1.

HIDES.

Inspection of, as affecting interstate commerce, see Commerce, 12, 13.

HIGHWAYS.

Effect of consolidation of street railways on contract exemption from paving obligation, see Corporations, 1.

Conditions of incorporation as affecting exemption from paving obligations enjoyed by predecessor in title of street railway, see Corporations, 2.

Effect of sale of capital stock on exemptions from paving obligations enjoyed by predecessor in title of street railway company, see Corporations, 3.

HOMESTEAD.

See Public Lands, 4, 5.

HOMICIDE.

Murder of prisoner pending appeal, see Contempt, 3.

Jurisdiction of Oklahoma over homicide committed in land not open to settlement, see Territories.

HUSBAND AND WIFE.

Judgment in suit by wife to obtain liquidation of community property, see Judgment, 3.

Marriage *per verba de præsenti*, see Marriage.

1. A rule of limited forfeiture in lieu of the rigorous rule of the Spanish law that the wife against whom a divorce for adultery was decreed forfeited all right to her share in the community property was adopted for Porto Rico by the provisions of Civil Code 1889, art. 73, ¶ 3, Civil Code 1902, tit. 5, chap. 5, § 174, to the effect that the guilty spouse shall forfeit all gifts from the innocent party, who shall retain everything which has been acquired from the other. Garrozi v. Dastas, 369

2. The rule of the Spanish law that the wife against whom a judgment of divorce for adultery has been decreed forfeits all right to her share in the community property does not obtain in Porto Rico because of the provision of Civil Code 1889, art. 1417, Civil Code 1902, § 1330, that the spouse who, by bad faith, has been the cause of the nullity of the marriage, shall not have a share in the common property, since this provision relates, not to the dissolution of a marriage by a decree of divorce, but to the recognition of the nullity of a seeming marriage for causes which have operated to prevent it from ever having existed. Garrozi v. Dastas, 369

3. The power of the husband as the head and master and administrator of the community property, under Porto Rico Civil Code 1889, arts. 1412, 1413, Civil Code 1902, §§ 1327, 1328, is such that, in the absence of express limitation, he cannot, after the dissolution of the community, be required to account for money which he may have recklessly and extravagantly expended during the existence of the community. Garrozi v. Dastas, 369

4. A divorced wife is entitled to obtain the liquidation of the community and the payment to her of her share, under Porto Rico Civil Code 1902, § 173, providing that a divorce carries with it a complete dissolution of all the matrimonial ties, and the division of all property and effects between the parties to the marriage. Garrozi v. Dastas, 369

5. The amount of alimony *pendente lite* and the expenses incurred by the wife in a divorce suit in a Porto Rico court, which were sanctioned by that court, are properly allowed to the divorced wife in her suit to obtain a liquidation of the community and a decree for the payment of her share. Garrozi v. Dastas, 369

6. Counsel fees cannot be allowed by the district court of the United States for the district of Porto Rico to a wife in her suit to obtain a liquidation of the community and a decree for the payment of her share. Garrozi v. Dastas, 369

IMPORTS.

Duties on, see Commerce, 6.

INDIANS.

Effect as to persons not parties of judgment of Choctaw and Chickasaw citizenship court in test case, see Judgment, 4.

Ratification by Choctaw Nation of illegal judicial sale, see Judicial Sale.
Mandamus to compel approval of Indian allotments, see Mandamus, 3.
Exemption of Indian allotments from taxation, see Taxes, 6.

1. Congress could constitutionally empower the Choctaw and Chickasaw citizenship court, created by the act of July 1, 1902 (32 Stat. at L. 641, chap. 1362), to review and annul, for irregularities, the judgments of the United States courts of the Indian territory in Indian citizenship cases, although by the terms of the act of June 10, 1896 (29 Stat. at L. 339, 340, chap. 398), those judgments had become final. Wallace v. Adams, 547

2. A title in fee may pass under a treaty with the Indians without the aid of an act of Congress, and without any patent from the United States. Francis v. Francis, 165

3. An alienable title in fee simple which could not be affected by restrictions, in a subsequent patent, upon the power of alienation, passed under the reservation of 640 acres of land for the use of the children of Bokowtonden and their heirs, made by the treaty of September 24, 1819 (7 Stat. at L. 203), with the Chippewa Nation, for the cession of Indian lands to the United States. Francis v. Francis, 165

4. A regulation of the Department of the Interior that the adoption of a person into an Indian tribe must be approved by the Indian Office to be valid can hardly be said to be beyond the power of that Department to adopt, in view of the provision of U. S. Rev. Stat. § 463, U. S. Comp. Stat. 1901, p. 262, that the "Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of the Indian relations." United States ex rel. West v. Hitchcock, 718

5. Indian allottees under the Stockbridge and Munsee treaty of February 5, 1856 (11 Stat. at L. 663), and the act of February 6, 1871 (16 Stat. at L. 404, chap. 38), are, notwithstanding the restraint upon alienation of the land, vested with sufficient title in their allotments to authorize the cutting of timber therefrom for sale, and not by way of improvements, without approval of the Department of the Interior. United States v. Paine Lumber Co. 1139

Cherokee enrolment.

6. White persons residing in the Cherokee Nation who became Cherokee citizens under the Cherokee laws by intermarriage with Cherokees by blood prior to November 1, 1875, when a Cherokee law became effective which declared that such persons by intermarriage acquired no rights of soil or interest in the vested funds of the Nation, are equally interested, and have equal *per capita* rights with Cherokee Indians by blood in the lands constituting the public domain of the Cherokee Nation, and are entitled to be enrolled for that purpose. Red Bird v. United States, 96

7. No rights, interest, or share in any funds belonging to the Cherokee Nation, except where such funds were derived by lease, sale, or otherwise from the lands of the Cherokee Nation conveyed to it by the United States by the patent of December, 1838, were acquired by white persons residing in the Cherokee Nation who became Cherokee citizens under the Cherokee laws by intermarriage with Cherokees by blood prior to November 1, 1875, when a Cherokee law became effective which declared that such persons by intermarriage acquired no rights of soil or interest in the vested funds of the Nation. Red Bird v. United States, 96

8. Civil and political, and not property, rights, were alone within the purview of the amendment made in 1866 to the 5th section of the Cherokee Constitution of 1839, relating to eligibility to a seat in the National Council, by which "whites legally members of the Nation by adoption" were declared to be citizens of the Cherokee Nation. Red Bird v. United States, 96

9. White persons who intermarried with Cherokees after November 1, 1875, when a Cherokee law became effective which declared that such persons by intermarriage acquired no right of soil or interest in the vested funds of the Cherokee Nation, are not entitled to share in the allotment of the lands or in the distribution of any of the funds belonging to such Nation, and are not entitled to be enrolled for that purpose. Red Bird v. United States, 96

10. The ratification by the Cherokee Nation of the act of Congress of July 1, 1902 (32 Stat. at L. 716, chap. 1375), which in § 26 declares that no white person intermarried since December 16, 1895, shall be entitled to enrolment or to participate in the distribution of the tribal property of the Cherokee Nation, does not amount to a concession of property rights by the Indians to all who intermarried prior to that date. Red Bird v. United States, 96

11. White persons who have intermarried with Delaware or Shawnee citizens of the Cherokee Nation, not thereby becoming citizens themselves under the Cherokee laws, have no part or share in the Cherokee property, and are not entitled to participate in the allotment of the lands or in the distribution of the funds belonging to such Nation, and are not entitled to be enrolled for that purpose. Red Bird v. United States, 96

12. White persons who intermarried with Cherokees by blood, and, after the death of the Cherokee wife or husband, intermarried with persons not of Cherokee blood, and white men who, having married Cherokee women, abandoned them, have no part or share in the Cherokee property, and are not entitled to share in the allotments of the lands or in the distribution of any of the

funds belonging to the Cherokee Nation, or to be enrolled for that purpose, although the proceedings in the nature of office found authorized by the Cherokee laws have not been instituted to deprive them of the rights and privileges acquired by intermarriage. Red Bird v. United States, 96

INDIAN TERRITORY.
Powers of Choctaw and Chickasaw citizenship court, see Indians, 1.
Effect as to persons not parties of judgment of Choctaw and Chickasaw citizenship court in test case, see Judgment, 4.

INDICTMENT.
Form as affected by Federal Constitution, see Appeal and Error, 29.
As probable cause for removal to another district for trial, see Criminal Law, 5.
Materiality of evidence under averments of, see Evidence, 10.

INFRINGEMENT.
Of patent, see Patents, 2.

INHERITANCE TAX.
Validity of, see Constitutional Law, 32, 33, 39.
Validity of statute excluding corporations from inheritance tax, see Constitutional Law, 53.
As affecting contract obligations, see Constitutional Law, 62.

INJUNCTION.
Enjoining proceedings in state court, see Courts, 17–19.
Laches as bar to injunctive relief, see Limitation of Actions, 9.

1. Foreign corporations will be enjoined at the suit of the state of Georgia from so discharging sulphurous fumes from their works in Tennessee as to pollute the air over large tracts of territory in Georgia, and to cause and threaten wholesale damage to forests and vegetable life therein, if not to health. Georgia v. Tennessee Copper Co. 1038

2. Kansas, having recognized the right to appropriate the waters of a stream for irrigation purposes, subject to the condition of an equitable division between riparian proprietors, is not entitled to enjoin Colorado from diminishing the flow of the Arkansas river by appropriating its waters for purposes of irrigation, which has resulted in reclaiming large areas of arid lands in Colorado, while the influence of such diminution, though of perceptible injury to some portions of the Arkansas valley in Kansas, has worked little, if any, detriment to the great body of the valley. Kansas v. Colorado, 956

As to taxes.

3. Injunctive relief against the taxation of railroad property because of the methods adopted by the state board of equalization and assessment in arriving at the valuation of such property for tax purposes will not be given in a Federal court except in a case of fraud or a clearly shown adoption of a fundamentally wrong principle. Chicago, B. & Q. R. Co. v. Babcock, 636

4. A Federal court will not enjoin the collection of state taxes on railroad property because of undervaluation of the other taxable property in the state, where such inequality is not the result of a scheme or agreement among the taxing officers. Chicago, B. & Q. R. Co. v. Babcock, 636

INSPECTION LAWS.
See Commerce, 6, 12, 13.

INSTRUCTIONS.
See Trial, 5–8.

INSURANCE.
Cash surrender value as asset of bankrupt estate, see Bankruptcy, 5–7.
On life of partner as asset of bankrupt partnership estate, see Bankruptcy, 8.
Due process of law in state regulation of, see Constitutional Law, 13.
Equal protection of the laws in state regulation of, see Constitutional Law, 13.
Validity of statute excluding suicide as defense, see Constitutional Law, 54.

A policy of accident insurance issued after the passage of Mo. Rev. Stat. 1879, § 5982, providing that in all suits on policies of insurance on life it shall be no defense that the insured committed suicide unless it be shown that he contemplated suicide when applying for the policy, cannot lawfully restrict the liability of the insurance company to one tenth of the principal sum insured, in the event of suicide not contemplated by the insured at the time application was made for the policy. Whitfield v. Ætna L. Ins. Co. 895

INTERIOR DEPARTMENT.
Control over Indians, see Indians, 4, 5.
Control of public lands, see Public Lands.
Mandamus to Secretary of Interior, see Mandamus, 3.

INTERPRETER.
When refusal to appoint is not prejudicial error, see Appeal and Error, 103.

INTERSTATE COMMERCE.
See Commerce.

INTERSTATE COMMERCE COMMISSION.
Review of findings of fact, see Appeal and Error, 99, 100.
Harmless error in decisions of, see Appeal and Error, 105.
Filing rates with, see Carriers, 6, 7.

Action by Commission as condition to obtaining relief from unreasonable interstate rates, see Carriers, 10, 11.
Effect of stipulation on judicial enforcement of order of, see Judgment, 2, Trial, 4.

1. The Interstate Commerce Commission, in making an investigation of a complaint filed by soap manufacturers as to the freight rate for common soap promulgated in a classification adopted to govern in official classification territory, had the power, in the public interest, unembarrassed by any supposed admissions contained in the complaint, to consider the whole subject, and the operation of the classification in the entire territory, and also how far its going into effect would be just and reasonable, would create preferences, or would engender discrimination. Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 995

2. The Interstate Commerce Commission is acting within its powers under the act to regulate commerce in ordering carriers to desist from further enforcing a classification by percentage of common soap in less than car-load lots, operating throughout official classification territory, which it finds has brought about a general disturbance in relations previously existing in that territory, and has created discriminations and preferences among manufacturers and shippers of the commodity, and between localities in such territory. Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 995

3. A concerted advance by interstate carriers in the freight rate upon a particular commodity may be held unreasonable and unjust by the Interstate Commerce Commission and by a Federal circuit court in the subsequent proceedings to enforce the order of the Commission, although such rate may be but a mere division of a through rate. Illinois C. R. Co. v. Interstate Commerce Commission, 1128

4. Any supposed admissions in a complaint filed by soap manufacturers with the Interstate Commerce Commission as to the freight rate for common soap promulgated in a classification adopted to govern in official classification territory are ineffectual to deprive a Federal circuit court, in a proceeding to enforce an order of the Commission directing the carriers to desist from enforcing this classification as to soap in less than car-load lots, of the power to test the validity of such order by the scope of the act to regulate commerce. Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 995

INTOXICATING LIQUORS.
Commerce in, see Commerce, 8-11.
Due process of law in issuing liquor licenses, see Constitutional Law, 9.

ISLE OF PINES.
As foreign country under tariff laws, see Duties, 1.

ISTHMIAN CANAL.
See Panama Canal Zone.

JUDGMENT.
On appeal, see Appeal and Error, VI.
Finality of decision for purposes of appeal, see Appeal and Error, I. a.
Due process of law in rendering new judgment after term, see Constitutional Law, 29.
Deficiency judgment in foreclosure proceedings, see Mortgage, 1.

1. No valid judgment *in personam* can be rendered against a defendant without personal service upon him in a court of competent jurisdiction, or waiver of summons, and voluntary appearance therein. Clark v. Wells, 138

2. The final decree of a Federal circuit court in the proceedings prosecuted under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 16, after action by the Interstate Commerce Commission declaring an increased freight rate to be unreasonable, may direct an order of reference to the standing master of the pleadings and evidence in the cause, with instructions to ascertain the sum of the increase in rates paid since the rate went into effect, where defendants stipulated in open court that, in case complainants prevailed, a decree of restitution might be made. Southern R. Co. v. Tift, 1124

3. The objection that the district court of the United States for the district of Porto Rico should not have given a money decree in a suit by the wife to obtain the liquidation of the community is not a valid one, where the rights of the wife arise simply from an increased value of property or assets brought by the husband to the marriage, or as a result of the falling into the community of the revenues of the property of the husband. Garrozi v. Dastas, 369

4. A decree of the Choctaw and Chickasaw citizenship court in the test case against ten persons who had been admitted to citizenship or enrolment by the United States courts in the Indian territory, vacating, for certain irregularities, the judgments of those courts, is binding on a person similarly situated who was not made a party, but who did not avail himself of his privilege, under the act of July 1, 1902 (32 Stat. at L. 641, chap. 1362), to transfer his individual case from the territorial court to the citizenship court, but chose to abide the outcome of the case against the ten representatives of his class. Wallace v. Adams, 547

5. Notice of the fraud in recovering a judgment on a policy of life insurance which induces the payment into court of the amount of recovery, out of which the clerk of court pays over the sums called for in

certain assignments by way of contingent fees for professional services in collecting the insurance, cannot be established by the mere fact that, while the assignees held an interest in the policy only, they were assignees of a chose in action, and took it subject to the equities. Fidelity Mut. L. Ins. Co. v. Clark, 91

6. Notice of the denial of the death of the insured in the answer in an action on a policy of insurance is not notice of the fraud in recovering judgment on the policy while the insured was alive which will impeach such judgment as to the parties to whom the clerk of court pays over, out of the money paid into court in satisfaction of such judgment, the sums called for in certain assignments of an interest in the policy by way of contingent fees for professional services, rendered in good faith in collecting the insurance. Fidelity Mut. L. Ins. Co. v. Clark, 91

Conclusiveness generally.

Conclusiveness of judgment of court-martial, see Courts-Martial.

7. A final decree of a Federal circuit court in favor of defendant in a patent infringement suit entitles him to continue the business of manufacturing and selling throughout the United States the alleged infringing article, free from all interference by the complainant by virtue of the patent alleged to have been infringed. Kessler v. Eldred, 1065

8. Defendant's rights under a final decree in his favor rendered by a Federal circuit court in a patent infringement suit are violated by the action of the complainant therein in thereafter filing a bill against one of the former's customers for an alleged infringement of the patent on account of the use or sale of the same article passed upon in the prior suit. Kessler v. Eldred, 1065

9. A recital in a decree for the sale of lands for unpaid levee taxes that the nonresident defendants were "severally constructively summoned by publication . . . proof of which has been previously filed herein" is conclusive as against a collateral attack based on the objection that there was no sufficient proof of publication of the warning order or notice filed or produced in court when the decree was made, where, under the local procedure, the entry of a warning order, even if required, is not jurisdictional. Ballard v. Hunter, 461

10. The jurisdiction of a territorial court to order a sale of property by a receiver appointed in an earlier action without formally extending the receivership to the suit in which the decree of sale was made cannot be collaterally attacked by a party to such suit after unsuccessfully prosecuting appeals to both the territorial supreme court and the Supreme Court of the United States, in which the jurisdictional question was not presented. Gila Bend Reservoir & Irrig. Co. v. Gila Water Co. 801

11. A decree dividing the damage sustained by two vessels held in default for a collision, but refusing to divide the damages to cargo, because that question was not open under the pleadings, does not prevent the vessel which has been compelled to pay the entire cargo damage from bringing a libel in admiralty against the other vessel to enforce contribution. Erie R. Co. v. Erie & W. Transp. Co. 450

12. A decree enjoining a municipality, at the suit of a waterworks company, from building its own waterworks, or denying liability, or refusing to pay the water rentals contracted for, is not conclusive as to the right of the municipality to regulate water rates charged to private consumers under a law passed long after the bill was filed, even if it could be said that the pleadings put in issue the reasonableness of the rates then charged. Vicksburg v. Vicksburg Waterworks Co. 1155

13. A decree rendered on demurrer, dismissing, on the merits, a suit to establish a trust in certain lands in favor of a railway company, which set up, as a basis of its alleged title in fee simple, the railroad land grant act of July 2, 1864 (13 Stat. at L. 365, chap. 217), prevents the successor in interest of such railway company from asserting, in an action of ejectment involving the same property, brought by the defendant in the former suit, that such company had acquired title under the act of March 3, 1875 (18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568), or under the state statute of limitations. Northern P. R. Co. v. Slaght, 738
Northern P. R. Co. v. Slaght, 742

14. A judgment sustaining a demurrer to the petition in an action by a creditor of a national bank against the directors, because the court was of the opinion that the petition only stated a right to recover for violations of the national bank act, causing damage to the bank as such, the right to recover for which was an asset of the bank, enforceable only by its receiver, is not a bar to a recovery in another action between the same parties under a petition which sets up a right to recover for the individual loss suffered, as distinct from the right of the bank. Yates v. Utica Bank, 1015

Foreign judgments.

Due process of law in enforcing foreign judgment, see Constitutional Law, 3.

Burden of proof in action on, see Evidence, 4.

15. The jurisdiction of the court rendering a judgment or decree is open to inquiry under proper averments, where its conclusiveness is questioned in a court of another state. Old Wayne Mut. L. Asso. v. McDonough, 345

16. Want of jurisdiction to set aside a judgment after the term, and render, without notice, a new and different judgment, is available as a defense to an action on such judgment in a foreign jurisdiction, whatever remedy the local practice may afford a

person against whom judgment is rendered in his absence and without his knowledge. Wetmore v. Karrick, 745

Full faith and credit.

17. A judgment of the Supreme Court of the United States to the effect that a policy of fire insurance could not be recovered upon as it stood nor be helped out by any doctrine of the common law is not denied full faith and credit by an adjudication of a state court that such judgment is not a bar to a suit in equity to reform the policy so that it will express consent to concurrent insurance, and to recover upon such policy as reformed. Northern Assur. Co. v. Grand View Bldg. Asso. 109

JUDICIAL NOTICE.

See Evidence, 1.

JUDICIAL SALE.

Evidence of ratification of illegal sheriff's sale, see Evidence, 8.

Foreclosure sale, see Mortgage, 1, 2.

1. A railway company and its receiver did not, by building outside its right of way through the Indian territory, lose the right to assert that a sheriff's sale to enforce a forfeiture to the Choctaw Nation, so incurred was invalid because made on credit, in clear violation of the Choctaw law of October 30, 1888, under which the sheriff assumed to sell. Walker v. McLoud, 495

2. Ratification by the general council of the Choctaw Nation of a sheriff's sale to enforce a forfeiture incurred by a railway company by reason of its erection of buildings outside its right of way through the Indian territory, which sale, because made on credit, was a clear violation of the law under which the sheriff assumed to sell, was not accomplished by subsequent legislation which appropriates money to defend the Nation in all suits "in any manner relative to the full and complete execution of the laws of the Choctaw Nation by the sheriffs of each and every county in the confiscation of the property of noncitizens who are now occupying lands or buildings, or who may hereafter occupy, not in conformity to the laws of the Choctaw Nation." Walker v. McLoud, 495

JURISDICTION.

Of courts generally, see Courts.

Appellate jurisdiction, see Appeal and Error.

Admiralty jurisdiction, see Admiralty.

Jurisdictional question as sustaining direct review of circuit or district court judgments, see Appeal and Error, 12–14.

Conflict of jurisdiction between state and Federal courts, see Admiralty; Bankruptcy, 1; Courts, 14–19.

Lack of, as justifying disobedience of order staying proceedings, see Contempt, 1.

Of courts-martial, see Courts-Martial, 2.

Presumption as to, see Evidence, 3.

Lack of, as ground for relief by habeas corpus, see Habeas Corpus, 3–5.

Validity of judgment *in personam* rendered without personal service, see Judgment, 1.

Conclusiveness of judgment as to jurisdiction, see Judgment, 10, 15, 16.

Of territory over land not open to settlement, see Territories.

JURISDICTIONAL AMOUNT.

As controlling appellate jurisdiction, see Appeal and Error, 17, 18, 22.

To sustain original jurisdiction, see Courts, 9, 10.

Sufficiency of evidence respecting, see Evidence, 11.

JURY.

Province of court and jury, see Trial, 2, 3.

KANSAS.

Rights of, in waters of Arkansas river, see Waters, 1, 2.

Right to enjoin Colorado from diverting Arkansas river, see Injunction, 2.

LACHES.

See Limitation of Actions, 2, 3.

LAND DEPARTMENT.

Control of public lands, see Public Lands.

LANDLORD AND TENANT.

1. Rent after re-entry cannot be recovered by the lessors unless a reasonable effort has been made to relet the premises where the lease provides that after re-entry for breach of any covenant the lessors "may, at their discretion, relet the premises, at the risk of the lessee, who shall remain, for the residue of said term, responsible for the rent herein reserved, and shall be credited with such amounts only as shall be, by the lessors, actually realized." International Trust Co. v. Weeks 234

2. A court of equity cannot, in the exercise of its general power to relieve from a forfeiture, endow a tenant with the right to create, at the risk of the owner, a contest involving the validity of an irredeemable tax sale, for the purpose of giving such tenant the right, if the tax title be held invalid, to pay the taxes and thus be relieved of a forfeiture for his breach of his covenant to pay such taxes. Kann v. King, 300

3. Equity will not relieve from the forfeiture of a lease for the breach by a tenant of his covenant to pay the taxes on any theory that his default was due to the misleading conduct of the landlord or to his own temporary oversight, where the testimony conclusively demonstrates the tenant's gross negligence. Kann v. King, 300

4. Relief from a forfeiture of a lease, incurred by a tenant because of his breach of

his covenant to pay the taxes, cannot be given by a court of equity on the ground of accident or mistake, where the relief sought cannot be afforded without subjecting the lessor to the peril of contesting the validity of an outstanding prima facie irredeemable tax title. Kann v. King, 360

5. The purchase of a irredeemable tax title with a view to securing a lease of the property is not such a fraud on the tenant in possession as entitles him to relief in equity from a forfeiture of the lease for a breach of his covenant to pay the taxes. Kann v. King, 360

6. The act of the landlord in accepting as a new tenant the purchaser of an irredeemable tax title to the property is not such a fraud on the tenant in possession as entitles him to relief in equity from a forfeiture of the lease for his breach of his covenant to pay the taxes,—especially where the landlord offered to condone the forfeiture if the tenant would commence proceedings to have the outstanding tax title declared invalid, and would secure the landlord from loss in the event that such title should be sustained, which offer the tenant declined. Kann v. King, 360

LEASE.
See Landlord and Tenant.

LIBEL.
To enforce contribution, see Admiralty, 1.

LIBERTY.
See Constitutional Law, 48.

LICENSE.
Due process of law in issuing liquor licenses, see Constitutional Law, 9.

LIEN.
Equitable lien, see Bankruptcy, 4; Mortgage, 3.

LIMITATION OF ACTIONS.

1. The two years' limitation prescribed by U. S. Rev. Stat. § 5057, for suits between an assignee in bankruptcy and a person claiming any adverse interest touching any property or rights of property transferable to or vested in such assignee is not applicable to adverse claims arising out of an equitable attachment and an assignment of the bankrupt's interest under a testamentary trust, where both attachment and assignment were subsequent to the assignment in bankruptcy. Hammond v. Whittredge, 606

2. The limitation of five years prescribed by U. S. Rev. Stat. § 1047, U. S. Comp. Stat. 1901, p. 727, for any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," does not apply to the action for threefold damages for injury to "business or property," authorized by the antitrust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3202), § 7, in cases of violations of that act. Chattanooga Foundry & Pipe Works v. Atlanta, 241

3. The ten years' limitation prescribed by Tenn. Code, § 2776, for "all other cases not expressly provided for," rather than the one year limitation prescribed by § 2772 for "statute penalties," or the three years limitation prescribed by § 2773 for injuries to personal or real property, governs an action for threefold damages for injury to "business or property" brought under the antitrust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3202), § 7, in which the right of recovery is based on the excessive price for iron water pipe which a municipality was led to pay by reason of an illegal arrangement between the members of a trust or combination formed in violation of that act. Chattanooga Foundry & Pipe Works v. Atlanta, 241

4. A proceeding in mandamus cannot be deemed to be governed by the limitations prescribed by Okla. Code, §§ 18, 23, for civil actions, in view of the provision of § 694 of such Code, that pleadings in mandamus are to be construed and may be amended and issues joined and the proceedings had in the same manner as in a civil action, and of the declaration in § 687, that writs of mandamus may not be issued where there is a plain and adequate remedy in the ordinary course of law. Duke v. Turner, 652

5. The limitation of the right to bring an action against a stockholder for a debt of the corporation to two years after he has ceased to be a stockholder, which is made by N. Y. Laws 1892, chap. 688, § 55, is not applicable to a suit to enforce the liability of a stockholder in a foreign corporation. Bernheimer v. Converse, 1163

6. A cause of action to enforce the liability of a stockholder under the Minnesota Constitution and laws does not accrue so as to start the running of the six years' limitation prescribed by N. Y. Code Civ. Proc. § 382, until the receiver of the corporation can sue upon the assessment after the stockholder has failed to pay as required by an order of court. Bernheimer v. Converse, 1163

7. A state statute of limitations for the recovery of real property does not begin to run in favor of a railway company as against a settler under the homestead laws of the United States until patent has issued. Northern P. R. Co. v. Slaght, 738
Northern P. R. Co. v. Slaght, 742

Laches.

8. Mandamus to compel the levy of a tax to satisfy municipal warrants will not be refused on the theory that the relators have slept upon their rights for an unreasonable time, to the prejudice of the rights of respondents, or of other interested persons, where, in some form, legal proceedings for the collection of these warrants have been prosecuted by various holders in different courts up to the commencement of the

mandamus proceedings, without beneficial results. Duke v. Turner, 652

9. The state of Georgia has not been guilty of such laches as bars her right to injunctive relief against the pollution of air over large tracts of her territory, and the destruction of forests and vegetable life therein by sulphurous gases discharged by foreign corporations from their works in Tennessee, where such conditions have not obtained until recent years, and the dismissal, without prejudice, of a similar bill filed in 1904, was due to the mistaken belief that changes in the process of manufacture then in progress would remove the evil. Georgia v. Tennessee Copper Co. 1038

LIMITING LIABILITY.
Of carrier for loss by fire, see Carriers, 1.

LIQUIDATED DAMAGES.
See Damages.

LIS PENDENS.
1. A suit in equity to enforce a judgment upon real property which, though standing upon the public records in the name of another than the judgment debtor, is alleged to have been paid for with his money, resulting in a decree that such judgment debtor is the owner of the equitable and beneficial title, is within the scope of the Porto Rico mortgage law, art. 42, which, in order to protect innocent purchasers *pendente lite*, provides for the giving of a cautionary notice in suits for the ownership of real property or for the creation, declaration, modification, or extinction of any property right. Romeu v. Todd. 1093

2. The local statutory law of real property requiring the giving and recording of cautionary notice of a pending suit in order to affect innocent third parties dealing with the recorded owner is applicable to a suit brought on the equity side of the United States district court of Porto Rico, in view of the provision of the act of April 12, 1900 (31 Stat. at L. 79, chap. 191), § 8, continuing in force the local laws not inconsistent with the laws of the United States, although, by § 34, the district court of the United States for Porto Rico is given, in addition to the ordinary jurisdiction of Federal district courts, jurisdiction of all cases cognizant in the Federal circuit courts, with power to proceed therein in the same manner as a circuit court. Romeu v. Todd. 1093

3. Failure of the clerk properly to index amended declarations in ejectment covering additional property, which were duly filed in his office, does not excuse the failure of a searcher to examine the files. Armstrong v. Ashley, 482

LODE LOCATION.
See Mines.

MANDAMUS.
Limitation of actions in mandamus proceedings, see Limitation of Actions, 4.
Laches as bar to mandamus, see Limitation of Actions, 8.
Original jurisdiction of Federal circuit court of, see Courts, 11.

1. Mandamus, rather than prohibition, is the proper remedy where the circuit court of the United States refuses to remand to the state court from which it was removed a case over which the Federal court has no jurisdiction. Ex parte Wisner, 264

2. Mandamus will not lie to compel a Federal circuit court to remand to a state court a cause which the circuit court has refused to remand to the state court because of the opinion that the case presents a controversy between the removing defendant and the plaintiff which can be fully determined between them without the presence of the other defendants. Re Pollitz, 1081

3. The Secretary of the Interior will not be compelled by mandamus to approve the relator's selection, as an adopted member of the Wichita tribe, of certain lands out of those ceded to the United States by the Wichita and affiliated bands of Indians, under the agreement of June 4, 1891, ratified by the act of March 2, 1895 (28 Stat. at L. 876, 895–897, chap. 188), where the Secretary's answer, though not in terms denying the averments of the petition as to the relator's membership in the tribe, alleges that he had, on a specified date, reached and announced a decision that such relator was not a member of the tribe, and therefore was not entitled to an allotment. United States ex rel. West v. Hitchcock, 718

MARITIME LIENS.
Enforcement in state court, see Admiralty, 2–4.

MARRIAGE.
Persons whose alleged marriage in Virginia might have been invalid for want of a license had they remained there, and might also, for want of a religious ceremony, have been invalid in Maryland, where they afterwards resided, must be deemed married in New Jersey, when, as husband and wife, they took up their permanent residence there, and lived together in that relation continuously in good faith and openly up to the time of the man's death, being regarded by themselves and in the community as husband and wife, since their conduct towards each other in the eye of the public while in New Jersey, taken in connection with their previous association, was equivalent in law to a declaration by each that they did, and during their joint lives were to, occupy the relation of husband and wife, which was as effective to establish the status of marriage in New Jersey as if it had been made in words of the present tense after they became domiciled in that state. Travers v. Reinhardt, 365

MASTER AND SERVANT.

Priorities in bankruptcy proceedings of assigned claims for wages, see Bankruptcy, 13.

Validity of statute selecting mine owners as a class responsible for defaults of certain employees, see Constitutional Law, 45.

Validity of statute imposing on mine owners responsibility for defaults of mine managers and mine examiners, see Constitutional Law, 50.

Proximate cause of mine explosion, see Proximate Cause.

When negligence of master is question for jury, see Trial, 3.

1. A shovel car is a "car" within the meaning of the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174) § 2, requiring any car used in moving interstate traffic to be equipped with an automatic coupler. Schlemmer v. Buffalo, R. & P. R. Co. 681

2. The possibility that a railway employee, while attempting to make a coupling with a car not equipped with an automatic coupler, as required by the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, might miscalculate the height to which he might safely raise his head, is so inevitably and clearly attached to the risk which, under § 8 of that statute, he does not assume, as to prevent a court from holding, as a matter of law, that he was guilty of contributory negligence which would defeat any recovery in lifting his head a little too high after being warned of the danger. Schlemmer v. Buffalo, R. & P. R. Co. 681

Eight-hour law.

Intentional violation of, see Criminal Law, 1.

3. The prohibition, under penalty of fine or imprisonment, except in case of extraordinary emergency, against requiring or permitting laborers or mechanics employed upon any of the public works of the United States or of the District of Columbia to work more than eight hours each day, which is made by the act of August 1, 1892 (27 Stat. at L. 340, chap. 352, U. S. Comp. Stat. 1901, p. 2521), is not repugnant to the Federal Constitution. Ellis v. United States, 1047

4. Dredging a channel in Boston harbor is not a public work of the United States, within the meaning of the act of August 1, 1892 (27 Stat. at L. 340, chap. 352, U. S. Comp. Stat. 1901, p. 2521), forbidding a contractor upon any public work of the United States, under penalty of fine or imprisonment, to permit or require employees thereon to work more than eight hours each day. Ellis v. United States, 1047

5. Masters, mates, engineers, firemen, crane men, deck hands, and scow men employed on tugs, dredges, and scows used in dredging a harbor channel are not laborers or mechanics within the meaning of the act of August 1, 1892 (27 Stat. at L. 340, chap. 352, U. S. Comp. Stat. 1901, p. 2521), forbidding contractors upon any public work of the United States or of the District of Columbia, under penalty of fine or imprisonment, to permit or require laborers and mechanics employed thereon to work more than eight hours each day. Ellis v. United States, 1047

6. A delay, not entirely unexpected, in obtaining the timber required for the construction of a pier at the Boston navy yard, does not create an "extraordinary emergency," within the meaning of the exception in the act of August 1, 1892 (27 Stat. at L. 340, chap. 352, U. S. Comp. Stat. 1901, p. 2521), forbidding a contractor upon any public work of the United States, under penalty of fine or imprisonment, to permit or require employees thereon to work more than eight hours each day. Ellis v. United States, 1047

MATERIALITY.

Of evidence, see Evidence, 10.

MAXIMS.

1. Damnum absque injuria. Union Bridge Co. v. United States, 523

2. Le mort saisit le vif. Cahen v. Brewster, 310

3. Mobilia sequunter personam. Buck v. Beach, 1106

4. Res inter alios acta. Chapman & D. Land Co. v. Bigelow, 953

MINES.

Commission of broker for sale of mining property, see Brokers.

Effect of compromise of adverse proceedings, see Compromise and Settlement.

Proximate cause of explosion of mine gas, see Proximate Cause.

Validity of statute imposing on mine owners responsibility for defaults of mine managers and mine examiners, see Constitutional Law, 18, 45, 50.

1. The requirement of parallelism of end lines of lode mining locations which is made by the act of May 10, 1872 (17 Stat. at L. 91, chap. 152, § 2, U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, pp. 1424, 1425), cannot be deemed to apply where the location had been made at the time of the passage of that act, and the proceedings under the act of July 26, 1866 (14 Stat. at L. 251, chap. 262,) had then so far advanced as to exclude adverse claims, in view of the various provisions of the later act for the protection of all rights previously acquired under existing laws, and of the provision of § 3 of that act, that prior locators shall have "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a per-

pendicular in their course downward as to extend outside the vertical side lines of said surface locations." East Central Eureka Min. Co. v. Central Eureka Min. Co. 476

2. Rights in mining property entitled to protection under the act of May 10, 1872 (17 Stat. at L. 91, chap. 152, § 2, U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, pp. 1424, 1425), as previously acquired under existing laws, exist where a lode mining location had been made at the time of the passage of that act, and the proceedings under the act of July 26, 1866 (14 Stat. at L. 251, chap. 262), had then so far advanced as to exclude adverse claims. East Central Eureka Min. Co. v. Central Eureka Min. Co. 476

3. An election by the grantee of a patent for a lode mining claim to abandon rights acquired under the act of July 26, 1866 (14 Stat. at L. 251, chap. 262), cannot be imported from the fact that such patent, in addition to granting such rights, also purports to grant all that would have been acquired by a location under the act of May 10, 1872 (17 Stat. at L. 91, chap. 152, § 2, U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, pp. 1424, 1425). East Central Eureka Min. Co. v. Central Eureka Min. Co. 476

MISTAKE.
As ground for equitable relief against forfeiture of lease, see Landlord and Tenant, 3, 4.

MONOPOLIES.
Limitation of action for three-fold damages under antitrust act, see Limitation of actions, 2, 3.

The action for threefold damages for injury to "business or property" authorized by the antitrust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3202), § 7, in cases of violations of that act, may be maintained by a Georgia municipal corporation against the foreign corporate members of a combination forbidden by that act, where the municipality was led, by reason of the illegal combination, to purchase from an Alabama corporation at an excessive price the iron pipe needed for its waterworks system. Chattanooga Foundry & Pipe Works v. Atlanta, 241

MOODY.
William H., Appointment of, as Associate Justice. 1195

MORTGAGE.
1. Jurisdiction to decree foreclosure and sale under a mortgage and to enter a deficiency judgment is not defeated because of the inability to join all the parties and to sell all the land, due to a conveyance of a part of the mortgaged property to the territory of Hawaii, which insists upon its immunity from suit. Kawananakoa v. Polyblank, 834

2. A foreclosure sale of mortgaged property may be set aside before confirmation upon the single ground of inadequacy of price if such price is grossly disproportionate to the value of the property. Ballentyne v. Smith, 803

3. Land in the possession of the true owners, as established by their successful prosecution of ejectment actions, which were pending when the defendant executed a deed of trust of the property, duly recorded, to secure a loan of money to be used in erecting improvements thereon, cannot be subjected, at the suit of the mortgagee, to an equitable lien for the value of such improvements, on the theory that such owners were charged with the duty of active investigation to discover from what source the money used in the improvements was obtained and on what security, where the mortgagee, even if unaware of the pendency of the ejectment actions, had knowledge that a suit in equity, raising the question of the mortgagor's title to the premises, had been begun, and dismissed for want of prosecution, without prejudice. Armstrong v. Ashley, 482

NATIONAL BANKS.
See Banks.

NATURALIZATION.
Of parent as affecting stitus of minor child, see Aliens.

NAVY.
1. The two months' extra pay provided for by the act of March 3, 1899 (30 Stat. at L. 1214, chap. 427), in favor of "officers and enlisted men comprising the temporary force of the Navy during the war with Spain who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged," should be computed, when awarded to a naval officer appointed under the act of May 4, 1898 (30 Stat. at L. 369, chap. 234, U. S. Comp. Stat. 1901, p. 1056), to serve only during the continuance of the exigency under which his services were required in the existing war, on the basis of the pay he was receiving when he was detached from duty, after the treaty of peace was signed, and was ordered home preliminary to his discharge. United States v. Hite, 814

2. A passed assistant surgeon in the Navy, with the rank of lieutenant, is entitled to the pay of a captain in the Army, mounted, in view of the respective provisions of U. S. Rev. Stat. § 1466, U. S. Comp. Stat. 1901, p. 1029, assimilating in rank lieutenants in the Navy with captains in the Army, of the Navy personnel act of March 3, 1899 (30 Stat. at L. 1007, chap. 413, U. S. Comp. Stat. 1901, p. 1072), § 13, entitling commissioned officers of the line of the Navy to the same pay and allowance as officers of corresponding rank in the Army, and of the act of June 7, 1900 (31 Stat. at L. 697, chap. 859, U. S. Comp. Stat. 1901, p. 990), declaring that assistant surgeons shall rank with assistant surgeons in the

Army, who are mounted, since Congress must have used the words "assistant surgeons" as descriptive of the whole class of assistant surgeons, passed as well as those not passed. United States v. Farenholt, 1036

NEGLIGENCE.
As cause of collision with government breakwater, see Collision.
Contributory negligence, see Master and Servant, 2.
Liability of pilots for each other's negligence, see Pilots.
Proximate cause of explosion of mine gas, see Proximate Cause.
When question for jury, see Trial, 3.

NEGOTIABLE INSTRUMENTS.
Given for patent rights, see Patents, 4, 5.

NEGROES.
Civil rights of, see Civil Rights.

NOTES (Editorial) INDEX TO.
Appeal; necessity of color of merit in Federal question to sustain writ of error to state court. 231
Error to state courts in cases involving questions of due process of law. 121
Error to state courts in cases presenting questions of impairment of contract obligations. 619
Federal questions as sustaining appellate jurisdiction of Supreme Court of United States over territorial supreme courts. 254
The appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts. 269
Appellate jurisdiction of Federal Supreme Court over Porto Rican courts. 369
Banks; pledgee as shareholder in national bank. 423
Commerce; inspection laws as regulations of commerce. 78
Local transportation of goods as part of interstate or foreign shipment. 540
Landlord and tenant; landlord's duty to relet on defaulting tenant's account. 224

NOTICE.
Necessity to afford due process of law, see Constitutional Law, 25–29.
Equal protection of the laws in providing for notice to nonresidents in proceedings to enforce levee taxes, see Constitutional Law, 38.
Of fraud in recovering judgment, see Judgment, 5, 6.
As giving rise to equitable lien in favor of mortgagee for improvements, see Mortgage, 3.

NUISANCE.
Injunction against, see Injunction.

OFFICERS.
Judges of superior court of West Florida as public officers, see Private Land Claims, 2.
Compensation of land officers, see Public Lands, 3, 4.

OKLAHOMA.
Jurisdiction over land not open to settlement, see Territories.

PANAMA CANAL ZONE.
1. Subsequent ratification by Congress is a sufficient answer to the contention that the title of the United States to the Isthmian or Panama Canal Zone was not acquired as provided in the act of June 28, 1902 (32 Stat. at L. 481, chap. 1302, U. S. Comp. Stat. Supp. 1905, p. 707), by treaty with the Republic of Colombia. Wilson v. Shaw, 351

2. Congress has power to construct the Panama canal in the territory acquired by the treaty of November 18, 1903 (33 Stat. at L. 2234), with the Republic of Panama. Wilson v. Shaw, 351

3. The title of the United States to the Isthmian or Panama Canal Zone under the treaty of November 18, 1903 (33 Stat. at L. 2234), with the Republic of Panama, is no less perfect because of the omission from that treaty of some of the technical terms used in ordinary conveyances of real estate. Wilson v. Shaw, 351

4. Failure to define the exact boundary of the Isthmian or Panama Canal Zone in the treaty of November 18, 1903 (33 Stat. at L. 2234), with the Republic of Panama, does not affect the title of the United States, where the description is sufficient for identification, and the boundaries have been practically identified by the concurrent action of the two nations alone interested. Wilson v. Shaw, 351

PAROL EVIDENCE.
See Evidence, 7.

PARTIES.
Territory as defendant in foreclosure proceedings, see Mortgage, 1.
To bill of review, see Review.

PARTNERSHIP.
Insurance on life of partner as asset of bankrupt partnership estate, see Bankruptcy, 8.

PATENTS.
Remedy in equity to prevent suing customers for infringement of patent, see Equity.
Estoppel by assuming defense of infringement suit, see Estoppel.

1. The claims of the Hayden patent No. 700,919, for an improvement in a spring-balance computing scale, must be deemed to be limited to the specific means shown for translating the vertical movement of the runner into the rotary movement of the

vertical inner computing cylinder, in view of the action of the Patent Office in requiring, as a means of saving the first claim, that such claim call for a "spring-supported, load-bearing, and cylinder-revolving rod," and "connecting means between rod and computing cylinder" to secure the rotary movement of the inner cylinder, in which action the applicant acquiesced, though "without prejudice to the claims which remain," because "the allowed claims appear to cover the invention as it would be constructed in practice," and in view of the state of the art, which shows that the elements of invention, broadly considered, were previously disclosed in horizontal machines, and that the idea of vertical construction was old. Computing Scale Co. v. Automatic Scale Co. 645

2. Infringement of the claims of the Hayden patent, 700,919, for an improvement in spring-balance computing scales, does not result from the use of a scale in which the downward movement of the load accomplishes the rotary movement of the inner computing cylinder by other mechanism than the suspended rod with its spiral, which, with its connection with the cylinder, is the essential element of the Hayden invention. Computing Scale Co. v. Automatic Scale Co. 645

3. An appeal from a decision of the primary examiner upon a motion to dissolve an interference, holding that the party had the right to make the interfering claims, may be prohibited by the rules of the Patent Office without infringing the right of appeal in interferences given by U. S. Rev. Stat. §§ 482, 483, 4904, 4909, U. S. Comp. Stat. 1901, pp. 272, 3389, 3390 since the appeal therein provided for must be deemed limited to final decisions upon the question of priority of invention which, under these statutes, is the sole question for determination in interference cases. United States ex rel. Lowry v. Allen, 281

State regulation of sale.

4. The requirement that a negotiable instrument taken on a sale of rights under a patent shall show on its face for what it was given, or be void, which is made by Kirby's (Ark.) Dig. § 513, does not violate U. S. Const. art. 1, § 8, granting to Congress the right to secure to inventors the exclusive right to their discovery, nor U. S. Rev. Stat. § 4898, U. S. Comp. Stat. 1901, p. 3387, authorizing written assignments of patents or interests therein, which shall be void as against subsequent purchasers unless recorded in the Patent Office. John Woods & Sons v. Carl, 219

5. The regulation of the sale of patent rights made by Kan. Laws 1889, chap. 182, which compels one selling a patent right in any county in the state to file with the clerk of such county an authenticated copy of the letters patent, together with an affidavit of the genuineness of the letters patent and as to other matters, and provides that any written obligation given for the purchase price of a patent right shall contain the words "given for a patent right."—d violate U. S. Const. art. 1, § 8, gran Congress the right to secure to invent exclusive right to their discovery, S. Rev. Stat. § 4898, U. S. Comp. Sta p. 3387, authorizing written assignm patents or interests therein, which s void as against subsequent purchas less recorded in the Patent Office. A Riley,

PAY.

Of Navy officer, see Navy.

Of Army officer, see Army.

PEDDLERS.

State regulation of, as affecting state commerce, see Commer

PERPETUITIES.

Sustaining testamentary trust f petual maintenance of city l Conflict of Laws.

Effect of partial invalidity of tr violating rule against perpe see Trusts, 2.

PHILIPPINE ISLANDS.

Appellate jurisdiction of Feder preme Court over courts of. peal and Error, 6.

Delegation of legislative authori Constitutional Law, 1.

Bill of rights, see Constitutions 36.

Ratification of illegal collectio ties, see Duties, 7.

PILOTS.

Members of a voluntary, unincorp pilot association, which, under the stat could neither select nor discharge its bers, nor control or direct them in th formance of their duties as licensed whether technically partners or not, a liable to the owners of piloted vessels f negligence of each other, because, inst taking their fees as they earn them, fees go into a common fund, and, aft ducting expenses, are distributed to th eral members according to the numl days they respectively were on the list. Guy v. Donald,

PLEADING.

Prejudicial error in permitting j consider counts in a declarati supported by evidence, see A and Error, 101.

Sufficiency of averment of alien sustain Federal jurisdiction Courts, 3.

Allegations of value as controll determining Federal jurisd see Courts, 8.

Conclusiveness of judgment rend demurrer, see Judgment, 12, 1

1. The particulars of the allegs sulting damages from the breach b obligees in a bond given to secure m 3, 204, 205, 206

f an alleged special agreement
; prices, pleaded as an offset to
ı on such bond, should be so far
that the court may be able to see
. that such alleged damages are
ɔbscure, vague, or shadowy, but
ıd probably would, naturally re-
the act complained of. McGuire
y, 581
erstley, 589
s in an action on a bond given
sales of merchandise on credit,
up a breach by the obligees of a
eement respecting prices, are in-
where there is nothing in the
n or bond which shows the exist-
y such separate agreement, or that
tion in the prices could or would
effect upon the liability of the
McGuire v. Gerstley, 581
Gerstley, 589
s sufficient to constitute a valid
coupment, or independent cause of
: not set up by a plea in an action
given to secure sales of merchan-
edit, which avers that the obligees
ıe of the principals to dissolve the
:p existing between them, and to
employment of the obligees for the
: ruining the partnership business,
ins no allegation as to how long
ership was to continue. McGuire
y, 581
Gerstley, 589
question whether the election by
in bankruptcy to avoid a prefer-
ld be exercised by a demand be-
or can be exercised by the suit it-
t open to the defendant, although
ed to the complaint, and urged, as
of demurrer, the absence of an al-
a demand, where it did not stand
ıurrer, but answered, and not only
the allegations of the complaint,
ıp an independent defense, and
ıt a demand would have been un-
Eau Claire Nat. Bank v. Jackman,
596
question whether the common-
Virginia has been released from
y on account of the public debt
by bonds of the state outstanding
v 1, 1861, will not be passed upon
ırrer to a bill filed by that state
e state of West Virginia, which
adjudication of the amount due
: by the latter as the equitable
of the public debt of the original
Virginia which was assumed by
inia at the time of its creation
, but the consideration of such
ill be postponed until final hear-
nia v. West Virginia, 1068
leration of the objections of
ısness, misjoinder of parties and
of action, may properly be post-
l the final hearing on a bill filed
ımonwealth of Virginia against
f West Virginia, which seeks an
n of the amount due the former
er as the equitable proportion of
the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state. Virginia v. West Virginia, 1068

PLEDGE.
Effect of filing petition in bankruptcy on pledgee's right of sale, see Bankruptcy, 2.
Equitable lien under invalid pledge, see Bankruptcy, 4.
Power of court of bankruptcy to direct disposition of collateral security, see Bankruptcy, 12.
Pledgee of national bank stock as shareholder, see Banks, 3.
Burden of proving unfairness in sale by pledgee, see Evidence, 6.

1. No such change of possession results from the issuance of so-called warehouse receipts acknowledging the receipt of goods on premises really occupied by the owner, though in form leased by the latter to the warehousing company, as renders valid a pledge of such receipts, where actual possession of the goods was exercised by and existed with the owner substantially the same after issuance of the receipts as before. Security Warehousing Co. v. Hand, 1117

2. A creditor of a bankrupt partnership may apply the proceeds of the sale of collateral in his hands, the property of one of the partners, to the extinction of the individual indebtedness of such partner. Hiscock v. Varick Bank, 945

3. A sale of collateral security at public auction, without notice, and the purchase thereof by the pledgee, are not void as against the trustee in bankruptcy of the pledgeor, in the absence of fraud, where the contract of pledge permits such action, and is valid under the law of the state where such contract was made and executed and was to be performed. Hiscock v. Varick Bank, 945

POLICE POWER.
See Constitutional Law, 54, 55.

PORTO RICO.
Appeals from court of, to Federal Supreme Court, see Appeal and Error, 22, 23.
Lis pendens in, see Lis Pendens, 1, 2.
Removal of cause from Porto Rican court to Federal court, see Removal of Causes, 4.

POSTOFFICE.
Equal protection of the laws in restricting carrier's liability to railway mail clerks, see Constitutional Law, 42.

The power of Congress to establish postoffices and post roads is not infringed by Pa. act of April 4, 1868, under which a railway postal clerk, injured in the course of his employment, can have no greater rights against the railway company than if

he were an employee. Martin v. Pittsburg & L. E. R. Co. 184

POWER OF ATTORNEY.
See Deeds; Principal and Agent.

PRESUMPTIONS.
See Evidence, 2, 3.

PRINCIPAL AND AGENT.
As to whether instrument is deed or power of attorney, see Deeds.

1. Knowledge of the local attorney and president of the local board of directors of a foreign building and loan association in regard to a matter coming within the sphere of their duty, and acquired while acting with reference thereto, and before sending to the company at its home office the report which it was their duty to make, —must be imputed to the company. Armstrong v. Ashley, 482

2. The fraud of an agent cannot alter the legal effect of his knowledge with respect to his principal in regard to third parties who had no connection whatever with such agent in relation to the perpetration of the fraud, and no knowledge that any such fraud had been perpetrated. Armstrong v. Ashley, 482

3. An interest in the property upon which the power is to operate, and not merely an interest in the exercise of the power, is essential to make a power of attorney one coupled with an interest, so as not to be subject to revocation. Taylor v. Burns, 116

PRIVATE LAND CLAIMS.
Appeal to Supreme Court, see Appeal and Error, 15.

1. The California legislature could enact the act of April 2, 1866, ratifying conveyances made by the corporate authorities of the city of Monterey of pueblo lands confirmed to that city by the United States and afterwards patented to it, its successors and assigns. Monterey v. Jacks, 220

2. Judges of the superior court of West Florida were "public officers acting under authority of Congress" within the meaning of the proviso in the act of June 22, 1860 (12 Stat. at L. 85, 87, chap. 188), § 3, prohibiting commissioners from embracing among the Florida land claims which ought to be confirmed "any claim which has been heretofore presented for confirmation before any board of commissioners or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means." United States v. Dalcour, 248

3. A judge of the superior court of West Florida, acting under the act of May 23, 1828 (4 Stat. at L. 284, 285, chap. 70), § 6, had jurisdiction to reject a Florida land claim because of an unwarranted alteration in the date of the registro which would save the grant from invalidity under the treaty of February 22, 1819 (8 Stat. at L. 258), with Spain, although a proviso to that section excluded him from taking cognizance of any claims annulled by the treaty. United States v. Dalcour, 248

4. Florida land claims which previously had been rejected as fraudulent or maintained by improper means, when the fraud addressed itself to avoiding the treaty of February 22, 1819 (8 Stat. at L. 258), with Spain, as well as when the fraud related to some other fact material to the validity of the claims at the time when they were created, were covered by the proviso in the act of June 22, 1860 (12 Stat. at L. 85, 87, chap. 188), § 3, prohibiting commissioners from embracing among the claims which ought to be confirmed "any claim which has been heretofore presented for confirmation before any board of commissioners or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means." United States v. Dalcour, 248

5. The rejection of a Florida land claim by a judge of the superior court of West Florida, acting under the act of May 23, 1828 (4 Stat. at L. 284, 285, chap. 70), § 6, because of an unwarranted alteration of the date in the registro which would save the grant from invalidity under the treaty of February 22, 1819 (8 Stat. at L. 258), with Spain, brings the case within the proviso of the act of June 22, 1860 (12 Stat. at L. 85, 87, chap. 188), § 3, prohibiting commissioners from embracing among claims which ought to be confirmed "any claim which has been heretofore presented for confirmation before any board of commissioners or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means." United States v. Dalcour, 248

PRIVILEGES AND IMMUNITIES.
See Constitutional Law, 49–53.

PROBABLE CAUSE.
For removal to another district for trial, see Criminal Law, 5.

PROCESS.
See Writ and Process.

PROHIBITION.
Not proper remedy to remand case to state court, see Mandamus, 1.

PROVISO.
Adoption of official construction by re-enactment, see Statutes, 3.

PROXIMATE CAUSE.
A mine owner is not absolved from responsibility for his neglect to perform his statutory duty to prevent the accumulation of dangerous gases, which led to an explosion, because there was another efficient cause contributing to the accident for which a recovery could not, under the declaration, 203, 204, 205, 206 U. S.

be had. Wilmington Star Min. Co. v. Fulton, 708

PUBLIC IMPROVEMENTS.

Due process of law in collecting levee taxes, see Constitutional Law, 22–24, 26–28.

Equal protection of the laws in enforcing levee taxes, see Constitutional Law, 38.

The apportionment of the cost of widening an alley in the city of Washington upon the property lying within the square through which such alley runs must be limited to benefits, where the jury of award, although directed by the act of July 22, 1892 (27 Stat. at L. 255, chap. 230), as amended by the act of August 24, 1894 (28 Stat. at L. 501, chap. 328), to apportion an amount equal to the damages ascertained and appraised, is to apportion such amount "according as each lot or part of lot in such square may be benefited." Martin v. District of Columbia, 743

PUBLIC LANDS.

Congressional power over arid lands, see Congress.

Congressional land grant for colleges of agriculture and mechanic arts, see Colleges.

Due process of law in restricting sheep grazing on the public domain, see Constitutional Law, 7.

Equal protection of the laws in restricting sheep grazing on public domain, see Constitutional Law, 37.

Rights of Indians on, see Indians.

Lode mining claims, see Mines.

Private land claims, see Private Land Claims.

Exemption of Indian allotments from taxation, see Taxes, 6.

1. Findings of the Secretary of the Interior to the effect that a designated party to a controversy in the Land Department had the right to enter the land as a homestead does not prevent such Department, if patent has not issued, from instituting further inquiry, and, upon such inquiry, finally awarding the land to the party held to have a better right. Love v. Flahive, 768

2. The Montana legislature must act in subordination to the state Constitution in executing the authority intrusted to it by Congress in the enabling act of Feb. 22, 1889 (25 Stat. at L. 676, chap. 180), § 17, which granted certain public lands to the state for a normal school, to be held, appropriated, and disposed of exclusively for that purpose, in such manner as the legislature should provide. Montana ex rel. Haire v. Rice, 490

Compensation of officers.

Statute permitting presentation of claim against United States as admission of merit, see Claims.

3. The Secretary of the Interior, acting through the Commissioner of the General Land Office, had the right to charge the various registers and receivers with the duty to sell the lands ceded by the Osage Indians to the United States by the treaty of September 29, 1865 (14 Stat. at L. 687), to be sold for their benefit, and to limit the annual compensation of such officers for this and all other services to the existing legal maximum of $2,500. Stewart v. United States, 1017

4. No commissions for selling the lands ceded by the Osage Indians to the United States by the treaty of September 29, 1865 (14 Stat. at L. 687), to be sold for their benefit, beyond what brings his annual compensation to the legal maximum of $2,500, can be claimed by a register of the land office who received his appointment after the Secretary of the Interior, acting through the Commissioner of the General Land Office, had charged the various registers and receivers with the duty of selling such lands, and had limited their annual compensation for this and all other services to the existing legal maximum. Stewart v. United States, 1017

Homestead entry.

When statute of limitations begins to run in favor of railway company, see Limitation of Actions, 7.

5. A sale of a homestead claim before patent has issued, although void, may be treated by the Land Department as a relinquishment or abandonment by the seller of his homestead application and entry. Love v. Flahive, 768

6. A party who, while in possession of a tract of public land with intent to enter it as a homestead, makes a sale, which the Land Department treats as an abandonment of his right of entry, cannot, by merely continuing in possession, create a new right of entry as against the party in whose favor he has relinquished his right. Love v. Flahive, 1092

Railroad land grants.

Adverse possession of lands within place limits, see Adverse Possession.

When statute of limitations begins to run against settler under homestead rights, see Limitation of Actions, 7.

7. Land which, at the date of the grant by the act of July 2, 1864 (13 Stat. at L. 365, 367, chap. 217), to the Northern Pacific Railroad Company, was withdrawn of record for the benefit of the Lake Superior & Mississippi railroad under the prior grant by the act of May 5, 1864 (13 Stat. at L. 64, chap. 79), was not "public land" within the meaning of the later grant, and did not pass under it when or because it was subsequently ascertained that such land was without the line of the definite location of the Lake Superior & Mississippi Railroad, and was within the place limits of the Northern Pacific Railroad, as defined by its map of definite location, but such land, when freed from the earlier grant, became a part of the public domain, subject only to be disposed of under the general land laws. Northern Lumber Co. v. O'Brien, 438

8. An order of the Land Department directing the local land office to suspend from pre-emption, settlement, and sale a "body of land about 20 miles in width" is not so uncertain and indefinite as to be without legal force as to lands which are coterminous and within 10 miles of the line of the general route of the railroad for the benefit of which the order was made, as such route is defined on a map or diagram to which the order refers. Northern Lumber Co. v. O'Brien, 438

PUBLIC MONEYS.
Congressional appropriation for colleges of agriculture and mechanic arts, see Colleges.

PUEBLO LANDS.
State control over, see Private Land Claims, 1.

QUARANTINE.
Validity of regulations promulgated by Secretary of Agriculture, see Commerce, 14.

RAILROADS.
Adverse possession of lands within railroad land grant, see Adverse Possession.
As to rates, see Carriers, 4–11; Constitutional Law, 19, 20; Evidence, 14.
State regulation of connecting carrier, see Carriers, 3; Constitutional Law, 21; Commerce, 2–6.
Due process of law in condemnation of railway stock, see Constitutional Law, 12.
Restricting carrier's liability to railway mail clerks, see Constitutional Law, 17, 42, 49.
Presumption of performance of condition precedent to issue of railroad aid bonds, see Evidence, 2.
Automatic couplers, see Master and Servant, 1; Evidence, 5.
Taxation of railroad property, see Injunction, 3, 4; Taxes, 1, 7.
Railroad land grant, see Public Lands, 7, 9.
Street railways, see Street Railways.

RATES.
Of carrier, see Carriers, 4–11.
Due process of law in state regulation, see Constitutional Law, 19, 20.
Regulation of water rates as impairing contract obligations, see Constitutional Law, 57.

RATIFICATION.
Evidence of ratification of illegal sheriff's sale, see Evidence, 8.
Of illegal judicial sale, see Judicial Sale, 2.

REAL PROPERTY.
Doctrine of *lis pendens*, see Lis Pendens.

A mere technical school which excludes all religious instruction does not satisfy the condition on which a Protestant mission was transferred by the American Board of Commissioners for Foreign Missions to the Hawaiian government, *viz.*, that the government should continue the same as an institution for the cultivation of sound literature and solid science, and should teach no religious tenet or doctrine contrary to those theretofore inculcated by the mission, as set forth in a confession of faith, where the government knew, when accepting the transfer of the mission to its "fostering care and patronage," that the mission was founded to convert the Hawaiians to Christianity and to educate young men to be Christian ministers, and for more than fifty years recognized its obligation under the agreement to afford religious instruction in the doctrines represented by the mission. Lowrey v. Hawaii, 1026

RECEIVERS.
A chancery receiver of a domestic corporation upon whom, as a quasi assignee and representative of the creditors, is conferred by Minn. Gen. Laws 1899, chap. 272, the authority to maintain an action to enforce the liability of stockholders, may sue in a foreign jurisdiction. Bernheimer v. Converse, 1163

RECORD.
On appeal, see Appeal and Error, IV.

RECORDING ACTS.
Recording assignment of chattel mortgage, see Chattel Mortgage.
Fees of clerk for recording judgment, see Clerks, 2.
Cautionary notice, see Lis Pendens, 1, 2.

RECOUPMENT.
Sufficiency of plea as, see Pleading, 3.

REGISTERS AND RECEIVERS.
Compensation of, see Public Lands, 3, 4.

REHEARING.
Appeal from order denying, see Appeal and Error, 1.

RELEASE.
Claims growing out of a delay caused by the Federal government, as well as those arising from a change in the specifications, were included in a release given to the United States by the builders of a battle ship of all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of the vessel under the contract, where such release was executed in performance of the contract requirement that the last payment should be made only when final release in a form approved by the Secretary of the Navy should be given of all claims of any kind or de-

scription under or by virtue of said contract. United States v. William Cramp & Sons Ship & E. Bldg. Co. 983

RELEVANCY.
Of evidence, see Evidence, 10.

REMEDIES.
Election of, see Election of Remedies.
Lack of remedy at law as ground for equitable jurisdiction, see Equity.

REMOVAL OF CAUSES.
Effect of appearing specially to remove cause, see Appearance, 1, 2.
Removal to another district for trial, see Criminal Law, 4, 5.
Sufficiency of evidence that resident was joined to prevent removal of cause, see Evidence, 12.
Mandamus to remand case to state court, see Mandamus, 1.

1. A suit which, by reason of the nonresidence of both parties, could not have been brought in the Federal circuit court in the first instance, cannot be removed to that court from a state court, under the acts of March 3, 1887 (24 Stat. at L. 552, chap. 373), and August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), on the ground of diverse citizenship, at least where the plaintiff resists such removal, even if the consent of both parties could confer jurisdiction. Ex parte Wisner, 264

2. The express declaration in Iowa Code 1897, § 2009, that, on the appeal to a district court, which either party may take from the commissioners' award in proceedings to condemn land for railway purposes, the "landowner shall be plaintiff and the corporation defendant," does not fix the status of the parties under the removal act, but the landowner must be deemed the defendant so far as the right of removal to a Federal circuit court on the ground of diverse citizenship is concerned, because, under the state statutes, the institution and continuance of the proceedings depend upon the will of the railroad company. Mason City & Ft. Dodge R. Co. v. Boynton, 629

3. A Federal circuit court to which a case has been removed as presenting a separable controversy properly refuses to remand the cause to the state court, where the testimony shows that the real purpose of the plaintiff in suing jointly in tort a resident employee and his nonresident employer was to prevent the exercise of the right of removal by the nonresident defendant. Wecker v. National Enameling & Stamping Co. 430

4. The party who has wrongfully procured a removal from the local Porto Rican court to the Federal district court of a case within the original jurisdiction conferred upon the latter court by the act of March 2, 1901 (31 Stat. at L. 953, chap. 812), § 3, cannot be heard, after judgment against him to assert that the Federal court had no jurisdiction, because of the irregularity of the removal, although, by the act of April 12, 1900 (31 Stat. at L. 84, chap. 191), § 34, it is provided that the laws of the United States relating to the removal of causes shall govern as between the district court of the United States for Porto Rico and the courts of Porto Rico. Garrozi v. Dastas, 369

5. The want of any jurisdiction over the person of defendant in a case removed to a Federal circuit court from a state court before service of summons, on a special appearance by defendant for that sole purpose, does not, in view of the provision of the removal act of March 3, 1875 (18 Stat. at L. 471, chap. 137, U. S. Comp. Stat. 1901, p. 511), § 4, preserving the lien of attachments in the state courts, prevent the Federal court from entering a judgment enforceable against the real property of defendant which had been attached before the case was removed, where the state court might, but for such removal, have rendered such a judgment on giving notice to defendant. Clark v. Wells, 138

RENT.
After re-entry, see Landlord and Tenant, 1.

REPEAL.
Of statute, see Statutes, 5–7.

REPLEVIN.
Mode of review, see Appeal and Error, 5.

RES JUDICATA.
See Judgment.

REVIEW.
Questions open on appeal from decree on bill of review, see Appeal and Error, 74.

The objection that the widow of the testator's son should have been made a party to a bill to review a decree declaring that a trust created by the will in favor of the testator's grandchildren violated the rule against perpetuities is too late when first raised on the hearing of a demurrer to the bill of review, where the fact of her existence does not appear of record. Landram v. Jordan, 88

REVOCATION.
Of power of attorney, see Principal and Agent, 3.

SALE.
Judicial sale, see Judicial Sale.
Foreclosure sale, see Mortgage, 2, 3.
Sale of collateral security, see Pledge, 2, 3.
Of homestead claim before patent, see Public Lands, 5, 6.

A contract for the sale of certain rails, cars, engines, and goods, to remain the property of the seller until payment of the note given for the purchase price, is no less

a conditional sale because possession was to be, and was, delivered, and it must have been contemplated that the rails would be put down upon a roadway assumed to belong to the purchaser, or because the contract required additional security in the form of first-mortgage bonds of the purchaser. Bierce v. Hutchins, 828

SEPARABLE CONTROVERSY.
As affecting removal of cause, see Removal of Causes, 3.

SERVICE.
Of process, see Writ and Process.

SET-OFF AND COUNTERCLAIM.
Sufficiency of plea as, see Pleading, 3.

1. Sums improvidently paid to an Army officer by the auditor for the War Department cannot be deducted from the extra pay sued for in the court of claims, where the United States filed no set-off or counterclaim. United States v. Mitchell, 752

2. A set-off in favor of the United States against the demand of a commissioner of a Federal circuit court for 5 cents more per folio for drawing complaints in civil-rights cases than the amount he had been paid as in full for such services may be allowed by the court of claims, under the broad provisions of U. S. Rev. Stat. § 1059, U. S. Comp. Stat. 1901, p. 734; act of March 3, 1887 (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752), § 1, to the extent of fees improperly and unlawfully paid him in the settlement of his former account, which was approved by the circuit court "subject to revision by the accounting officers of the United States Treasury," even though some of such illegal payments were made later than the filing of the claim. Allen v. United States, 634

SHIPPING.
Collision of vessel with government breakwater, see Collision.
Contribution between vessels in fault for collision, see Contribution.
Liability of pilots for each other's negligence, see Pilots.

SITUS.
Of property for taxation, see Taxes, 4, 5.

SKINS.
Duty on growth on skin of Mocha sheep, see Duties, 2.

SPAIN.
Spanish land grant, see Private Land Claims, 2–5.

STATE COURTS.
Appellate jurisdiction of Supreme Court of United States, see Appeal and Error, II. b. 2.
Following decisions of, in Federal courts, see Courts, 12, 13.
Conflict of jurisdiction with Federal courts, see Courts, 14–19.
Removal of cause to Federal circuit court, see Removal of Causes.

STATES.
Review of decisions of state courts in Federal Supreme Court, see Appeal and Error, II. b, 2.
Validity of state regulation of railway rates, see Carriers, 4.
Sufficiency of evidence of boundary between states, see Evidence, 13.
Right to protect national flag against illegitimate uses, see Flag.
Right to enjoin pollution of air, see Injunction, 1.
Right of Kansas to enjoin Colorado from diverting Arkansas river, see Injunction, 2.
Regulation of sale of patent rights, see Patents, 4, 5.
Questions open on demurrer in suit between states, see Pleading, 5, 6.
State regulation as infringing congressional power over post roads, see Postoffice.
State control over pueblo lands, see Private Land Claims, 1.
Validity of state disposal of public lands under congressional authority, see Public Lands, 2.
Original jurisdiction of Federal Supreme Court of suits by and between states, see Supreme Court of United States.
Validity of state taxation, see Taxes.

A suit to enjoin the enforcement of an order of the Mississippi railroad commission compelling a railroad company to stop its trains at a specified station is not a suit against the state. Mississippi R. Commission v. Illinois C. R. Co. 209

STATUTES.
1. The validity of so much of N. C. Laws 1905, chap. 538, enacted to prevent dealing in futures, as makes indictable the carrying on of a "bucket shop" business, is not affected by any repugnancy to the due process of law or equal protection of the laws clauses of the 14th Amendment to the Federal Constitution of the provisions of that act which raise a prima facie presumption of guilt from the proof of certain acts when done by persons generally, and not when done by those engaged in manufacturing or wholesale merchandising. Gatewood v. North Carolina, 386

Construction.
2. The re-enactment in the same words of a statute which has notoriously received a construction in practice from those whose duty it is to carry it out gives rise to the presumption that such construction is satisfactory to the legislature, unless it is plainly erroneous. Copper Queen Consol. Min. Co. v. Arizona, 1143

3. Congress, by enacting the proviso to the act of July 24, 1897 (30 Stat. at L. 213, 203, 204, 205, 206 U. S.

chap. 11, U. S. Comp. Stat. 1901, p. 1701), § 33, which differs from the proviso to the act of October 1, 1890 (26 Stat. at L. 624, chap. 1244), § 50, only in substituting the word "entry" for the word "withdrawal" as the date when the weight of merchandise withdrawn from bonded warehouses is to be taken as the basis of the duty, must be deemed to have adopted the construction given to the earlier proviso by the Attorney General and followed by the executive officers charged with the administration of the law, *viz.*, that such proviso was general in its application, and not restricted to merchandise imported before the act took effect. United States v. G. Falk & Bro. 411

4. The construction given by the Colorado courts to a statute of that state which is alleged to have served as the model for Ariz. Rev. Stat. § 3880, defining the powers of the board of equalization, need not be followed by the Arizona courts when construing the territorial statute, where the Colorado decision turned partly on the notion, inapplicable to Arizona, that the board of equalization had no function of assessment, and in part on the Constitution of the state. Copper Queen Consol. Min. Co. v. Arizona, 1143

Repeal.

Of exemption from taxation, see Taxes, 7.

5. The trusts for the perpetual maintenance of cemetery lots and of monuments and other structures erected thereon, expressly authorized by D. C. Code (31 Stat. at L. 1295 and 1351, chap. 854), § 669, are not forbidden because § 1023 of such Code, prohibiting perpetuities and restraints upon alienation, does not in terms make an exception in favor of the trusts provided for in the earlier section. Iglehart v. Iglehart, 575

6. A later treaty will not be regarded as repealing an earlier statute by implication unless the two are absolutely incompatible, and the statute cannot be enforced without antagonizing the treaty. Johnson v. Browne, 816

7. The original Cherokee law as duly passed and approved must prevail as against omissions in subsequent compilations, where the acts providing for such compilations did not declare that they should be effective as laws of the Cherokee Nation. Red Bird v. United States, 96

STIPULATION.

Effect of, on judicial enforcement of order of Interstate Commerce Commission, see Judgment, 2; Trial, 4.

STOCKHOLDERS.

Liability of, see Corporations, 4.

STREET RAILWAYS.

Reserved right to amend or repeal charter, see Constitutional Law, 59.

Effect of consolidation on contract exemptions from paving obligations, see Corporations, 1.

Conditions of incorporation as affecting exemption from paving obligations enjoyed by predecessor in title, see Corporations, 2.

Sale of capital stock as affecting exemptions from paving obligations enjoyed by predecessor in title, see Corporations, 3.

1. Municipal grants of street railway franchises must be strictly construed. Cleveland Electric R. Co. v. Cleveland, 399

2. Municipal ordinances extending the life of the franchise of the Euclid avenue or main line of the Cleveland street railway system will not be construed as applicable to a road with a separate route and a different term of life, known as the Garden street branch, on the theory that the latter road became a part of the main line because it was permitted to run in connection with such main line, and to use a portion of that line to reach a public square. Cleveland Electric R. Co. v. Cleveland, 399

3. The words "main line" in municipal ordinances granting respectively the right to construct a small extension to the Garden street branch of the Cleveland street railway system and the right to lay a second track on a portion of that branch, to terminate with the expiration of the grant for the main line, must be deemed to refer to the rest of the Garden street branch, and not to the Euclid avenue line. Cleveland Electric R. Co. v. Cleveland, 399

4. A street railway franchise made to terminate with the grant to the main line is to be measured by the grant as it then exists, and not by any subsequent extension of the term which may be granted. Cleveland Electric R. Co. v. Cleveland, 399

5. A grant of a street railway franchise by the Cleveland common council, to be valid "until the expiration of the grants for said company's tracks on said Quincy street east of Lincoln avenue, to wit: July 13, 1913,"—is not a grant extending to that date, where the Quincy street grants were then in fact to terminate at an earlier date. Cleveland Electric R. Co. v. Cleveland, 399

6. An extension of the time for the termination of the franchise of the Garden street branch of the Cleveland street railway system to the date set for the termination of the Euclid avenue or main line was not effected by a municipal ordinance consenting to a consolidation of several street railroads, including the Euclid avenue and Garden street lines, on condition that but one fare should be charged for a continuous ride. Cleveland Electric R. Co. v. Cleveland, 399

7. The title to the rails, poles, and other appliances for operating the Garden street branch of the Cleveland stret railway system remaining in the various streets at the expiration of its franchise is

in the railway company which has been operating the road. Cleveland Electric R. Co. v. Cleveland, 399

SUCCESSION TAX.
Validity of, see Constitutional Law, 32, 33, 39.
Validity of statute excluding corporations from inheritance tax, see Constitutional Law, 53.
As affecting contract obligations, see Constitutional Law, 62.

SUICIDE.
As defense in action on insurance policy, see Insurance.
Validity of statute excluding suicide as defense in insurance cases, see Constitutional Law, 54.

SUPERSEDEAS.
Liability on supersedeas bond, see Appeal and Error, 107.

SUPREME COURT OF THE UNITED STATES.
Appellate jurisdiction, see Appeal and Error.
Power to make orders in bankruptcy, see Bankruptcy, 9.
Cases certified by circuit court of appeals, see Cases Certified.
Certiorari to court of appeals of District of Columbia, see Certiorari, 1.
Certiorari to circuit courts of appeals, see Certiorari, 2.
Questions open on demurrer in suit between states, see Pleading, 5, 6.

1. The original jurisdiction of the Supreme Court of the United States does not extend to a bill filed by the attorney general of Kansas on behalf of the state as trustee for the Missouri, Kansas, & Texas Railway Company of certain lands in the Indian territory, alleged to have been granted by Congress to the state for the benefit of the railway company, where the name of the state is being used simply for the prosecution of the claim of the railway company. Kansas v. United States, 510

2. The original jurisdiction of the Supreme Court of the United States extends to a controversy between the states of Kansas and Colorado and the United States, presenting the questions whether Kansas has a right to the continuous flow of the waters of the Arkansas river as that flow existed before any human interference therewith, or whether Colorado has the right to appropriate the waters of that stream so as to prevent the continuous flow, or whether the amount of the flow is subject to the superior authority and supervisory control of the United States. Kansas v. Colorado, 956

3. The original jurisdiction of the Supreme Court of the United States extends to a suit by the commonwealth of Virginia against the state of West Virginia to determine the amount due to the former by the latter as the equitable proportion of the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state. Virginia v. West Virginia, 1068

4. The question of the liability of the state of West Virginia for its equitable proportion of the public debt of the commonwealth of Virginia was not so submitted to the West Virginia legislature as to defeat the original jurisdiction of the United States of a suit between the states by the provision of W. Va. Const. art. 8, § 8, that an equitable proportion of such public debt shall be assumed by the state, and the legislature "shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof," since such provision, when read *in pari materia* with the Virginia ordinance of August 20, 1861, that the new state shall take upon itself a just proportion of the public debt, to be ascertained as therein provided, must be regarded as meaning only that the legislature should ascertain, as soon as practicable, the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained. Virginia v. West Virginia, 1068

TARIFF.
See Duties.

TAXES.
Priority of franchise tax in bankruptcy proceedings, see Bankruptcy, 14-16.
Due process of law in tax proceedings, see Constitutional Law, 22-28.
Validity of stock transfer tax, see Constitutional Law, 30, 31, 41.
Validity of state inheritance tax, see Constitutional Law, 32, 33, 39.
Equal protection of the laws in enforcing levee taxes, see Constitutional Law, 38.
Validity of statute excluding corporations from inheritance tax, see Constitutional Law, 53.
Taxation of foreign corporation as impairing contract obligation, see Constitutional Law, 56.
Inheritance tax as impairing contract obligation, see Constitutional Law, 62.
Injunction against, see Injunction, 3, 4.
Assessments for public improvements, see Public Improvements.

1. A state may tax that portion of the property of an interstate railroad company lying within the state at its value as an organic portion of the entire road. Chicago, B. & Q. R. Co. v. Babcock, 698

2. The members of a state board of equalization and assessment should not be subjected to a cross-examination, in a proceeding for equitable relief against the taxation of railroad property, with regard to the operation of their minds in arriving at the valuation of such property for tax pur-

poses. Chicago, B. & Q. R. Co. v. Babcock, 636

Federal securities.

3. The immunity of national securities from state taxation is violated by a tax imposed under the authority of Iowa Code, § 1322, directing that shares of stock of state banks shall be assessed to such banks, and not to individual stockholders, the substantial effect of which is to require taxation upon the property, not including the franchises, of such banks, and to adopt the value of the shares as the measure of the taxable valuation of such property, without permitting any deduction from such valuation on account of bonds of the United States owned by the banks. Home Sav. Bank v. Des Moines, 901

Property of nonresident.

4. The state of Indiana cannot, consistently with due process of law, tax debts evidenced by notes given and payable in Ohio, by residents of that state, to a resident of New York, for loans made in Ohio on lands there situated, merely because, in the attempt to escape proper taxation in Ohio, such notes, together with mortgages securing their payment, were sent to an Indiana agent of the payee, there to be held by him until they were needed in Ohio to have payments of interests indorsed, or to be delivered up if the principal were paid. Buck v. Beach, 1106

5. State taxation of credits arising out of loans made in the regular course of business by the local agent of a foreign insurance company to its policy holders is not forbidden by U. S. Const. 14th Amend., where the loans were negotiated, the notes signed, the security taken, the interest collected, and the debts paid within the state, because the promissory notes which are the evidences of such credits are kept at the home office at all times when not needed in the state. Metropolitan L. Ins. Co. v. New Orleans, 853

Exemptions.

6. Land allotted under an Indian treaty which exempts such land from levy, sale, or forfeiture until the state legislature shall, with the consent of Congress, remove the restriction, can no longer escape taxation after the Indian patentee has become a citizen under the act of February 8, 1887 (24 Stat. at L. 388, chap. 119), which, in addition to the grant of citizenship, provides that "Indians to whom allotments have been made shall have the benefit of, and be subject to, the laws, both civil and criminal, of the state or territory in which they may reside," and the ten years during which Congress, by the act of March 3, 1893 (27 Stat. at L. 612, 333, chap. 209), postponed the operation of the provision of Wash. Laws 1889, 1890, p. 499, granting the power of alienation "in like manner and with like effect as any other person may do under the laws of the United States and of this state," and removing all restrictions in reference thereto, have expired. Goudy v. Meath, 130

7. The withdrawal of a repealable exemption from state taxation of the property of a reorganized railway company, if any such exemption existed, was affected by Md. Acts 1896, chap. 120, which directs a new assessment for taxation of the property in the state, and expressly declares that the property of every railroad shall be assessed for county and municipal purposes, and contains a proviso that nothing therein contained shall be held to discharge, release, or impair any irrepealable contract or obligation then existing, which sufficiently evidences the legislative intent to repeal exemptions from taxation which were not protected by binding contracts beyond legislative control, and to bring all property within the taxing power of the state. Wicomico County Comrs. v. Bancroft, 112

Equalization.

8. The total valuation of the property in the territory may be increased by the Arizona board of equalization beyond the sum of the returns of the board of supervisors of the several counties, since Ariz. Rev. Stat. § 3880, empowering the board to increase or diminish the valuation of property in any county in order to produce a just relation between all the valuations of property in the territory, only prohibits the board from reducing the aggregate valuation below that as returned by the clerks of the several counties, which implies that the board has the power of change, and, but for the prohibition, might reduce the total. Copper Queen Consol. Min. Co. v. Arizona, 1143

9. The Arizona board of equalization, in exercising its power under Ariz. Rev. Stat. § 3880, to increase or diminish the valuation of property in any county in order to produce a just relation between all the valuations of property in the territory, is not bound to deal with the valuation of each county as a whole, but may increase or diminish the valuations of particular classes of property within the county. Copper Queen Consol. Min. Co. v. Arizona, 1143

TERRITORIES.

Appellate jurisdiction of Federal Supreme Court over territorial courts, see Appeal and Error, 5, 16–19, 69, 70, 75.

Congressional power over, see Congress, 2.

Powers of Choctaw and Chickasaw citizenship court, see Indians, 1.

Effect as to persons not parties of judgment of Choctaw and Chickasaw citizenship court in test case, see Judgment, 4.

As party defendant, see Mortgage, 1.

Land now embraced within the limits of Comanche county, Oklahoma, had become part of that territory on August 4, 1901, so as to make a murder committed therein on that date an offense against the territorial

rather than the Federal statutes, although the land had not then been opened for settlement. Re Moran, 105

TEST CASE.
Effect as to persons not parties of judgment of Choctaw and Chickasaw citizenship court in test case, see Judgment, 4.

TIMBER.
Right of Indian allotees to cut timber on public lands, see Indians, 5.

TITLE.
Of railway company to lands within congressional land grant, see Adverse Possession.
Of United States to Panama Canal Zone, see Panama Canal Zone.

TOBACCO.
Duty on withdrawal from bonded warehouses, see Duties, 5.

TREATIES.
With Indians as grant, see Indians, 2, 3.
Right of Indian allottees to cut timber under Stockbridge and Munsee treaties, see Indians, 5.
Effect of treaty as repealing prior statute, see Statutes.

The United States may acquire territory by treaty. Wilson v. Shaw, 351

TRIAL.
Reception of evidence as denying due process of law, see Appeal and Error, 30.
Harmless error in refusing to strike out expert testimony, see Appeal and Error, 104.

1. The discretion of the trial court is not abused by permitting witnesses who have had practical railroad experience and are familiar with overhead structures and buffers to testify as to whether a buffer at the end of a spur track was a reasonably safe and proper one, and as to whether reasonable and proper care had been exercised in so building an overhead structure as to prevent the use of the hand brakes on a freight car until about 100 feet from the end of the spur track. Gila Valley, G. & N. R. Co. v. Lyon, 276

2. The trial court properly refuses to instruct the jury to bring in a verdict of not guilty in a homicide case, on the theory that the *corpus delicti* has not been proved, although there was no witness to the homicide, and the identification of a partly burned body as that of the victim was not perfect, where, taking all the circumstances together, there is clearly enough evidence to warrant the jury in finding that such body was that of the deceased, and that he had been killed by the defendant. Perovich v. United States, 722

3. Evidence tending to show that a spur railroad track was not a safe and proper structure for the operation of cars is sufficient to carry to the jury, on the question of the negligence of the railway company, an action to recover for the killing of a brakeman while riding on a car which plunged over the end of the spur track, although the evidence for the railway company tended to show that the accident was due to the negligence of a fellow servant in ordering the car to be detached from the train and engine. Gila Valley, G. & N. R. Co. v. Lyon, 276

4. Parties, after action by the Interstate Commerce Commission declaring an increased freight rate to be unreasonable, may make a valid stipulation, in the subsequent proceedings had in the Federal court under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 16, that such court may adjudge the amount of the reparation. Southern R. Co. v. Tift, 1124

Instructions.
Prejudicial error in, see Appeal and Error, 102.

5. The trial court is not required to give a requested instruction in a criminal case which singles out and emphasizes an isolated fact. Perovich v. United States, 722

6. The trial judge does not err in refusing to adopt the exact words of a requested instruction if he instructs the jury correctly and in substance covers the relevant rules of law proposed by counsel. Cunningham v. Springer, 662

7. Requested instructions based upon an hypothesis which there is no evidence tending to support are properly refused. Wilmington Star Min. Co. v. Fulton, 768

8. Evidence tending to justify the inference that a mine employee who was allowed to enter a roadway without warning knew, before entering, that it had not been cleared of gas, does not require the giving of a requested instruction in an action for the death of such employee as the result of an explosion, which is based on the assumption that such employee, when killed, was wilfully endangering the lives or health of others, or the security of the mine or its machinery, or was recklessly disregarding his personal safety. Wilmington Star Min. Co. v. Fulton, 768

TRUSTS.
Abandonment by assignees in bankruptcy of bankrupt's interest under, see Bankruptcy, 3.
Sustaining testamentary trust on principles of comity, see Conflict of Laws.

1. A testamentary trust survives the death of the trustee where the will provides that, if the executrix, who was also named as trustee, should die or for any cause should become unable to act in the trust, a new trustee should be appointed by the

court, so that the trusts thereby created should be at all times preserved and carried into effect. Cruit v. Owen, 227

2. An equitable life estate given to a niece of the testator in the income from a specified piece of land excepted from the general scheme for the creation of a trust fund from the rents of the testator's real property for the benefit of his grandchildren does not fail because of the repugnancy of this scheme to the rule against perpetuities, the effect of which is to give the testator's daughter all the rest of the property, including the remainder in the life estate; nor does this result follow because the trustees are directed to keep such income up to $40 per month from the other property included in the trust. Landram v. Jordan, 88

UNITED STATES.

Statute permitting presentation of claim against United States as admission of merit, see Claims.
Courts of, see Courts.
Title of, to Panama Canal Zone, see Panama Canal Zone.
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State taxation of Federal securities, see Taxes, 3.
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VENUE.

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The trial in Comanche county, Oklahoma, of an offense committed within territory which, at the time of trial, had been organized as such county, with a term of court fixed for it by order of the territorial supreme court, satisfies the requirements of the organic act of May 2, 1890 (26 Stat. at L. 85, 86, chap. 182), § 10, that crimes shall be tried in the county to which territory not embraced in any organized county "shall be attached," although at the date of the commission of the offense Comanche county had not been organized, but was attached for judicial purposes to Canadian county. Re Moran, 105

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Directing verdict in criminal case, see Trial, 2.

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Of special appearance, see Appearance, 3.
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Validity of delegation of power to Secretary of War, see Constitutional Law, 2.
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Injunction against diversion, see Injunction, 2.

1. The respective rights of the states of Kansas and Colorado in regard to the flow of water in the Arkansas river is not subordinate to any supposed superior right on the part of the national government to control the whole system of the reclamation of arid lands, since the reclamation of arid lands is not one of the powers granted to the general government. Kansas v. Colorado, 956

2. The determination of the respective rights of the state of Kansas and Colorado to the benefit of the water in the Arkansas river cannot be affected by any theory that, because at times and in some places the entire bed of the channel is dry, there are two rivers, one commencing in the mountains of Colorado and terminating at or near the state line, and the other commencing at or near the place where the former ends, and, from springs and branches, starting as a new stream, to flow onward through Kansas and Oklahoma toward the Gulf of Mexico. Kansas v. Colorado, 956

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WILL.
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Testamentary trusts, see Trusts.

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2. The surviving daughter of the testator does not take to the exclusion of her sister's children under a will executed after the marriage of such sister, devising the testator's real property in trust to his daughters "for and during their respective lives . . . and from and after their death in trust for the child or children of each of my said daughters then alive in fee simple," and providing that, if any of the daughters should die without having been married, her share should pass to the survivors. Cruit v. Owen. 227

WILSON ACT.
See Commerce, 8, 9, 11.

WITNESSES.
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WRIT AND PROCESS.
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Sufficiency of service to satisfy due process of law, see Constitutional Law, 16, 26.
Equal protection of the laws in service, see Constitutional Law, 38.
Effect of special appearance to remove cause, see Appearance, 1, 2.
Effect of lack of service on right to enforce attachment in cause removed to Federal court, see Removal of Causes, 5.

1. Service by publication in the manner prescribed by the state statutes for nonresident defendants cannot be had in the Federal circuit court to which a suit in which an attachment has issued has been removed from a state court before service of summons. Clark v. Wells, 138

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v. James B. Clow & Sons.

WRIT OF ERROR.
See Appeal and Error.

of an independent subsurface river, flowing continuously from the Colorado line through the state of Kansas. Kansas v. Colorado, 956

WILLS.
Costs in suit to construe, see Appeal and Error, 106.
Sustaining testamentary trust on principles of comity, see Conflict of Laws.
Testamentary trusts, see Trusts.

1. The word "and" will not be substituted for "or" in the clause in a will providing for the disposition of the testator's estate in case any of his sons should die "without leaving a wife or child," unless the whole context of the will plainly and beyond question requires such substitution in order to give effect to the intention of the testator. Travers v. Reinhardt, 865

2. The surviving daughter of the testator does not take to the exclusion of her sister's children under a will executed after the marriage of such sister, devising the testator's real property in trust to his daughters "for and during their respective lives . . . and from and after their death in trust for the child or children of each of my said daughters then alive in fee simple," and providing that, if any of the daughters should die without having been married, her share should pass to the survivors. Cruit v. Owen, 227

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Service on foreign corporation.
Validity of statute providing for service on state auditor, see Constitutional Law, 15, 43.

2. Soliciting through its district freight and passenger agent in Philadelphia, freight and passenger traffic for a railway company incorporated in Iowa and having its eastern terminal at Chicago, is not doing business within the eastern district of Pennsylvania in such a sense that process can be served upon the corporation there. Green v. Chicago, B. & Q. R. Co. 916

3. The ownership by a foreign railway company of a controlling interest in the stock of a domestic railway company which retains its own officers, has property of its own, and is responsible for its contracts and to persons with whom it deals, does not make the foreign corporation liable to service of process within the state on the theory that it is doing business therein through the agency of the domestic corporation. Peterson v. Chicago, R. I. & P. R. Co. 841

4. Service of process on an agent of a foreign corporation doing business within the state, in order to be valid, must be upon an agent representing the corporation with respect to such business. Peterson v. Chicago, R. I. & P. R. Co. 841

5. The implied assent of a foreign insurance company transacting business in Pennsylvania without complying with Pa. act of June 20, 1883, that service of process in a suit brought against it there in respect of business transacted in that state may be made upon the state insurance commissioner, as prescribed by that statute, does not extend to a suit brought by citizens of that state on a contract of insurance executed in another state. Old Wayne Mut. L. Asso. v. McDonough, 345

6. The lack of any valid service of process upon a foreign corporation does not defeat the jurisdiction of a Federal circuit court of an action in which such corporation pleaded in its answer a demand in recoupment,—especially since, under the local practice, as defined in Ill. Rev. Stat. chap. 110, §§ 30, 31, the defendant may have a verdict and judgment in his favor if it appears that the plaintiff is indebted to him for a balance when the two claims are set against each other, and, after the cross claim is set up, the plaintiff is not permitted to dismiss his suit without the consent of the defendant or leave of court granted for cause shown. Merchants Heat & Light Co. v. James B. Clow & Sons, 488

WRIT OF ERROR.
See Appeal and Error.

MAR 3 - 1916

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Liability on supersedeas bond, see Appeal and Error, 107.

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Appellate jurisdiction, see Appeal and Error.
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TARIFF.
See Duties.

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Priority of franchise tax in bankruptcy proceedings, see Bankruptcy, 14–16.
Due process of law in tax proceedings, see Constitutional Law, 22–28.
Validity of stock transfer tax, see Constitutional Law, 30, 31, 41.
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Equal protection of the laws in enforcing levee taxes, see Constitutional Law, 38.
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Taxation of foreign corporation as impairing contract obligation, see Constitutional Law, 56.
Inheritance tax as impairing contract obligation, see Constitutional Law, 62.
Injunction against, see Injunction, 3, 4.
Assessments for public improvements, see Public Improvements.

1. A state may tax that portion of the property of an interstate railroad company lying within the state at its value as an organic portion of the entire road. Chicago, B. & Q. R. Co. v. Babcock, 636

2. The members of a state board of equalization and assessment should not be subjected to a cross-examination, in a proceeding for equitable relief against the taxation of railroad property, with regard to the operation of their minds in arriving at the valuation of such property for tax pur-

poses. Chicago, B. & Q. R. Co. v. Babcock, 636

Federal securities.

3. The immunity of national securities from state taxation is violated by a tax imposed under the authority of Iowa Code, § 1322, directing that shares of stock of state banks shall be assessed to such banks, and not to individual stockholders, the substantial effect of which is to require taxation upon the property, not including the franchises, of such banks, and to adopt the value of the shares as the measure of the taxable valuation of such property, without permitting any deduction from such valuation on account of bonds of the United States owned by the banks. Home Sav. Bank v. Des Moines, 901

Property of nonresident.

4. The state of Indiana cannot, consistently with due process of law, tax debts evidenced by notes given and payable in Ohio, by residents of that state, to a resident of New York, for loans made in Ohio on lands there situated, merely because, in the attempt to escape proper taxation in Ohio, such notes, together with mortgages securing their payment, were sent to an Indiana agent of the payee, there to be held by him until they were needed in Ohio to have payments of interests indorsed, or to be delivered up if the principal were paid. Buck v. Beach, 1106

5. State taxation of credits arising out of loans made in the regular course of business by the local agent of a foreign insurance company to its policy holders is not forbidden by U. S. Const. 14th Amend., where the loans were negotiated, the notes signed, the security taken, the interest collected, and the debts paid within the state, because the promissory notes which are the evidences of such credits are kept at the home office at all times when not needed in the state. Metropolitan L. Ins. Co. v. New Orleans, 853

Exemptions.

6. Land allotted under an Indian treaty which exempts such land from levy, sale, or forfeiture until the state legislature shall, with the consent of Congress, remove the restriction, can no longer escape taxation after the Indian patentee has become a citizen under the act of February 8, 1887 (24 Stat. at L. 388, chap. 119), which, in addition to the grant of citizenship, provides that "Indians to whom allotments have been made shall have the benefit of, and be subject to, the laws, both civil and criminal, of the state or territory in which they may reside," and the ten years during which Congress, by the act of March 3, 1893 (27 Stat. at L. 612, 333, chap. 209), postponed the operation of the provision of Wash. Laws 1889, 1890, p. 499, granting the power of alienation "in like manner and with like effect as any other person may do under the laws of the United States and of this state," and removing all restrictions in reference thereto, have expired. Goudy v. Meath, 130

7. The withdrawal of a repealable exemption from state taxation of the property of a reorganized railway company, if any such exemption existed, was affected by Md. Acts 1896, chap. 120, which directs a new assessment for taxation of the property in the state, and expressly declares that the property of every railroad shall be assessed for county and municipal purposes, and contains a proviso that nothing therein contained shall be held to discharge, release, or impair any irrepealable contract or obligation then existing, which sufficiently evidences the legislative intent to repeal exemptions from taxation which were not protected by binding contracts beyond legislative control, and to bring all property within the taxing power of the state. Wicomico County Comrs. v. Bancroft, 112

Equalization.

8. The total valuation of the property in the territory may be increased by the Arizona board of equalization beyond the sum of the returns of the board of supervisors of the several counties, since Ariz. Rev. Stat. § 3880, empowering the board to increase or diminish the valuation of property in any county in order to produce a just relation between all the valuations of property in the territory, only prohibits the board from reducing the aggregate valuation below that as returned by the clerks of the several counties, which implies that the board has the power of change, and, but for the prohibition, might reduce the total. Copper Queen Consol. Min. Co. v. Arizona, 1143

9. The Arizona board of equalization, in exercising its power under Ariz. Rev. Stat. § 3880, to increase or diminish the valuation of property in any county in order to produce a just relation between all the valuations of property in the territory, is not bound to deal with the valuation of each county as a whole, but may increase or diminish the valuations of particular classes of property within the county. Copper Queen Consol. Min. Co. v. Arizona, 1143

TERRITORIES.

Appellate jurisdiction of Federal Supreme Court over territorial courts, see Appeal and Error, 5, 16–19, 69, 70, 75.

Congressional power over, see Congress, 2.

Powers of Choctaw and Chickasaw citizenship court, see Indians, 1.

Effect as to persons not parties of judgment of Choctaw and Chickasaw citizenship court in test case, see Judgment, 4.

As party defendant, see Mortgage, 1.

Land now embraced within the limits of Comanche county, Oklahoma, had become part of that territory on August 4, 1901, so as to make a murder committed therein on that date an offense against the territorial

rather than the Federal statutes, although the land had not then been opened for settlement. Re Moran, 105

TEST CASE.
Effect as to persons not parties of judgment of Choctaw and Chickasaw citizenship court in test case, see Judgment, 4.

TIMBER.
Right of Indian allotees to cut timber on public lands, see Indians, 5.

TITLE.
Of railway company to lands within congressional land grant, see Adverse Possession.
Of United States to Panama Canal Zone, see Panama Canal Zone.

TOBACCO.
Duty on withdrawal from bonded warehouses, see Duties, 5.

TREATIES.
With Indians as grant, see Indians, 2, 3.
Right of Indian allottees to cut timber under Stockbridge and Munsee treaties, see Indians, 5.
Effect of treaty as repealing prior statute, see Statutes.

The United States may acquire territory by treaty. Wilson v. Shaw, 351

TRIAL.
Reception of evidence as denying due process of law, see Appeal and Error, 30.
Harmless error in refusing to strike out expert testimony, see Appeal and Error, 104.

1. The discretion of the trial court is not abused by permitting witnesses who have had practical railroad experience and are familiar with overhead structures and buffers to testify as to whether a buffer at the end of a spur track was a reasonably safe and proper one, and as to whether reasonable and proper care had been exercised in so building an overhead structure as to prevent the use of the hand brakes on a freight car until about 100 feet from the end of the spur track. Gila Valley, G. & N. R. Co. v. Lyon, 276

2. The trial court properly refuses to instruct the jury to bring in a verdict of not guilty in a homicide case, on the theory that the *corpus delicti* has not been proved, although there was no witness to the homicide, and the identification of a partly burned body as that of the victim was not perfect, where, taking all the circumstances together, there is clearly enough evidence to warrant the jury in finding that such body was that of the deceased, and that he had been killed by the defendant. Perovich v. United States, 722

3. Evidence tending to show that a spur railroad track was not a safe and proper structure for the operation of cars is sufficient to carry to the jury, on the question of the negligence of the railway company, an action to recover for the killing of a brakeman while riding on a car which plunged over the end of the spur track, although the evidence for the railway company tended to show that the accident was due to the negligence of a fellow servant in ordering the car to be detached from the train and engine. Gila Valley, G. & N. R. Co. v. Lyon, 276

4. Parties, after action by the Interstate Commerce Commission declaring an increased freight rate to be unreasonable, may make a valid stipulation, in the subsequent proceedings had in the Federal court under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 16, that such court may adjudge the amount of the reparation. Southern R. Co. v. Tift, 1124

Instructions.
Prejudicial error in, see Appeal and Error, 102.

5. The trial court is not required to give a requested instruction in a criminal case which singles out and emphasizes an isolated fact. Perovich v. United States, 722

6. The trial judge does not err in refusing to adopt the exact words of a requested instruction if he instructs the jury correctly and in substance covers the relevant rules of law proposed by counsel. Cunningham v. Springer, 662

7. Requested instructions based upon an hypothesis which there is no evidence tending to support are properly refused. Wilmington Star Min. Co. v. Fulton, 708

8. Evidence tending to justify the inference that a mine employee who was allowed to enter a roadway without warning knew, before entering, that it had not been cleared of gas, does not require the giving of a requested instruction in an action for the death of such employee as the result of an explosion, which is based on the assumption that such employee, when killed, was wilfully endangering the lives or health of others, or the security of the mine or its machinery, or was recklessly disregarding his personal safety. Wilmington Star Min. Co. v. Fulton, 708

TRUSTS.
Abandonment by assignees in bankruptcy of bankrupt's interest under, see Bankruptcy, 3.
Sustaining testamentary trust on principles of comity, see Conflict of Laws.

1. A testamentary trust survives the death of the trustee where the will provides that, if the executrix, who was also named as trustee, should die or for any cause should become unable to act in the trust, a new trustee should be appointed by the 202, 204, 205, 208 U. S.

court, so that the trusts thereby created should be at all times preserved and carried into effect. Cruit v. Owen, 227

2. An equitable life estate given to a niece of the testator in the income from a specified piece of land excepted from the general scheme for the creation of a trust fund from the rents of the testator's real property for the benefit of his grandchildren does not fail because of the repugnancy of this scheme to the rule against perpetuities, the effect of which is to give the testator's daughter all the rest of the property, including the remainder in the life estate; nor does this result follow because the trustees are directed to keep such income up to $40 per month from the other property included in the trust. Landram v. Jordan, 88

UNITED STATES.
Statute permitting presentation of claim against United States as admission of merit, see Claims.
Courts of, see Courts.
Title of, to Panama Canal Zone, see Panama Canal Zone.
What claims against, are included in release, see Release.
State taxation of Federal securities, see Taxes, 3.
Acquisition of territory by treaty, see Treaties.
Rights of, in waters of Arkansas river, see Waters, 1, 2.

The United States may not, without its consent, be sued by a state. Kansas v. United States, 510

VENUE.
Federal question respecting right to change of, see Appeal and Error, 31.

The trial in Comanche county, Oklahoma, of an offense committed within territory which, at the time of trial, had been organized as such county, with a term of court fixed for it by order of the territorial supreme court, satisfies the requirements of the organic act of May 2, 1890 (26 Stat. at L. 85, 86, chap. 182), § 10, that crimes shall be tried in the county to which territory not embraced in any organized county "shall be attached," although at the date of the commission of the offense Comanche county had not been organized, but was attached for judicial purposes to Canadian county. Re Moran, 105

VERDICT.
Directing verdict in criminal case, see Trial, 2.

VESTED RIGHTS.
In judgments in Indian citizenship cases, see Indians, 1.

WAIVER.
Of special appearance, see Appearance, 3.
Of objection by pleading over, see Pleading, 4.

WAR DEPARTMENT.
Validity of delegation of power to Secretary of War, see Constitutional Law, 2.
Necessity of compensation for requiring changes in bridge over interstate water way, see Eminent Domain, 1.

WAREHOUSEMEN.
Equitable lien of holder of warehouse receipts under invalid pledge, see Bankruptcy, 4.
Sufficiency of change of possession to validate pledge of warehouse receipts, see Pledge, 1.
Duties on withdrawals from bonded warehouses, see Duties, 5, 6.

WASHINGTON.
Assessments for public improvements in city of, see Public Improvements.

WATERS.
Authority of Secretary of War over bridges, see Constitutional Law, 2.
Necessity of compensation for requiring changes in bridge over interstate water way, see Eminent Domain, 1.
Regulation of water rates as impairing contract obligations, see Constitutional Law, 57.
Injunction against diversion, see Injunction, 2.

1. The respective rights of the states of Kansas and Colorado in regard to the flow of water in the Arkansas river is not subordinate to any supposed superior right on the part of the national government to control the whole system of the reclamation of arid lands, since the reclamation of arid lands is not one of the powers granted to the general government. Kansas v. Colorado, 956

2. The determination of the respective rights of the state of Kansas and Colorado to the benefit of the water in the Arkansas river cannot be affected by any theory that, because at times and in some places the entire bed of the channel is dry, there are two rivers, one commencing in the mountains of Colorado and terminating at or near the state line, and the other commencing at or near the place where the former ends, and, from springs and branches, starting as a new stream, to flow onward through Kansas and Oklahoma toward the Gulf of Mexico. Kansas v. Colorado, 956

3. The presence of water beneath the bed of the Arkansas river as it passes through the state of Kansas, though in places of considerable amount and running in the same direction, does not show the existence

rather than the Federal statutes, although the land had not then been opened for settlement. Re Moran, 105

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Effect as to persons not parties of judgment of Choctaw and Chickasaw citizenship court in test case, see Judgment, 4.

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of an independent subsurface river, flowing continuously from the Colorado line through the state of Kansas. Kansas v. Colorado, 956

WILLS.
Costs in suit to construe, see Appeal and Error, 106.
Sustaining testamentary trust on principles of comity, see Conflict of Laws.
Testamentary trusts, see Trusts.

1. The word "and" will not be substituted for "or" in the clause in a will providing for the disposition of the testator's estate in case any of his sons should die "without leaving a wife or child," unless the whole context of the will plainly and beyond question requires such substitution in order to give effect to the intention of the testator. Travers v. Reinhardt, 865

2. The surviving daughter of the testator does not take to the exclusion of her sister's children under a will executed after the marriage of such sister, devising the testator's real property in trust to his daughters "for and during their respective lives . . . and from and after their death in trust for the child or children of each of my said daughters then alive in fee simple," and providing that, if any of the daughters should die without having been married, her share should pass to the survivors. Cruit v. Owen, 227

WILSON ACT.
See Commerce, 8, 9, 11.

WITNESSES.
When refusal to appoint interpreter is not prejudicial error, see Appeal and Error, 103.

WRIT AND PROCESS.
Sufficiency of service to sustain jurisdiction, see Judgment, 1.
Sufficiency of service to satisfy due process of law, see Constitutional Law, 16, 26.
Equal protection of the laws in service, see Constitutional Law, 38.
Effect of special appearance to remove cause, see Appearance, 1, 2.
Effect of lack of service on right to enforce attachment in cause removed to Federal court, see Removal of Causes, 5.

1. Service by publication in the manner prescribed by the state statutes for nonresident defendants cannot be had in the Federal circuit court to which a suit in which an attachment has issued has been removed from a state court before service of summons. Clark v. Wells, 138

Service on foreign corporation.
Validity of statute providing for service on state auditor, see Constitutional Law, 15, 43.

2. Soliciting through its district freight and passenger agent in Philadelphia, freight and passenger traffic for a railway company incorporated in Iowa and having its eastern terminal at Chicago, is not doing business within the eastern district of Pennsylvania in such a sense that process can be served upon the corporation there. Green v. Chicago, B. & Q. R. Co. 916

3. The ownership by a foreign railway company of a controlling interest in the stock of a domestic railway company which retains its own officers, has property of its own, and is responsible for its contracts and to persons with whom it deals, does not make the foreign corporation liable to service of process within the state on the theory that it is doing business therein through the agency of the domestic corporation. Peterson v. Chicago, R. I. & P. R. Co. 841

4. Service of process on an agent of a foreign corporation doing business within the state, in order to be valid, must be upon an agent representing the corporation with respect to such business. Peterson v. Chicago, R. I. & P. R. Co. 841

5. The implied assent of a foreign insurance company transacting business in Pennsylvania without complying with Pa. act of June 20, 1883, that service of process in a suit brought against it there in respect of business transacted in that state may be made upon the state insurance commissioner, as prescribed by that statute, does not extend to a suit brought by citizens of that state on a contract of insurance executed in another state. Old Wayne Mut. L. Asso. v. McDonough, 345

6. The lack of any valid service of process upon a foreign corporation does not defeat the jurisdiction of a Federal circuit court of an action in which such corporation pleaded in its answer a demand in recoupment,—especially since, under the local practice, as defined in Ill. Rev. Stat. chap. 110, §§ 30, 31, the defendant may have a verdict and judgment in his favor if it appears that the plaintiff is indebted to him for a balance when the two claims are set against each other, and, after the cross claim is set up, the plaintiff is not permitted to dismiss his suit without the consent of the defendant or leave of court granted for cause shown. Merchants Heat & Light Co. v. James B. Clow & Sons, 488

WRIT OF ERROR.
See Appeal and Error.

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